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W. M. CREEKMORE *v.* EUNICE GREGORY, EXC'X AND EARNEST GREGORY

5-4433 423 S. W.2 d 548

Opinion delivered February 5, 1968

Harold C. Rains Jr., for appellant.

Lonnie Batchelor, for appellees.

CARLETON HARRIS, Chief Justice. W. H. Creekmore died testate in April, 1913, and his will was admitted to probate. Creekmore was survived by his widow, N. J. Creekmore, and four sons, W. M. Creekmore, John W. Creekmore, Fred G. Creekmore, and C. C. Creekmore. Included in the will were the following provisions:

"I give to my woman N. J. Creekmore the NW/4 of the SE/4 of Sec. 31, 11, 29 during her life, at her death to go to and be the property of W. M. Creekmore if he should die without any heirs then one of the other boys to take the land and pay the other 2/3 of its value.[1]

[1]It is apparent that this sentence should be interpreted as though a semi-colon appeared after the name, "W. M. Creekmore."

I don't want it to go out of the family."

N. J. Creekmore died many years ago (date not shown in record), and in 1937 John W. Creekmore, Fred G. Creekmore and C. C. Creekmore, together with their wives, conveyed their interest in the land by quitclaim deed to W. M. Creekmore.[2]

W. M. Creekmore died testate on March 18, 1966, having been predeceased by C. C. and Fred. John W. Creekmore, father of appellant, J. M. Creekmore, died approximately three weeks after W. M. Creekmore, and it is agreed that presently there are no closer relatives than nephews and nieces. In his will, W. M. Creekmore devised the above mentioned property to a nephew, Earnest Gregory; J. M. Creekmore contends that W. M. Creekmore was not the owner of the lands devised to Gregory, and accordingly had no right to include this devise in his will. The trial court disagreed, and the sole question on this appeal is the proper construction of the clause in the will of W. H. Creekmore, heretofore quoted.

The trial court ruled correctly. In *Harrington* v. *Cooper*, 126 Ark. 53, 189 S. W. 667, the court was called upon to construe the following provision of the testator, George Wood:

"I give to my beloved wife, Mary Jane Wood, during her natural life and to our daughter, Georgia Anna Wood, that portion of the tract of land on which we reside, lying north and east of Jacks Creek containing about five hundred acres, including the dwelling and gin house and other improvements as a joint support for my wife and at the death of my wife I desire and intend that my daughter, Georgia Anna Wood, shall take in her own right the entire interest should she survive her mother and shall my said daughter, Georgia Anna Wood, die childless then in that case the whole shall revert to my estate and be equally divided between my other children

[2]There is no necessity to discuss the effect, if any, of the deeds.

or their descendants of the same, the children of such as may be dead taking the interest that the parent would be entitled to if living."

This court said:

"It seems clear that the defeasance relates to the time of the death of the mother of appellants. That is the time fixed for her remainder interest to take effect. The words 'die childless' mean without having had or without leaving a child. In this way and in no other can every clause of the will be harmonized and have force and effect. It is perfectly clear that the testator intended that his daughter, Georgia Anna, should take a fee simple when he used the words, 'shall take in her own right the entire interest,' and it is also clear that he intended the estate to vest when her mother died by using the words, 'should she survive her mother.' The last clause already quoted by using the words 'die childless,' etc., means that if Georgia Anna should die without having a child or leaving a child before her mother's death, that the whole shall revert to the testator's estate and be equally divided among the testator's other children. In short it meant that the remainder in fee should be vested in Georgia Anna at her mother's death and in case Georgia Anna should die without leaving a child before her mother's death the estate should revert to the testator's estate and be divided among his other children. This is in application of a rule that where an estate is devised to one for life, with remainder to another, with the further provision that, if the remainderman should die without having a child, then to a third person, the words 'die without having a child' are restricted to the death of the remainderman before the termination of the particular estate."[3]

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[3]It is of interest to note the comment in Simes and Smith, *The Law of Future Interests*, § 540, pp. 529-31:

"The disposition 'to A and his heirs, but if A die without issue, then to B and his heirs' has been considered, and the two possible constructions have been indicated. Suppose, however, that a testator devises property 'to X for life, remainder to A and his

When we apply that holding to the instant litigation, the words, "without any heirs" (instead of "die childless"), are restricted to the death of W. M. Creekmore, the remainderman, *before the termination of the particular estate, i. e.,* the life estate of N. J. Creekmore. See *Lewis* v. *Bowlin,* 327 Ark. 947, 377 S. W. 2d 608, which explains the distinction between this rule and those cases that are governed by Ark. Stat. Ann. § 50-405 (1947).

Affirmed.

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heirs, but if A die without issue (or children) remainder to B and his heirs.' Three constructions are now possible: First, that 'die without issue' means 'die without issue before the death of the testator;' second that 'die without issue' means 'die without issue before the death of X, the life tenant;' and third, that 'die without issue' means 'die without issue at any time.' The first two are fairly termed substitutional constructions; the third, obviously, is not. The Restatement, and the weight of authority adopt the second view where this situation is presented.

"In a jurisdiction which prefers the substitutional construction when there is no preceding life estate, it would seem likely that the same preference would be adopted in construing the limitation here under consideration. All of the reasons for preferring the substitutional construction are still applicable. The only question is whether the substitutional date is the death of the testator or the death of the life tenant. Some courts continue to apply the substitutional rule at the death of the testator. A greater number of courts, however, apply the substitutional rule at the death of the life tenant. The latter construction seems preferable, since it gives full weight to the preference for making interests absolute as early as possible and still reflects the normal wishes of a testator."

This jurisdiction, of course, follows the second view. *Harrington* v. *Cooper, supra,* is cited as an example of the substitutional rule at the death of the life tenant.

JERRY G. PALMER *v.* PAM MYKLEBUST

5-4438 424 S. W. 2d 169

Opinion delivered February 5, 1968
[Rehearing denied March 11, 1968.]

Gannaway & Darrow, for appellant.

Howell, Price & Worsham, for appellee.

GEORGE ROSE SMITH, Justice. This is a guest statute case. On the night of May 26, 1966, the appellee Pam Myklebust, age 21, the appellant Jerry G. Palmer,

and another young couple were riding in North Little Rock in a car being driven by Jerry. Pam was admittedly a guest. She was injured when Jerry turned sharply into a filling station and struck a vending machine with such force that Pam was thrown against the windshield, shattering the glass and cutting her face. In this action brought by Pam the jury awarded her $2,500. For reversal the appellant contends that there was no proof of willful misconduct on his part and that Pam assumed the risk of his hazardous driving.

The court properly submitted to the jury the issue of willful misconduct. Jerry admitted that he had been drinking and had had about nine beers. Even though neither Pam nor Jerry testified that he was intoxicated, the jury were entitled to take into the jury box their common sense and experience in the ordinary affairs of life. *Rogers* v. *Stillman,* 233 Ark. 779, 268 S. W. 2d 614 (1954). They might fairly have concluded that the consumption of so much beer had affected Jerry's ability to drive. One who drives while intoxicated may be found to be chargeable with willful and wanton misconduct. *Bridges* v. *Stephens,* 238 Ark. 801, 384 S. W. 2d 490 (1964).

Furthermore, Pam testified that Jerry seemed not to be familiar with the car, which belonged to the other young man's grandmother, and that his driving so frightened her that she asked to be taken home. That request angered Jerry, who at once tried to turn back and comply with Pam's request. In his attempt to make a U-turn Jerry drove into the filling station at an excessive speed and hit the vending machine without even attempting to apply his brakes. He later pleaded guilty to reckless driving, which involves a wanton disregard for the safety of others. Ark. Stat. Ann. § 75-1003 (Repl. 1957); *Miller* v. *Blanton,* 213 Ark. 246, 210 S. W. 2d 293, 3 A. L. R. 2d 203 (1948).

On the whole, there was ample testimony to support a finding of willful misconduct.

We are similarly of the opinion that the issue of assumed risk was for the jury. Even though Jerry had been drinking, Pam testified that he didn't appear to be under the influence of alcohol. When, however, it became apparent that he was driving very badly, Pam protested—asking first that she be permitted to take the wheel and later that she be taken home. Upon substantially the same testimony we held, when contributory negligence was a complete defense, that the passenger was not guilty of contributory negligence as a matter of law. *Scott* v. *Shairrick,* 225 Ark. 59, 279 S. W. 2d 39 (1955). We likewise hold in the case at bar that Pam did not, as a matter of law, assume the risk of Jerry's hazardous driving. The verdict sets the issue at rest.

Affirmed.

BYRD, J., concurs.

CONLEY BYRD, Justice, concurring. I concur in the result reached here. I consider that a factual issue on willful and wanton negligence was made upon the showing that appellant made an enraged and erratic U-turn without slackening the speed of his automobile. I do not consider the amount of beer shown by the record to have been consumed to be sufficient in itself to submit to the jury the issue of willful and wanton negligence.

EARNEST BAILEY JR. AND LAWRENCE DAVIS *v.* VICKIE SUE BRADFORD ET AL

5-4446 423 S. W. 2d 565

Opinion delivered February 5, 1968

Joe P. Melton and *Charles A. Walls Jr.*, for appellants.

Martin, Dodds & Kidd and *Lowber Hendricks Jr.*, for appellees.

GEORGE ROSE SMITH, Justice. On a November afternoon in 1964, the plaintiff-appellees, Mr. and Mrs. Earnest Bradford and their seven-year-old daughter Vickie Sue, were passengers in a car traveling north through the city of Cabot. While the car was waiting for a line of traffic to move forward it was struck from the rear by a truck owned by the appellant Bailey and being driven by his employee, the appellant Davis. There is no question about the appellants' liability: Davis, aged

77, admitted that he did not even see the Bradford car before the collision. This appeal is from a verdict and judgment for $30,000 in favor of Vickie Sue.

The point that has given us the greatest concern is the appellants' contention that the court erred in instructing the jury that they might consider whether Vickie Sue's injuries were temporary or permanent and might consider any pain and suffering reasonably certain to be experienced by her in the future. AMI 2202 and 2205.

On the issue of permanency the testimony amply supports the giving of the instruction. Vickie Sue suffered a brain injury, evidenced by bleeding from her nose, mouth, and ears, and by a discharge of spinal fluid from both ears. She was at first in a very critical condition and did not regain consciousness for four or five days. Upon similar facts we held in *Duckworth* v. *Stephens,* 182 Ark. 161, 30 S. W. 2d 840 (1930), that the injury of itself indicated its permanency. Other facts confirming that conclusion will be mentioned in a moment.

The difficult question is that of future pain and suffering, because those elements of damage are to be submitted to the jury only if they are "reasonably certain" to be experienced in the future. AMI 2205; *McCord* v. *Bailey,* 195 Ark. 862, 114 S. W. 2d 840 (1938); *St. Louis, I. M. & S. Ry.* v. *Bird,* 106 Ark. 177, 153 S. W. 104 (1913). Here the medical testimony falls short of meeting that test of submissibility. Dr. Weber testified that there is a good possibility that the child had suffered permanent brain damage that might lead to epileptic seizures or convulsions in the future. A "good possibility," however, does not meet the standard of reasonable certainty laid down in the *Bird* case and other decisions to the same effect.

Nevertheless, there is testimony by lay witnesses that supports the trial court's action in the matter.

Vickie Sue's mother testified that at the time of the trial, more than two years after the accident, Vickie Sue still had a fear of riding in an automobile, still had trouble with her speech, and still suffered headaches. The child's father testified that Vickie Sue could not carry on a conversation "without getting tangled up with her words and having to stop."

We must conclude that the lay testimony, which the jury were at liberty to accept despite the absence of expert corroboration (*Western Union Tel. Co.* v. *Byrd*, 197 Ark. 152, 122 S. W. 2d 569 [1938]), made an issue for the jury. Even though headaches and speech difficulties are not equally as serious as other injuries from which Vickie Sue made what the doctors called a remarkable recovery, they are certainly not negligible elements of damage. To the contrary, the pain resulting from recurrent headaches has been recognized in scores of our opinions as a proper basis for compensatory damages. Decidedly similar to this case is *Arkansas Drilling Co.* v. *Gross*, 179 Ark. 631, 17 S. W. 2d 889 (1929). Finally, if those consequences of the accident had continued for more than two years at the time of trial the jury could fairly conclude that they were reasonably certain to afflict Vickie Sue in the future.

The appellants' other contention is that the $30,000 award is excessive. We think not. It seems almost a miracle that Vickie Sue's injuries were not fatal. As we have said, there was bleeding from her nose, mouth, and ears, and a drainage of spinal fluid from her ears. She was unconscious or nearly so for some thirteen or fourteen days, during which she did not regain her ability to talk. The use of her right hand was impaired for about three months. She had difficulty in remembering things at school for six months. At the time of the trial she still suffered speech difficulties, a "jumping" of her left eye, and headaches. She still faces the grim possibility of future epileptic seizures and convulsions. The size of the verdict is not so great as either to indi-

cate passion and prejudice on the part of the jury or to shock the conscience of this court. In such circumstances it is our duty to uphold the award. *Freeman* v. *Jones,* 239 Ark. 1143, 396 S. W. 2d 931 (1965).

Affirmed.

THE AETNA CASUALTY & SURETY COMPANY
v. MURL PILCHER ET AL

5-4390 424 S. W. 2d 181
Opinion delivered February 5, 1968
[Rehearing denied March 11, 1968.]

W. A. Eldredge Jr., for appellant.

Paul Rawlings and *Fenton Stanley,* for appellees.

Thomas J. Bonner, Amicus Curiae, Arkansas Hospital Association.

PAUL WARD, Justice. Very briefly stated, this litigation pertains to the question of liability for a germ infection incident to an operation on the leg of Gary Pilcher, a fourteen-year-old boy.

On September 20, 1962 Gary was admitted to St. Vincent Infirmary, and on the following day the opera-

tion was performed, necessitating an incision on his leg. He was discharged eight days later and returned to his home. About two months later Gary was admitted to a hospital in Malvern because of fever and a "reddened throat" where his condition was diagnosed as a Streptococcal Respiratory Infection, and was discharged on December 10, 1962. Four days later Gary was examined in Little Rock by Dr. Christian, and no objective sign of infection in his leg was found. On January 25, 1963 Gary was reexamined by Dr. Christian and for the first time it was discovered he had a bone infection.

It is stipulated that "St. Vincent Infirmary had in full force and effect a policy of liability insurance with the Aetna Casualty & Surety Company". St. Vincent is immune from liability but voluntarily carries insurance.

A complaint was filed by Gary (by his father as Next Friend) and by his parents (appellees here) against Aetna (appellant here), containing, in substance, the material allegations set out below.

(a) Gary has suffered injury as previously mentioned because of negligence on the part of St. Vincent's employees in these ways:

1. They failed to keep those areas of the hospital where Gary was during and after the operation free of infecting organisms.

2. They failed to warn Gary of these organisms.

3. They failed to discover these organisms in the hospital.

4. They failed to discover Gary had the infecting organisms.

(b) The acts of negligence set out above were the proximate cause of Gary's infection and the resulting damage.

(c) As a result of the infection and Gary's injury, his parents have incurred, and will incur, medical and hospital expenses and have been, and will be, deprived of his services—in the total sum of $15,000.

Appellant entered a general denial, and also moved for a directed verdict when all evidence was introduced, which motion was denied. A jury trial resulted in a judgment of $18,000 for Gary and $2,000 for his parents.

On appeal appellant waives any reversible error that may have occurred during the trial, and seeks a reversal of the judgments and a dismissal of the complaint on the ground that there is no substantial evidence to support the jury verdicts.

The record in this case is voluminous, and the excellent briefs discuss at length several aspects of the case but, after careful consideration, we have concluded that there is only one pivotal issue. That issue is:

Is there substantial evidence to support a jury finding that Gary's injury was the result of negligence on the part of the employees of St. Vincent Infirmary?

At the outset we should say that we consider it highly speculative as to when the germ entered Gary's system. For example, from the proof offered, it is just as possible that he contracted the germ at Malvern two months after the operation as that the germ entered the body at the time of the operation. However, for the purpose of this opinion only, it may be conceded that:

(a) At the time and in the process of the operation Gary was infected by a germ technically termed as "Hemolytic Staphylococcus Aureus. Coagulase Negative, Penicillin Sensative." (Hereafter we may refer to this germ as "staph negative.") There is also a similar germ often referred to in the record which may be referred to as "staph positive."

(b) Both of these germs are prevalent in hospitals and were, and are very hard to control or eradicate in all hospitals. The record of control by St. Vincent is as good as the average in hospitals locally and nationally.

(c) There is no direct or positive testimony that Gary's infection by the germ was the result of negligence on the part of St. Vincent.

If, therefore, the jury verdict is to be affirmed we must find, based on the record hereafter examined, that the negligence of St. Vincent was the proximate cause of Gary's infection. In this approach it may be conceded, for the purpose of this opinion, that the record reveals substantial evidence from which the jury could have found that St. Vincent was negligent in failing, in some respects not vital to the issue here, to provide better protection generally against germ infection.

Referring to appellees' four allegations of negligence on the part of St. Vincent as being the proximate cause of Gary's injury, we feel it sufficient to summarily dispose of the last three.

2. We cannot agree that St. Vincent's failure to warn Gary of these organisms was the cause of his injury. If he had been warned it is not reasonable to suppose he would have refused the operation or that he could have done anything about it. Also, the doctor knew about them and if he did not use reasonable care to guard against them, then he and not St. Vincent was negligent.

3. St. Vincent did discover the germs in the hospital and made efforts to guard against them.

4. It was not the duty of St. Vincent to discover Gary had received an infection germ as a result of the operation. Again, this was the duty of his doctor. Moreover, the undisputed testimony reveals that the infec-

tion cannot be discovered until later when the result of the germ is manifested—in this instance it was not discovered for several weeks.

1. We now look, in more detail, at the contention of appellees that St. Vincent's negligence in failing to keep the operation room and surgical instruments free from infecting germs was the proximate cause of Gary's injury. Set out below is a summary of the testimony relied on by appellees.

> *Dr. Orr.* If you touch a contaminated piece of equipment the hands become contaminated, if the blade (or plate) inserted in the leg had this germ on them that could have caused the infection—they are sterilized by St. Vincent; frequently the infection comes from contact with hospital personnel. He concluded that the post-op infections were the result of a break in cleaning technique and had been corrected.
>
> *Dr. White* testified that a chemical company claimed to have a disinfectant which will kill these germs; he *thinks* the infection here occurred during surgery because of germs on the plate, screws, or instruments, but is aware of other possibilities such as blood-borne organism.
>
> *Dr. Christian,* who performed the operation, stated that "*probably* the infection, the germ was introduced *probably* at the time of surgery;" and that "if some instrument was unsterile it could have introduced it into the bone," but that there were other ways it could have happened.
>
> *Dr. Burger* stated that when a person was being operated on he was more likely to be infected, and that "we try to keep all infections to a minimum and we try to be a little more careful in surgery . . . ."

Mr. Leslie, in charge of housekeeping for St. Vincent, stated they tried to be more careful in combating the germs in the surgery area than in other areas of the hospital.

Dr. Lee corroborated the testimony of Dr. Burger and Mr. Leslie.

Notwithstanding the testimony above set out and conceding that St. Vincent might have done more than it did do to eradicate or contain the germ, we are unable to hold, in view of what we later point out, that a jury question has been made—as to proximate cause.

Dr. Burger testified that even a mask on the face of the operating doctor could not eliminate the bacteria danger. Dr. Christian, who performed the operation, testified that in spite of the finest surgical technique in the operating room and the hospital this germ cannot be eliminated; that this germ infection happens in approximately 5% of all operations; that it is impossible for medical science to guarantee against this infection; that it is impossible to keep bacteria out of the air; that it is possible Gary or any other person, including himself, could have brought this particular germ into the operating room.

In view of the undisputed testimony that this germ could have entered Gary in so many ways and from so many sources, and in view of the unchallenged difficulty in controlling it, we must conclude that the jury verdict must have been based on speculation and not on substantial evidence. This conclusion is confirmed by the fact that there is no *expert* testimony showing St. Vincent was negligent. In many cases the courts have held, in a case of this kind, that expert testimony has great weight where there is no direct proof to the contrary.

In *Durfee* v. *Dorr*, 131 Ark. 369, 199 S. W. 376, we find this pertinent statement:

> "We think this evidence was competent, as it related to a subject upon which the average juror would have no information or experience upon which he would be in position to formulate an intelligent conclusion *unless he based his conclusion upon the opinion of one qualified to speak as an expert.*" (Emphasis added.)

In *Gray* v. *McDermott*, 188 Ark. 1, S. W. 2d 94, we said:

> "(*these*) *were questions requiring scientific knowledge to determine.* It cannot and should not be left to a jury to speculate whether or not the experts in the practice of their profession have pursued the proper course of procedure." (Emphasis added.)

In the case of *Thompson* v. *Methodist Hospital,* (Tenn.) 367 S. W. 2d 134, a similar issue was involved and the Court made this statement:

> "As heretofore noted, the undisputed evidence is that these infections occur in and out of hospitals, and in the absence of negligence. If, under the evidence in this case the Methodist Hospital is to be held liable for the infection contracted by the Thompson baby and transmitted by him to his parents, then few hospitals could reasonably incur the financial risks of having born within its walls a baby."

It is therefore our conclusion that there is no substantial evidence here to support the jury verdict and the judgment based thereon. The judgment is reversed and the cause of action is dismissed.

George Rose Smith and Jones, JJ., dissent.

RAY DEAM ET AL *v.* O. L. PURYEAR & SONS, INC.

5-4413 423 S. W. 2d 554

Opinion delivered February 5, 1968

Odell C. Corter and *T. S. Lovett Jr.*, for appellants.

Marion C. Gill and *Gannaway & Darrow*, for appellee.

LYLE BROWN, Justice. The appellants here were plaintiffs below. Appellee was one of three defendants. The parties will be referred to as they appeared in the

trial court. As the result of a fatal accident Ray Deam and others brought this suit against O. L. Puryear & Sons, Inc., and two individuals. Puryear successfully moved for summary judgment and plaintiffs appeal.

One of the defendants, V. I. Clark Sr., had been engaged in the public hauling business in the Dumas-Grady-Dermott area for some fifteen years. He operated from two to three dump trucks and hauled sand and gravel. Another defendant, John Vanzandt, was operating one of Clark's trucks at the time of the accident. The other defendant, O. L. Puryear & Sons, Inc., with headquarters at Dumas, was engaged in the construction business and was a substantial user of sand and gravel. Puryear frequently placed orders with Clark for the delivery of those materials to job sites. Clark's truck, driven by Vanzandt, was involved in the fatal accident forming the basis of this suit. It is alleged that Vanzandt was then in the course of traveling to Puryear's job site with a load of sand.

Plaintiffs' theory of liability as against Puryear is based on the assertion that both Clark and Vanzandt were agents of Puryear and that they were acting within the scope of that agency at the time of the collision.

Puryear's motion for summary judgment was supported by the discovery depositions of Clark and Vanzandt and by four affidavits. We summarize the pertinent assertions found in that evidence.

In his sand and gravel trucking business Clark had in operation three dump-bed trucks. Vanzandt was one of three employees regularly used in the business. Extra help was utilized at odd times. Clark hauled for anyone who needed his services in the trade area. He named some five substantial firms for which he hauled. "There isn't many around there but what we haven't hauled some for." He charged by the cubic yard. He was not the exclusive hauler for any of the named firms, in-

cluding Puryear, Inc. A person or firm needing Clark's services ordinarily called him, giving him the yardage of sand or gravel, and stating the point of delivery, usually a job site or a stockpile. Clark gave the information to Vanzandt. The driver would proceed to Pine Bluff Sand and Gravel Company to pick up the materials and they were there charged to the user. If the point of destination was a job site, Vanzandt proceeded there and dumped the load in a particular place shown him by the contractor. On occasions a building contractor would desire delivery of part of a load in one place and the balance at another location. Vanzandt conformed.

Vanzandt had been a regular employee of Clark for over two years. Vanzandt was directed exclusively by Clark as to all details of pickup and delivery excepting the information from the contractor as to the specific point of delivery on the job site. There is no evidence that any contractor supervised or directed the process of unloading.

Our summarization is taken from the depositions of Clark and Vanzandt, together with affidavits of four others, all introduced by Puryear in support of the motion for summary judgment. Plaintiffs responded with two affidavits; however, the content of those responses referred to the single contention that at the time of the accident the load of sand was destined for Puryear's job site. There was evidence to the effect that the load was to be delivered to another party. We can place that contention at rest by assuming, for purposes of this opinion, that Vanzandt was on his way to defendant Puryear's job site at the time of the accident.

In considering a motion for summary judgment the trial court examines the pleadings, and any depositions, admissions, or affidavits, to determine if there is a genuine issue as to the material fact involved. Ark. Stat. Ann. § 29-211 (Repl. 1962). ". . .[T]he theory underlying a motion for summary judgment is the same as

that underlying a motion for a directed verdict." Hence the trial court views the evidence "in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party." *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S. W. 2d 89 (1963). The opposition to the motion cannot always successfully take his stand on the content of his pleading alone. If the movant makes a case for summary judgment the opponent must come from behind "the shielding cloak of formal allegations and demonstrate a genuine issue." *Mid-South Insurance Co.* v. *First National Bank of Fort Smith,* 241 Ark. 935, 410 S. W. 2d 873 (1967).

The relationship between the truck owner, Clark, and Puryear, Inc., the building contractor, is so clear that it warrants little discussion. Clark was clearly an independent hauler of sand and gravel. He owned his own equipment and hauled for anyone desiring his services. He operated in the same manner as do hundreds of haulers in this State—local transfer companies, franchised independent haulers of numerous commodities both local and statewide. They all pick up commodities at the request of the owner and deliver those commodities to a location designated by the owner. They bill the owner according to a fixed tariff or by charges otherwise agreed upon. As does Clark, they serve the general public in their area.

In *Fordyce Lumber Company* v. *Wardlaw,* 206 Ark. 35, 176 S. W. 2d 241 (1943), we held that Fordyce was entitled to a directed verdict; that Wardlaw was an independent log hauler and not a servant of Fordyce Lumber Company. Wardlaw's business relations with the lumber company were very similar to those existing between Clark and Puryear. Additionally, Puryear's witnesses gave evidence to the effect that Clark was not in Puryear's employment.

Finally, we conclude that reasonable minds would never reach the conclusion that a master-servant rela-

tionship existed between Puryear, Inc., and Vanzandt. The right to control the manner in which work is performed is vital in determining the relationship between the parties. *Barr* v. *Matlock*, 222 Ark. 260, 258 S. W. 2d 540 (1953). Vanzandt was in the general employment of Clark. It was Clark who hired and paid Vanzandt, furnished the hauling equipment, gave him instructions to pick up loads, gave him the delivery destination, and no person other than Clark could discharge him from that employment. The only contact between Vanzandt and Puryear, Inc., was at a job site when the contractor would point out the particular place or places to dump the sand. Vanzandt had not arrived at the job site when the collision occurred; he was enroute. To hold that a deliveryman whose general employer directs him to unload the material where the recipient desires it placed—to say that such placement, standing alone, creates a new employer-employee relationship—would toll the end to a service that is so essential to countless numbers of daily recipients of every type of commodity. We say countless because that would encompass deliveries to homes, businesses, and industries.

Affirmed.

G. L. NICKLAUS, TRUSTEE IN BANKRUPTCY IN SUCCESSION ET AL *v.* ROBERT Y. McCLURE

5-435 9 423 S. W. 2d 562

Opinion delivered February 5, 1968

Rose, Meek, House, Barron, Nash & Williamson, for appellee and cross-appellant.

James K. Young, for appellants.

JOHN A. FOGLEMAN, Justice. This is an appeal from a decree dismissing a suit to recover payments alleged to constitute preferences under the federal bankruptcy act.

The suit was brought by R. M. Priddy, Trustee in Bankruptcy of the estate of Commodities, Inc., a cor-

poration, adjudicated bankrupt on November 5, 1959, on petition filed September 16, 1959. Later, G. L. Nicklaus, trustee in succession to Priddy, was substituted as plaintiff during the pendency of the action in the lower court. It was alleged that appellee, who was president of the corporation, received $10,000, or some other amount, from the corporation in payment of an indebtedness within 120 days prior to the filing of the petition in bankruptcy, with full knowledge of the insolvency of the corporation. The suit was filed July 13, 1962. The complaint contained an allegation that information relating to the cause of action was not obtained by the trustee until an audit of the affairs of the corporation was had. Appellee filed a general denial and pleaded the bar of limitations set forth in Ark. Stat. Ann. § 64-803 (Repl. 1966) and in 11 U. S. C. § 29. The trial court entered judgment for appellee on December 8, 1966, finding that the action was barred by 11 U. S. C. § 29(e). This judgment was set aside by the trial court on January 4, 1967, and appellant Hi-Pro Fish Products, Inc., a creditor and assignee of other creditors of the bankrupt corporation, was permitted to intervene.[1] Later the court dismissed the action "on limitations."

The trustee employed one D. C. (Dave) Garrett, CPA, to make an audit of the affairs of the corporation. This audit was delivered to the trustee between July 1 and July 15, 1961. The trustee was authorized to bring this suit on April 4, 1962.

Appellee was called as a witness by appellant. He testified that he, his wife, and an unnamed person each owned 30% of the stock of the corporation. McClure was president and had general supervision of the corporation business. The Bank of Russellville loaned the cor-

[1]Appellee contends on cross-appeal that the chancery court erred in permitting this intervention. We deem it unnecessary to pass on this question because an appeal was taken by the trustee and the brief was filed on behalf of both the trustee and the intervenor, the questions raised by them here being identical.

poration $10,000 on March 25, 1959. McClure testified that the note was signed by Commodities, Inc. and endorsed by him. He stated that these proceeds did not go through his hands, the bank having only given him a deposit slip to the account of Commodities, Inc. for the proceeds of the loan. These were used to pay debts of the corporation.

It was stipulated that the loan was repaid as follows:

April 28, 1959	$1,630.00
May 26, 1959	1,638.15
June 26, 1959	1,646.34
July 25, 1959	1,655.76
August 25, 1959	1,662.70
August 27, 1959	1,767.05

The executive vice president of the Bank of Russellville testified that a loan of $10,000 was made to appellee personally; however, the loan was actually made by an officer of the bank who did not testify. The bank's liability ledger sheet indicated that this loan was made on March 25, 1959, for 30 days. The credits appearing on this ledger correspond with the stipulated dates and amounts of payments on the loan which appellee testified was made to the corporation.

D. C. Garrett testified that his audit of the books of the corporation was not a complete one because many of its records were not available for inspection. McClure had testified that some of the corporate records had been destroyed prior to the filing of the bankruptcy petition. Garrett's partial audit and report to the trustee in bankruptcy were dated in May 1961. He had found a record of payments by the corporation on the $10,000 note on the journal of the corporation. It corresponded with the dates and amounts shown on the bank's liability ledger sheet. When the witness asked appellee for the note, he was told that it had been de-

stroyed. The books of the corporation reflected the receipt of this $10,000 and showed that it was expended in payment of company obligations.

Title 11, § 29(e), USCA provides in pertinent part:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."

Appellant seeks to avoid the bar of this statute by the argument that the statutory period did not begin to run until July 1, 1961, when the audit was delivered to appellant.

We find that the learned chancellor was correct in his application of this statute of limitations. Authorities cited by appellants are based upon the rule of law that statutes of limitations do not run against a cause of action based upon fraud until the fraud is discovered. In equity this rule has often been applied where the one allegedly injured remains in ignorance of the facts without fault or want of diligence on his part. See *Bailey* v. *Glover,* 88 U. S. (21 Wall.) 342, 22 L. Ed. 636; *Holmberg* v. *Armbrecht,* 327 U. S. 392, 66 S. Ct. 582, 90 L. Ed. 743.

This cause of action to set aside a preference is created by the bankruptcy statutes themselves. See *Herget* v. *Central Nat'l. Bank & Trust Co.,* 324 U. S. 4, 65 S. Ct. 505, 89 L. Ed. 656, where it was clearly held that the two-year statute of limitations provided by 11 USC, § 29(e) applies to a cause of action to set aside and recover a preferential transfer. Resort to state statutes of limitations, such as the three-year limitation provided in Ark. Stat. Ann. § 37-206 (Repl. 1962), suggested by appellants, is foreclosed by that opinion, in-

sofar as actions to recover preferences are concerned. The qualification in the federal statute allowing a longer period under applicable federal or state law applies only to causes of action accruing before the adjudication in bankruptcy and not then barred by the applicable limitations statute.

In actions for recovery of preferential transfers, made fraudulent only by the statute itself, it has been held that the doctrine of *Bailey* v. *Glover, supra,* [also relied on in *Austrian* v. *Williams,* 80 F. Supp. 437 (S. D. NY 1948).] was not to be read into § 29(e). *Wells* v. *Place,* 92 F. Supp. 477 (N. D. Ohio 1950). On the other hand, there are decisions in Clayton Act cases holding that fraudulent concealment of causes of action created by federal statute tolls all applicable statutes of limitations. See *Kansas City* v. *Fed. Pac. Elec. Co.,* 310 F. 2d 271 (CCA 8th 1962); *Pub. Serv. Co.* v. *Gen. Elec. Co.,* 315 F. 2d 306 (CCA 10th 1963); *Westinghouse Elec. Corp.* v. *Pac. Gas & Elec. Co.,* 326 F. 2d 575 (CCA 9th 1964). These decisions apply statements from the opinion in *Holmberg* v. *Armbrecht,* 327 U. S. 392, 66 S. Ct. 582. 90 L. Ed. 743, which might well be considered dicta.

Even if the doctrine should be held applicable, however, we do not find adequate factual basis to sustain appellants' position. Where there is sufficient information in the record to put the trustee in bankruptcy on inquiry, there is no fraudulent concealment. *Greene* v. *Taylor,* 132 U. S. 415, 10 S. Ct. 138, 33 L. Ed. 411. The "Statement of Affairs" filed January 4, 1960, by appellee on behalf of the corporation in the bankruptcy proceeding stated the following:

> A financial statement had been furnished by the corporation to Peoples Exchange Bank in Russellville in 1959;
>
> Bank accounts were maintained in the same bank, as well as in the Bank of Russellville and the Bank of Dardanelle;

The loan of $10,000 by the Bank of Russellville was repaid within a year immediately preceding the filing of the bankruptcy petition;

All papers and ledgers had been delivered to the trustee.

Had appellants or their accountant made inquiry at the Bank of Russellville at the time this document was filed, or within 22 months thereafter, they would have learned every fact that is in the record now. There seems to have been no difficulty in ascertaining that the payments on this loan were made by the corporation, once the inquiry was made. The books and records in the hands of trustee's accountant, as set out earlier, also showed practically every fact necessary to institute this action. It appears that they had been in the accountant's hands for more than six months prior to the date of his report. One seeking to avoid the bar of the statute of limitation provided in bankruptcy statutes must show diligence on his part in seeking knowledge of the facts which are the foundation of the cause of action. *Avery* v. *Cleary*, 132 U. S. 604, 10 S. Ct. 220, 33 L. Ed. 469.

We have searched the record and find no act on the part of appellee by which he sought to conceal the facts from appellants. Some affirmative act on his part is required before we can say there was fraudulent concealment. Mere failure to reveal, in the absence of a duty to speak, is not sufficient. *Williams* v. *Purdy*, 223 Ark. 275, 265 S. W. 2d 534.

The judgment is affirmed.

O. T. BAKER, GUARDIAN *v.* WALTER A. HELMS ET UX.

5-4409 423 S. W. 2d 540

Opinion delivered February 5, 1968

Guy H. Jones and *Phil Stratton,* for appellant.

George F. Hartje Jr., for appellees.

JOHN A. FOGLEMAN, Justice. This appeal is taken from a decree of the trial court dismissing appellant's complaint seeking to set aside a deed dated August 17, 1956, from one E. E. Hodges and his wife, Olga, to appellee Hazel Ella Helms, one of their seven children living at the time of the execution of the deed.[1]

[1]It is another of life's sad stories of acrimonious controversy among siblings over the disposition of property acquired by their parents.

This deed conveyed lots in Vilonia on which the Hodges home was located. It was recorded on November 16, 1956. The consideration recited is $1.00 and other valuable considerations. A reservation in the deed is worded as follows:

> "Retaining a dower interest for the said E. E. Hodges & Olga A. Hodges for the use and possession during their natural life."[2]

The attack on this deed is twofold; *i. e.*, (1) breach of a continuous promise by appellees of future support to appellant's ward and his wife, and (2) fraud in procurement. Appellees deny that a promise of future support to E. E. and Olga Hodges constituted any part of the consideration for the deed and assert that any claim for cancellation of the deed is barred by the statute of limitations and laches.

At the time of the trial, E. E. Hodges was 91 years of age, 10 years older than he was when the deed was executed. He had built a modest home on these lots which he had owned since 1906. The deed in question had been drawn by an attorney at Beebe and the acknowledgment thereof was before him.

Mrs. Olga Hodges died April 30, 1960, having resided on the property until her death. E. E. Hodges resided there after the execution of the deed, except for absences due to surgery and a broken hip, because of which he was a patient in hospitals and nursing homes. He was in hospitals and nursing homes in the latter part of 1963 and early 1964. When he returned home, the appellees had gone to California. He remained at

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[2]While this reservation may seem ambiguous, it is not questioned that the correct construction of the clause effects the retention of an estate for the life of the survivor of E. E. and Olga Hodges.

home for six or seven months during their absence. A short time before this case was filed, he broke his hip and went to a hospital, after which his son, Doyle, took him to a nursing home where he was at the time of the trial. His maintenance cost there exceeds the welfare department allowance by $70 per month, the payment of which is borne by appellee Hazel Helms and three of her brothers in rotation.

When the deed was executed, appellees had sold a motel at Beebe and were apparently in good financial condition. At least six years before the execution of the deed, the parents had executed a will or wills devising and bequeathing everything they owned to appellee Hazel Helms. This was done with the acquiescence of most, if not all, of the Hodges children. One of them, Doyle (W. E.) Hodges (who admits having promoted this suit), claims to have instigated and encouraged this testamentary action. It is clear that it was not contemplated at that time that the Helmses would ever live with the parents at the family home. It is certain that there was no agreement at this time that they would support the father and mother.

The Hodges family was raised in comparative poverty. Several of the children left home at early ages to seek employment. Hazel was probably the first to leave when she was 14 or 15 years of age. There seems to be no dispute about the fact that thereafter she made substantial contributions to the maintenance and support of the family, particularly to her mother and father. The only dispute is about the extent of these contributions.

Hazel Helms testified that she and her husband moved in with her parents, at their invitation and urging, after the sale of the Beebe Motel, although she and her husband had previously planned to build their own home. She said that the move was considered by her mother and father for four or five months. The well at

the Hodges homestead had gone dry and the parents were persistent about the need for alterations. The will or wills had previously been made, but Hazel said she told her mother that if she and her husband were going to spend money for the home place, she would prefer a deed rather than a will. After the parents approved, she related, they went to the attorney's office in Beebe. While they wanted a will, she insisted on "a dower right." She stated that her parents voluntarily gave her the property, except for their right to live there.

After the execution of the deed, appellees moved into the parents' home, remodeled it and made substantial improvements thereto. They have maintained the property and paid all taxes thereon since that time. While appellees were apparently in good financial circumstances when the deed was executed, adversity has come upon them lately. These adverse conditions were attributable, at least in part, to the poor health of Walter Helms which has resulted in his becoming a wheel chair invalid since he had a leg amputated in 1964. So far as the record reveals, the only income of appellees is $300 per month from social security payments and veteran's pension payments to the husband. The wife says that she is unable to seek employment because of her husband's need for her attention.

Not long after the execution of the deed, the mother and father qualified for welfare grants and E. E. Hodges is still receiving a welfare check.

Appellees endeavored to sell the property in 1964 and 1966, but apparently were impeded by the reservation in the deed. It is admitted that appellee Hazel Helms offered Doyle $500 to obtain their father's signature on a quitclaim deed which would make a conveyance of title to the property possible. Hazel Helms testified that her father was to have whatever the law allowed for his life estate from the proceeds of the sale.

No attempt was ever made by E. E. or Olga Hodges to rescind or cancel this deed. Appellant's complaint seeking to do so was filed April 24, 1967. The exact date of his appointment as guardian of E. E. Hodges does not appear, but it seems to have been subsequent to the appellees' listing of the property for sale by him as a real estate agent in January 1967.

Although one other son testified on each side, the real controversy is between Doyle Hodges and appellees. It seems clear that this brother has known of the existence of this deed since 1959. His brother who testified for appellant recalled having gone with his sister to a lawyer's office to discuss the drawing of such a document. The brother who testified for appellees said that he knew of the deed earlier, although he lived in California and had lived on the west coast since 1936.

The testimony as to the existence of an agreement on the part of Hazel Helms to support her parents for the rest of their lives is sharply conflicting. Most of it was given by Doyle Hodges and relates to statements of his sister after the deed to her was executed. When first asked about conversations with his sister about her responsibilities under the deed, he told of an occasion when Hazel, sitting with their mother and father, spoke on the subject. He said: "She says I promised to take care of—you only have a lifetime dower in it. Now what that means, I don't know." He also stated: "There's nothing I can recite about the commitment of the defendant if you want me to." In response to the trial judge's question whether his mother or father ever told him what constituted the consideration for the deed, he answered, in part:

> "Said they were going to care for them. You know didn't make it very strong. Did—says this is disagreeable here. One statement from mother says Son, I wish we had a little home off to ourselves. I said if I ever get the money and in shape, I'll get

> it for you. If they won't let you build it here, I'll build it somewhere else. Said they were supposed to take care of us but she don't cook half of the time."

The date or dates of such statements are not given. Doyle Hodges and his wife also testified that on one occasion they got Hazel Helms off the street when she was intoxicated and driving an automobile. They said that, after taking her to their home, they went to the home of the oldest Hodges daughter where the two sisters got into a quarrel, after which Hazel was said by Doyle to have responded to their sister's accusation that she took their mother's home by saying that she took it because she had agreed to take care of them the rest of their lives. Doyle's wife's version was that Hazel said that she had taken the place and would keep it and would take care of "Mama" and "Papa" as long as she (Hazel) lived. Doyle testified that on another occasion, while his mother was living, his sister Hazel cursed their father and called him a "s.o.b." and other names, and said to him, "[Y]ou can only have a lifetime dower and I agreed to take care of you, but you can take care of yourself." Harold Hodges, who was younger than either Doyle or Hazel, was the son who testified on behalf of appellant. He moved to California in 1936, but visited at his father's home almost every summer. His sister had talked to him about getting the property conveyed to her about 1955 or 1956, and said the home was "made" to her and the "folks" would have a place to stay and would be well taken care of as long as they lived, according to his understanding. He went with her to the attorney in Beebe to talk about drawing up a will or deed for the place to go to her when their parents passed away, their having a home there as long as they lived. Later, in response to questioning by the trial judge, Harold testified that Hazel said, in the absence of their father and mother, that in order to get this property, she would

see that the folks were well taken care of as long as they lived.

On the other hand, Hazel Helms vehemently and repeatedly denied any such agreement.

I. O. Lee Hodges testified on behalf of appellees. He had left home in 1936, when about 21 years of age, and had lived in Oregon and California since that time. He stated that in 1957 or 1958, after extensive improvements had been made, he asked his mother if there was any "setup" to protect Hazel's interest. His mother replied, he said, that a will and the necessary papers had been made to protect her. His mother said to him that Hazel had done so much for them that she hoped she could be repaid. Mrs. Hodges' concern, said I. O. Lee, was a home near Hazel. He had known that Hazel had the deed since 1957 or 1958, having been told of it by his mother.

E. E. Hodges, the grantor, testified after the court adjourned to Meadow Lake Nursing Home upon invitation of appellees' counsel and following testimony by Doyle Hodges that his father could clearly reveal the situation. He denied knowing what he had signed but said he learned for sure what it was after about two years. On examination by appellant's counsel, he denied that Hazel ever used any language around him indicating that she would take care of him the rest of his life. He never talked to her about the matter since he discovered that he signed a deed.

A mere preponderance of the evidence is not sufficient to establish an alleged unperformed agreement on the part of the grantee in a deed to support the grantor where that consideration is not expressed in the deed. *Viesey* v. *Wooten,* 220 Ark. 962, 251 S. W. 2d 593; *Hammett* v. *Cannon,* 226 Ark. 300, 289 S. W. 2d 683. Evidence to engraft upon a deed a consideration other than that expressed therein must be clear, cogent and convincing.

May v. *Alsobrook,* 221 Ark. 293, 253 S. W. 2d 29. Evidence to justify the cancellation in equity of a deed properly executed and acknowledged must also be something more than a mere preponderance. It must be clear, strong and conclusive, or clear, cogent and convincing, or clear, unequivocal and decisive. *Williams* v. *Shaver,* 100 Ark. 565, 140 S. W. 740; *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253; *Johnson* v. *McAdoo,* 222 Ark. 914, 263 S. W. 2d 701; *Swim* v. *Brewster,* 177 Ark. 1171, 9 S. W. 2d 560. Especially is this burden applicable when fraud is alleged as the basis of cancellation. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517; *Herr* v. *Murphree,* 240 Ark. 834, 402 S. W. 2d 393.

In a letter constituting his findings, the trial judge found all issues of law and fact in favor of appellees. The court's decree contained these specific findings of fact:

> "That certain Warranty Deed executed by E. E. Hodges and wife, Olga Hodges, on the 17th day of August, 1956, and recorded in Deed Record Book 140 at page 217 in the office of the Recorder within and for Faulkner County, Arkansas, was executed for a valuable consideration, and that said deed should not be cancelled nor set aside. That said deed was not executed in return for any continuing promise of support by the defendants herein to E. E. Hodges or his wife, Olga Hodges, and that the said Hazel Ella Helms took title to the following described property subject to a life estate in E. E. Hodges and his wife, Olga Hodges, who is now deceased."

When we consider the testimony showing the contributions made by Mrs. Helms to her mother, father, brothers and sister, before the execution of the deed, the improvements made by the Helms on the property after the deed, and the fact that the mother and father resided in the home as long as, and whenever they de-

sired to do so, we cannot say that the chancellor, who saw and heard the witnesses and observed their manner and demeanor while testifying, erred in finding that appellant failed to meet his burden. We cannot, for that matter, say that his findings are against the preponderance of the evidence. Thus, it is not necessary that we consider the very conflicting testimony relating to manner of performance of the alleged contract.

The decree of the lower court is affirmed.

JIMMY BLAKE *v.* STATE OF ARKANSAS

5323 423 S. W. 2d 544

Opinion delivered February 5, 1968

Leroy Froman, for appellant.

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

J. Fred Jones, Justice. This is an appeal from a Criminal Procedure Rule 1 hearing denying appellant release from the Arkansas penitentiary.

The appellant, Jimmy Blake, is sixteen years of age, has less than a fifth grade education, and is one of ten children whose father does common labor at a mill and whose mother works in a laundry.

Appellant's first brush with the law came in 1965, when he was sent to the Boy's Industrial School from Woodruff County Juvenile Court. The instant appeal involves three cases in the White County Circuit Court.

In July 1966, in case number 2132, appellant was charged with burglary, petit larceny, and car theft. At the Rule 1 hearing, appellant testified that he could not read or write, but that he made a statement to the officers when he was arrested on these charges, and that he signed a statement, that about three weeks later an attorney was appointed to represent him, and that he entered a plea of guilty because he felt that he would not "get as much time" on a plea of guilty. Appellant was sentenced to the penitentiary for two years on the burglary charge and five years on the grand larceny

charge (car theft). These sentences were suspended and appellant was sent to the Boy's Industrial School where he remained for four months, after which he ran away. He was captured the following day and returned to the Industrial School and about three weeks later he escaped again.

During this absence from the Industrial School in January 1967, he was arrested and charged in case number 2142 with five counts each of burglary and petit larceny and two counts of grand larceny. Appellant made an oral statement to the arresting officers admitting his guilt to these charges and by appointed counsel, he entered a plea of guilty at his trial. He was sentenced to ten years on each of the five counts of burglary, sentences to run concurrently. The sentences were again suspended and appellant was again returned to the Boy's Industrial School, from which he escaped again after about three weeks.

While absent from the Industrial School this time, appellant was arrested in March 1967, and charged in case number 2151 with burglary, grand larceny, and petit larceny. Once again he made an oral statement to the arresting officers and pleaded guilty by appointed counsel. He received a sentence of two years on each of two counts of burglary and one year on grand larceny, sentences to run consecutive to each other and consecutive to the sentences in cases number 2132 and 2142. This sentence in case number 2151 was suspended, but the suspension of sentence in cases number 2132 and 2142 was revoked and appellant was sent to the penitentiary. Thus, at present, appellant is serving 17 years as sentenced in 2132 and 2142, and has five years suspension remaining in case number 2151.

In July 1967, appellant testified at his Rule 1 hearing where he was represented by appointed counsel. From the petition, the testimony of appellant, the testimony of the sheriff of White County, and the testimony of the counsel appointed for appellant in his prior

trials, together with all matters appearing of record, including the docket sheets and files in the circuit clerk's office, and after argument of counsel, the trial court denied relief, from which this appeal is brought. For reversal, appellant relies upon five points:

> "1. Appellant was not advised of his right to counsel and his right to remain silent during his interrogations. He could not have made an intelligent waiver of these rights.
>
> 2. Appellant did not have the services of an attorney prior to his conviction in Case No. 2132.
>
> 3. Appellant did not have assistance of counsel at the critical stages of the proceedings against him in Cases No. 2142 and No. 2151. He did not have the effective benefit of counsel after counsel was appointed in Case No. 2142 and Case No. 2151.
>
> 4. Appellant was promised shorter sentences in Case No. 2142 and Case No. 2151 in return for a guilty plea. Appellant did not know the full consequences of his guilty plea in Case No. 2151.
>
> 5. Appellant's sentence to the Arkansas State Penitentiary constitutes cruel and unusual punishment within the meaning and spirit of the Eighth Amendment to the United States Constitution."

As to the first point argued by appellant, we find no merit. Though appellant denies being advised of his rights, the trial court found, and the sheriff of White County who arrested appellant testified, that appellant was advised of his rights on each occasion and that appellant was not interrogated, but always talked freely and was cooperative. The sheriff also testified that appellant usually had the stolen items with him, indicating that there was no need for a confession. The cases of *Meeks* v. *State* 239 Ark. 1066, 396 S. W. 2d 306; *Swagger* v. *State,* 227 Ark. 45, 296 S. W. 2d 204, and *Johnson*

v. *Zerbst,* 304 U. S. 458, 59 S. Ct. 1019, 82 L. Ed. 1461, relied upon by appellant on the issue of intelligent waiver, are not applicable here. These cases were reversed when the defendant went to trial and pleaded guilty without the aid of counsel and without an intelligent waiver of counsel. The appellant in the case at bar was represented by counsel prior to his guilty plea. Appellant's reliance on *Miranda* v. *Arizona,* 384 U. S. 436, 86 S. Ct. 1602, and *Escobedo* v. *Illinois,* 378 U. S. 478, 84 S. Ct. 1758, is to no avail here, as appellant pleaded guilty in all three cases, and thus, the confessions were never used against him. In *Roach* v. *Bennett, Warden,* 148 N. W. 2d 488 (Iowa 1967), where the defendant made admissions and gave statements as to his guilt during the first two days of his detention without being advised of his right to counsel, but had counsel at the time of his plea of guilty in open court, the Supreme Court of Iowa, in habeas corpus proceedings, held:

> "Since statements allegedly given were not introduced or considered in a trial, the rights announced in Escobedo and Miranda could not have been violated."

Appellant s second point is also without merit. We agree that the docket entry does not reflect that appellant had counsel in case number 2132 and that it is not shown in the record who that counsel was, but the appellant himself testified on direct and on cross-examination that counsel was appointed for him in that case about three weeks after his arrest, and that the counsel was present in the court room when he entered a plea of guilty. The trial court found as a fact that appellant had counsel in all three cases and this is supported by the evidence.

Appellant's third point is also to no avail. As to the issue of whether he had counsel at the critical stages, we reiterate our holding, *supra,* that *Escobedo* and

Miranda do not apply where the confession is not considered or introduced against the defendant in a trial. On the issue of whether appellant had effective benefit of counsel after counsel was appointed, the record shows that attorneys were appointed for appellant on the same date as his plea of guilty was made and sentence pronounced. We agree that under the facts and circumstances of a particular case, this might amount to a failure of effective benefit of counsel, but we do not agree that this is the situation here. The attorneys in the prior cases testified that they discussed the respective cases with the appellant, his parents, the prosecutor, and the court in chambers; that they felt that they did what was best for appellant; that they fully explained the charges to the appellant and his parents, and that appellant and his family were satisfied that a guilty plea was best. Under these facts and circumstances, we cannot see where advice to plead guilty would not be effective benefit of counsel, even if the attorney felt that the appellant's confession would be inadmissible.

We find no merit in the fourth point relied upon by appellant. While appellant testified that the sheriff and appellant's attorneys promised him a certain sentence if he would plead guilty, the record indicates that the attorneys and prosecutor only stated that, in their opinion and with their recommendations to the court, appellant would get a shorter sentence or be sent to the Boy's Industrial School on a plea of guilty. The sheriff, in his testimony, flatly denied that he advised appellant to plead guilty or that appellant would receive a certain sentence for a plea of guilty. The trial court found against appellant on this issue and this finding of fact is supported by the evidence.

Appellant also contends that he did not know the full consequences of his guilty plea in case number 2151. His attorney in that case testified that appellant and his parents clearly understood the consequences of appellant's guilty plea and he (the attorney) took notes

concerning this. The trial court found that appellant knew the full consequences of his plea and this is supported by sufficient evidence.

We cannot agree with the appellant as to his fifth assignment of error. There is no contention by appellant that any of the sentences he received are more than the maximum called for by our criminal code. He merely argues that the cumulative effect of the sentences constitutes cruel and unusual punishment in his case, considering his age, education, etc. We feel that the trial court could and did consider the number of times appellant has been sent to the Boy's Industrial School, the great number of criminal offenses he has committed, how many sentences have been suspended, and how many opportunities appellant has had to stay out of the penitentiary. The fact that the punishment authorized is severe does not make it cruel or unusual. *Johnson* v. *State,* 214 Ark. 902, 218 S. W. 2d 687. It is within the power of the legislature to classify crimes and determine punishment for violation of such classifications. After such punishment is set, and until it is declared unconstitutional, no sentence under it can be regarded as cruel or unusual. *Hadley* v. *State,* 196 Ark. 307, 117 S. W. 2d 352. We do not find the sentence in the present case to result from passion or prejudice, exceed the statutory limits, or to be cruel and unusual. Furthermore, we have on many occasions held that the suspension of a sentence rests in the sound discretion of the trial court and that the sufficiency of the evidence for revocation of such suspension also lies within the sound discretion of the trial court. See *Smith* v. *State,* 241 Ark. 958, 411 S. W. 2d 510, and *Kinard* v. *City of Conway,* 241 Ark. 255, 407 S. W. 2d 382. No abuse of that discretion has been shown in the case at bar.

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

Affirmed.

OLLIS HEARD *v.* STATE OF ARKANSAS
5316 424 S. W. 2d 179

Opinion delivered February 5, 1968
[Rehearing denied March 11, 1968.]

[redacted]

Charles J. Hlavinka, for appellant.

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

CONLEY BYRD, Justice. Appellant Ollis Heard was convicted of burglary and grand larceny in connection with the breaking and entering of the Broadway Shoe Shop, 525 East Broad Street, Texarkana, Arkansas, and the taking and carrying away of certain property therefrom. For reversal he relies upon the following:

> "The trial court erred in admitting into evidence certain statements allegedly made by the defendant as a result of custodial interrogation because such statements had been made prior to the defendant's having been taken before a magistrate, without his having been informed of his right to remain silent, without his having been warned that any statement might be used against him, without his having been informed of his right to consult with a lawyer and

> to have a lawyer present during an interrogation, without his having been informed that a lawyer would be appointed to represent him if he were unable to employ one and because the alleged statements were made under duress and pressure."

The record shows that a warrant was outstanding for appellant's arrest and that when the officers first attempted to apprehend him he ran, notwithstanding two warning shotgun shots. He was finally apprehended the same day in a marshy area behind the Ritz Motel by officers from both Texarkana, Arkansas and Texarkana, Texas. When he was taken into custody by Lt. Thurman Quisenberry, he was suffering from a buckshot wound inflicted by Max Tackett, Chief of Police of Texarkana, Arkansas. Immediately upon arrest he was fingerprinted and taken to a doctor for treatment of the wound (in the nature of a pump knot). Appellant was then jailed until around 1:00 p. m. the next day, when he was taken to Chief Tackett's office. There appellant signed a statement showing that the *Miranda* warning (*Miranda* v. *Arizona*, 384 U.S. 436 [1967]) had been given and his rights thereunder waived. He also signed eleven other typed statements connecting him with eleven burglaries in the city of Texarkana.

The *Miranda* warning consisted of twelve mimeographed questions on legal-size paper, with space between each question for the answer. The record shows that answers were inserted and the statement signed by appellant and witnessed by Max Tackett and Thurman Quisenberry. The other eleven statements were taken by typing the question and then the answer. Appellant's signature on each statement was witnessed by the officers present at the time.

Under our statutes, failure to take an arrested person before a magistrate before interrogating him does not vitiate a confession so obtained. *Paschal* v. *State*, 243 Ark. 329, 420 S. W. 2d 73 (1967).

Regarding the *Miranda* warning, appellant contends that it was nothing more than a preliminary ritual to the police's interrogation and that the record shows appellant incapable of reading and comprehending the prepared questions. In this connection Porter Eastland, appellant's third grade teacher, testified that appellant was unable to read and write. Substantially the same testimony was given by Whitaker Allen, Jr., appellant's seventh and eighth grade coach. Mott H. Mosely, principal of Booker T. Washington High School, testified that in his opinion appellant was unable to read and write. The latter opinion was based on appellant's scholastic record and not on any personal observation by Mr. Mosely.

Appellant says that when he was taken to the fingerprint room on the day of his arrest, Lt. Quisenberry got angry and reached for a club, "something like a nightclub," and that while Lt. Quisenberry was doing this, Chief Tackett kicked him. He asserts that before he was taken to the doctor he was forced to sign some statements which he couldn't read. Appellant also says that when he was brought to the Chief's office the day after the arrest, they handed him some papers and the Chief began reading to him; and that after Chief Tackett read this thing to him, the Chief told him "there wasn't no need of me trying to hold back anything, that I might as well go on and clear everything up, and he handed me some more papers and things, and told me to sign them." Appellant says that he can only write and spell his name but cannot read.

On the Motion to Suppress, during appellant's interrogation by the court, the following occurred:

"Q All right, go ahead with what you were about to tell me. You were about to tell me what scared you into signing the statements the second day, I believe.

"A He told me to go ahead on—that I might as well to go on and sign them. I don't know what it was.

He was reading something; I don't know what it was, and then he mentioned that I had already signed the papers, so I went on and signed them then. I don't know how many there was. There wasn't too many, and then he read this other statement off. He read that off to me then, and he said, 'We've got you now.'

"Q This was Chief Tackett talking all the time you say 'he?'

"A Yes, sir."

The officers testified they personally knew appellant, he having been arrested before. They denied any abuse of appellant and explained that the *Miranda* warning was given by handing appellant a copy of the questions they proposed to ask him. In addition they read and explained the questions to him before they put the paper in the typewiter and started typing his answers to each specific question. As appellant responded, the officer would type the answer before proceeding to the next question. After the questions were completed, the sheet was removed for signatures. The same procedure was followed with the other statements, except that the questions were typed as they were asked.

With respect to the language used in the answers, Chief Tackett explained as follows:

". . . then I read each question as I came to it, and asked him if he understood what it said. And then I wrote down exactly what he told me. Now, I didn't just say yes or no, or uh-huh. When he said, 'Uh-uh,' or 'Uh-huh,' or 'Yeah,' I said, 'Now, tell me exactly what you mean.' And for instance, on this first answer to the first question, 'Yes, I understand that I do not have to give any statement.' I nailed him down to that very thing before I quit it, and I did that on each occasion, on each case."

When we consider appellant's previous experience with the law, and compare the answers he gave in the statements with those he made in open court in response to questions from the lawyers and the trial court, we find that the evidence is sufficient to sustain the trial court's finding that appellant voluntarily made the confessions after having been fully advised of his constitutional rights and having knowingly waived the same.

Notwithstanding his inability to read, the record refutes any inability to comprehend the questions asked. It may be true that the officers did some editorializing in writing down appellant's answers, but this is not an uncommon problem in recording answers, and we do not find the discrepancies of such character as to make a material difference.

Nor can we find any merit in the contention that the *Miranda* warning should have been given anew each time the officers questioned appellant about a different burglary. The record shows that the questioning was continued after the warning was given, with only brief interruptions.

Affirmed.

BROWN, J., not participating.

ARKANSAS STATE HIGHWAY COMMISSION *v.* IRMA LINCOLN HAMPTON ET AL

5-4383 423 S. W. 2d 567

Opinion delivered February 5, 1968

John R. Thompson and *Thomas B. Keys,* for appellant.

House, Holmes & Jewell, for appellees.

CONLEY BYRD, Justice. Appellant Arkansas State Highway Commission brings this appeal from a jury verdict and judgment for $20,000 following the taking of 29.59 acres out of 130.59 acres owned by appellees.

Appellant urges that the trial court erred in permitting the landowners' witnesses to testify that their

values were based upon this land having public access without showing that there was public access to the property, and in not striking the testimony of appellees' expert witnesses after appellees failed to show there was public access to the property.

One of the landowners and appellees' two expert witnesses testified that they had in the past entered the property on the old Military Road which had been in existence since the Mexican War, running from Helena to Arch Street Pike in Little Rock. The location of the road shows up on aerial photos introduced in evidence. Mr. C. V. Barnes testified that he had used the old Military Road to get to the property as early as 1929 or 1930, that the road was not now passable by car, that a four-wheel drive vehicle was necessary, and that the road was no paved highway, but it was access, which no longer existed since the new highway had cut it in half. Mr. Lincoln, one of the landowners, stated that he had been on the property a number of times, and that when he heard about the proposed highway, he and an adjoining landowner had gone in on the old Military Road by pick-up truck and had seen hunters and picnickers on the property. Mr. Lloyd Pearce also testified that before the taking the road was passable by four-wheel drive vehicle, but after the taking one could not use the road because the non-access highway bisected it, and that the old Military Road had been some type of access before the taking.

There was proof, both oral and documentary (photographs), that the old Military Road existed and had existed for a number of years. Testimony also showed that this road had been used for access to the subject property for some years—rough, unpaved, even primitive access, but access it was, now severed by a limited access highway. Generally speaking, an easement acquired by grant or prescription cannot be lost by mere nonuser for any length of time, no matter how great. The nonuser must be accompanied by an express or im-

plied intention to abandon, 25 Am. Jur. 2d § 105, which intention was not shown here.

Appellant's second point is that the trial court erred in not striking the before and after values of Mr. C. V. Barnes because he based his market for rock on sales that took place after the date of taking.

This court has long adhered to the rule that a condemnor should not be required to purchase property at a price enhanced by the particular public project for which the property was taken. *Arkansas State Highway Comm.* v. *Griffin,* 241 Ark. 1033, 411 S. W. 2d 495 (1967); 4 Nichols, Eminent Domain § 12.3151 (3d ed. 1962). There is no testimony in this record that the construction of this piece of highway increased the value of lands in the area. Mr. Barnes testified that the property has granite and that his research showed that from 1950 to 1962 the United States market for granite had increased 300 per cent, due to factors such as increased river development and highway construction throughout Arkansas.

The subject property was taken in February 1962; trial was held in 1966. Mr. Barnes testified in detail about nine sales of similar property, both before and after the taking. The three sales before February 1962 ranged from $300 to $1,000 per acre; the sales after the taking (with one exception) ranged from $1,000 to $1,-850 per acre. He explained how he charted these sales and arrived at the conclusion that as of February 1962 the low trend was $750 per acre and the high $1,125 per acre. He then testified that the February 1962 value of the land taken was $22,192.50 (about $740 per acre), and damage to remaining land was $10,557.57, a total of $32,750.

Although 5 Nichols, Eminent Domain § 21.31(2) (3d ed. 1962) states that evidence of sales made subsequent to the taking is not admissible unless the sales

were made almost simultaneously with the taking, the treatise prefaced this general rule with the statement that "there is ample authority to the contrary." Simply stated:

> "There is authority for the admission of evidence of sales of comparable land made subsequent to the date of condemnation where the sales considered involve land that was not benefitted or its market value affected by the public improvement causing the condemnation." *State* v. *Williams,* (Texas 1962), 357 S. W. 2d 799.

We see no error in the court in its discretion admitting comparable sales, not too remote in time, and not having been enhanced or decreased in value by the project or improvement which prompted the taking.

Appellant's third point is that the court committed reversible error in permitting Mr. Barnes to testify as to what the price of one foot of granite per acre would be at five cents a ton.

4 Nichols, Eminent Domain § 13.22 (3d ed. 1962), "The rule is widely prevalent in this country that the existence of mineral deposits in or on land is an element to be considered in determining the market value of such land." (*Arkansas State Highway Comm.* v. *Elliott,* 234 Ark. 619, 353 S. W. 2d 526 [1962]).

We have permitted market value of minerals to be determined by multiplying the mineral quantity by its fixed price per unit in an unusual situation such as occurred in *Arkansas State Highway Comm.* v. *Cockran,* 230 Ark. 881, 327 S. W. 2d 733 (1959), where the land taken had been leased at royalty for mining a certain mineral. However, that was unusual, and this court in *Arkansas State Highway Comm.* v. *Stanley,* 234 Ark. 428, 353 S. W. 2d 173 (1962) fortified the general rule that market value of land may not be determined simply by

multiplying the estimated quantity of mineral by a unit price. In the case at bar, this error did not occur.

On cross-examination of appellees' expert, Mr. Barnes, the state asked him if he knew about a 1957 Brazil sale. Barnes testified that "it wasn't an outright sale . . . The consideration was $278 per acre plus a 5-cent per cubic yard royalty on all rock quarried off the property." Barnes admitted that he did not know whether that consideration was stated in the deed, but that he had verified the agreement with both parties to the transaction and that the purchaser thought the property, considering royalty, was costing him $2,000 per acre. On re-direct, Mr. Barnes was asked what the 5-cent royalty meant where an acre of ground had granite one foot deep. Mr. Barnes replied that in the Brazil sale the royalty was 5 cents per cubic yard, which would figure approximately $150 per acre, one foot deep.

The fact that the Brazil property had sold for $278 per acre plus a 5-cent per cubic yard royalty was already before the jury without objection. The testimony here objected to did nothing more than make a mere calculation which the jury itself could have made. Since no effort was made to capitalize this into market value of either the Brazil property under discussion or the subject property, we fail to see any prejudicial error.

Appellant finally urges that there was no substantial evidence to support the verdict. We do not agree. One of the landowners and two expert witnesses testified for appellees to damages of $40,000, $32,750, and $33,000 to appellees; appellant's two experts testified to damages of $6,850 and $7,000. The qualifications of all the witnesses were admitted, and the jury had the advantage of detailed examination and cross-examination of each witness before reaching its verdict.

Affirmed.

HARRIS, C. J., BROWN and JONES, JJ., dissent.

SEARCY COUNTY *v.* HOWARD STEPHENSON

5-4466 424 S. W. 2d 369

Opinion delivered February 12, 1968
[Rehearing denied March 18, 1968.]

Joe Purcell, Attorney General; *Don Lanaston* and *Ralph G. Brodie,* Asst. Atty. Generals and *Bill Doshier,* Prosecuting Attorney, for appellant.

Donald Adams, for appellee.

CARLETON HARRIS, Chief Justice. Searcy County, Arkansas, appellant herein, has appealed from a judgment of the Circuit Court of Searcy County holding Act 68 of 1965 (Ark. Stat. Ann. § 3-841 [Supp. 1965]) unconstitutional, and granting judgment to Howard Stephenson against said county in the sum of $1,497.00. The facts giving rise to the litigation are as follows:

Stephenson, appellee herein, qualified as an independent candidate for the office of Sheriff and Collector

of Searcy County, Arkansas, for the general election to be held in November, 1966. In filing as a candidate, Stephenson paid a fee of $1,500.00 in accordance with the provisions of Act 68 of 1965, which, *inter alia,* provides as follows:

"Hereafter, any person who shall file as an independent candidate, as authorized by Act No. 352 of 1955 [Ark. Stats. (1947) Sec. 3-836 through 3-840], for election as United States Senator or Congressman, or for any state, district, or county office in this state shall pay a filing fee in the same amount charged by the appropriate officials of the political party in this state charging the greatest filing fee for nomination for such office at the primary election of such political party preceding the general election at which such person is a candidate."

The highest filing fee at the primary election in Searcy County for the office of Sheriff and Collector was set by the Republican Central Committee, and was in the amount of $1,500.00. Appellee was unsuccessful in his race for this office, and in December, 1966, filed a claim against the County of Searcy for reimbursement of the $1,500.00 filing fee. The then County Judge, sitting as the County Court, allowed the claim, but the claim and order were lost without ever being placed of record. The subsequent county judge held that the claim was not valid, and that the order allowing same should be set aside. In the meantime, the first order had been appealed to the Searcy County Circuit Court. There, as here, appellee contended that Act 68 was void and unconstitutional because it was discriminatory against independent candidates in the general election, the $1,500.00 fee being required of him, while party nominees for county office were allowed to get their names on the general election ballot by the payment of the sum of $3.00. The Circuit Court held the act unconstitutional for that reason, and for the further reason that it constituted an attempt by the General Assembly to delegate

to political parties the authority to fix ballot fees required of candidates for public office in the general election. Thereupon, the court entered its judgment, holding that Stephenson was entitled to recover $1,497.00.

The main issue here is whether Searcy County owes Stephenson $1,497.00, and we have held on numerous occasions that we do not pass upon constitutional questions if the litigation can be determined without doing so. In *Honea* v. *Federal Land Bank of St. Louis,* 187 Ark. 619, 61 S. W. 2d 436, this court said:

"* * * It is both proper and more respectful to a coordinate department to discuss constitutional questions only when that is the very *lis mota.* Thus presented and determined, the decision carries a weight with it to which no extra judicial disquisition is entitled. In any case therefore where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable. Such has been the unvarying practice of this court. See also *Martin* v. *State,* 79 Ark. 236, 96 S. W. 372; *Sturdivant* v. *Tollett,* 84 Ark. 412, 105 S. W. 1073; *Road Imp. Dist. No.* 1 v. *Glover,* 86 Ark. 231, 110 S. W. 1031."

Here, the question of whether the county is liable can be determined without passing upon the validity of Act 68 of 1965, and in accordance with the above cited cases, we by-pass the constitutional question.

It is asserted by appellant, and we find correctly so, that Mr. Stephenson did not take the proper steps to insure a return of the filing fee, whatever the status

of the act in question. Of course, if the statute be constitutional, he could not prevail. Assuming, therefore, for purposes of this discussion only, but without deciding, that the act is unconstitutional, it will be noted that no complaint was raised by appellee until after the election had been held, and it had been determined that he was the losing candidate. Then, and then only, did he raise any question about the legality of the amount of the fee. Before paying the $1,500.00, as far as this record reflects, he made no effort to ascertain whether the statute was valid or invalid.[1] It is not disputed that the payment of $1,500.00 was entirely voluntary.

The most that can be said on appellee's behalf is that the payment was made under a mistake of law. In *Thompson, Commissioner of Revenues* v. *Continental Southern Lines, Inc.,* 222 Ark. 108, 257 S. W. 2d 375, this court said:

"Appellee seeks to recover voluntary payments made of taxes. This cannot be done. Cooley in *The Law of Taxation,* Ch. 20 § 1282, gives this rule: 'It is well settled that if the payment of a tax is a voluntary payment, it cannot be recovered back, except where a recovery is authorized by the provisions of a governing statute regardless of whether the payment is voluntary or compulsory' (Vol. 3 at p. 2561); and further: 'Where voluntary payments are not recoverable, it is immaterial that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. *Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the State should furnish him with legal remedies to recover it back.*[2] * *

[1]In fact, he did not even pay the amount "under protest."

[2]Emphasis supplied.

"* * * The common law rule governing cases of this kind is laid down in the following cases: *Lambron* v. *County Commissioners,* 97 U. S. 181, 24 L. Ed. 926; *Union Pacific R. R. Co.* v. *Dodge County* 97 U. S. 541, 25 L. Ed. 196. These cases lay down the following rule: '*Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor,*[3] or unless to release (not to avoid) his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back."

While this case related to a voluntary payment of taxes, the overall principles are set out in the italicized language. Applying the principles to the instant case, Mr. Stephenson was due to know the law; yet he voluntarily made a payment which, according to his present contention, the law would not have compelled him to make. Still, he made it, and he cannot now assert ignorance of the law as a reason why his money should be returned. Further applying the language in *Thompson, Commissioner of Revenues* v. *Continental Southern Lines, Inc., supra,* if Stephenson paid an illegal demand, he certainly, at that time, had full knowledge of all the facts, *i. e.,* he knew that the $1,500.00 charge to him was based on the fee set in the Republican primary, and he certainly should have been as aware of any alleged illegality before the election—as after it!

Actually, it would seem that there is less reason to refund a fee paid to seek office, than to refund taxes paid under an invalid act, for under the last circumstance, an owner is endeavoring to protect his property from detention or seizure.

Stephenson had two remedies which he could have followed before making the payment. He could have sought a writ of mandamus, directing the proper county

[3]Emphasis supplied.

official to place his name upon the general election ballot after the payment of $3.00, or he could have acted under provisions of Ark. Stat. Ann. § 34-2502 (Repl. 1962), which states:

"Any person interested under a deed, will, written contract or other writings constituting a contract, *or whose rights, status or other legal relations are affected by a statute,*[4] municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder."

Certainly, the validity of Act 68 of 1965 could have been determined prior to paying the fee.

A rather pertinent argument is also made by appellant to the effect that the filing fee, having been comingled with other county monies in the general fund, cannot now be refunded without an appropriation, and it is argued that there is no constitutional authority to make such an appropriation. It is not necessary that we discuss this point, since the litigation is disposed of under the previous contention.

Reversed.

BYRD, J., concurs.

CONLEY BYRD, Justice, concurring. I concur in the result reached, but I think we should determine the constitutional issue since it involves our election laws. In *Horn* v. *White,* 225 Ark. 540, 284 S. W. 2d 122 (1955), after holding that Horn could not contest the election because he had not filed his petition to be an independent candidate within the 45 days allowed by Act 241 of 1953, we said:

[4]Emphasis supplied.

"II. *Election Law Question.* Ordinarily an opinion of this Court need go no further than has been above stated; but we are now constrained to go further because the question posed by the parties (that is, whether Act 211 of 1953 or Act 241 of 1953 is the governing law) relates to an interpretation of certain provisions in our election laws; and it is the policy of this Court to settle such questions for the future guidance of the public."

I agree with the trial court that Act 68 is discriminatory and unconstitutional.

JOSEPHINE BERGETZ *v.* JOHN REPKA ET UX

5-4487 424 S. W. 2d 367

Opinion delivered February 12, 1968

William W. Green and *Richard W. Hobbs,* for appellant.

Wootten, Land & Matthews, for appellees.

George Rose Smith, Justice. This is an action brought by the appellant, Josephine Bergetz, against the appellees, Mr. and Mrs. John Repka, for personal injuries suffered by Mrs. Bergetz while she was a paying guest at the appellees' motel on Lake Hamilton. The appellees filed a motion for summary judgment, supported by discovery depositions and answers to interrogatories. The trial court granted the motion, finding that the Repkas "used ordinary and reasonable care for plaintiff's safety as a guest of defendants' motel." The correctness of that ruling is the issue here.

We observe at the outset that a motion for summary judgment is similar to a motion for a directed verdict, in that the testimony must be viewed in the light most favorable to the party resisting the motion. A summary judgment should be entered only if the proof, when so considered, presents no issue for the jury with respect to the defendant's liability. *Van Dalsen* v. *Inman,* 238 Ark. 237, 379 S. W. 2d 261 (1964).

The parties testified with such candor that there are hardly any conflicts in the proof. At about noon on April 6, 1964, Mrs. Bergetz, aged 63, stopped at the motel, ac-

companied by her foster son and her spitz dog. Mrs. Repka, in response to an inquiry, assured Mrs. Bergetz that pets were allowed at the motel if kept on leash at all times. Mrs. Bergetz also asked if the Repkas had a dog of their own, as she was afraid of strange dogs and would not stay at the motel if a large dog were allowed to run loose. In fact, earlier in the day Mrs. Bergetz had refused to check into another motel because a big boxer dog was kept there.

Mrs. Repka explained that they owned a German shepherd dog, but she told Mrs. Bergetz that the animal was kept penned in an enclosure. She said that the dog was occasionally taken out for exercise, but in such instances her husband stayed with it all the time. Upon those assurances Mrs. Bergetz engaged a room and moved into the motel. Mrs. Repka told her husband about her conversation with their new guest, but despite that fact Repka released the large German shepherd within an hour or so and allowed it to run at large without supervision.

A little later Mrs. Bergetz, with her dog on its leash, walked down to see the lake. As she was coming back up a flight of stone steps she was suddenly confronted by the German Shepherd, which was standing above her and growling. Mrs. Bergetz testified: "I got deathly scared, I remember, and my dog started to growl. They growled at each other, and I got more scared. And the collar, my dog, he pulled it back, and I fell. That's all I remember." In falling down the steps Mrs. Bergetz sustained painful injuries.

We think the proof presented a question of fact for a jury. In negligence cases especially, where the standard of care is that of a reasonably careful person, the issues are often peculiarly appropriate for determination by a jury. *Spink* v. *Mourton,* 235 Ark. 919, 362 S. W. 2d 665 (1962). If fair-minded men might honestly differ about the conclusion to be drawn from the testimony, the dispute should be submitted to a jury. *Mississippi*

River Fuel Corp. v. *Senn,* 184 Ark. 554, 43 S. W. 2d 255 (1931).

Repka's decision to let the large German shepherd out of its enclosure violated the assurances that his wife had given to Mrs. Bergetz. A jury might fairly conclude that an encounter between that dog and an apparently timid woman leading a smaller dog upon a leash might foreseeably involve an injury to Mrs. Bergetz. "It is not," as we said in *Pulaski Gas Light Co.* v. *McClintock,* 97 Ark. 576, 134 S. W. 1199, 32 L.R.A. (n.s.) 825 (1911), "necessary that the particular injury should have been foreseen. In *Foster* v. *Chicago, R. I. & P. Ry. Co.,* 4 Am. & Eng. Ann. Cas. 150, 127 Iowa 84, the court said: 'Doubtless, the particular situation might not have been foreseen, but this was not essential to making out a charge of negligence. Accidents as they occur are seldom foreshadowed; otherwise many would be avoided. If the act or omission is of itself negligent and likely to result in injury to others, then the person guilty thereof is liable for the natural consequences which occurred, whether he might have foreseen it or not. In other words, if the act or omission is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting therefrom, although he might not have foreseen the particular injury which did happen.' "

Here the trial court put some stress upon the absence of evidence that the defendants' dog was vicious or had ever attacked anyone. Such proof, however, was not essential to the plaintiff's case. *Finley* v. *Smith,* 240 Ark. 323, 399 S. W. 2d 271 (1966). We should add, in remanding the case for further proceedings, that we agree with the trial judge's conclusion that the defendants' failure to equip the steps with a railing was not actionable negligence.

Reversed.

SOUTHERN FARM BUREAU CASUALTY INS. CO.
v. W. B. ISGRIG JR. ET AL

5-4458 424 S. W. 2d 164

Opinion delivered February 12, 1968
[Rehearing denied March 11, 1968.]

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

H. Clay Robinson and *Harry C. Robinson,* for appellees.

PAUL WARD, Justice. The sole question here is: When did an automobile liability insurance policy, issued by the Southern Farm Bureau Casualty Insurance Company, become effective?

The following pertinent facts are not in dispute:

(a) Appellant, the above named insurance company, issued its policy to W. B. Isgrig, Jr. (appellee herein) covering an automobile owned by appellee and involved in a collision, causing injury to Regina Lorene Byrd.

(b) The term of the policy was "from the effective date 06/02/65 to 12/02/65 12:01 a.m. . . ."

(c) The collision occurred at 10 or 10:15 on the morning of June 2, 1965.

This particular litigation began when appellee filed a complaint in chancery court asking it to declare the policy in force and to cover the accident, and to direct appellant to defend a lawsuit brought against him by Regina Lorene Byrd.

In its answer appellee admitted issuing the policy as set out above and admitted the date of the accident, but alleged "that said policy of insurance was issued after said accident occurred . . . ."

The trial court found that "said policy was in full force and effect and afforded protection for said accident".

An unusual set of facts are here involved, and a somewhat unique issue is presented, but we have concluded the case must be reversed.

It is admitted: (a) that the accident happened on June 2, 1965 not later than 10:30 a.m.; (b) that the insurance policy in question had not been actually written or issued at that time, but was issued, paid for and delivered later on the same day of the accident; (c) that all these facts were known to appellees and to the agent of appellant; (d) that no fraud or deception was practiced by either party, and; (e) that the policy contains this clause—"The term of the policy shall be from the effective date 06/02/65 to 12/02/65, 12:01 a.m.

It is our opinion that clause (e) above is not clear or decisive as to the exact hour and minute on June 2, 1965 the policy became "effective". That being true, it is our further opinion that we can and must consider oral testimony to resolve the ambiguity.

The case of *Kansas City & Memphis Railroad Co.* v. *Smithson,* 113 Ark. 305, 168 S. W. 555 concerned a

dispute over the subject matter of a contract, and we said:

> "No rule of evidence was violated in permitting appellee to prove this state of facts, for it did not vary or contradict the terms of the contract, but only explained the subject-matter thereof. It clearly establishes a mutual mistake on the part of both participants in the negotiation as to what they were really contracting about, that is to say, the purpose for which the acquired right-of-way was to be used."

The subject matter here is the "effective date" of the insurance policy, so we now consider the testimony relative to that point.

Mr. Isgrig, Jr. testified, in substance; that on the day of the accident he went to the agency office of appellant and reported it to Joe Rodman, an employee; that he was told he did not have insurance; that he was sent to see Miss Milligan; that he had applied previously for insurance but did not know whether a policy had been issued since he had not paid for it.

Joe Rodman, appellant's agent, testified in substance: I talked to appellee on the day of the accident; I asked him if he had coverage, and he said "no" but that he needed coverage for the rest of the time. I told him he could go by the office and "pay his premium and coverage would be in effect then but not at the time of the accident".

Miss Milligan, a secretary of appellant, testified, in substance: Appellee came to the office on the day of the accident to get the policy; I knew of the accident and "I told him he didn't have any coverage at the time of the accident"; she further testified: "He said, 'well he knew that but it was a relief to get some insurance.' "

Since the insurance policy itself does not state the exact time it was to take effect but only when it would

expire, and in view of the testimony set out above, we are forced to conclude that the weight of the testimony shows the policy was not to be in effect when the accident happened.

The decree is therefore reversed, and the cause of action is dismissd.

FOGLEMAN, J., not participating.

MARY T. TARVER ET AL *v.* ELENA TALIAFERRO ET AL

5-4400 423 S. W. 2d 885

Opinion delivered February 12, 1968

Bridges, Young, Matthews & Davis and *Carlton Currie,* for appellants.

Coleman, Gantt, Ramsey & Cox, for appellees.

LYLE BROWN, Justice. This case orginated as a suit to quiet title to a 483-acre farm in Lincoln County. Elena Taliaferro, widow of M. M. (Mac) Taliaferro, brought the action for herself and the two minor children, claiming under Mac's will. The trial court upheld the will and cancelled that portion of a "Release Deed and Agreement" executed by Mac which was in conflict with the devise. Mary T. Tarver and James H. (Buck) Taliaferro, Mac's sister and brother, appeal.

Mrs. Pearl Taliaferro had four living children, M. M. (Mac), James H. (Buck), Sandy, and one daughter, Mrs. Mary T. Tarver. For the sake of brevity, we shall often refer to the parties by their first names, as did most of the witnesses. The Mother owned substantial properties, mostly farms, in Jefferson, Lincoln, and Cleveland Counties. She was advanced in years. The children were all grown and living in the same general area. The family ties were closely intact. The Mother decided to divide a substantial part of her holdings, by deed, among her four children. She deeded three farms, one to each of the sons. The "big farm" in Lincoln County, the only property here involved, was deeded to Mac. The other two farms were approximately one-fourth the size of the "big farm." In order to more evenly balance the gifts, and at the same time give something of equal value to Mary, the Mother had prepared fifteen interest-bearing notes, each in the sum of $1,000, payable annually. The notes were payable to Mary and were executed by Mac. The deed of the "big farm" to Mac reserved a lien to secure payment of those notes. The Mother had the attorney insert Mary's name as a grantor in the deed, presumably because she thought it would better secure Mary's notes.

The deed and notes were executed respectively by the Mother and Mac in an attorney's office in May 1956. It is not known with certainty whether the deed was then delivered to Mac or whether it was left in the at-

torney's office pending Mary's signature. The Mother, Mac, and the attorney are deceased. In fact, the Mother died within three months. Shortly *after* her death, and on November 15, Mary signed the deed in the same attorney's office. It was recorded the same day.

A second instrument of importance now comes into the case. At the time Mary executed the deed to the 483 acres, Mac instructed the attorney (according to Mary) to draft another instrument. It was styled "Release Deed and Agreement." It was prepared in a matter of days and Mary and Mac returned to the attorney's office and signed it on November 27, along with Mac's wife, who relinquished her dower rights. The instrument had two purposes. The first part of the instrument conveyed lands in Jefferson County in which Mac owned a child's part. The remaining portion of the instrument, which we will refer to as "Agreement," related to the 483-acre farm in Lincoln County. The provisions of the "Agreement" are unique. They provided that should Mac die prior to the retirement of the fifteen one-thousand-dollar notes held by Mary, the unpaid notes would be cancelled and title to the "big farm" would become vested jointly in Mary Tarver and Elena Taliaferro, Mac's wife. On the other hand, should Mac live out the fifteen years and retire the notes, title would vest in Mac and Elena, rather than in Mary and Elena.

Mac Taliaferro's will is the next instrument of significance. For some eight years after the described instruments were executed, Mac lived on and cultivated the "big farm" without incident. He timely paid each note that became due. He executed a will dated April 5, 1965, at a time when he was apparently suffering a terminal illness. Notwithstanding the "Release Deed and Agreement" we have described, Mac bequeathed the farm in trust for the benefit of his wife and children. The trustee was directed to pay one-third of the income to Mac's wife until her remarriage or death, and the balance to his two children. Upon death or remarriage of

the wife, title would vest absolutely in the children. Mac designated his sister, Mary Tarver, as trustee to serve without bond.

Mary Tarver qualified as executrix and trustee and administered the estate for more than a year. Some thirteen months after her appointment, Mary filed her first and final accounting. In those instruments she listed the "big farm" and recited that Mac's estate owned a *one-half* interest in those lands, not the *entire* interest recited in his will. The owner of the other interest was not named but it is undisputed that Mary was asserting that she in fact owned the other interest under the terms of the "Release Deed and Agreement." Her accounting to the court was for a one-half interest.

Mac's widow, Elena, filed an objection to the accounting and at the same time filed this suit to quiet and confirm title in her husband's estate. It was the opinion of the trial court that Mary was estopped from claiming any interest in the farm under the terms of the "Agreement" which Mac executed in her favor. Of course it is her contention that since seven of the annual notes had not been paid when Mac died, she therefore became vested with a one-half interest. These factors are advanced in support of the trial court's finding:

(a) Mary Tarver's petition for appointment as executrix recited that the deceased owned the 483-acre tract; (b) with court approval Mary leased the entire acreage in her capacity as executrix; (c) the "Agreement," if valid, would have passed title directly to Mary and Elena, hence no interest in the land would have been included in Mac's estate; (d) Mac ignored the "Agreement" when he made his will, and his nomination of Mary as executrix and trustee would indicate a common understanding between Mary and Mac about the status of the "Agreement"; (e) Mary Tarver never surrendered, or tendered, the seven unpaid notes; (f) when Mary filed the estate tax return she showed a one-half interest to be vested in Mac's estate, contrary to the pro-

vision in the "Agreement" which would have vested the title in Mary and Elena jointly; (g) the estate was administered for thirteen months before Mary formally asserted her claim to one-half interest; (h) Mary was acting in a fiduciary capacity and the logical procedure would have been to assert her own rights rather than follow a pattern indicating that she made no claim under the "Agreement"; (i) had Mary been claiming any interest it is unreasonable to believe that she would not have so advised her counsel, whereupon he certainly would have adjusted her course of action; and (j) the attorney was aware of the "Agreement."

Let it be emphasized that we are not here dealing with the law of estoppel in the strict sense. Estoppel involves the conduct of both parties. The fault of one party induces the other to detrimentally alter his position. The problem at hand may be more likened to a waiver. Specifically, by accepting the trusteeship under the will and proceeding to act, did Mrs. Tarver waive her right to claim under the "Agreement"?

In resolving Mary Tarver's rights in this premise we are not aware of a controlling case in our own jurisdiction. The basic relationship between the trustee and his beneficiaries is thoroughly discussed in *Hardy* v. *Hardy,* 222 Ark. 932, 263 S. W. 2d 690 (1954). As concluded in *Hardy,* the law demands of the trustee a high standard of loyalty in his fiduciary capacity. The reason for that well accepted rule is stated in Bogert, *Trusts,* 2d Ed. § 543 (1960), as a recognition that it is practically impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction. "If one of the interests involved is that of the trustee personally, selfishness is apt to lead him to give himself an advantage." Bogert concludes that the courts deem it wiser to invoke a hard and fast rule against such service (absent prior approval of the court) rather than attempt "to separate the harmless and the harmful by permitting the trustee to justify his representation of two interests."

Perry, *Trusts and Trustees,* Vol. 1, § 433 (1929). states the rule thusly:

> "Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the *cestui que trust.* Nor can he deny his title. If a trustee desires to set up a title to the trust propery in himself, he should refuse to accept the trust."

To the same effect see 90 CJS *Trusts* § 181; *Power* v. *Jones,* 333 P. 2d 34 (Calif. 1959); and Loring, *Trustee's Handbook* (5th Ed. 1940) § 18, stating that if the trustee has an adverse interest when he accepts the trust, that interest cannot be set up against the trust. We hold that Mary is precluded from claiming an interest in the "big farm" under the title purportedly passed to her by the "Agreement."

The chancellor approved the lien created by the deed from Mrs. Taliaferro and Mary to Mac and represented by the seven notes unpaid at the time of Mac's death. That finding is not here questioned, and of course we do not disturb it.

Appellant James H. (Buck) Taliaferro contends Mac's deed was not effective because it was not delivered during the life of the grantor mother. Buck reasons that since Mac's title fails, the latter remained in posession as a co-tenant of his brothers and sister, entitling Buck to a one-fourth interest in the property.

With respect to Buck's contention, any defect in the delivery of the deed would be immaterial because it is clear to us that Mac's title ripened by adverse possession. Mac's deed was recorded November 15, 1956, at which time he was occupying the land with his family. There he continued to reside until his death in 1965. During those years a well was put down; the old house was replaced with a new one; abandoned tenant houses were razed and out-buildings were erected; land was cleared;

timber was sold; the taxes were paid by Mac; and Mac was commonly recognized in the community as being the owner. Buck lived in the same area and frequently passed the farm. Buck testified that his mother related that she was giving the "big farm" to Mac and the latter was to pay Mary $15,000. Further, he testified that he considered Mac to be the owner. Under all those circumstances it became unnecessary for Mac to specifically exclaim to the world that he was holding adversely. *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96 (1938).

Finally, Buck contends that the "post-mortem execution and delivery of the deed" was concealed from him and that concealment should defeat a claim of adverse possession. There are two answers to that proposition. First, the record does not disclose whether the deed was left in the attorney's office when Mrs. Taliaferro executed it, or whether Mac took it home and put it in his safe. Second, there is not a scintilla of evidence that Mac made an intentional concealment. Mac's good faith is not seriously questioned even by Buck. Intentional concealment is a prerequisite to the sustaining of Buck's premise. *Landman* v. *Fincher,* 196 Ark. 609, 119 S. W. 2d 521 (1938).

Numerous points not here recited are raised by the parties; however, the rulings herein make it unnecessary to resolve the other issues.

Affirmed.

HARRIS, C. J., and BYRD, J., not participating.

LARRY RAY AND VIRGINIA RAY *v.* OSS FLETCHER AND MILDRED FLETCHER, D/B/A FLETCHER PLUMBING & HEATING CO. ET AL

5-4375 423 S. W. 2d 865

Opinion delivered February 12, 1968

George Theil and *McCourtney, Atkins & Hunter,* for appellants.

Kirsch, Cathey & Brown and *Ray S. Goodwin,* for appellees.

JOHN A. FOGLEMAN, Justice. In this case the propriety of the action of the trial court in directing a verdict is questioned.

Appellants negotiated the purchase of a house in Paragould sometime prior to a conveyance to them on March 24, 1966. Appellees were the plumbing subcontractors engaged by the general contractor building the house. A part of their contract was the installation of a water heater therein. During construction, an LP (liquid petroleum) water heater was erroneously placed in the house by appellees' subcontractor but was removed and replaced with a natural gas unit before appellants moved into the house. When the change was made, a vent pipe, which was connected with the LP gas heater and which extended from three to six inches above the ceiling, was found to be unsuitable for the natural gas heater. It was removed and placed on the bathroom floor. Oss Fletcher remarked to someone at the time that he would replace this vent pipe later. There was no gas line from the street to the house at this time.

Appellants moved into the house on March 3, 1966, having started cleaning it on the preceding day. Work was still being done on the house when the Rays moved in, and unidentified workmen were in and out from time to time. The water supply was not turned on until March 5th, after appellant Virginia Ray had called the real estate agent handling the sale of the house. They did not have any hot water until about four weeks later. Appellant Virginia Ray did not know by whom, or under what circumstances, the hot water heater was started or the gas supply turned on, as she discovered that they had hot water one day when she came home from work. She only knew that her husband had put up the necessary deposit and that they had requested that the gas be turned on. There was no other testimony as to the time or circumstances with reference to the water supply being turned on or the heater started. Appellant Larry Ray did not testify.

On March 5th it was necessary to repair the light in the hall immediately next to the closet housing the

water heater and furnace. There were electrical fixtures and electrical wires in the wall between this closet and the kitchen. This wall was burned by the fire.

On May 2nd, Mrs. Ray noticed the smell of smoke and went to the back part of the house where she saw smoke in the bathroom. She opened the closet wherein the water heater and furnace were installed. Seeing smoke and flames around the vent pipe of the water heater in the ceiling, she called the fire department. Mrs. Ray had been using her electric washing machine, which was adjacent to the closet wall, about 30 minutes before she noticed the fire. As a result of the fire, the ceilings in the bathroom and kitchen were damaged and the walls "smoked." Mrs. Ray didn't look in the attic to see where the fire was burning, nor did she look there after the fire. After this occurrence, a photograph was made of the wall and ceiling of the closet. This photograph shows two holes in the ceiling, through one of which a metal pipe appears to extend from an object identified as a water heater into the attic. Through this hole appears what seems to be a charred ceiling joist. The other hole is smaller and appears to be nearby and to the viewer's right of the vent pipe. There is also a hole in the wall behind the vent pipe, near the junction of the wall and ceiling.

The Paragould Fire Chief said that the fire was in the bathroom when the fire department arrived. Upon opening the closet, he looked up and saw that there was no vent of the hot water heater reaching from the ceiling to the roof. The firemen tore some of the sheetrock off the ceiling around the place that appeared to be burned around the vent pipe and tore out some of the insulation in the ceiling. According to the Chief, the hole to the right of the vent was made by the firemen attempting to determine the extent of the fire. He did not know whether the one in the wall was burned there or put there by the firemen. He thought that the furnace was in the attic.

Ted Gardner, a fireman, testified that the vent pipe did not extend more than two or three inches above the ceiling.

Wilson B. Cox, who supervised the repairs after the fire, testified that the attic was burned throughout.

Viewing the evidence in the light most favorable to appellants and considering all inferences favorable to them which might be drawn from the testimony, we find no error in the direction of the verdict. We do not find any evidence making a question of fact for the jury, either as to negligence or proximate cause.

There is no evidence whatever that appellees were responsible for the condition of the hot water tank or its vent. Neither of them nor any of their agents, subcontractors, or employees are shown to have been about the premises at any time after the vent for the LP tank was left on the bathroom floor when there was neither a water supply nor gas supply for the substituted water heater. The appellants moved into the uncompleted house and caused these supplies to be turned on. There is not even any evidence that the vent pipe was connected to the water heater when they moved in or any suggestion of the identity of the person who connected the vent pipe. (Mrs. Ray testified that she did not even notice a vent pipe when they moved in, either on the floor or on the water heater.) Under these circumstances, we do not feel that any reasonable view of the evidence could justify a finding that there was any negligent act or omission on the part of appellees. From all we can gather from this record, it is just as likely that appellants caused the vent pipe to be placed on the water heater as it is that appellees did.

Even if we found evidence of negligence to make a jury question, we could not say that there was sufficient evidence, even circumstantial, to show the cause of the fire so as to remove a jury determination from the realm of speculation and conjecture. No one testified as to the function of the vent pipe or that any flames or

sparks would ever pass from the burning gas through that pipe. The furnace was located in the vicinity of the water heater and no one testified as to its type, its fuel, or its condition before or after the fire. Electrical wires passed through the wall of the closet, and there had previously been a failure of a light in the adjacent hall which called for repairs of some sort. Just 30 minutes before the fire, appellee Virginia Ray had used her electric washing machine which was against the wall between the kitchen and the closet. While there were flames around the vent pipe at the ceiling when Mrs. Ray discovered the fire, there was also a hole in the wall, which may, for all the evidence shows, have been the point of origin of the fire. It was necessary that appellants offer evidence by which the jury could say, without speculation or conjecture, that the fire was caused by the deficiency in the vent pipe. *Reeves* v. *Arkansas Louisiana Gas Co.*, 239 Ark. 646, 391 S. W. 2d 13. Here, the jury would have to speculate as to the origin and cause of the fire.

A second point asserted for reversal is the alleged error of the trial judge in refusing to permit one offered as an expert witness to testify as to the cause of the fire in Paragould.

There are at least two reasons that we cannot hold the court's exclusion of the testimony of the fire chief as to the cause of the fire to be erroneous. The witness was asked to state an opinion as to the cause of the fire without showing any qualifications or experience to make his opinion admissible, other than the fact that he had been a fireman for 18 years and chief for three of those years. Later it was shown that he was a full-time employee of a furniture store and only a part-time fireman. The determination of the qualifications of an expert witness to express an opinion is within the discretion of the trial judge, and we will not reverse his decision unless it appears that he abused that discretion. *Smith* v. *State,* 243 Ark. 12, 418 S. W. 2d 627. We find no abuse of discretion here. Further-

more, we cannot consider this point because there was no offer of proof or other showing of what the testimony of the witness would have been. *Barnes* v. *Young,* 238 Ark. 484, 382 S. W. 2d 580. Thus, it is unnecessary that we determine whether or not an expert found to have been properly qualified should have been permitted to express an opinion as to the cause of the fire under the facts and circumstances of this case.

The judgment is affirmed.

G. W. SISK, D/B/A SISK STAVE MILL AND HARTFORD INS. CO. *v.* BILL R. PHILPOT, GUARDIAN OF THE ESTATE OF HERMAN WARDEN DAVIS

5-4448 423 S. W. 2d 871

Opinion delivered February 12, 1968

Shaver, Tackett & Jones, for appellants.

Shaw & Shaw, for appellee and cross-appellant.

J. FRED JONES, Justice. This is a workmen's compensation case presenting an unusual question under the provision of Ark. Stat. Ann. § 81-1311 (Repl. 1960) which provides in part as follows:

> "The employer shall promptly provide for an injured employee such medical, surgical, hospital and nursing service, and medicine, crutches, artificial limbs and other apparatus as may be necessary during the period of six [6] months after the injury, or for such time in excess thereof as the Commission, in its discretion, may require."

The precise question presented in this case is whether or not the employer (or compensation insurance carrier) can be required to provide nursing service by the injured employee's mother and father. The question is not whether nursing service should be provided. The question is where and by whom the service should be rendered.

On November 24, 1965, while in the course of his employment, Herman Davis, a young man 28 years of age, sustained an accidental injury to his left hand when it was struck with a chopping axe. While under anesthetic during the medical repair of the wound to the hand, his heart stopped functioning for a period of some twenty-two minutes, resulting in severe and irreversible brain damage. As a result of the brain damage, Herman is mentally incompetent and physically helpless. He lives with his mother and father where he requires constant attention twenty-four hours each day.

The employer and compensation insurance carrier recognized and accepted the claim as compensable. They furnished the required medical, surgical, hospital and nursing service, including medicine, crutches, etc. during

the period of six months after the injury and for some time thereafter. They recognize that Herman Davis is permanently and totally disabled as a result of his injury, and they are paying the weekly amounts due Herman for this disability. They recognize and are willing to accept their responsibility for extended medical benefits, including nursing service beyond six months, but they do not recognize their obligation to pay Herman's parents for rendering this service in their home.

Bill R. Philpot is the legally appointed and acting guardian of the estate of Herman Davis, and Johnnie Davis, the father of Herman, is guardian of his person. The compensation carrier paid Johnnie Davis $100.00 per week for a period of three months for nursing Herman, but these payments were suspended and Mr. Philpot filed claim, apparently on behalf of Herman and his father, for reinstatement of payments for nursing expenses and claimed $500.00 per month as a reasonable amount to be paid to Herman's father and personal guardian for the nursing care being rendered to Herman. Mr. Philpot is designated claimant and the employer and compensation insurance carrier are designated "respondents" in the record of proceedings before the Commission.

A hearing was had before the referee in Mena at which time the claimant was represented by counsel, and the respondent was not represented and did not participate. The referee awarded $500.00 per month for the care of Herman Davis and ordered this amount, from the date of last payment, to be paid in one lump sum and such payments to continue on a monthly basis. The referee awarded the maximum attorney fee to claimant's attorney.

On review by the full Commission, respondents did appear and offered evidence as to the availability of hospital and rest home facilities in the area of Mena, and respondents argued that a rest home for Herman would be some less expensive and much more

efficient in caring for him. Following the hearing before the full Commission on review, the Commission made the following award:

> "Beginning the day after the last day for which Johnnie Davis was paid by respondents for the care of Herman Warden Davis, respondents shall resume payments to Johnnie Davis at the rate of $500.00 per month with such payments to continue subject to the provisions and limitations of the Act, and the further directions of this Commission. All sums accrued to date shall be paid in one lump sum. Respondents shall, of course, continue the payment of weekly compensation benefits at $34.91, to Mr. Bill R. Philpot, as guardian of the estate of Herman Warden Davis, with such payments to continue subject to the provisions and limitations of the Act.
>
> "Respondents shall, also, provide Herman Warden Davis with the necessary and reasonable medical attention required as the result of his admitted compensable injury on November 24, 1965.
>
> "Respondents shall, also, pay to claimant's attorney, Mr. Robert Shaw of Mena, an attorney's fee in the sum of $600.00, which is in addition to the other benefits awarded in this case."

This award of the Commission was affirmed on appeal to the circuit court and on appeal to this court, respondents rely on the following point for reversal:

> "The Court erred in allowing the employee's father the sum of $500.00 per month as compensation for his care of the employee."

The claimant has cross appealed relying upon the following points:

> "The Court properly allowed the employee's father the sum of $500 per month as compensation for his services in caring for the injured employee.

"The Court erred in failing to award attorney fees based upon the total award."

Herman Davis was first hospitalized at De Queen where his brain damage occurred. He was then transferred to a hospital in Texarkana where he was under intensive medical care by a neurosurgeon, and later by a physiotherapist. In preparation for releasing him to his home, Herman's mother and father went to Texarkana and observed and practiced the physical therapy treatment being administered under the supervision of the neurosurgeon and physiotherapist. At the suggestion of the compensation carrier and the neurosurgeon, Herman's mother and father purchased a home in Mena and moved to it from their former home several miles out in the country from Mena, in order that Herman would be near doctor's offices and where telephone service would be available. Herman was first transferred from the hospital in Texarkana to a hospital in Mena, and was later transferred to the home of his mother and father in Mena where he has remained since his release from the hospital.

When Herman was first released from the hospital, he could not bend his knees and could not speak. He has improved under the care of his parents, to the extent that he can now bend his knees and repeat simple single words, but he still does not recognize anyone and is still totally helpless insofar as mental processes and body functions are concerned. He requires constant nursing care twenty-four hours per day. He weighs 170 pounds and must be lifted and attended as would a very young baby. The service of two individuals is required in lifting Herman to avoid injury, and his father and mother have learned to interpret and respond to his symptoms of discomfort and physical needs.

After Herman's release from the hospital, a practical nurse was first employed to stay with him in his home and the compensation carrier paid the nurse $30.00 per day, amounting to $900.00 per month. The work be-

came so strenuous for the nurse she quit. Although effort has been made, no other person has been found who is capable or willing to accept employment in nursing Herman.

Herman's father was earning more than $500.00 per month as an employee of the U. S. Forestry service. He quit this employment in order to assist his wife full time in attending their injured son. Mr. Davis testified as to the full days routine recommended by the doctors and as carried out by him and his wife in caring for Herman.

Dr. Calvin Austin, a practicing physician in Mena, testified that he had observed Herman in the home of his parents and the overall substance of his testimony is to the effect that Herman is receiving excellent care and better care than could reasonably be expected if he were in a rest home.

Dr. Retia L. Edmonson of Texarkana, who had attended Herman following his injury, rendered a supplementary report on March 21, 1967, of examination conducted on March 17, in which she stated:

> "This patient has continued to show some progress in the last several months, but he continues to be totally helpless and it is necessary for him to have continued constant supervision and care. The patient's parents have taken excellent care of him, and he has been able to remain at home with them. I feel that these parents are well qualified to continue caring for their son. Since the patient has no control over his sphincters (urination and bowel movements) a routine has been set by the parents, who both must assist the patient in his daily activities.
>
> * * * The parents have done a lot for their son; they are interested in his health and welfare, and by this time they are quite well trained in his care."

There is no medical evidence, in the record, even suggesting that Herman is not receiving the best possible nursing care and attention at the hands of his mother and father. There is no medical evidence, in the record, that Herman would be better, or as well, provided for in rest home on a hospital. All the medical evidence, in the record before us, is exactly to the contrary. There is no medical or other evidence that Herman does not require full-time nursing attention. All the evidence on this point is to the effect that such attention is required.

The statute does not limit the medical, surgical, hospital and nursing service, for which the employer is liable, to any particular place or to be performed by any particular individuals. The statute does provide, however, "all persons who render service or provide things mentioned herein [Ark. Stat. Ann § 81-1311 (Repl. 60)] shall submit the reasonableness of the charges to the Commission for its approval, and when so approved, shall be enforceable by the Commission in the same manner as is provided for the enforcement of compensation payments."

Under the facts and circumstances, as evidenced by the record in this particular case, we are of the opinion that there was substantial evidence to sustain the findings and award of the compensation Commission and that the judgment of the circuit court sustaining the award should be affirmed.

Ark. Stat. Ann. § 81-1332 (Repl. 1960) sets a maximum limitation on attorney fees that may be legally charged in a compensation case and provides that the attorney's fee, to be valid, must be approved by the Commission. The last sentence of this section is as follows:

> "In determining the amount of fees, the Commission shall take into consideration the nature, length and complexity of the services performed, and the

benefits resulting therefrom to the compensation beneficiaries."

Thus it is seen that a great deal of discretion is placed in the Commission in approving attorney fees within the percentage limitations of the statute, and we find no abuse of the Commission's discretion in limiting the award of attorney's fee to the maximum percentage of the accrued amount due under the award in this partially controverted case, rather than on the amount paid and to be paid under the award, as contended by appellee on cross appeal. As pointed out in the case of *Sparks Memorial Hospital* v. *Walton,* 229 Ark. 1014, 320 S. W. 2d 102, this court does not award attorney fees for appeals in compensation cases, that authority rests in the sound discretion of the Workmen's Compensation Commission.

Affirmed on appeal and cross appeal.

ARKANSAS LOUISIANA GAS COMPANY
v. LILLIAN HOWELL ET AL

5-4440 423 S. W. 2d 867

Opinion delivered February 12, 1968

Douglas Bradley, for appellant.

Kirsch, Cathey & Brown, for appellees.

CONLEY BYRD, Justice. From a jury award of $4,278 as the just compensation due appellees Lillian and Nettie Howell for the taking of a 2.5-acre tract along the east side of 119 acres owned by them adjacent to the city of Paragould, appellant Arkansas Louisiana Gas Company brings this appeal, alleging as reversible error the following points:

I. The court erred in admitting unrecorded plats into evidence, and other instruments referring to an unrecorded plat.

II. The court erred in not permitting a continuance on appellant's plea of surprise, or permitting the pleadings to be amended to conform with the proof.

III. The court erred by permitting speculative arbitrary and fictitious testimony with reference to damage, and by failing to strike the testimony of witness Dennis Y. Jarrett and Johnny A. Knight except for lands within right-of-way.

IV. The court instructed the jury erroneously as to the measure of damage to real property.

V. The verdict is excessive.

I.

On the issue of the unrecorded plat, the testimony showed that appellees' 119 acres was south of and adjacent to the city of Paragould. A portion of the property was actually within the city limits. The northeast corner of their property abutted the southernmost terminus of Seventh Street, a north-south through street. Appellees contended that since the 2.5-acre easement took the portion of the property abutting the southernmost terminus of Seventh Street, a subdivider would have to make a 24-foot jog in Seventh Street to reach the property, and that as a result of this jog or access the 39.29 acres ready for residential subdivision was damaged. A portion of the property 241.2 feet east and west by 135 feet north and south had been sold prior to the eminent domain action by a metes and bounds description with this addendum:

> "... which property is also described as Lots 1, 2 and 3 of Block A of Howell's Second Addition according to an unrecorded plat of Howell's Second Addition, which Plat was prepared by Knight Laird and dated December, 1963."

The unrecorded plat introduced into evidence is totally irrelevant to any of the issues involved. All the witnesses recognized that the portion of the property covered by the plat was suitable and ready for residential subdivision. All testimony treated the area on an acreage basis for valuation purposes.

Appellant contends that under *Arkansas State Highway Comm'n* v. *Parks*, 240, Ark. 719, 401 S.W. 2d 732 (1966), the introduction of the unrecorded plat constituted reversible error. With this we are unable to agree, for the record fails to show how or by what means or even innuendo the plat was used to measure the property owners' damages. Since appellant's own

witnesses stated that the highest and best use of the land included in the plat was for residential subdivision, and no attempt was made to evaluate damages on a per lot basis instead of a raw acreage basis, we can find no prejudice in the admission of the unrecorded plat and consequently hold the admission thereof to be harmless error.

II.

On the motion for continuance and the motion to amend the pleadings to conform to the proof, the record shows that the trial began on March 16, 1967, and that the testimony was concluded at 4:25 p. m., whereupon the court excused the jury until the next morning at 9:30. When court reconvened the next day, appellant made a motion for continuance to give it time to locate its franchise agreement with the city of Paragould, and a motion to amend the pleadings to conform to the proof, whereby appellant would release from the eminent domain action a portion of the property on which the transmission line had not been constructed. Of course both motions were addressed to the sound discretion of the trial court, *Norton & Wheeler Stave Co.* v. *Wright,* 194 Ark. 115, 106 S.W. 2d 178 (1937), and Ark. Stat. Ann § 27-1160 (Repl. 1962), and we are unable to find any abuse of such discretion here.

III.

Appellant here contends that there is no substantial or proper evidence to sustain the damages assessed to the before and after value of the 39.29-acre tract. In particular, it stresses that witness Jarrett took 5 per cent from the before value to arrive at the after value. In this connection there is substantial evidence from which the jury could find that the access to the property had been impaired, and on the whole record we are unable to say that there was no reasonable basis for the witness's opinion as to the damages he assigned to the tract. The record shows no evidence of comparable sales with a similar impaired access.

IV.

The objection here is to the court's instruction to the jury that the landowners were entitled to recover for the full market value of the 2.5 acres of land within the easement and in addition to recover damages, if any, to the remaining lands caused by the taking. In *Arkansas Louisiana Gas Co. v. Burkley,* 242 Ark. 662, 416 S. W. 2d 263 (1967), we pointed out that a corporation authorized to condemn land under our Constitution (article 12, § 9) is not entitled to deduct benefits to the landowner from the award to be given for the taking. Consequently, we hold that, when a private corporation takes property through the process of eminent domain, damages are properly awarded on the basis of the full fair market value for the easement taken, plus any damage occurring to the remainder of the property. Therefore it follows that the instruction of the court was proper.

V.

It is contended that the jury's award was excessive. However, there is little discrepancy between the market values per acre for the 2.5-acre easement testified to by appellant's witnesses and those of the landowners. Actually, this argument gets back to the issue of whether or not the jog in the road constituted an impairment of the access, but as we have already indicated, this was an issue for the jury and we are unwilling to say that the verdict is excessive.

Affirmed.

HARRIS, C. J., and BROWN, J., dissent.

FOGLEMAN, J., disqualified.

CARLETON HARRIS, Chief Justice, dissenting. I think the court erred in permitting the unrecorded plat to be offered as evidence; in my opinion, it was not at all admissible, and I think that the jury, in its deliberations,

undoubtedly could not help but consider this plat. In *Arkansas Louisiana Gas Company* v. *Lawrence,* 239 Ark. 365, 389 S. W. 2d 431, this court reversed an award to the appellee, because of the introduction of an unauthenticated private plat. No subdivision existed, and we quoted from 32 C. J. S., Evidence, § 730, p. 1048, as follows:

"Generally, a map . . . must be accurate in order to warrant its admission, that is to say, the paper must correctly represent the situation as it existed at the time under consideration; and a diagram showing a hypothetical condition and not shown to represent any condition actually existing, . . . is not admissible."

It is argued by appellees that, because a subdivision plat had been prepared in 1963, and a portion of the area had been deeded by metes and bounds to another party, the subdivision map was admissible, even though not recorded.

The evidence reflects that, at the time of trial, a good part of appellees' lands was planted in wheat, and it seems to me that the introduction of the unrecorded subdivision plat had the effect of presenting to the jury a vision of what could be done with the land in the future. In other words, I think the introduction of the plat, for whatever reason it may have been introduced, allowed to jury to speculate.

In *Arkansas State Highway Commission* v. *Watkins,* 229 Ark. 27, 313 S. W. 2d 86, this court, quoting from Nichols, Eminent Domain, Third Edition, Chapter 12, Section 3142 (1), stated:

"It is well settled that if land is so situated that it is actually available for building purposes, its value for such purposes may be considered, even if it is used as a farm or is covered with brush or boulders. The measure of compensation *is not* (emphasis supplied) however, the aggregate of the prices of the lots into which

the tract could best be divided, since the expense of cleaning off and improving the land, laying out streets, dividing it into lots, advertising and selling the same, and holding it and paying taxes and interest until all the lots are disposed of cannot be ignored and it is too uncertain and conjectural to be computed."

Further, quoting from the Louisiana case of *Louisiana Railway and Navigation Company* v. *Baton Rouge Brickyard,* 67 So. 922, we added:

"At the time of the institution of this suit the tract in question had not been subdivided, and the question before the jury was as to the market value as a whole, considering all the uses to which it was adapted. The value of the tract for town lot purposes was one of the factors to be considered, but what the owner or purchaser might realize by a subsequent subdivision of the property and sale of lots partakes too much of the character of speculation to serve as a basis of valuation at the date of the institution of the present suit."

Again, in the same opinion, quoting from *City of Philadelphia* v. *United States,* 53 Fed. Supp. 492, we held:

"Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it might be divided, that is to be valued."

Less than two years ago, in the case of *Arkansas State Highway Commission* v. *Parks,* 240 Ark. 719, 401 S. W. 2d 732, we likewise stated:

"We think the court erred in allowing the plat to be introduced. When the land being condemned has not itself been dedicated as a subdivision it is reversible

error for the trial court to allow the property owners to exhibit to the jury a plat showing how the land could be laid off in lots and blocks. [Citing case.] Such a projected plat is misleading to the jury in that it does not take into account the various expenses for streets, utilities, and similar improvements that could not be explained to the jury without bringing a host of collateral issues into the case."

The majority say, "The unrecorded plat introduced into evidence is totally irrelevant to any of the issues involved." I agree with this statement, which is all the more reason why I feel that the case should be reversed, *i. e.*, it had no proper place in the litigation, and could only have served to prejudice the rights of appellant.

I respectfully dissent.

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

RUFUS HODGES *v.* MRS. BETTY JO HODGES ET AL

5-4369 424 S. W. 2d 174

Opinion delivered February 19, 1968

N. M. Norton, for appellant.

Mann & McCulloch, for appellee.

CARLETON HARRIS, Chief Justice. This litigation relates to a suit brought by Rufus Hodges, appellant, seeking specific performance of a contract, wherein Edd Hodges had allegedly agreed to leave appellant certain property by will. Edd Hodges died on April 21, 1964, a resident of St. Francis County, leaving a widow, but no descendants. The widow was appointed executrix, but evidently declined to serve, and the First National Bank of Eastern Arkansas was appointed administrator with the will annexed. In January, 1965, Rufus Hodges instituted a suit in the St. Francis Chancery Court, in which he alleged, *inter alia,* that, upon retiring from

naval service, he had returned to Forrest City at the behest of Edd Hodges (according to appellant, a distant relative). Hodges, it was alleged, in consideration of appellant's working on his farm, had agreed to make a will, leaving to appellant farms known as the Noah Hodges place, the Powell place, and the George Pugh place, together with one-third of Edd's stock in the Yocona gin. Edd Hodges did devise to Rufus the Maggie Powell place, consisting of 160 acres, but the other properties, together with all stock in the Yocona gin, were left to the widow, Betty Jo Hodges. Mrs. Hodges answered, denying the allegations, and subsequently the bank intervened as to the personal property. On trial, the court held that Rufus Hodges had not established the existence of the alleged contract by evidence that was clear, satisfactory, and convincing, and the complaint was dismissed. From the decree so entered, appellant brings this appeal. It is asserted that the court erred in ruling that evidence of the contract between the two Hodgeses fell short of the standard of proof required.

Appellant testified that, in 1953, while he was serving with the Navy, he had some conversations with Edd, who suggested that when it was time for Rufus to get out of the Navy, he should contact Edd; in compliance with this request, Rufus called thirty days before his discharge date, and told Edd that he had an opportunity for a Civil Service job, but the latter told him to come on back to St. Francis County: "We can work out something." Upon discharge, on February 1, 1957, appellant returned to Forrest City with his wife and children, arriving on February 4. The witness said that Edd wanted him to take over some of his farming operations, but told him that the house he was to live in was then being occupied by a man named Kelly, and that as soon as he could get Kelly out of the house, the Rufus Hodges family could move in.

There was no agreement as to whether appellant would be an employee, a renter, a partner, or what par-

ticular status Rufus would occupy, but Edd said that they would get it "worked out." According to the witness, the owner stated that it would be about six months before the house would be ready for Rufus, and appellant's duties were due to start when he moved into the house. Thereafter, Rufus went to work for the Forrest City Machine Works, where he was employed for six months, and he then was employed by Yale and Towne for fourteen months. Rufus finally moved to the Hodges farm on October 4, 1958.

Appellant testified that there had never been any definite arrangements between the parties until August, 1958, when Edd stated that he would start Rufus at a salary of $250.00 per month, furnish a truck and expenses, and fix up the house in a manner that would be satisfactory to Rufus. Appellant said that he paid $1,100.00 of the house repair expense, moved in on the October date, and was told that he would go on the payroll around March 1. In the meantime, appellant resumed his employment at Yale and Towne until that time. At the end of his first month's employment with Edd, Rufus was given a check for $150.00, instead of $250.00, and he talked to Edd about it. The latter, said appellant, advised that if Rufus wanted to work, he (Edd) would "make it up," and then stated he would leave to Rufus the Noah Hodges place, which contained about 1,000 acres. Rufus was to mainly work with the cattle.

According to appellant, this arrangement lasted for about two years, and he then entered into a lease agreement. This agreement reflects that Rufus had leased 532 acres of farm land from Edd for a period of three years, commencing January 1, 1959; however, instead of three years, the lease recites that it shall last until 1966, the figure, "66," having obviously been altered from some other date. The instrument reveals that Edd was to receive one-fourth of the crop as rent; further, there appears in handwriting, in the body of the lease, these words:

"Rufus Hodges has two Ford Tractors, one 900, one 800, and one J. D. 60 with planter, disc, breaking plow, and two trailers. When his half interest in 60 head of cattle sold, Half will go for tractors. Will take care of them in full. E. H."

Rufus had testified that he "bought into the herd" of cattle, paying $1,000.00 for his interest in same. He stated that he was not given a receipt; that Edd said, "You don't need to have a receipt. You got my word. Don't I always stand behind my word?" He also testified that he owned some of the farm machinery; further, that he never received any settlement whatever on the 1959 crop, which was a good one; when asking for a settlement from Edd, he would always be put off. Likewise, he stated that he never received any settlement for the 1960 crop, but was told by Edd that that money would apply on Rufus' purchase of equipment. Appellant contended that he had already paid for the equipment. Edd then stated, "You're going to get that place down there. You got where you worry too much about stuff lately. Let me worry." The "place," according to appellant, was the Noah Hodges place, containing 732 acres of land, which also included two other farms, known as the Emmett Powell place and Fisher place: "He told me, 'You stay on until the end of this thing and you're going to get this place right here.' I said, 'Can I depend on that?' He said, 'You got my word.' "

Rufus stated that he did not receive any settlement for the 1961 and 1962 crops, which also were being farmed on the share basis, but Edd would always refer to the fact that he was leaving the place to Rufus. The witness stated that in 1963 he was told by Edd that, if appellant would work at the gin, Edd would give him one-third of the gin stock. The testimony was very lengthy, and other matters will be subsequently mentioned; however, the above testimony is sufficient to explain the basis of the contention by appellant that there was a contract between him and Edd to the effect that

the latter would leave the several farms and one-third of the stock to him.

Appellant then offered several witnesses on his behalf. Witness Barney Carlton and C. D. Simmons added nothing to the proof, the former testifying that Rufus was injured while working at Yale and Towne, and the latter stating that he had never heard Edd Hodges say anything about what he intended to do with the Noah Hodges place. Ralph Dye testified that Edd told him that Rufus was a hard worker, and that he was going to see that Rufus was taken care of; that Rufus would not lose anything by repairs being made on the house, stating to Mrs. Rufus Hodges, "When I'm gone you can do what you want with it." He said he did not recall ever hearing Edd say that he intended to leave the Noah Hodges place to Rufus. Richard Hodges, a brother of appellant, stated that Edd told him in 1957, "Maybe some day Rufus will own this place," and several times said, "Well, we'll clear this land. Maybe Rufus will still wind up with it." Henry Birmingham testified that Edd told him that he had willed Rufus the George Pugh place and the Noah Hodges place. Rob Simmons, a former employee of Edd Hodges, testified that about two years before Edd died, he told the witness that he would leave the place to Rufus.

Mrs. Marie Swan, secretary to present counsel for appellant, testified that, in the office, there was a retired file, called "Hodges will." She stated that in this file there was a draft of a will which had been prepared by Mr. Norton, and memoranda relating to changes to be made in this will. These memoranda were dated January 17, 1959, January 24, 1959, February 12, 1959, and March 7, 1959. The memoranda were then offered in evidence, same reflecting that Rufus Hodges was to be left the Noah Hodges place (except the northeast quarter of the northwest quarter of Section 30), the Emmett Powell place, the Fisher place, and one-third of Edd's stock in the Yocona gin. There was then introduced a

copy of a will dated March 7, 1959, under the terms of which Rufus Hodges was devised the properties mentioned in the memoranda, and also one-third of the gin stock. The copy indicates that the will was witnessed by three persons, and a note reflects that the original had been taken by Edd Hodges. This testimony was objected to by defendants, and the court, though expressing doubt whether the evidence was admissible in view of the attorney-client relationship, admitted same.

Appellee argues that the testimony of Rufus Hodges was not admissible, since it violates the "dead man's statute," (Section 2 of Schedule, Arkansas Constitution); however, we agree with appellant that the First National Bank of Eastern Arkansas, administrator, was not a necessary[1] party, and we, accordingly, hold the testimony of Rufus to be admissible. Likewise, as mentioned, the testimony of Mrs. Marie Swan was objected to, but there is no need in discussing whether this evidence was admissible, for when we consider the testimony of appellant, the evidence offered by his witnesses, including Mrs. Swan, and the exhibits offered into evidence, *i. e., all* of his evidence, we still are unable to find that Rufus Hodges established the oral agreement (s), upon which he relies, by clear, cogent and decisive evidence. In *Taylor* v. *Milam,* 219 Ark. 592, 243 S. W. 2d 644, a suit filed to enforce specific performance of an oral contract to devise land, it being alleged that Milam had made such an agreement in consideration of appellant's taking care of him, this court said:

"The rule has been many times announced by this court that, in order to establish title to and ownership of land on an oral contract, the burden is on the person seeking to establish the contract to show execution thereof by a higher degree of proof than a mere preponderance of the testimony. To establish such a contract the

[1]Actually,the bank filed its final settlement, and was discharged as administrator on May 18, 1967.

evidence of its execution must be clear, cogent and decisive. It must be so strong as to be substantially beyond a reasonable doubt. *Tucker* v. *Peacock,* 216 Ark. 598, 227 S. W. 2d 929."

Numerous other Arkansas cases are to the same effect. Without any hesitancy whatsoever, we very quickly hold that appellant's proof in the instant litigation does not comply with that standard.

It is really difficult to understand exactly what appellant asserts as the precise contract. As to the real estate, there are several versions of what Edd purportedly promised to convey. The complaint alleges that he promised to convey the Noah Hodges place, consisting of 407.18 acres, the Maggie Powell place containing 160 acres, and the George Pugh place, containing 169.7 acres. However, on trial, Rufus testified that the Noah Hodges place contained 732 acres, and consisted of the Noah Hodges place proper, the Emmett Powell place (167.79 acres), and the Fisher place (86 acres). He stated that the George Pugh place was the 160 acres north of the Noah Hodges place. At another time, appellant testified that Edd Hodges, while standing at the corner where John Devasier lives, promised to leave him "everything north and west from this corner." The location of the corner was later established by other testimony, and according to appellee's evidence, would include the following lands: Noah Hodges place (less 40 acres), Fisher place, Emmett Powell place, George Pugh place, and Maggie Powell place. Appellant, in his reply brief, admits that it is not entirely clear from the evidence as to what tracts of land constituted the "Noah Hodges place," and it is also admitted that the copy of will offered in evidence did not entirely corroborate appellant's testimony. However, it is insisted that the evidence as to the agreement to devise the Noah Hodges place proper, is entirely clear and convincing. Here again, we do not agree.

Rufus testified that he returned to Forrest City at the urging of Edd for the purpose of entering into a working agreement; yet, it seems strange that Rufus, upon returning to that city (a number of his and his wife's relatives living in the vicinity) purchased a farm (which was later traded for equity in a house), and worked for other concerns for over a year and a half before moving to the Hodges farm. He testified that his compensation was cut from $250.00 to $150.00 the very first month, and subsequently stated that he never received any part of his share of the crop money for 1959, 1960, 1961 and 1962. It is not reasonable for one to forego payment for several years' work purely on the basis of a promise from someone, who had (according to appellant) already violated earlier agreements. The same is true with reference to the farm machinery. Rufus testified that he had paid for it, but that Edd contended that he had not. This, in itself, would normally have occasioned litigation. Appellant, in large measure, depends upon the handwritten provision in the lease to establish his interest in the farm machinery and cattle. One gains the impression from the evidence, that the principal reason for entering into the lease was to enable Rufus to acquire benefits paid by the government under the GI farm training program. To qualify for this program, the veteran had to either rent, or own, a farm, and he also had to make arrangements to obtain equipment. The program lasted for three years, during which time the veteran would attend school two hours per week, and Rufus was eligible for benefits commencing at $130.00 per month, the amount being successively smaller each month until the final payment of $44.29 was paid for the last month (total of thirty-six months).

Evidence was offered by the decedent's bookkeeper, Banks Wilkinson, that he could find no entries showing Rufus Hodges as a tenant; that Rufus never had a rent account; that the cattle sale by Edd Hodges in 1958 did not involve Rufus, and the bookkeeper stated that he had never seen a settlement sheet for appellant. Wilkin-

son also stated that the handwriting did not appear to be that of Edd Hodges; he testified that he did not recall Edd's ever using the initials, "E. H."

Rufus Hodges stated that he borrowed $1,000.00 from his brother-in-law, who lived in the state of Washington, for the purpose of purchasing the interest in the cattle owned by Edd Hodges. The loan was corroborated, but not the purpose of it. None of the witnesses offered by appellant testified relative to any claim of ownership by Rufus of the cattle, tractors, farm equipment, or gin stock.

Not a single witness corroborates the alleged fact that Edd had said that he was leaving, or would leave, any property to Rufus, *because of an agreement entered into between them.* Henry Birmingham testified that Edd had told him that he had left to Rufus the George Pugh place and Noah Hodges place, and Rob Simmons testified that Edd had told him that he would leave the Noah Hodges place to Rufus. The testimony of the other witnesses offered by appellant does not even come close to going as far as these two. Of course, there is quite a distinction between property that is devised as a gift —and property devised by reason of contract. Actually, Edd did devise to appellant a 160-acre farm (Maggie Powell place), which, according to appellant's own testimony, was rather valuable property. When asked what he would "take for it," Rufus replied, "$100-thousand. That is what it would take to get it."

As pointed out in *Taylor* v. *Milam, supra,* the burden on the person seeking to establish title to land on an oral contract is one that requires a higher degree of proof than a mere preponderance of the evidence.

We are unable to find that appellant has established any oral contract for the devise of any farm by evidence that is clear, cogent, and decisive, *i. e.*, evidence so strong as to establish his contention substantially beyond a reasonable doubt.

Affirmed.

D. B. ROSS *v.* STATE OF ARKANSAS

5308 424 S. W. 2d 168

Opinion delivered February 19, 1968

Robert W. Faulkner, for appellant.

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

GEORGE ROSE SMITH, Justice. Ross was charged by information with the crime of false pretenses, in that he borrowed $2,000 from an Arkadelphia bank for the purpose of buying 29 head of cattle, upon which the bank was to have a lien, but he failed to use the money as he had promised to do. He defended the charge upon the ground that the offense in question must be based upon a misrepresentation of an existing or past fact rather than upon a promise to be performed in the future. The trial court, rejecting that defense, instructed the jury that the misrepresentation can relate to future conduct if it is accompanied by a present intention not to perform the promise. This appeal is from a verdict and judgment finding Ross guilty and sentencing him to imprisonment for one year.

The court lapsed into error, perhaps being misled by the rule that now prevails in civil cases. *Victor*

Broadcasting Co. v. *Mahurin,* 236 Ark. 196, 365 S. W. 2d 265 (1963). On the criminal side, however, we still follow the English rule that was adopted in Arkansas more than a century ago: "This, as the authorities show, was clearly not a false pretence within the statute, because, to be such, it must have been of some existing fact and not a pretence that he would do an act which he did not mean to do." *McKenzie* v. *State,* 11 Ark. 594 (1851). The California court's departure from the great weight of authority on the point is of interest, but we do not find its reasoning persuasive. See *People* v. *Ashley,* 42 Cal. 2d 246, 267 P. 2d 271 (1954).

The judgment is reversed, and, since the case has been fully developed, the charge is dismissed.

RICHARD VERNON SWENSON AND C. B. MONROE *v.* EUGENE G. HAMPTON

5-4462 424 S. W. 2d 165

Opinion delivered February 19, 1968

Carrold E. Ray and *House, Holmes & Jewell,* for appellants.

Daggett & Daggett, for appellee.

George Rose Smith, Justice. This is an action for personal injuries and property damage brought by the appellee, a retired army colonel. At about midday on January 14, 1966, on a highway in Crittenden county, Colonel Hampton met a tractor-trailer rig being driven by the defendant Swenson for his employer, the defendant Monroe. As the two vehicles approached each other a large inflated spare tire fell from the trailer and struck the plaintiff's radiator with great force, inflicting the injuries complained of. In the court below the defendants filed a general denial but offered no proof, so that the principal issue for the jury was that of damages. This appeal is from a $7,800 verdict and judgment for the plaintiff. We need discuss only two of the points for reversal.

First, it is insisted that the court erred in allowing Dr. Gray, for thirteen years a general practitioner, to testify that in his opinion the accident could have caused the neck and shoulder pains that Hampton was still complaining of at the time of trial. Dr. Gray had testified that when his patient's shoulder pain continued be-

yond a normal healing period he referred the patient to a nerve specialist. "I felt that he needed some special examination, some neurological examination that I don't make." The appellants rely upon the sentence just quoted as a basis for their insistence that Dr. Gray was not qualified to testify that the accident could have caused the pains.

We think the court was right in admitting Dr. Gray's testimony. A general practitioner often refers his patients to specialists, as for the removal of an appendix or for the treatment of a skin disease. That does not mean, however, that the G. P. is not qualified to discuss his patients' ailments. To the contrary, as we held in *Crocker's Heirs* v. *Crocker's Heirs,* 156 Ark. 309, 246 S. W. 6 (1922), his expert opinion is admissible, subject to the jury's determination of its proper weight.

Secondly, the appellants argue that there was no substantial evidence to justify the court in submitting to the jury, as elements of damage, the permanency of the plaintiff's injuries and his loss of earnings. With respect to permanency, Dr. Gray's statement that Hampton had suffered a 10 percent disability to the body as a whole sufficiently supported the instruction.

The serious question is whether the plaintiff adduced adequate proof of earnings lost between the date of the accident and the date of the trial. He made no showing of his earnings in the military service, his earnings in any civilian pursuit, or his training or fitness for any particular occupation. No other witness, such as an employment counselor, was called to testify. See Woods, Earnings and Earning Capacity as Elements of [Damage] In Personal Injury Litigation, 18 Ark. L. Rev. 304, 318 (1965).

We have only Colonel Hampton's testimony on the point. The day of the accident was also his first day as an employee of a collection agency, on a commission basis. He had no record of past earnings in that job

and made no effort to show what others were earning in a similar occupation. On direct examination he agreed with his attorney's statement that he was "on commission" with a $400 monthly drawing account. Most of his pertinent testimony was educed on cross examination, as follows:

Q. You were to draw four hundred dollars a month in commissions?

A. Yes, sir.

Q. How was that to be drawn?

A. I had a certain schedule. They said they would pay me so much draw. I had so much draw, and if my commissions exceeded two hundred and fifty dollars I would have so much put in what they might call a sinking fund. Then if my commissions didn't equal as much as one hundred and twenty-five dollars a week I could draw out of this fund, but at the end it was paid on a percentage basis, rotation basis. I might agree with you that I wouldn't push you or I would give you time to pay the account. You would give me some settlement or a note or something, and that money would go in to the company. It all went in to them. That was the agreement when I signed up. It was contingent on the way I would draw my commission. If I worked I made it, and if I didn't I didn't make it.

Q. You had to pay your own expenses?

A. No, sir, unless I earned less than my commissions.

Absent proof of commissions actually earned in the past, Hampton's burden was that of producing sufficient evidence to enable the jury to determine what he would have earned had he not been hurt. Such a reconstruction of what would have happened is similar to a plaintiff's effort to prove the value of earnings to be lost in the future. There the rule is that the loss must

be shown with reasonable certainty. AMI 2206; *Check* v. *Meredith,* 243 Ark. 498, 420 S. W. 2d 866 (1967); see also *McCord* v. *Bailey,* 195 Ark. 862, 114 S. W. 2d 840 (1938). A similar standard is fairly applicable here.

We are forced to conclude that the plaintiff failed to sustain his burden of proof. Hampton's testimony about the sinking fund and about his minimum weekly quota was really of no assistance to the jury. The only *facts* known to the jury were that the colonel was employed as a collection agent, on a commission, with a $400 monthly drawing account. Presumably at least part of the drawing account was intended to be used for the payment of expenses, which were not charged to Hampton "unless I earned less than my commissions" (whatever that statement may be taken to mean). There is no definite indication of what Hampton's expenses would have been. He merely said, in describing his disability, that the job required "considerable driving." That he was hurt in Crittenden county, at some distance from his home in Marianna, suggests that his assigned territory was extensive.

Not only was the proof of expenses vague. The jury was given no indication of the total collections that Hampton might expect to make for his employer or of what his commission would be. Upon the record as a whole the jury had no basis, except guesswork, for estimating Hampton's lost earnings. Such a verdict cannot be allowed to stand.

When the only error relates to a separable item of damages, a new trial can sometimes be avoided by the entry of a remittitur. *St. Louis, I. M. & S. Ry.* v. *Bird,* 106 Ark. 177, 153 S. W. 104 (1913). Such a remittitur is fixed by the highest estimate of the element of damage affected by the error. *Surridge* v. *Ellis,* 117 Ark. 223, 174 S. W. 537 (1915). Here that maximum would be earnings of $400 a month for thirteen and three-quarter months, or a total of $5,500. If by any chance the appellee wishes

to remit that amount within seventeen days, the rest of the judgment will be affirmed. Otherwise the cause must be remanded for a new trial.

HARRIS, C. J., AND JONES, J., dissent.

CALLIE L. WEBB *v.* TOM PEARSON JR. ET AL

5-4484 424 S. W. 2d 145

Opinion delivered February 19, 1968

Lewis D. Jones and *John E. Butt,* for appellant.

Walter B. Cox, Putnam, Davis & Bassett and *Charles W. Atkinson,* for appellees.

PAUL WARD, Justice. Callie L. Webb, appellant, was injured when she stepped on a grease spot on a board walkway. The walkway ran along the west side of, and was attached to, a building owned by Sonneman Trusts and in which Tom Pearson Jr. and Guy Pinkerton (also lessees) operate "Razorback Bowling Lanes"—all appellees.

Appellant filed a complaint alleging, in essence, that: she slipped on a patch of grease, foreign to a public sidewalk, and fell, causing severe injuries; that defendants, being in complete control of the sidewalk, are guilty of negligence, viz, (a) in allowing the grease to be on the public sidewalk, (b) allowing the grease to remain on the sidewalk more than a reasonable period of time, and (c) allowing this dangerous situation to be created amounts to "wilful, wanton and malicious conduct toward the general public, and more particularly toward the plaintiff". The prayer was for $28,000.

To the above complaint appellees entered a general denial, and then filed a Motion for a Summary Judgment.

The matter was presented to the trial judge on affidavits and, in granting the same, he made findings as follows: (1) Appellant was not a trespasser or an invitee, but was a mere licensee; (2) The walkway was on the private property of Sonneman Trusts who owed appellant no duty other than to be free of wilful and wanton misconduct; (3) Since the Razorback Bowling Lanes was only a lessee it owed appellant no duty other than to exercise due care not to do anything to cause her injury after her presence on the premises was discovered. The trial court then held there was no material issue of fact to be resolved, and, by Order, dismissed the complaint. From such Order appellant now prosecutes this appeal.

A review of the testimony, as applied to previous decisions of this Court, convinces us that the findings and the decisions of the trial court must be affirmed.

The essence of the pertinent testimony of appellant is: She asked Mr. Sonneman about a month before the accident for permission to park in the rear of his building, and it was orally granted, and that she paid him nothing; the public has been using the sidewalk for

years. The undisputed testimony of Sonneman is: The walkway in question is a part of his building, located entirely on private property and is not now and never has been a public walkway.

It is clear, from the undisputed portion of the record, that appellant, when injured, was on the private property of Sonneman Trusts and, this being true, she was a licensee. In the case of *Knight* v. *Farmers' & Merchants' Gin Company,* 159 Ark. 423, 252 S. W. 30, the rule is stated in these words:

> "In all of our decisions on the subject—and there are many—we have adhered to the rule that one who goes upon the premises of another as a mere licensee is in the same attitude as a trespasser so far as concerns the duty which the owner owes him for his protection; that he takes the license with its concomitant perils, and that the owner owes him no duty of protection except to do no act to cause his injury after his presence there is discovered."

The above quotation was copied and approved in *Garrett* v. *Arkansas Power & Light Company,* 218 Ark. 575 (p. 586), 237 S. W. 2d 895.

In this case there is no evidence nor even any contention that appellant was injured because of any wilful or wanton negligence on the part of either of the appellees. In *Cato* v. *St. Louis Southwestern Railway Company,* 190 Ark. 231 (p. 233), 79 S. W. 2d 62, there appears the following pertinent statement:

> "'Whether he be called a trespasser or licensee, the same rule of law applies, and that is that the only duty owing to him was not to wilfully or wantonly injure him and to exercise ordinary care under the circumstances to avoid injury to him after discovering his peril."

There is, of course, no contention here by appellant that either appellee saw her on the walkway before she was injured.

Affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result reached by the majority in this case and in the rules of law applied by the majority on the question of appellees' liability if appellant's injury were suffered on their property. I do not agree, on the record before us, that it is undisputed fact that appellant, when injured, was on the private property of Sonneman. Assuming that appellant was on public property at the time of her injury, however, I find no allegation or assertion by appellant that would make appellees liable to her. Appellant alleged that appellees were in complete control of the sidewalk and were negligent in allowing a deposit of grease and foreign materials to be present on the walk and to remain there, without warning, for longer than a reasonable period of time. She asserted that this was a breach of reasonable care in keeping and maintaining a clear and unobstructed sidewalk for the general travelling public. In opposing the motion for summary judgment, appellant's affidavit made no mention of any affirmative act on the part of appellees that caused the condition. Nor is there any statement in any pleading, affidavit or deposition that appellees owned the barrels, placed them on the sidewalk, or knew of the condition which existed. Nor is it stated that the condition had existed for a sufficient period of time to justify an inference that appellees knew of the presence of the grease and foreign matter. As a matter of fact, appellant testified that she did not see any foreign substance on the sidewalk before she fell. She stated that after she fell, she discovered a greasy liquid on the sidewalk which had seeped from the bottom of some trash barrels on the walk.

A summary judgment has been affirmed by this court in a strikingly similar case. *Epps* v. *Remmel*, 237 Ark. 391, 373 S. W. 2d 141. In addition to allegations virtually parallel to those of appellant here, the plaintiff-appellant there relied on an allegation that a city

ordinance required the property owner to maintain and repair the sidewalk. While this court recognized that there could be liability if the defendant-appellee had affirmatively done something which caused a dangerous or hazardous condition, the court found that there was no such issue in the case. Furthermore, it was held that even a violation of the ordinance did not subject the owner to liability for bodily harm to one using the sidewalk. Since no affirmative act on the part of appellees is suggested by any pleading, affidavit or deposition in the record, I would affirm this judgment on the authority of the above case.

SUMMERS APPLIANCE CO. ET AL *v.* GEORGE'S GAS COMPANY, INC. ET AL

5-4464 424 S. W. 2d 171

Opinion delivered February 19, 1968

Warren & Bullion, for appellants.

Courtney Crouch, Boyce Love and *Roy Finch,* for appellees.

LYLE BROWN, Justice. Summers Appliance Co. and the six other appellants are holders of Class 1 permits issued by the Arkansas Liquefied Petroleum Gas Board. They are LP gas distributors in an area comprising six counties in Northwest Arkansas. George's Gas Co., Inc., was granted a Class 1 permit by the LP Gas Board. George proposes to operate in the same general area. The Board was affirmed on appeal to the circuit court. Appellants contend that the LP Gas Act requires a determination of public convenience and necessity as a prerequisite to the issuance of the permit and that no such showing was made.

The business of distributing butane and propane gas (liquefied petroleum substances) is substantial and statewide in Arkansas. Because of the dangers inherent in the handling of those substances we have had a safety feature law since 1939. Our present law is Act 31 of 1965, Ark. Stat. Ann. §§ 53-701-34 (Supp. 1967).

The requirements for a Class 1 permit set up detailed and rigid specifications covering every phase of handling, storage, and distribution. A certificate of competency must be renewed annually. In addition to the predominant safety features of the act there is a provi-

sion which was inserted in 1959 and carried over into Act 31. It is significant to this litigation:

> § 53-723 (A) (7) . . . . "In determining whether to grant a Class 1 Permit, the Board shall take into consideration the convenience and necessity of the public."

The appellants urge this court to interpret the quoted language "to require the same proof of public convenience and necessity for a permit to sell and distribute butane and propane gas as is required to sell natural gas." That necessitates a comparison of certain phases of the two laws, namely, the Public Utilities Act under which natural gas companies operate, and the Act under which butane and propane distributors are licensed.

1. *Laws Regulating Natural Gas Companies.* The Public Service Commission is vested with the power, jurisdiction, and duty to "supervise and regulate every public utility in this Act defined." Ark. Stat. Ann. § 73-202 (Repl. 1957). The antecedent section (definitions) refers to public utilities as including those who furnish *gas* to the public for compensation. However, from a study of the entire chapter, the amendments thereto, and the rules and regulations of the PSC, it is clear that those laws and regulations presently govern *natural gas.* It is mandatory upon those companies to make a showing of public convenience and necessity and obtain a certificate from the PSC evidencing the public need. Ark. Stat. Ann. § 73-240 (Supp. 1967). That has been the law at least since Act 324 of 1935. When it is proposed to operate a new public utility in an area already served, the applicant must show either "(a) that the present service is inadequate; or (b) that additional service would benefit the general public; or (c) that the existing [facility] has been given an opportunity to furnish additional service as may be required." *Santee* v. *Brady,* 209 Ark. 224, 189 S. W. 2d 907 (1945).

2. *The Law Regulating the LP Gas Business.* Act 31, heretofore cited, contains all the statutory law per-

taining to LP gas and deals exclusively with that subject. It deals almost entirely with two subjects, namely, the financial stability and technical competency. Suffice it to say that we are dealing with one of the most comprehensive codes of law and regulations in force in this State. Those provisions governing the granting of a Class 1 permit will later be discussed.

The Legislature has not declared the LP gas business to be a public utility. It has not imposed on LP gas distributors the mandatory duty to obtain a certificate of public convenience and necessity. It has merely directed the LP Gas Board to *consider* public convenience and necessity. That phrase is not so rigid in meaning as to require that it be interpreted to mean the same thing in every legislative act in which it is used. In the Public Utilities Act it is used with reference to those utilities—natural gas companies, public carriers, and electric power companies—operations devoted to public use to the extent that their use is thereby granted to the public. So much so that matters such as their rates, their territories, and methods of detailed operation must be supervised by the sovereign. In turn, those utilities enjoy exclusive privileges which the Legislature has declared in the public interest, such as long-term franchises, the right of eminent domain, and security of their enormous investment from unnecessary competition.

The legislative directive that the LP Gas Board *consider* public convenience and necessity was not intended to vest in the Board the power to regulate competition in a field of private endeavor. There are many commodities just as inherently dangerous as butane and propane. We need only point to dynamite, drugs, and gasoline as some examples. Stringent regulations governing the manufacture and distribution of those items are required and justified under the police power. When it is considered necessary for the public welfare to remove those pursuits from the field of free enterprise, it should certainly be spelled out and justified.

The mere insertion of one sentence, in a code devoted entirely to safety and competence, directing the administrative board to "consider public convenience and necessity" is not sufficient.

Having determined that we are not dealing with a declared public utility, we turn to the application of the term "public convenience and necessity" as it is used in the LP Act. Public utilities do not have a monopoly on the use of the phrase. All authorities recognize the words "convenience" and "necessity" as being relative and elastic, rather than absolute. We conclude that § 53-723 (A) (7) directs the Gas Board to consider the public welfare *within the scope of its authority* under Act 31 and the approved regulations. Here are some of the many "musts" to be met by a Class 1 applicant who desires to enter all phases of the liquefied petroleum gas business:

Furnish evidence of his financial condition, character, and ability to engage in the business; file a certificate of intended insurance which covers six fields of possible liability; all his employees in charge of operations, servicemen, installation men, and truck drivers to pass an examination and receive a certificate of competency; file a current financial statement prepared by a public accountant; provide a bulk storage capacity of not less than 15,000 water gallons, the location to be approved by the Board in advance; provide all necessary equipment satisfactory to the Board; provide approved unloading facilities; furnish a storage container of not less than 1,000 gallons; submit an inventory of all trucks and that equipment must be inspected and approved; provide service station facilities acceptable to the Board; provide blueprints for all gas containers for the Board's examination and approval; and the products he proposes to handle to be approved by the Board.

The discharge of the enumerated responsibilities, as well as the others pertaining to issuing a Class 1 per-

mit, are not purely ministerial acts. Most of them require the exercise of considerable judgment and discretion. In making those judgments the Legislature directed the Board to consider the public welfare in the fields of public safety and the stability of the applicant.

We have not arbitrarily substituted the phrase "public welfare" for the term "public convenience and necessity." The latter phrase has been described by this court as "what will conduce to the general public welfare." *Arkansas Elec. Coop.* v. *Ark-Mo Power Co.*, 221 Ark. 638, 255 S. W. 2d 674 (1953). The safety of the public and the assurance that the applicant can render competent service are by Act 31 made primary; the right of the individual to possess a permit is declared secondary.

The Board certified to the circuit court that it considered the matter of public convenience and necessity and that its determination on that point, along with all other matters set forth in the transcript, favored the granting of George's permit. From the record we conclude that the Board applied the same construction to the convenience and necessity clause as outlined in this opinion. That assumption is based on the absence of any testimony proffered by George's in line with the public utility rule of convenience and necessity.

Since we do not apply the construction urged by appellants, we do not reach the attack by appellees on the constitutionality of the convenience and necessity provision.

Affirmed.

LEWIS B. SMITH ET AL *v.* FARM SERVICE COOPERATIVE ET AL

5-4488 424 S. W. 2d 147

Opinion delivered February 19, 1968

Wade & McAllister, for appellants.

Warner, Warner, Ragon & Smith, for appellees.

LYLE BROWN, Justice. This is a workmen's compensation case. It was stipulated that Michael L. Smith, a minor, was fatally injured while in the employment of the appellee company, Farm Service Cooperative. Appellants, Michael's family, seek recovery on the basis of partial dependency on Michael. The family unit consisted of the parents and four minor children, including eighteen year old Michael. The Commission and the trial court found no partial dependency. It was held that

"the claimants were not dependents within the meaning of the Act."

Michael worked for Farm Service Cooperative in Fayetteville and grossed approximately $41 per week. His father testified that Michael gave him $60 per month for expenses. The family also contended that Michael's car was in fact the *family* automobile. It was stated that he contributed labor to the raising of rabbits, chickens, cows, and other livestock that benefited the family. On at least one occasion Michael paid the electric and butane bills.

At the time of Michael's death the father was unemployed. The record indicates it was merely temporary and that for the full year preceding the fatal accident, Lewis Smith had earned approximately $85 per week. He returned to the same job shortly after Michael's death but at a slightly lower wage. None of the other members of the family earned any income.

The appellants first question the propriety of the Commission's consideration of the economic situation prior to the day of the accident. They argue that under Ark. Stat. Ann. § 81-1315 (h) (Repl. 1960) "all questions of dependency shall be determined as of the time of the injury." Since the father was in fact unemployed at the time of Michael's death, appellants contend that is the proper time to determine the dependency of the family on Michael's earnings. Instead, the Commission considered a reasonable period of time in making its factual finding. According to *Nolen* v. *Wortz Biscuit Co.*, 210 Ark. 446, 196 S. W. 2d 899 (1946), the Commission was correct in considering the prior events as opposed to a temporary situation.

Appellants next challenge the correctness of the test used to determine partial dependency as applied to minor children. Ark. Stat. Ann. § 81-1315(i) (Repl.

1960) provides that the right to workmen's compensation benefits is based on a finding of dependency. That provision allows proportionate compensation in relation to the amount of actual dependency on the employee's earnings to the total dependency of claimant. Appellants argue that the legal obligation to support the minor child by the father should be the controlling factor in determining dependency. Without reciting the circular reasoning of the appellants, we do not find the position meritorious.

Dependency is a fact question. It is to be determined in the light of surrounding circumstances. *Crossett Lumber Co.* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161 (1945). The Commission used the correct test. The rule is stated in 2 Larson, *Workmen's Compensation Law,* § 63:11, as follows: "whether his contributions were relied on by claimant to maintain claimant's accustomed mode of living." In *Crossett Lumber Co.* v. *Johnson* the same standard is used: "it is quite apparent that the contributions did affect their standard of living and were properly a part of their support."

At the time of his death Michael's expenses included an automobile payment of $38.92 per month, clothing, gasoline, and one meal daily when away from home. He traveled 52 miles round trip to work. He was required to repair his automobile on occasions and recently bought new tires for it. An additional expense was the cost of remodeling a house in anticipation of his marriage. Michael also dated regularly. Social security, state, and federal taxes must be deducted from his gross income of $41 per week. Moreover, when Michael died, according to the father, he owed some open accounts.

The only testimony as to the $60 per month payment came from the father, an interested party, and the Commission gave doubtful credence to it. Even the mother could not substantiate the amount, regularity of payment, or the agreement. The Commission discounted all testimony as to the loss of services performed on or

about the farm, those services not being a part of the *earnings* as required by the Act.

The Commission, in considering Michael's income after tax deductions and his own expenses, found that he could not have contributed to the extent alleged. Further, they found no evidence that the family's standard of living had been lowered due to Michael's death.

Affirmed.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* ASA JULIUS LOCKWOOD

5-4465 424 S. W. 2d 158

Opinion delivered February 19, 1968

Wright, Lindsey & Jennings, for appellant.

Switzer & Griffin and *Martin, Dodds & Kidd,* for appellee.

JOHN A. FOGLEMAN, Justice. Chicago, Rock Island and Pacific Railway Company appeals from a judgment awarding Asa Julius Lockwood $75,000 as damages for personal injuries suffered while performing his duties on May 12, 1964, as a brakeman employed by the company. Only two points are relied on for reversal. They are:

I.

The trial judge erred when he permitted appellee to interject and substitute a new issue in the litigation by amending the complaint at the close of plaintiff's [appellee's] testimony.

II.

The $75,000.00 verdict is excessive.

We will discuss these in the order listed.

I.

Appellee made the following allegations relating to appellant's liability:

"That at the time aforesaid the handle of one of the handbrakes and the brake machinery on said train which Plaintiff, as such brakeman, was required to operate was imperfectly constructed, defective and unsafe; that said imperfection, defectiveness, inadequacy and unsafeness could have been by said Defendant discovered and known by the use and exercise by it of ordinary care and diligence, and were at the time aforesaid known to the Defendant; but the same were unknown to the Plaintiff.

* * *

That the negligent acts complained of herein by the Defendant have damaged the Plaintiff, ASA JULIUS LOCKWOOD, in the sum of $150,000.00."

There was no evidence of negligence on the part of appellant. At the conclusion of appellee's evidence, his attorney, before resting, made a motion that the complaint be amended to conform to the proof—specifically to state that appellee's injuries proximately resulted from violation by appellant of 45 USCA § 11,[1] which required appellant to equip its cars with a hand brake that would perform properly when used in the usual and customary manner.

The amendment was allowed by the trial court, over appellant's objection that pleading the Safety Appliance Act, which had not previously been referred to, injected a new and different theory and basis of liability into the case. Appellee had testified that on the occasion of his injury he was going to get up on a pole car and set a hand brake. In order to do so, he mounted a little platform on the end of the car and took hold of the brake handle preparatory to swinging around on the platform. He took hold of the brake handle with his right hand and turned loose of a grab iron on the side of

[1]This is a part of the act known as the Federal Safety Appliance Act.

the car which he held with his left hand. Thereupon his entire weight was thrown on his right hand and the brake handle snapped, causing him to fall to the ground. After the fall, he still had the broken brake handle in his hand. Appellee stated that he had never performed this duty in any other way, had never seen it done in any other way, and that as far as he knew, this was the normal, customary manner in which it was done.

There was no motion for a continuance by appellant, nor is there any contention by appellant that the evidence was not sufficient to support a verdict under the Federal Safety Appliance Act. No evidence was offered by appellant.

Title 45, USCA § 11 requires that all railroad cars be equipped with efficient hand brakes. This act does not impose an absolute liability, but it does impose an absolute duty, and a carrier is not excused from liability by any showing of care, however assiduous. *Myers* v. *Reading Co.,* 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615 (1947); *Brady* v. *Terminal R. Ass'n.,* 303 U. S. 10, 58 S. Ct. 426, 82 L. Ed. 614 (1938). Even though a complaint alleges negligence consisting of failure to warn an injured employee, failure to inspect and failure to furnish the employee with a safe place to work, without mentioning this section of the statute, the railroad's absolute duty is brought into the case if there is evidence which shows a brake to be inefficient. *Long* v. *Union R. Co.,* 175 F. 2d 198 (3d. Cir. 1949). In such a case, allegations of negligence are considered surplusage. *Colwell* v. *St. Louis-S. F. Ry. Co.,* 335 Mo. 494, 73 S. W. 2d 222 (1934). The only burden on a plaintiff is that he prove by direct or circumstantial evidence either a specific defect or the failure of the brake to function efficiently on normal, ordinary operation. *Selby* v. *Chesapeake & Ohio Ry. Co.,* 11 Ill. App. 2d 395, 137 N. E. 2d 657 (1956).

Under the Arkansas Civil Code, a plaintiff is only required to state the facts constituting his claim or cause

of action. Ark. Stat. Ann. §§ 27-1101, 27-1113. The statement of facts constitutes the cause of action. *Albersen* v. *Klanke*, 177 Ark. 288, 6 S. W. 2d 292; *Grytbak* v. *Grytbak* (on rehearing), 216 Ark. 674, 227 S. W. 2d 633, 635; *Taylor* v. *Taylor*, 224 Ark. 328, 273 S. W. 2d 22. All that is necessary is that the complaint state a cause of action within the jurisdiction of the court. *Crowder* v. *Fordyce Lbr. Co.*, 93 Ark. 392, 125 S. W. 417. It is not necessary to plead a federal statute in order to have the benefit of it, so long as allegations constituting a cause of action thereunder are made. *St. Louis I. M. & S. Ry. Co.* v. *Hesterly*, 98 Ark. 240, 135 S. W. 874 (reversed on other grounds) 228 U. S. 702, 33 S. Ct. 703, 57 L. Ed. 1031).

Under Ark. Stat. Ann. § 27-1160 (Repl. 1962), a court may at any time, in furtherance of justice and on such terms as may be proper, amend any pleading by conforming it to the facts proved, when the amendment does not substantially change the claim or defense. Under the circumstances existing here, the trial judge did not abuse the discretion vested in him by this section of the civil code. The amendment permitted here effected a less substantial change than was involved in *El Dorado Pipe & Supply Co.* v. *Penguin Oil Co.*, 174 Ark. 843, 296 S. W. 713, wherein reversible error was found in refusal to permit the amendment under this section. There the amendment would have changed the action from a suit to charge a surety on a note to one on open account with an allegation that the defendant received the benefit of certain property sold by plaintiff. The amendment was requested on the basis of plaintiff's offer of proof that the property was sold for the benefit of the defendant at whose request plaintiff accepted a note made by a third party to whom defendant traded the property. In that case the defense of ultra vires asserted in defendant's answer to the original complaint would have been eliminated by the amendment.

In the case at bar, the appellee alleged and offered evidence of facts which constituted a cause of action un-

der the Safety Appliance Act. Appellant has not indicated any defense of which it was deprived by the amendment or any evidence which it might have offered in defense of the amended complaint which would not have been admissible under the issues raised by the original complaint. If appellant had asked for a continuance, the burden would have been upon it to show to the satisfaction of the court how it had been misled to its prejudice. *Williams* v. *Bullington*, 195 Ark. 253, 111 S. W. 2d 507. Since prejudice to appellant has not been shown and is not apparent, we cannot say that the trial judge abused his discretion in granting the amendment incorporating into the pleading an allegation not essential to the recovery sought.

We consider cases cited by appellant to be distinguishable. In cases such as *Patrick* v. *Whitely,* 75 Ark. 465, 87 S. W. 1179, and *Bridges* v. *Harold L. Schaefer, Inc.,* 207 Ark. 122, 179 S. W. 2d 176, the amendments refused would have permitted recovery based on contracts or agreements different from those asserted in the original pleading, or would have included elements of damage not recoverable under the original pleading. The amendments in *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. 2d 63, and *Price v. Price,* 215 Ark. 425, 220 S. W. 2d 1021, would have added allegations supporting new and different issues not raised by the facts alleged in the original complaint. Defendants in the two latter cases would necessarily have had to offer evidence of facts materially different from that which would have been admissible on the issues made by the original pleadings. Such is not the case here.

II.

Appellant's argument that the verdict is excessive is based largely upon these contentions:

1. Appellee's 1966 earnings were $2,124.00 greater than his earnings in 1962, the year prior to that in which his injury occurred.

2. No loss of future earnings is anticipated.

3. Appellee's work hours would cause fatigue independent of his injury.

4. Appellee had injured his back on two previous occasions.

5. The medical testimony giving appellee a 22½% disability rating based on limitation of motion does not support the verdict in view of the doctor's statement that appellee had made excellent recovery after his surgery and appellee's demonstrated ability to perform his job.

In considering whether this verdict should be set aside as excessive, we note that there was testimony before the jury tending to show the following facts:

Appellee had a hard fall, from which he suffered "unbearable" pain in his back. He was in discomfort while in traction for ten days. His left leg became drawn and would not straighten out. The effects of a myleogram were so painful that he couldn't raise his head for two days. He went through quite an ordeal after a second myleogram and disc removal surgery in May 1964. When he went to work for a few trips, after this surgery, his back kept getting worse until he felt like "an old rusty spike" had been driven in him. A spinal fusion done in June 1965 was very painful and thereafter for about six weeks he could "hardly bat his eyes." For sometime after the injury, he couldn't sit or stand still and couldn't sleep or stay in bed. Often he would get up around midnight and spend the rest of the night on a couch, lying on the floor, or sitting up and drinking coffee. His trouble sleeping continued for about two years. His wife had to help him dress and undress for a time after the injury and again after surgery. He wore a corset after the injury and was in traction for a ten-day period before any surgery was done. He wore an uncomfortable brace for a while after the disc removal and a "chair-back" brace for two or three months af-

ter the fusion. He was in hospitals undergoing traction, therapy or surgery on six different occasions totalling about 70 days. He was "scared to death" when surgery was suggested. For a long time he was without much hope, his mental outlook was bleak and he was despondent because of his inability to work. He and his family had financial problems. His disposition changed from that of an easy-going, "life of the party" individual to a short-tempered and impatient one. This has affected his relationship with his wife and family. Prior to his injury, he was a very active person, participating in fishing, swimming, baseball and other activities with his children. In spite of their invitations, he cannot now continue these activities. A fine father-son relationship has been destroyed by his inability to spend most of his off-duty time with his son as he formerly did. For two years he was unable to do anything when not at work except sit or lie down. There were long periods of time when he could not drive an automobile and he cannot sit comfortably in one now. He will experience some pain in the future, depending upon his activities. Lockwood's medical bills totaled $4,245.86, of which appellant paid $2,800.00. A balance of $855 is due Dr. Logue.

Appellee's job at the time of the injury was on a run from El Dorado to Crossett. His pay rate at that time was $19.03 for an eight-hour day, plus certain overtime pay. This run involves a nine to ten-hour day. His earnings were:

1961—$7,697	1962—$ 7,992	
1963— 6,958	1964— 1,179	(Including 3 weeks vacation pay)
1965— 1,659	1966— 10,116	

Only a few months after his injury Lockwood became entitled by seniority to the job on the El Dorado-Winnfield, Louisiana run on which he returned to work on November 17, 1965. During the time he was unable

to work, his pay rate increased to $21.06 for eight hours, plus overtime pay. He worked nine to ten hours on the Crossett run, but the hour range on the Winnfield run is twelve to sixteen. If he had been able to work in 1964 and 1965, he would have made $11,000 to $12,000 on the higher pay scale.

After appellee returned to work in November 1965, he found it necessary, because of the condition of his back, to miss at least one trip every two weeks until the fall of 1966. He also missed a week or ten days during the month preceding the trial for the same reason. Had it not been for these absences, he could have made $12,000 or $13,000 in 1966.

Lockwood has a high school education. He has never done anything except work for the railroad. He has a limitation of motion in bending and a minor weakness of his leg. His permanent disability of the body as a whole resulting from the fall is 22½%. He now avoids one of the duties of his job—lifting 300-pound frogs after a car derailment. He also avoids getting on certain types of railroad cars because of his inability to bend in order to get a hand hold. On his present job, his back bothers him after he stands on the ground "switching." The longer he continues this, the worse it hurts. On some days the pain is great enough to bring tears to his eyes, and he has to lie down in the caboose of the train between stations. Just bending, squatting or sitting down is painful. The present run is too heavy a job for him. He has continued on this job because of his financial needs and in order to see if he could do the job. If he leaves the Winnfield run, he cannot get back on the Crossett run until there is an opening. His doctor has advised him to do a minimum of strenuous work and to get off his present job. It is his doctor's opinion that the duties associated with Lockwood's work for appellant are beyond his physical capacity. The doctor has recommended that appellee change jobs because it is his opinion that one who has this history of back trouble

and surgery should not expose himself to the rigors of full-time railroading. In the opinion of this doctor, this injury to the spine and resultant spinal fusion will probably cause the back to age more quickly and may accelerate the onset of arthritis. Further, after a fusion, jumping on and off a train will increase the chance of his having disc trouble in the upper spine. If appellee can continue at his present work, he will be eligible for retirement at age 65 or, if able, he could continue to work until age 70. A person his age at the time of the trial has a life expectancy of 31 years.

Appellee is drawing payment for 40% disability from shrapnel wounds about the head, shoulders and arms suffered during World War II. He has been drawing this compensation since the injury. He was employed by appellant after his world war service. He also suffered back injuries in February of 1961, and in the spring of 1963. He had osteopathic treatment in June, July and August 1963, for the 1963 injury. Neither injury was disabling, and he was never caused to miss a day's work because of either back injury or his military disability. None of these injuries or their results had interfered with the performance of his duties.

While the jury award is extremely liberal, we cannot say that it is so excessive as to shock the conscience of the court, when we review, in the light most favorable to appellee, the evidence of pain, suffering and mental anguish suffered and to be suffered, earnings lost and to be lost, and the nature, extent, duration and permanency of the injury.

The judgment is affirmed.

JONES, J., dissents in part.

WILSON & CO., INC. *v.* JOHN CHRISTMAN

5-4472 424 S. W. 2d 863

Opinion delivered February 19, 1968

[Rehearing denied April 1, 1968.]

Crouch, Blair & Cypert, for appellant.

Lewis E. Epley, for appellee.

J. FRED JONES, Justice. This is a workmen's compensation case involving a back injury. The respondent accepted responsibility for a 27% permanent partial disability to the body as a whole based on medical evidence,

but controverted any percentage in excess of that amount. The referee, and the full Commission on review, awarded compensation for a 60% permanent partial disability and this award was affirmed by the circuit court on appeal. The respondent has appealed to this court and relies upon the following point for reversal:

> "The court erred in affirming the order and award of the Arkansas Workmen's Compensation Commission for the reason that there was not substantial competent evidence in the record upon which to base such order and award."

Ark. Stat. Ann. § 81-1310 (a) (Repl. 1960) provides:

> "* * * Compensation payable to an injured employee for disability shall not exceed sixty-five per centum (65%) of his average weekly wage at the time of the accident, and shall not be greater than thirty-five dollars ($35.00) per week, nor less than seven dollars ($7.00) per week, and shall be paid for a period not to exceed 450 weeks of disability, and in no case shall exceed twelve thousand five hundred dollars ($12,500.00), in addition to the benefits and allowances under section 11 [§ 81-1311] hereof. The minimum and maximum limitations of time and money expressed in the foregoing sentence shall apply in all cases pertaining to the payment of money compensation on account of disability."

Ark. Stat. Ann. § 81-1302 (e) (Repl. 1960) defines disability as follows:

> " 'Disability' means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury."

Ark. Stat. Ann. § 81-1313 (c) (Repl. 1960) provides for scheduled injuries as follows:

"An employee who sustains a permanent injury scheduled in this subsection shall receive, in addition to compensation for the healing period, sixty-five per centum [65%] of his average weekly wage for that period of time set out in the following schedule:

(1) Arm amputated at the elbow, or between the elbow and shoulder, two hundred [200] weeks; [This subsection then enumerates a total of 20 scheduled specific losses and sets out their value in weeks.]

* * *

(21) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for amputation of the member.

(22) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member shall be for the proportionate loss or loss of use of the member.

(d) *Other cases*: A permanent partial disability *not scheduled in subsection (c) hereof shall be apportioned to the body as a whole,* which shall have a value of 450 weeks, *and there shall be paid compensation to the injured employee for the proportionate loss of use of the body as a whole* resulting from the injury." (Emphasis supplied.)

Thus, it is seen that we actually have two types of disability, or two criteria, for measuring compensable disability, set out in our workmen's compensation statute. Disability under the *definition section,* § 81-1302 (e), supra, is measured by "incapacity because of injury to earn" and loss of wages is a prime factor. The disability referred to under the *scheduled injury section,* § 81-1313 (c), supra, is measured in number of weeks of compensation and partial loss of the use of the body as a whole is the prime factor under § 81-1313 (d).

Thus, an injured employee who suffers a permanent partial loss of the use of his body is entitled to payment of compensation for the number of weeks the percentage of such loss bears to 450 weeks. This loss of use may consist of physical functional loss only, and its duration and extent may best be measured through physical examination by competent medical specialists. This permanent partial loss of use to the body may or may not also result in incapacity to earn the same wages received at the time of injury. An accidental injury under this subsection may result in a permanent partial disability consisting only of a partial loss of use of the body as a whole and with no change in earning capacity at all. An injured employee is entitled to the payment of compensation, however, for *this loss of use* whether his earning capacity is diminished by the injury or not. *Dockery* v. *Thomas,* 229 Ark. 984, 320 S. W. 2d 257. Where the permanent partial disability consists also of an incapacity, because of the injury to earn wages as defined and set out in § 81-1302 (e), supra, such disability includes, blends in with, and is usually greater than the disability occasioned by loss of functional use only.

The case of *Glass* v. *Edens,* 233 Ark. 786, 346 S. W. 2d 685, was a compensable heart case involving permanent partial disability *including incapacity to earn wages.* The maximum medical rating of disability, apparently based on functional loss of use to the body as a whole, amounted to 40%. The referee, in awarding compensation for a permanent partial disability of 40% to the body as a whole, failed to distinguish the two methods of measuring disability, as evidenced in his opinion, stated as follows:

> " 'In the case of *Jesse A. DeBin* v. *Kaiser Engineers,* reported Vol. 214, page 3 of the Opinions of the Full Commission, the Commission held that evidence other than clinical findings cannot be considered to arrive at a rating for permanent partial

disability. I must therefore only consider the medical rating of disability.' "

The award of the referee in the *Glass* case was sustained by the Commission and affirmed by the circuit court. The judgment of the trial court was reversed on appeal, and after quoting from Larson on Workmen's Compensation Law, § 57.10, this court said:

> "The maximum medical rating of disability in this case was 40%, which was allowed by the referee and affirmed by the Full Commission. Apparently, they also considered only medical evidence and this we consider error. Under the rules as set out in Larson, consideration should have been given, along with the medical evidence, to the appellant's age, education, experience, and other matters affecting wage loss."

An excellent and pointed article analyzing *Glass* v. *Edens,* as distinguished from, and compared with, cases from other jurisdictions, is found in Arkansas Law Review, Vol. 18, p. 269. As recognized in this article, the rule laid down in the *Glass* decision is that the proper determination of the extent of permanent partial disability is reached through a balancing of wage loss disability (where wage loss is involved) with physical, functional disability.

The rule laid down in the *Glass* case was affirmed and clarified to some extent in the case of *Mann* v. *Potlatch Forests,* 237 Ark. 8, 371 S. W. 2d 9, wherein the claimant had been awarded compensation for a permanent partial disability of 25% to the body as a whole because of a back injury. He later claimed a greater disability contending that the *doctors* had not considered his age, occupation, etc. as they should have done in arriving at their estimate of his permanent partial disabilty, and as was required that they should do by the decision in the *Glass* case. In affirming the Commission in the *Mann* case, this court reaffirmed the holding in the *Glass* case, that consideration should be given, along

with medical evidence, to the appellant's age, education, experience, and other matters affecting wage loss. The case was affirmed, however, on the ground that the Commission *did* take these elements into consideration. In the *Mann* case, this court further clarified the *Glass* opinion in these words:

> "The *Glass* opinion places the duty on the *Commission*, and not the *doctor,* to consider the elements mentioned above. In the cited case we said: 'Apparently, they also considered only medical evidence and this we consider error.' The word "they" obviously refers to the Commissioners and not the doctors. In the next place, appellant is in no position to contend the Commission failed to take into consideration his age, occupation, etc. The record shows that the Commission was made aware of our holding in the *Glass* case, and we cannot say it did not follow that holding here in arriving at appellant's disability."

The workmen's compensation Commission is charged with the duty and the full responsibility of deciding *all claims for disability* falling under its jurisdiction, and although its decisions are based on competent evidence, it is not limited, and never has been limited, to *medical evidence only* in arriving at its decision as to the amount or extent of permanent partial disability suffered by an injured employee as a result of injury. The Commission should consider *all competent evidence,* and where the claim is for permanent partial disability based on *incapacity to earn,* the Commission should consider all competent evidence relating to such incapacity, including the age, education, experience, and other matters affecting the claimant's incapacity to earn the same wages he was receiving at the time of his injury. The Commission should form its opinion and base its award on the preponderance of all the competent evidence, including medical, as well as lay testimony, and also including the testimony of the claimant himself. The Com-

mission weighs all of the evidence as a jury would do and we affirm the order or award of the Commission on appeal unless the Commission acted without, or in excess of its powers; unless the order or award was procured by fraud; unless the facts found by the Commission do not support the order or award; or unless there was not sufficient competent evidence in the record to warrant the making of the order or award. [Ark. Stat. Ann. § 81-1325 (b) (Repl. 1960).] We have many times held that the findings of fact made by the Commission are entitled to the same force and effect as a jury verdict, and will not be disturbed on appeal if supported by substantial evidence. (*Hollifield* v. *Bird & Son, Inc.*, 227 Ark. 703, 301 S. W. 2d 27.)

Turning now to the case at bar, the appellee was 24 years of age when he was injured. He had an eighth grade education and quit school to help support his mother and brothers and sisters when he was sixteen years of age. He was married at the time of his injury, and has two children of his own. Appellee was more or less an itinerant worker. He changed jobs rather frequently, but seemed to lose little time between jobs. All the jobs appellee ever did, or knew how to do, consisted of heavy manual labor, ranging from cutting and carrying mining posts in Pennsylvania, to dipping chicken off-fall from a vat with a bucket in Fayetteville, where he was injured. The appellant agrees with our holding in *Glass* v. *Edens, supra,* but argues that the appellee in the case at bar has failed to prove that he has a permanent partial disability in the magnitude of 60%.

Appellee underwent an operation for the removal of a herniated intervertebral disc. He testified at the hearing that he was in constant pain and had been since his injury. Two of his former employers testified that they could not re-employ him because of incapacity to work as reflected by the medical reports in evidence.

Dr. Tom P. Cocker on May 10, 1966, reported as follows:

"I do not believe that there is likelihood of further improvement as far as the back is concerned although the patient should continue on exercises in that hope.

"I do not think that he will be able to return to manual type work or anything that requires repeated bending, stooping, lifting or prolonged standing or walking. It is my opinion that the patient has a permanent partial disability to his body as a whole of 25%."

On June 8, 1966, Dr. William G. Lockhart, a neurosurgeon of the Holt-Krock Clinic in Fort Smith who performed the surgery on appellee, reported as follows:

"As stated in previous correspondence, I feel that we cannot, on any means, classify this boy with anything but a poor result from surgery.

"Once we get through the emotional and psychogenic overlay here, I think that we would be justified in suggesting a permanent partial disability of the body as a whole of 25% to 30%.

"I do not feel that this boy is going to be able to go back to an employment that he has enjoyed before such as manual exertions of lifting or bending over postures.

"I do believe that he is employable in such work as bench work, in which he might be re-trained in. If he was able to get back into an employable situation, regardless of its nature, I am sure that this would help reduce some of his anxiety and emotional overlay."

On July 1, 1966, Dr. Stanley Applegate reported as follows:

"I have seen Mr. Christman this week and believe that he has 25% permanent disability due to his back

trouble and have recommended that he settle as soon as possible and get into Vocational Rehabilitation and learn a trade where he will not have to use his back so much as he was doing common labor at Wilson and Co."

All that appellee had ever done, or knew how to do, required stooping, bending and lifting. There is evidence in the record that appellee suffered poor eyesight as an additional handicap to some types of employment. The importance of appellee's educational background and experience in evaluating his disability in connection with his incapacity to earn because of his injury, is pointed up in Dr. Lockhart's earlier report of July 1, 1966, wherein he said:

"Several days ago, 6/20/66, he appeared in my office accompanied by his wife stating that he had total paralysis of the right lower extremity that had come on spontaneously.

"* * * It was obvious, when he was examined in the office, that we were dealing with either a hysterical paralysis or malingering.

* * *

"I feel that I have done as much as I can do with this man at the present time. They seemingly do not wish to accept the fact that this could be a hysterical problem and certainly his wife does not even like to consider the fact that there may be a question of malingering here also. It is obvious that we are not dealing with that degree of physical disease at the present time that would cause the magnitude of problems, or for that matter what physical disease is present is so far over-shadowed by these other factors that it is impossible to treat this man intelligently without thorough psychiatric evaluation and treatment."

It goes without saying, and without the necessity for citation of cases, that true malingering is not a form of disability of any sort. It is a form of ability rather than disability. It is a form of ability to feign injury or disability that does not exist. Had appellee in this case been malingering his disability, the Commission might well have determined that he had none. If appellee was suffering a true hysterical paralysis or reversionary reaction of a total degree and permanent nature as a result of the injury, the Commission might well have found that his permanent partial disability amounted to considerably more than the 60% awarded in this case.

In Larson's Workmen's Compensation Law, § 42.22, numerous cases from other jurisdictions are cited in support of the following statement:

> ". . . [W]hen there has been a physical accident or trauma, and claimant's disability is increased or prolonged by traumatic neurosis, conversion hysteria, or hysterical paralysis, it is now uniformly held that the full disability including the effects of the neurosis is compensible. Dozens of cases, involving almost every conceivable kind of neurotic, phychotic, depressive, or hysterical symptom or personality disorder have accepted this rule."

The opinions of attending physicians and medical experts are admissible as competent evidence when properly presented in a compensation case, but such opinions are not conclusive. They are only to be considered by the Commission along with all other competent evidence, medical and otherwise, in arriving at the degree of permanent partial disability in a compensation case.

Appellant argues that there is no evidence to sustain the Commission's award of 60% permanent partial disability. It is true that no one testified that claimant had a 60% permanent partial disability. Neither did any witness, including the appellee's own testimony, fix his partial disability at 50% or 70,% but there is substantial

evidence in the record that appellee has suffered a disability both in the loss of use of his body as a whole, and in loss of capacity to earn in the same or any other employment, the same wages he was receiving at the time of the injury. There is substantial evidence that this disability is permanent in nature and we are of the opinion that there is substantial competent evidence in the record to justify the Commission's order and award based on a 60% permanent partial disability to the body as a whole.

Judgment affirmed.

WILLIAM J. KIRBY, JUDGE, CIRCUIT COURT OF PULASKI COUNTY, ET AL

5328 424 S. W. 2d 149

Opinion delivered February 19, 1958

G. Thomas Eisele, for petitioner.

R. B. Adkisson, Prosecuting Attorney, for respondents.

J. Fred Jones, Justice. This cause is submitted here on certiorari from the Pulaski County Circuit Court, First Division.

The record before us is meager indeed, but the petitioner and the respondent agree in their briefs, that on December 5, 1967, the petitioner, Lynn A. Davis, while serving in the capacity of director of the Arkansas State Police, appeared before the Pulaski County grand jury, in response to a summons, and refused to answer a question propounded to him by, or on behalf of, the grand jury while it was in session.

The record does reveal that the foreman, the secretary, and the chairman of the Law Enforcement Committee of the grand jury, together with the prosecuting attorney, appeared with Davis before the trial judge in chambers and upon inquiry as to the purpose of the appearance in chambers, the foreman of the grand jury stated:

> "[W]e can't get any place because of the Colonel here just refuses to give us any information whatsoever, and he makes a statement that he don't intend to, and we feel like we have gone as far as we can go."

The court then inquired as to the nature of the information sought by the grand jury, and the foreman of the grand jury continued,

> "[H]e says he has an informant but he is not willing to give us the informant or anything to go on at all. It's all hearsay so far."

The trial court inquired of the foreman of the grand jury whether the question propounded to Davis was in connection with the investigation the grand jury had under consideration at the present time, and the grand jury foreman answered in the affirmative. The prosecuting attorney stated to the court that it had been pointed out in the record that Davis had information to the effect that another person had personal knowledge and legal evidence presentable in court to the effect that a person —Kenneth Brown—was operating a gambling house, and that the only way the evidence could be obtained was through the disclosure of the person's name which Davis refused to divulge. The prosecuting attorney then requested the court reporter to read the information from the notes taken before the grand jury, but this was not followed through.

At the close of these discussions in chambers, the pertinent parts of the record are as follows:

> "THE COURT: Well now, as I understand it, and all of the Grand Jury has all agreed, and the Colonel here also agrees, that the question asked him, and that he refused to answer was: What was the name of his informant? And, now the Court wants to ask you. I have decided that it is material, and I think under Section 43-916 I can propound the same question to you, and of course, if you refuse to answer you will be in contempt of this Court, and be dealt with contempt. Now, what is the name of your informant?
>
> COL. DAVIS: I refuse to name the informant for fear of life or property.
>
> * * *
>
> THE COURT: * * * I am going to have to hold you in contempt and send you to jail until you change your mind."

Davis was then committed to the Pulaski County jail to be held until such time as he purged himself by answering the question propounded to him.

Grand juries have the "duty to inquire into all public offenses committed within the jurisdiction of the court in which they are impaneled, and to indict such persons as they find guilty thereof." (Ark. Stat. Ann. § 43-908 Repl. 1964.) But, "the grand jury can *receive* none but legal evidence...." (Ark. Stat. Ann § 43-918 [Repl. 1964].) (Emphasis supplied.) There is nothing in the record before us that would reveal the nature of the investigation being conducted by the grand jury, or what information, if any, the grand jury desired, or hoped to obtain, from the individual whose identity Davis refused to reveal. The context in which the question was propounded to Mr. Davis is not in the record before us. The record does not reveal what the evidence of Davis's informant would have been, and the record does not reveal what, if anything, Davis had indicated it would be, if he did so indicate. Consequently, not knowing what Davis had testified that his unknown informant knew or could offer in the way of evidence, we have no way of determining whether it would have been legal evidence which the grand jury could receive. In fact, the record here places us in the same position Davis's testimony placed the grand jury as expressed by its foreman—it does not give us anything to go on at all.

Ark. Stat. Ann. § 43-916 (Repl. 1964) under which Davis was held in contempt and committed to jail, is as follows:

> "When a witness, under examination, refuses to testify, or to answer a question put to him by the grand jury, the foreman shall proceed with the witness into the presence of the court, and there distinctly state the refusal of the witness, and if the court, *upon hearing the witness* shall decide that he is bound to testify or answer the question propounded, *he shall inquire of the witness if he persists in*

> *his refusal,* and if he does, shall proceed with him as in cases of similar refusal in open court." (Emphasis supplied.)

The statute does not set out to what extent the witness is to be heard before the court shall decide whether or not he is bound to testify or answer the question propounded, but surely the statute contemplates more than simply hearing the witness refuse again to answer the same question propounded to him in the grand jury room, without first ascertaining the nature of the information the question is designed to produce.

Our grand jury system is derived from the common law of England, and during the more than one-hundred years it has been in operation in Arkansas, this appears to be the first case before this court in which contempt proceedings have been instituted against a police officer for failure to answer a question propounded by a grand jury. Indeed, we have found no cases indicating that a police officer has ever before refused to answer a question propounded to him by a grand jury.

As a usual procedure, the prosecuting attorney presents evidence to the grand jury based on information furnished him by investigating officers and the prosecuting attorney and police officers are usually on the same side in seeking indictments for criminal law violations and in presenting information or legal evidence to a grand jury for that purpose.

The petitioner, Davis, and the prosecuting attorney argue extreme views in opposite directions. The petitioner contends that as a police officer, he has an absolute privilege to refuse to reveal to a grand jury the source of any information he may have or obtain in connection with law violations. The prosecuting attorney contends that a police officer is bound to answer *any and all* questions propounded to him by a grand jury including the name of informers in all situations. We do not agree with either contention.

The privilege of a police officer in refusing to reveal the source of his information in criminal investigations ("informer privilege") is recognized as based on public policy under certain circumstances, the availability of which, depends upon the facts and circumstances of each particular case. *Roviaro* v. *United States,* 353 U. S. 53, 62 (1957); *McCray* v. *Illinois,* 386 U. S. 300 (1967); *State* v. *Edwards,* 317 S. W. 2d 441 (Mo. 1958); *Application of Heller,* 53 N. Y. S. 2d 86 (N. Y. 1945). Therefore, the privilege claimed by Davis in the case at bar is not an absolute privilege, but is qualified by the facts and circumstances of the particular case. In order, therefore, to determine whether Colonel Davis should have been required to answer the question, it is absolutely essential that we know something of the background, *i. e.,* the nature of the inquiry which led up to this particular question. In other words, there are circumstances under which the question "What is the name of your informant?" should have been answered. To the contrary, under different facts and circumstances, the privilege could have been claimed.

The only background given this court is in the statement made in the judge's chambers by the prosecuting attorney, in which he stated:

> "Your Honor, it's been pointed out in the record that *this information* which Col. Davis has *is to the effect* that a person has personal knowledge and *legal evidence* presentable in Court *to the effect* that a person under consideration by the Grand Jury at this time—
>
> Kenneth Brown.
>
> Was operating a gambling house and Col. Davis has refused to divulge the name of the person who is possessed with this information, and it has been pointed out to Col. Davis that *his statement regarding what the information that this person has is hearsay information* and not presentable in Court,

and the only way the evidence can be obtained is through the disclosure of a person's name." (Emphasis supplied.)

It will at once be seen that this statement contains several conclusions. The prosecutor states that the unidentified person has "*legal* evidence" and he twice uses the expression, "to the effect." This, of course, is simply an interpretation of the alleged evidence by the prosecutor—and we are unable to tell from this record whether this interpretation was correct. We have no idea what Davis claimed the informant is supposed to have known. Did he go to Brown's premises on an unrelated matter and observe gambling while there? Did he participate in gambling on Brown's premises (which would make him an accomplice) or was he told by others that Brown was engaging in this illegal enterprise, and he then passed this information on to Davis? Was it Davis's own testimony or the information Davis testified that the informant had, that the prosecuting attorney considered "hearsay information"? These are examples of questions that have a direct bearing on the issue of whether the privilege could be rightfully claimed.

A statement could have been placed in the record by the foreman of the grand jury or the prosecuting attorney, with the assent of Davis (a stipulation), indicating the nature of the investigation that led to this particular question, or the foreman of the grand jury could have testified as to the facts which prompted the question propounded to Mr. Davis. He might have testified that Davis had stated that his informant *saw* gambling in progress, or he might have testified that Davis claimed that his informant *heard* that gambling was going on. In any event, the implications of the question "What is the name of your informant?" would be discernible in the setting the question was asked, and we would have some basis for determining whether the question would constitute or produce legal evidence which the grand jury could receive and which Davis was bound to give.

It may well be that the circuit judge had other information not in the record before us, in making his determination that the question was material. This is somewhat indicated by the prosecuting attorney's opening statement, "Your Honor, it's been pointed out *in the record.*" Subsequently, the prosecutor said to the court reporter, "Would you read the information." [Apparently referring to the alleged information held by the informant.] The reporter replied. "It will take some time to read back in my notes." And this was as far as the matter went. At any rate, no record is before us.

Even if the record was such that we could conclude that the question should have been answered, the answer should have been given in the secret confines of the grand jury room and not in the judge's chambers or in open court. Answers given to questions propounded by a grand jury are not public records and their secrecy is protected by statute. (Ark. Stat. Ann. § 43-928 [Repl. 1964]).

The statute § 43-916, supra, provides that upon hearing the witness, if the court should decide that he is bound to answer the question propounded by the grand jury, that the court "*shall inquire of the witness if he persists in his refusal.*" That is as far as the statute goes pertaining to the question and answer, and that is as far as the court should go pertaining to the question and answer. The statute does not direct the court to propound the same question in semipublic court chambers or in completely public open court, calling for the same answer the grand jury sought, and which the witness refused to answer in the secret confines of the grand jury room, and the reason for this is obvious. The statute does not set out what the court shall do if the witness *does not* persist in his refusal, but certainly in that event, the witness should be returned to the grand jury room where the question is to be answered and the jury's investigation continued.

From the record before us we are unable to say that Davis was guilty of criminal contempt in refusing to answer the question propounded to him, so the summary order of the trial court holding Davis in contempt is hereby set aside.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. Involved here is the issue of whether a policeman can invoke before the grand jury the so-called informer's privilege as to the identity of an informant. In addition, the majority opinion questions the sufficiency of the record and the procedure used by the trial court in determining whether the witness persisted in refusing to answer the question; and lastly holds that a grand jury cannot pursue a chain of witnesses to acquire legal testimony about a law violation or an exoneration of an alleged offense.

I

Before today's decision there was no Arkansas statute or case law recognizing the so-called informer's privilege. My research discloses only two cases, *In re Kohn,* 227 La. 245, 79 So. 2d 81 (1955), and *People* v. *Keating,* 286 App. Div. 150, 141 N. Y. S. 2d 562 (1955), where the invoking of the privilege before a grand jury has been attempted. The issue ordinarily arises during the trial of the accused—see Annot., 76 A. L. R. 2d 262 (1961).

Some jurisdictions follow the common law, as in *Roviaro* v. *United States,* 353 U. S. 53 (1957), where the privilege and its limits are stated as follows:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher* v. *United States,* 305 US 251, 254 83 L ed 151, 154,

59 S Ct 174; *Re Quarles,* 158 US 532, 39 L ed 1080, 15 S Ct 959; *Vogel* v. *Cruaz,* 110 US 311, 316, 28 L ed 158, 160, 4 S Ct 12. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

"The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.

* * * *

"We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Other jurisdictions have adopted by statute American Law Institute Model Code of Evidence Rule 230, which provides:

"A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues."

In 76 A. L. R. 2d 275 (1961) the theory of the privilege is stated as follows:

"The privilege is founded upon public policy, and seeks to further and protect the public interest in effective law enforcement. It recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers, and by preserving their anonymity, encourages them to perform that obligation. The privilege is designed to protect the public interest, and *not to protect the informer.*" (Emphasis supplied.)

Thus it is seen that the theory and purpose behind the privilege are not complicated matters but in fact are within the comprehension of the average citizen. Furthermore, since the privilege is not for the protection of the informer, but for the protection of the public interest, it logically follows that some public official or public body must have the discretion to determine when it is or is not in the public interest to invoke the privilege.[1] In fact, practical law enforcement demands that such discretion be deposited with some public official or body,[2] for obviously the law enforcement policies of our cities would be hamstrung if a police chief had to go before the courts and make the showing required by the majority opinion here before he could obtain the name of an informant known only by his subordinates who had different views as to the *public interest.*

If, as demonstrated above, the informer's privilege is not applicable as between a rookie policeman and a city police chief, or as between a state patrolman and the state police director, then why is not the same logic applied to a policeman and the grand jury? In arriving at this logic I accede to Lincoln's theory that our government is "of the people, by the people and for the people."

Our grand juries are directed by law, Ark. Stat. Ann. § 39-206 (Repl. 1962), to consist of sixteen persons of good character, approved integrity, sound judgment and reasonable information. By Ark. Stat. Ann. § 43-908 (Repl. 1964) the grand jury has the power and the duty ". . . to inquire into all public offenses committed

[1]The majority opinion recognizes that the applicability of the privilege is not left to the officer. 8 Wigmore, Evidence (McNaughton rev. 1961) § 2379 (g) points out that the lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege.

[2]During oral argument petitioner conceded that the privilege was not applicable as between a rookie policeman and a city police chief.

within the jurisdiction of the court in which they are impaneled, and to indict such persons as they find guilty thereof." Ark. Stat. Ann. § 43-907 (Repl. 1964) specifically directs it to inquire "into the wilful and corrupt misconduct in officers of every description in the county." The right to subpoena witnesses is given by Ark. Stat. Ann. § 43-912 (Repl. 1962). Thus it is obvious that the grand jury is an arm of the court, comprising a body selected from the people and recognized by statute as having a standing, from the administration of justice viewpoint, superior to that of the policeman. This is emphasized by virtue of the subpoena power and the mandatory direction to inquire into the wilful and corrupt misconduct of officers of every description.

The fact that only two cases have been found where an attempt was made to invoke the informer's privilege before a grand jury demonstrates that grand juries are capable of understanding the nature of the privilege and of determining what is in the public interest. The Pulaski County grand juries are no exceptions. The lists of those selected to serve are usually published in the state's leading newspapers—among those selected are farmers, bank directors, labor leaders, contractors, advertising executives and advisors to governors. These people are as capable as any public official in determining what is in the "public interest."

Therefore it is my opinion that as between a policeman and a grand jury, the policeman should not be entitled to invoke the informer's privilage. Of course this does not mean that the policeman is not entitled to state his position to the grand jury and the court before identifying his informer.

II

The record made before the trial court is not long. Since I disagree with the majority as to its sufficiency, I am attaching it hereto as an appendix.

III

The procedure followed by the court here is identical with that approved in *Ex parte Butt*, 78 Ark. 262, 93 S. W. 992 (1906). The majority opinion suggests that the trial court erred in asking petitioner to give it the name of the informant—*i. e.* the trial court should have instructed petitioner to return to the grand jury room and answer the question. In this, the majority opinion does violence to the statute, Ark. Stat. Ann. § 43-916 (Rep. 1964), which provides:

> "When a witness, under examination, refuses to testify, or to answer a question put to him by the grand jury, the foreman shall proceed with the witness into the presence of the court, and there distinctly state the refusal of the witness, and if the court upon hearing the witness shall decide that he is bound to testify or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and if he does, shall proceed with him as in cases of similar refusal in open court."

The statute requires the trial court to determine only (1) whether the witness is bound to answer the question, and (2) if he persists in his refusal. The summary procedure used by the trial court was also affirmed in *Lockett* v. *tate,* 145 Ark. 415, 224 . W. 952 (1920). ee also *Uphaus* v. *Wyman,* 360 U. . 72 (1959).

IV

By innuendo it is suggested that the record is insufficient because the grand jury could receive only "legal evidence" and that the informant's name would not necessarily be "legal evidence" within the meaning of Ark. Stat. Ann. § 43-918 (Repl. 1964). The statute provides:

> "The grand jury can receive none but legal evidence; they are not bound to hear evidence for the

defendant, but it is their duty to weigh all the evidence before them, and if they believe that other evidence within their reach will explain away the charge, they should order the evidence to be produced."

I disagree with the suggestion (1) because it lifts the phrase "legal evidence" out of its context; (2) because it ignores the fact that a grand jury is ordinarily composed of laymen; and (3) because it presupposes that if the name of the informant were irrelevant or immaterial, the grand jury could not make any inquiry about it.

With respect to the relevancy of testimony, in *Ex parte Butt, supra,* we held:

"Petitioner, Butt, contends that a witness cannot be punished for contempt for refusal to answer irrelevant questions. If a witness is interrogated before a court or officer about a matter entirely outside of its jurisdiction, he may refuse to testify. This, of course, does not authorize him to refuse to answer questions propounded in a legitimate cross-examination. But, if the court or officer has jurisdiction of the subject-matter involved, a witness should not be permitted to refuse to answer a question on the ground that it is irrelevant. To permit him to do so against the opinion of the court or officer taking his testimony would 'be subversive of all order in judicial proceedings. The fact that such questions are irrelevant or improper' furnishes no reason for impeaching the commitment of the witness for refusing to answer them. *Ex parte McKee,* 18 Mo. 600; *People* v. *Cassels,* 5 Hill (N. Y.), 165; *Bradley* v. *Veazie,* 47 Mo. 85; Rapalje on Contempt, § 66, and cases cited."

Under the majority's suggestion, a grand jury can no longer inquire of any witness as to who told him

that gambling was going on at the place of business of the person under investigation, unless the witness can also say that his informant saw the gambling going on. I do not think the statutes should be so constrictively interpreted.

It therefore appears to me, for the reasons stated, that the name of petitioner's informant was a matter into which the grand jury was entitled to inquire, and that he persisted in his refusal after the trial court found that he was bound to answer the question.

I would deny the petition for certiorari.

PROCEEDINGS HEARD BEFORE HON. WILLIAM J. KIRBY IN HIS CHAMBERS, FOURTH FLOOR PULASKI COUNTY COURTHOUSE, LITTLE ROCK, ARKANSAS, ON THE FIFTH DAY OF DECEMBER, 1967, AT THE HOUR OF APPROXIMATELY 1:30 P.M.:

THE COURT: First, let's let the record show what this is all about. Let the record show that the Pulaski County, Foreman of the Grand Jury, Mr. Burroughs, and the Grand Jury Secretary, Mr. Wimberly, and Chairman of the Law Enforcement Committee, Mr. Larry Robinson, along with the Prosecuting Attorney and Chief Davis appeared before me at—I'll do it right, 1:30.

Now, Mr. Prosecutor, you may state, or Mr. Foreman, you may state what the purpose of this is for.

MR. BURROUGH: Well, Judge, Your Honor, we can't get any place because of the Colonel here just refuses to give us any information whatsoever, and he makes a statement that he don't intend to, and we feel like we have gone as far as we can go.

THE COURT: Well, now, what is the nature of the information? What do you want to know? I will have

to know so I can ask him, to see whether I think it should be asked.

MR. BURROUGHS: Well, he says he has an informant but he is not willing to give us the informant or anything to go on at all. It's all hearsay so far.

EXHIBIT 'A'

THE COURT: Well now, is this in connection with the investigation you have got under way at the present time?

MR. BURROUGHS: Yes.

MR. ADKISSON: Your Honor, it's been pointed out in the record that this information which Col. Davis has is to the effect that a person has personal knowledge and legal evidence presentable in Court to the effect that a person under consideration by the Grand Jury at this time—

THE COURT: What's his name?

MR. ADKISSON: Kenneth Brown.

THE COURT: All right.

MR. ADKISSON: Was operating a gambling house and Col. Davis has refused to divulge the name of the person who is possessed with this information, and it has been pointed out to Col. Davis that his statement regarding what the information that this person has is hearsay information and not presentable in Court, and the only way the evidence can be obtained is through the disclosure of a person's name.

THE COURT: Well, of course, the Grand Jury is not supposed to consider anything confidential evidence. You've read the Statute here, 43-916, haven't you?

COL. DAVIS: I'm not sure, Your Honor.

THE COURT: Well, you can have the book there and read it or you can do it.

COL. DAVIS: Which one?

THE COURT: 43-916. Right down at the bottom there.

COL. DAVIS: Yes, sir.

THE COURT: Now, why don't you think that applies to you?

COL. DAVIS: Supreme Court decisions have been made that the police officer and his informant enjoys somewhat the same rights as clergy and people—

THE COURT: The high Supreme Court has decided that?

COL. DAVIS: The U. S. Supreme Court.

THE COURT: Well, I'm not bound by their rules in this particular instance here. This is a hearing before the Grand Jury. Now, has our Supreme Court, to your knowledge?

COL. DAVIS: I don't know.

THE COURT: If they have, well, you have some law that I don't know.

COL. DAVIS: I don't know, but I was advised by legal counsel that I did not have to.

THE COURT: I can't make you disclose it all.

MR. ADKISSON: Would you read the information?

REPORTER: It will take some time to read back in my notes.

MR. ADKISSON: Well, it was right at the first.

THE COURT: Well now, as I understand it, and all of the Grand Jury has all agreed, and the Colonel here also agrees, that the question asked him, and that he refused to answer was? What was the name of his informant. And, now the Court wants to ask you. I have decided that it is material, and I think under Section 43-916 I can propound the same question to you, and of course, if you refuse to answer you will be in contempt of this Court, and be dealt with contempt.

Now, what is the name of your informant?

COL. DAVIS: I refuse to name the informant for fear of life or property.

THE COURT: Well, I saw something in the paper the other day where you weren't particularly concerned, that you did not feel or think that these boys would hurt him.

COL. DAVIS: Well, of course, I said life and or property.

THE COURT: I don't know whether you can believe everything you read in the paper, but that is not much of a reason. Call my bailiff in here. I am going to have to hold you in contempt and send you to jail until you change your mind.

* * *

ROBERT C. STROUD *v.* PULASKI COUNTY SPECIAL SCHOOL DISTRICT ET AL

5-4442 424 S. W. 2d 141

Opinion delivered February 19, 1968

Warren & Bullion, for appellant.

Leon Catlett, Roy Finch and *Jim Moore,* for appellees.

CONLEY BYRD, Justice. Appellant Robert C. Stroud, in his capacity as a taxpayer, appeals from a decree holding valid a contract between Holiday Manufacturing Company and the Pulaski County Special School District. Appellant instituted his action pursuant to Ark. Stat. Ann. § 80-136, -137 and -1909 (Repl. 1960) against the School District; E. F. Dunn, Superintendent; and Winston G. Chandler individually and as a member of the School District, to enjoin only the pay-

ment of the transportation costs—the validity of the balance of the contract is not challenged. The complaint alleges that the School District entered into a contract with Winston G. Chandler, a board member, through a corporation owned by Chandler and his family known as Chandler Trailer Convoy, Inc., to move certain relocatable school buildings from Holiday's plant in Camden to the sites desired by the School District. Holiday Manufacturing Company, a division of Holiday Inns of America, Inc., and Chandler Trailer Convoy, Inc., intervened.

The School District had entered into their separate contracts for delivery, F. O. B. school's address, of a total of 25 such buildings. The price per building in each contract is the same and the other charges are in proportion thereto. A portion of the July 28, 1966 contract showing the way Holiday arrived at its contracted amount is as follows:

"That the Seller, in consideration of the covenants, on the part of the Buyer, hereinafter contained, hereby agrees with the Buyer, that the Seller will deliver to the Buyer at the Buyer's address, above listed, the following described equipment, for the following sum of money:

1.	Twenty (20) Portable, Relocatable Buildings, 26 ft. x 56 ft., f.o.b. factory, at $13,643.00 per building	$272,860.00
2.	Twenty (20) Partition Walls, full width and height, at $298.30 ea.	5,966.00
3.	Twenty (20) Hollow Core doors, 1 3/8 in. x 2 ft. 8 in. x 6 ft. 8 in., complete with door jambs, stops, hinges, and hardware, installed and painted, at $30.45 ea.	609.00
4.	Welsch California Ash Hardwood Paneling, installed, at $152.00 per	

	building, Total of $2,736.0 Sub-Total	*No Charge* $279,435.00
5.	Sales Tax (Arkansas) at 3%	8,303.05
6.	Transportation — 40 units (20 buildings) including permits at $86.00 per unit	3,440.00
7.	Service Charge — 40 undercarriages for 95 miles average, at $.10 per mile per unit	380.00
	Total	$291,638.05

of good merchantable quality and in accordance with specifications and the letter furnished to Pulaski County Public Schools, Pulaski County, Little Rock, Arkansas."

It was shown that, of the $86 transportation charge per unit, Holiday calculated $8 as overhead consumed by it in connection with the transportation of the buildings. Another $8 was paid to the state: $5 for the special permit required to transport each unit and $3 for a transit tag. The remaining $70 was paid to the common carrier for transporting one unit of the building from Camden to the school site. Each building consisted of two units.

The record further shows that Winston G. Chandler is president of Chandler Trailer Convoy, Inc., of which he owns 14 per cent of the stock; that his wife owns 50 per cent of the stock; and that the balance is owned by other family members. Chandler Trailer Convoy, Inc. is a common carrier of transport and holds a Certificate of Convenience and Necessity under the regulations of the State Commerce Commission. Only two other entities are authorized by the State Commerce Commission to engage in similar intrastate transportation of portable buildings. They are Arkansas Transit Homes and Morgan Driveaway, Inc. Arkansas Transit Homes is

owned by Chandler's brother. Chandler owns no interest in Arkansas Transit Homes, nor does the brother own an interest in Chandler Trailer Convoy, Inc. Morgan Driveaway, Inc., has its home offices in Elkhart, Indiana. Its closest terminal is St. Louis.

The tariffs filed with the State Commerce Commission by Chandler Trailer Convoy and Arkansas Transit Homes authorize the transportation of the Holiday units from Camden to the school site for $70 per unit. The filed tariff rate for Morgan Driveaway, Inc., is $104 for the same transportation. Our laws, Ark. Stat. Ann. § 73-1770 (Repl. 1957), provide that no greater or less or different compensation for transportation or for any service in connection therewith between the points enumerated in such tariff shall be charged, demanded or collected. The record shows that after Chandler Trailer Convoy hauled 34 of the units the rest were hauled by Arkansas Transit Homes. It is silent about any contract between Chandler Trailer Convoy and Holiday Manufacturing Company when the contracts were entered into between the School District and Holiday. So far as the record shows, the dealings between Chanler Trailer Convoy and Holiday were on an "as needed" basis.

Ark. Stat. Ann. § 80-136, -137 and -1909 make it unlawful for any school board member to be interested directly or indirectly in the sale of any commodities sold to and purchased by the member's district. Thus, in determining whether the contract was void or voidable we look at the contract at the time it was executed. Unless Chandler was to receive a benefit either directly or indirectly when the contract was executed between the School District and Holiday, then Holiday's contract would be valid. The only proof on this issue is that the itemized transportation charge coincides with Chandler's tariff. But here again, the transportation charge also coincides with the tariff filed by Arkansas Transit Homes. Since the law will not presume that the parties to a contract intended an illegal act, 17 Am. Jur. 2d,

Contracts, § 238, we are unwilling to say that this meager evidence is sufficient to show that Chandler had an interest either directly or indirectly in the contract between Holiday and the School District at the time the contract was executed.

The record indicates that the contract between Holiday and the School District was upon competitive bid. Defendant's Exhibit 7 is entitled "Bid Sheet" and has attached thereto specifications for portable buildings for the Pulaski County Special School District. In this instance bids were taken and apparently the bids were let to the lowest bidder meeting the specifications required by the School District. At any rate, Superintendent Dunn testified that the specifications for the bids were drawn so that they would not eliminate any bidder. Of course, if the contract was let on competitive bids, then appellant's argument is without merit, because Ark. Stat. Ann. § 80-1909, *supra*, specifically recognizes that a board member may deal with the school district as to material upon competitive bids.

Affirmed.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, Justice, dissenting. The majority opinion overlooks a basic principle in the law of trusts—the rule that a fiduciary, regardless of his good faith, is absolutely forbidden to take a position in which his personal interest is in conflict with his duty as a trustee.

A public officer occupies the status of a trustee with respect to the governmental body (here the school district) that he represents and with respect to its property. *Fidelity & Deposit Co. of Md.* v. *Cowan,* 184 Ark. 75, 41 S. W. 2d 748 (1931); *Grooms* v. *Bartlett,* 123 Ark. 255, 185 S. W. 282 (1916); *State* v. *Baxter,* 50 Ark. 447, 8 S. W. 188 (1887). As a trustee he must conform to the high ethical standard imposed by the law

upon all fiduciaries. In Cardozo's familiar words: "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Meinhard* v. *Salmon,* 249 N. Y. 458, 164 N.E. 545, 62 A. L. R. 1 (1928).

A trustee cannot engage in any activity in which his own financial interest conflicts with that of the trust. For example, an administrator cannot buy at his own sale, simply because his own pecuniary interest demands that he get the property as cheaply as possible while his fiduciary duty demands that he obtain the highest possible price. Good faith and what might appear to be the best interest of the trust have nothing to do with the matter.

In the case at bar I do not impugn Chandler's motives, because, conceding his integrity and high principles, the disqualification is absolute. "No one can be allowed to assume a position in which his interests are antagonistic to his duties, and derive a personal benefit from it. However firm the virtue of individuals may be, human nature as a general rule cannot endure the test, and equity, for security, removes the temptation by the inflexible rule that all profits of the trustee . . . must enure to the benefit of the *cestuis que trustent.*" *Trimble* v. *James,* 40 Ark. 393 (1883).

Apart from statute, Chandler's position in this case involves that same conflict of interest which, without exception, is prohibited by the law of trusts. On the one hand his duty as a school director required him to purchase the needed school buildings or other property at the lowest possible price. The district is entitled to demand that its directors be absolutely free from any personal interest in such purchases. Here the testimony makes it plain that all the district's contracts are not let to the lowest bidder, but even if they were we all know that one prospective seller can be favored over his competitors by the wording of the specifications.

On the other hand, if Chandler can participate to his profit in the performance of the contract, as he is doing in this case, his personal interest clashes directly with his duty to the school district. Suppose, for example, that there are two rivals competing for the district's business. One fabricates his buildings or other products locally, while the other must rely upon the type of transportation facilities furnished only by Chandler or his brother. How can Chandler, in choosing between the two, discharge his duty to the district with the perfect impartiality that the law demands? He cannot.

It is no answer to say, as the majority do, that unless there was prearrangement between Chandler and Holiday when the contract was executed between Holiday and the district, then Holiday's contract is valid. That attitude accomplishes nothing except to outlaw actual dishonesty if it is detected. In Cardozo's phrase, it condones conduct meeting the morals of the market place, but it fails to hold public officers to their fiduciary duty. Moreover, nothing is in issue here except Holiday's subcontract with Chandler. If that contract were declared to be invalid, as against public policy, the district would be fully protected both in this instance and in similar situations that will certainly arise now that the majority have opened the door to constructive fraud.

Finally, the statutes adopt the controlling principle so explicitly that I do not understand how the majority can conclude that Chandler's subcontract is not in direct violation of the law. Section 80-138 reads in pertinent part as follows: "It shall be unlawful for any person serving as a member of any . . . local school board to be *or become* interested directly or indirectly in the profits or purchase price received by any person, firm or corporation from the sale of any . . . materials of whatsoever kind or character sold to any school board of which such person may be a member." (My italics.) The wording of the statute fits the District-Holiday-Chandler transaction like a rubber glove. If the legislature has not prohibited deals such as the one now be-

fore us, the English language is incapable of achieving that result. I would reverse the decree and declare the Chandler subcontract to be void.

WELDON DOUGLAS ET AL *v.* THE CITIZENS BANK OF JONESBORO

5-4401 424 S. W. 2d 532

Opinion delivered February 26, 1968

Ward & Mooney, for appellants.

Douglas Bradley, for appellee.

CARLETON HARRIS, Chief Justice. This litigation involves two separate causes of action, which however, by agreement, were set forth in one set of pleadings, and disposed of at one hearing. Appellants, Weldon Douglas, and Janie Chandler, each maintained a checking ac-

count in the Citizens Bank of Jonesboro. Rees Plumbing Company, Inc. (which is not presently a party to this proceeding), was a customer of the bank, and maintained checking accounts. On August 19, 1966, the plumbing company delivered its check in the amount of $1,000.00 to Douglas. On that same day Douglas presented the check to the bank for deposit to his own checking account; an employee at the teller's window prepared a deposit slip, dated as of that day, reflecting that the check was being deposited to Douglas' account. He was given a duplicate of the deposit slip, and an employee of the bank thereafter affixed to the back of the check a stamp in red ink, denoting the August 19th date, and stating, "Pay to any bank—P.E.G., Citizens Bank of Jonesboro, Jonesboro, Arkansas." Under date of August 20, 1966, the bank dishonored the check because of insufficient funds, and charged the amount back to the account of Douglas. This same statement of facts applies to Mrs. Chandler, except that the check she presented was originally made payable to a Richard R. Washburn (in the amount of $1,600.00) by the same Rees Company, and this check had been properly endorsed by Washburn before coming into the hands of Mrs. Chandler.[1]

Rees Plumbing Company filed an unverified complaint against the bank, alleging that it had issued the aforementioned checks to the parties, and that it had sufficient funds in the accounts to honor these checks. It was alleged that the checks were wrongfully dishonored, and Rees sought damages due to the alleged willful and wanton negligence of the bank in handling its checks. Subsequently, the complaint was amended to join appellants as parties plaintiff (together with another party which later took a non-suit). Thereafter, on motion of appellee, Rees Plumbing Company was strick-

[1]The check presented to the bank by Mrs. Chandler was dated on August 18, instead of 19, and was drawn by Rees on another account, which it had in the Citizens Bank.

en as a party plaintiff. After first demurring, and moving to make the complaint more definite and certain, the bank filed an answer setting out that the accounts of Rees were insufficient on August 19 to honor the checks, and further, that both were charged back to the accounts of the respective appellants on August 20, and the appellants so notified. The bank further denied that the endorsement stamp, heretofore mentioned, constituted an acceptance stamp. The bank asserted that the stamp was no more than a method of identification. Both appellants and the bank, appellee herein, filed verified motions for summary judgment. Appellants' motion was supported by the checks and the deposit slips, which had already been filed, and appellee's motion was supported by the affidavit of Major Griffin, Vice-President of the Citizens Bank, filed with the motion for summary judgment. The affidavit reflects that Griffin had been engaged in banking with the Citizens Bank for 20 years, and it asserted that he was familiar with the processing of items in the Citizens Bank, as well as the normal procedures of other banks, and particularly familiar with the stamps and symbols used by banks in the area. He then explained the procedure used by appellee, and stated that the stamp served only to identify the depository bank, and that the endorsement appeared on all checks received by appellee which are not received from other banking institutions. He then stated:

"Any item for any reason can be returned by the Citizens Bank or any other banking institution (except those cashed over the counter) if rejected before midnight of the next banking day following the banking day on which the item is received, and prior to the bank stamping its 'paid' stamp thereon and filing in the customer's file.

"I have examined the Citizens Bank records with reference to a $1,600.00 check drawn on Rees Plumbing Company, Inc. account number 810 657 payable to Richard R. Washburn and find that it was deposited to the account of Mrs. Janie Chandler, a customer of the Citi-

zens Bank in account number 301 191 on August 19, 1966. This deposit was posted to the Citizens Bank Journal to the credit of Mrs. Janie Chandler's account on August 19, 1966, but the check was not posted to Citizens Bank Journal as a charge to the Rees Plumbing Company account on which it was drawn because there was no balance in the Rees Plumbing Company Account at close of business on the date of August 19, 1966. The account of Mrs. Janie Chandler was debited for the insufficiency under date of August 20, 1966, and was returned to Mrs. Chandler."

He stated that the same procedure was followed with the Douglas check. The court denied the motion of the appellants, but granted that of the bank.

Thereafter, appellants petitioned the court to reopen the case for the purpose of receiving additional evidence on the question of what weight, if any, might be given to a statement printed on the backs of the deposit slips which had been introduced into evidence by agreement. The language on the back of the deposit slips provides, *inter alia*, that "items drawn on this bank not good at close of business day on which they have been deposited may be charged back to depositor." Appellants desired to introduce evidence to show that they did not know of the language on the back of the slips. The court refused to reopen the case, but the trial judge did state that, in reaching his conclusions, he gave no consideration at all to this language; nor do we consider same in the present instance, it being immaterial to the disposition of the litigation. From the judgment denying the motion to reopen the case; denying the motion for summary judgment filed on behalf of appellants, and granting the motion for summary judgment on behalf of appellee, comes this appeal.

The principal question at issue is, "Did the bank, by stamping the endorsement upon the checks deposited by appellants, and by delivering to appellants the de-

posit slips, accept both of said checks for payment?" The answer is, "No," and it might be stated at the outset that cases decided prior to the passage of the Uniform Commercial Code are not controlling. This case is controlled by the following sections of the Code: Ark. Stat. Ann. § 85-4-212 (3), § 85-4-213, and § 85-4-301 (1) (Add. 1961).

Subsection (3) of Section 85-4-212 reads as follows:

"A depositary bank which is also the payor may charge back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (Section 4-301[§ 85-4-301])."

Subsection (1) of Section 85-4301 provides:

"Where an authorized settlement for a demand item (other than a documentary draft) received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day[2] of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment (subsection (1) of Section 4-213 [§ 85-4-213]) and before its midnight deadline it

(a) returns the item; or

(b) sends written notice of dishonor or nonpayment if the item is held for protest or is otherwise unavailable for return."

Section 85-4-213 simply sets out the time that a payment becomes final, not applicable in this instance.

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[2]According to Section 85-4-104, "midnight deadline with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item or notice or from which the time for taking action commences to run, whichever is later."

When we consider the statutes above referred to, it is clear that appellants cannot prevail.[3] Clark, Bailey and Young, in their American Law Institute pamphlet on bank deposits and collections under the Uniform Commercial Code (January, 1959), p. 2, comment as follows:

"If the buyer-drawer and the seller-payee have their accounts in the same bank, and if the seller-payee deposits the check to the credit of his account, his account will be credited provisionally with the amount of the check. In the absence of special arrangement with the bank, he may not draw against this credit until it becomes final, that is to say, until after the check has reached the bank's bookkeeper and, as a result of bookkeeping operations, has been charged to the account of the buyer-drawer. (The seller-payee could, of course, present the check at a teller's window and request immediate payment in cash, but that course is not usually followed.) If the buyer-drawer's account does not have a sufficient balance, or he has stopped payment on the check, or if for any other reason the bank does not pay the check, the provisional credit given in the account of the seller-payee is reversed. If the seller-payee had been permitted to draw against that provisional credit, the bank would recoup the amount of the drawing by debit to his account or by other means."

The comment of the commissioners is also enlightening. Comment 4, under Section 85-4-213, states:

"A primary example of a statutory right on the part of the payor bank to revoke a settlement is the right to revoke conferred by Section 4-301. The under-

[3]An order denying a motion for summary judgment is merely interlocutory, leaving the case pending for trial, and is not appealable; however, in holding that the court did not err in granting the summary judgment to the bank, the question of whether appellants were entitled to summary judgment is necessarily answered in the negative.

lying theory and reason for deferred posting statutes (Section 4-301) is to require a settlement on the date of receipt of an item but to keep that settlement provisional with the right to revoke prior to the midnight deadline. In any case where Section 4-301 is applicable, any settlement by the payor bank is provisional solely by virtue of the statute, subsection (1) (b) of Section 4-213 does not operate and such provisional settlement does not constitute final payment of the item."

Appellants assert that the affidavit of Major Griffin was never introduced into evidence, and cannot be considered as anything more than any other pleading in the case. We do not agree. We know of no requirement that an affidavit be "introduced;" the affidavits are simply filed, and this particular one was filed with the motion for summary judgment. *Epps* v. *Remmel,* 237 Ark. 391, 373 S. W. 2d 141.

No counter-affidavits were filed by appellants. They were content to rely on the checks and deposit slips offered as exhibits, and counsel for appellant stated, "I want the motion for summary judgment on behalf of defendant to be considered as contradicted. Did not file a formal affidavit, offered proof." This, of course, constituted no more than the legal question here presented for determination, *i. e.,* "Did the bank by stamping the endorsement upon the checks deposited by appellants, and by delivering to appellants the deposit slips, accept both of said checks for payment?" It is not necessary to discuss whether counsel's simple statement can be considered as controverting the Griffin affidavit, since the court permitted it, and it is not decisive in determining the issue herein presented. There was no request by counsel for time to present an affidavit, or to take the deposition of Rees, or anyone else. The Rees complaint (unverified) alleged that sufficient funds were on hand to pay the checks, and the checks were wrongfully dishonored. Nonetheless, no affidavit was made to support this conclusion, nor was one made that

sufficient funds had been deposited on the 19th to enable the checks to be paid. In *Epps* v. *Remmel, supra,* we said:

"* * * To take a simple example, if in an action on a promissory note, the defendant in his answer denies the making of the note; the plaintiff makes a motion for a summary judgment, accompanying it by an affidavit of a person who swears that he saw the defendant sign the note; and the defendant does not file an opposing affidavit, summary judgment should be rendered for the plaintiff."

There is absolutely nothing in the record to contradict Major Griffin's sworn statement that he examined the records at the close of business on August 19, and there was no balance in the Rees Plumbing Company accounts.

Affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result reached. I consider the fact statements in the affidavit of Major Griffin with reference to the sufficiency of funds in the Rees accounts to have been inadmissible in evidence, not having been within his personal knowledge and having been obtained only by an examination of records. *Oliver* v. *Eureka Springs Sales Company,* 222 Ark. 94, 257 S. W. 2d 367; *Mevorah* v. *Goodman,* 79 N. D. 443, 57 N. W. 2d 600. A movant for summary judgment must sustain his burden to clearly show that there is no genuine issue of fact by matters of which the court will take judicial notice or by evidentiary matters which the court is entitled to consider. 6 Moore's Federal Practice, § 56.15[3], p. 2340. Affidavits must be made on personal knowledge. Ark. Stat. Ann. § 29-211(e) (Repl. 1962); 6 Moore's Federal Practice, § 56.11[1-2], p. 2145; *Walling* v. *Fairmont Creamery Co.,* 139 F. 2d 318 (8th Cir. 1943); *Zampos* v. *U. S.*

Smelting, Refining & Mining Co., 206 F. 2d 171 (10th Cir. 1953). Testimony that would not be admissible at the trial may not be set forth in affidavits supporting or opposing summary judgment. *DePinto* v. *Provident Security Life Ins. Co.,* 374 F. 2d 50 (9th Cir. 1951) Where written documents are relied upon, they must be exhibited in full. Neither the statement of their substance, the affiant's interpretation of them nor his conclusions drawn therefrom are sufficient. *Walling* v. *Fairmont Creamery Company, supra.* While an affidavit may be used to introduce documentary proof, the written material should be attached to the affidavit and served with it. *Sprague* v. *Vogt,* 150 F. 2d 795 (8th Cir. 1945); 6 Moore's Federal Practice, § 56.11[1.-2], p. 2145. Statements of legal conclusions and references to papers to which no sworn or certified copy is attached should be disregarded. *State of Washington* v. *Maricopa County,* 143 F. 2d 871 (9th Cir. 1944).

Important questions as to credibility and right of cross-examination might also arise, particularly in view of the fact that information as to the Rees bank accounts was peculiarly within the knowledge of appellee.

Yet, appellants did not file controverting affidavits, as they might have pursuant to Ark. Stat. Ann. § 29-211(e) (Repl. 1962), or move for a continuance under § 29-211(f) (Repl. 1962), or avail themselves of discovery procedures under § 28-348 et seq. (Repl. 1962). Nor did they by any objection at any time raise any question of credibility, right of cross-examination or admissibility of testimony.

By the great weight of authority it is not reversible error for a trial court to consider a defective statement or affidavit on motion for summary judgment in the absence of a motion to strike or other form of objection specifying the deficiencies therein. 6 Moore's Federal Practice, § 56.22[1], p. 2817; *Mitchell* v. *Dooley Bros.,* 286 F. 2d 40 (1st Cir. 1960), cert. denied, 366 U. S. 911,

81 S. Ct. 1086, 6 L. Ed. 2d 236; *Klingman* v. *National Indemnity Co.,* 317 F. 2d 850 (7th Cir. 1963); *U. S.* v. *Western Electric Co. Inc.,* 337 F. 2d 568 (9th Cir. 1964); *Scharf* v. *Waters,* 328 Ill. App. 525, 66 N. E. 2d 499 (1946); *Baum* v. *Martin,* 335 Ill. App. 277, 81 N. E. 2d 757 (1948); *Republic Chemical Corp.* v. *United Sterling Corp.,* 205 Misc. 730, 118 NYS 2d 368, aff'd, 281 App. Div. 1018, 121 NYS 2d 272 (1953). It has been said that the objection must be specific. See, *e. g., Grubbs* v. *Slater,* 266 S. W. 2d 85 (Ky. 1953). Failure to object is sometimes said to constitute a waiver. See *Scharf* v. *Waters, supra; Republic Chemical Corp.* v. *United Sterling Corp., supra*; *Hall* v. *Fowler,* 389 S. W. 2d 730 (Tex. Civ. App. 1965). Yet it would not be error for the court to disregard inadmissible evidence on motion for summary judgment in the absence of any objection. *Mitchell* v. *Dooley Bros., supra.* It has been said, also, that objection should be made in the trial court in order to afford an opportunity for correction of the objectionable defects. *Hall* v. *Fowler, supra.* It is also said that objections to formal deficiencies based on incompetency of evidence should not be raised on appeal for the first time. *Youngstown Sheet & Tube Co.* v. *Pennsylvania,* 363 S. W. 2d 230 (Tex. 1963).

These rules and the reasons therefor seem to me to be applicable in this case.

I concur fully in the majority opinion on all other issues.

JOHN R. THOMPSON, TRUSTEE *v.* NINA P. DUNLAP

5-4408 424 S. W. 2d 360

Opinion delivered February 26, 1968

Jones & Stratton, for appellant.

Robert W. Henry, for appellee.

GEORGE ROSE SMITH, Justice. James W. Dunlap, at his death in 1957, was a resident of Faulkner county,

where his will was probated. Two-thirds of his estate, consisting of lands in White and Faulkner counties, was left to the appellant as trustee, with directions that he pay $150 a month to the appellee, Dunlap's widow, during her lifetime, with remainder to other beneficiaries. The will provided that in the event of "unusual economic inflation, it is my desire that the Chancery Court shall have authority to adjust the amount of income. . . to be turned over monthly to Nina P. Dunlap."

In 1967 Mrs. Dunlap filed this proceeding in the Faulkner Chancery Court, asserting that as a result of inflation her payments should be increased to $300 a month. The trustee, who resides in Lonoke county and was served with a summons in Pulaski county, questioned the venue and also defended the case on its merits. After a hearing the chancellor held (*a*) that he had jurisdiction, because Dunlap's estate had been administered in Faulkner county, (*b*) that the payments should be increased to $200, and (*c*) that the trustee should file in the Faulkner Chancery Court proceeding a copy of the will and an inventory of the trust property and should thereafter submit annual accountings for the court's approval. By direct appeal the trustee questions all three rulings; by cross appeal Mrs. Dunlap insists that her payments should be fixed at $300 a month.

(*a*) We do not agree with the chancellor's conclusion that the venue was properly laid in Faulkner county. Venue is governed by statute. This is not a local action within Ark. Stat. Ann. § 27-601 (Repl. 1962), because it does not involve the title to the trust realty. Nor is there any statutory basis for holding that merely because the trust was created by a will probated in the Faulkner Probate Court some ten years earlier, the Faulkner Chancery Court thereby inherited jurisdiction of this suit. The chancery court and the probate court are separate tribunals, each having its own jurisdiction. Ark. Const., Amendment 24; *Lewis* v. *Smith,* 198 Ark.

244, 129 S. W. 2d 229 (1939). Neither court derives its jurisdiction from the other.

If the testator had expressed a desire that the *Faulkner* Chancery Court should have authority to adjust the trust income, it might be said that the appellant agreed to that venue by accepting the appointment as trustee. But the testator referred merely to "the Chancery Court." Some other chancery court might have proved to be the right forum—if, for example, all the interested persons were residents of another county. By elimination we conclude that this proceeding is a transitory action that should have been brought in the county where the defendant trustee resided or was summoned. Ark. Stat. Ann. § 27-613.

With respect, however, to this particular case, as distinguished from others that may arise later on, we agree with the appellee's contention that the trustee waived his objection to the venue. He first appeared specially to file a motion to quash the service, which was overruled. He then filed an answer in which he attempted to preserve his special appearance. The trouble is that he included this request for affirmative relief: "Defendant further pleads by way of his answer that his fees as trustee should be made current and the court should fix a reasonable attorney's fee to be paid from the trust estate as costs in defending this action."

In *Federal Land Bank of St. Louis* v. *Gladish,* 176 Ark. 267, 2 S. W. 2d 696 (1928), we explained why a demand for affirmative relief enters one's appearance: "But one cannot come into court, assert a claim, ask the court for affirmative relief, and then, when there is an adverse judgment, claim that the court had no jurisdiction over his person. If this could be done, the appellant would have the opportunity and advantage of prosecuting its claim and, in case it recovered judgment, it could collect and at the same time take no chances of a judgment against itself."

In that case we were referring to jurisdiction of the person, which is what is involved here. A defeat of venue goes to jurisdiction of the person and therefore may be waived. *Gland-O-Lac Co.* v. *Creekmore,* 230 Ark. 919, 327 S. W. 2d 558 (1959). That is manifestly the right view, there being no sound reason why a defendant should not be at liberty to enter his appearance and try the case in a county other than the one designated by the venue laws.

The point is not argued, but we have not overlooked the possibility that in some situations a defendant might, as a practical matter, be compelled to ask affirmative relief to avoid the risk of losing his rights under the statute that makes the assertion of a counterclaim mandatory. Ark. Stat. Ann. § 27-1121; *Shrieves* v. *Yarbrough,* 220 Ark. 256, 247 S. W. 2d 193 (1952). We do not reach that question here, because the trustee's request that his fees be made current was not a proper counterclaim against the life beneficiary of the trust. Such a request involves primarily the trust property, as the beneficiaries are not personally liable for expenses of the trust. Restatement, Trusts (2d), § 249 (1959). The beneficiaries of the remainder interest in the trust should have been brought into the case if the trustee's compensation was to be determined and paid from the trust assets. Hence, for want of all proper parties, the trustee's failure to ask that his fees be fixed in this proceeding would not have precluded him from seeking that relief at a later date. It is therefore evident that the filing of the appellant's request for affirmative relief was not mandatory under the counterclaim statute. (Even though the request was later withdrawn, it was effective as an entry of the trustee's appearance.)

(*b*) The extent to which economic inflation called for an increase in the monthly payments to the testator's widow was a question of fact in the court below. The trustee relied upon the Government's cost-of-living figures to show that the increase had been only 18.1% since

the testator's death. The appellee's proof would have supported much greater liberality in the award. Much of her testimony, however, went to show that, disregarding her other sources of income, she is unable to live on less than $300 a month. That is not the test, the issue being the extent to which economic inflation demands an increase in the monthly allowance. On conflicting proof we cannot say that the chancellor's decision was against the weight of the evidence.

(*c*) The chancellor, on his own initiative, decided to supervise the administration of the trust from now on. Had the trustee requested such supervision of his stewardship, the court's action would have been proper. Restatement, *supra,* § 260. But no such request was made. Judicial supervision of a trust unavoidably involves added expense in court costs and attorneys' fees. In the absence of a direction by the creator of the trust that it be so supervised and of any peculiar facts suggesting the desirability of such judicial scrutiny, we are of the opinion that the issue should not be raised by the court on its own motion, however desirable the court may think that course to be. True, the appellee now asks that the court's directive be upheld, but she did not establish even a hint of misconduct on the trustee's part that might call for an annual accounting in the chancery court. We are of the opinion that the decree should be modified to delete the directive that in effect domesticates the trust in Faulkner county.

As so modified the decree is affirmed.

FOGLEMAN AND BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. Venue means the place, *i. e.,* the county or district wherein a cause of action is to be tried. *Gland-O-Lac* v. *Franklin County Circuit Court,* 230 Ark. 919, 327 S. W. 2d 558. Where the court has jurisdiction of the subject matter in a transitory action, such as this case, and venue is determined by the domicile or residence of the defend-

ant, venue may be waived. *Arkansas Association of County Judges* v. *Green,* 232 Ark. 438, 338 S. W. 2d 672; *Gland-O-Lac* v. *Franklin County Circuit Court, supra; Crutchfield* v. *McLain,* 230 Ark. 147, 321 S. W. 2d 217. This waiver can be accomplished by a failure of a defendant to make objection at the first opportunity and before taking some step indicating satisfaction with the venue or constituting an entry of appearance. *Barnes* v. *Balz,* 173 Ark. 417, 292 S. W. 391; *Howe* v. *Hatley,* 186 Ark. 366, 54 S. W. 2d 64; *Mutual Benefit Health & Accident Ass'n* v. *Moore,* 196 Ark. 667, 119 S. W. 2d 499; *Arkansas State Racing Commission* v. *Southland Racing Corp.,* 226 Ark. 995, 295 S. W. 2d 617; *Crutchfield* v. *McClain, supra; Gland-O-Lac* v. *Franklin County Circuit Court, supra; Arkansas Ass'n of County Judges* v. *Green, supra.*

I have not been able to find any case, however, either in Arkansas or other jurisdictions that holds that the venue is waived by any act of the defendant when, as here, the objection is timely made and preserved.

As I see it, the real error in the majority opinion is in equating venue with jurisdiction of the person. Jurisdiction of the person is the power of the court to hear and determine the subject matter of a controversy between the parties to a suit, *i. e.,* to adjudicate or exercise judicial power over them. *Lamb & Rhodes* v. *Howton,* 131 Ark. 211, 198 S. W. 521. It is the power to render a personal judgment in a particular case or to subject the parties to the court's decisions and rulings. 21 C. J. S. *Courts* § 15, p. 32; Black's Law Dictionary, 4th Ed., p. 992. It is based upon appearance of the person or the issuance and service of proper process upon him in the manner required by law. Bouvier's Law Dictionary, Rawles 3rd Ed., p. 1761; *Stevenson* v. *Christie,* 64 Ark. 72, 42 S. W. 418; *Federal Land Bank of St. Louis* v. *Gladish,* 176 Ark. 267, 2 S. W. 2d 696; *Healey & Roth* v. *Huie,* 220 Ark. 16, 245 S. W. 2d 813; 20 Am. Jur. 2d *Courts* § 106, p. 465.

Equating "venue" in this case with "jurisdiction of the person" is not consistent with prior actions of this court. In cases involving venue, rather than question of service of process, it is said that a motion to dismiss for want of venue might be treated as a motion for change of venue and where well taken, the cause should be removed to the proper venue. *Terminal Oil Co.* v. *Gautney, Judge,* 202 Ark. 748, 152 S. W. 2d 309; *Ft. Smith Gas Co.* v. *Kincannon,* 202 Ark. 216, 150 S. W. 2d 968 (on rehearing). Had those cases been treated as if the question was one involving jurisdiction of the person, the only proper action would have been to dismiss them.

We would be more consistent if we followed the precedent in cases wherein venue was based on the residence of, or place where summons was served on, a codefendant. In these circumstances, it has been held that by filing a counterclaim (not then compulsory) a defendant, whose timely motion questioning venue had been overruled, did not make the court his own forum so that he could not further question the judgment against him. *Seelbinder* v. *Witherspoon,* 124 Ark. 331, 187 S. W. 325. While this case is discussed as not having been applicable to the facts in *Federal Land Bank* v. *Gladish,* 176 Ark. 267, 2 S. W. 2d 696, cited by the majority, because the venue there was governed by a statute which specifically exempted a nonresident defendant from judgment where no judgment was rendered against a resident defendant, it is quite clear that venue was involved in the *Seelbinder* case and jurisdiction of the person in the *Federal Land Bank* case. That jurisdiction of the person was the governing principle in the *Federal Land Bank* case is made quite clear by these words in the opinion:

> "The appellant in this case, by filing a counterclaim and asking for affirmative relief asking the court to give it judgment, thereby enters its appearance, and waives any defense there might be *in the service or*

> *any failure to get proper service,* if there was such failure. In other words, the defendant, by filing a counterclaim and asking affirmative relief in the court, thereby subjected itself to the jurisdiction of the court *whether it had been served at all or not.*" [Emphasis ours]

This statement clearly recognizes that the case was governed only by rules pertaining to appearance or proper service, the basis of jurisdiction of the person.

It seems to me that the rule pronounced here by the majority will lead to some undesirable results. Suppose, for instance, that because of the pendency of an action involving corpus personalty brought by a cestui que trust in the wrong venue, as this one was, it became advisable for the trustee to seek injunctive relief against the plaintiff in order to protect the trust property after his objection to the venue had been overruled.[1] He could then be said to have submitted the trust to the trial of a proceeding in a county remote from the trust property, the records of the trust or witnesses who might be readily available at the proper venue but not at the improper one. I respectfully submit that the precedent is a bad one. Such a result seems to me to be just as vicious as the rejected rule that one who appealed from an adverse ruling on a motion to quash for want of jurisdiction of the person thereby entered his appearance. See *Anheuser-Busch Company* v. *Manion,* 193 Ark. 405, 100 S. W. 2d 672. It is strongly indicated in *Harger* v. *Oklahoma Gas & Elec. Co.,* 195 Ark. 107, 111 S. W. 2d 485, that where objection was made and preserved, such actions as motions for continuance, requests for additional time to plead, contest of motions and motions to transfer from law to equity should no longer be considered as voluntary appearances.

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[1]Such a situation could well arise under conditions which would make the filing of an independent action impossible or impractical.

While I would not reach the other points treated by the majority, I would concur in the result reached on them.

I would reverse and dismiss.

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

CARLOND HAMMOND *v.* STATE OF ARKANSAS, EX REL JOHN DAVIS, SHERIFF

5311 424 S. W. 2d 861

Opinion delivered February 26, 1968
[Rehearing denied April 1, 1968.]

Darrell Hickman, for petitioner.

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

PAUL WARD, Justice. This is a review of a refusal by the Circuit Court of White County to grant Carlond Hammond (Petitioner) a Writ of Habeas Corpus whereby he sought to evade extradition to the State of Louisiana. A brief statement of facts from which stems this litigation is set out below.

On May 30, 1967 the Governor of Louisiana signed requisition papers directed to the Governor of Arkansas asking for the return of Petitioner who was charged in 1964 with the crime of stealing $25,000 in Louisiana. On August 2, 1967 a hearing was held on the matter in the office of the Governor of Arkansas, and one week later the Governor of Arkansas issued a warrant to have Petitioner arrested by the sheriff of White County and placed in jail. Thereupon Petitioner applied for a Writ of Habeas Corpus in the Circuit Court of said county to obtain his freedom. A hearing was had, and on September 6, 1967 the trial judge denied the petition and remanded Petitioner to the custody of the sheriff of White County.

On September 22, 1967 Petitioner filed this Petition for a Writ of Certiorari, and now urges three grounds for a reversal of the trial court.

One. It is first contended "the Governor of Arkansas improperly delegated all responsibility for determining the validity of the extradition papers".

We find no merit in this contention which is based on the fact that Bob Scott (an agent or employee of the Governor) examined the requisition papers and found them adequate before the Governor signed the warrant of arrest.

Ark. Stat. Ann. § 43-3002 (Repl. 1964) provides that it is the duty of the Governor to have arrested and delivered to another state any person charged in that state with a felony who has fled from justice. Section 43-3004 provides that the Governor may call upon the Attorney

General to investigate or assist in investigating the "demand" and report to him. Section 43-3007 provides that if the Governor decides the "demand" should be complied with, "he shall sign a warrant of arrest. . . ."

We find nothing in the above statutes which forces a conclusion that the Governor *must* personally make the investigation or have it made by the Attorney General. It must be recognized that a governor has the right to rely on his agents or employees to make investigations and report their findings, and to rely thereon. This is consistent with his *right* to call on the Attorney General for assistance and advice if he deems it necessary. Obviously the legality of the Governor's action in signing the warrant of arrest in this case is not dependent on the source of the information upon which he acted.

Two. It is next argued that "The documents of 'demand' do not show probable cause. . . ."

Demand documents refer here to certain documents executed in Louisiana setting out the facts relative to the accusations against Petitioner. It is necessary therefore to set out below a brief summary of these documents.

(a) Morris Lucia who is a resident of Louisiana, in an affidavit sworn to before a District Judge of said state, stated, in essence: On May 13, 1964 Joe Fassulo, whom I knew, introduced me to Carlond Hammond (Petitioner) who told me he knew a "person" who had $200,000 in bills of large denominations and desired to exchange them (at a 40% discount) for bills of smaller denominations; Petitioner stated the deal was legitimate since the "person" had previously been in trouble with the revenue agents and feared circulation of the large bills might renew the trouble; a week later I was informed by Joe that Petitioner had arranged for me to meet the "person" at a hotel in Opelousas to effect an exchange of bills; Joe and I went to the hotel where I was told the "person" would not negotiate per-

sonally with me; Therefore, I gave Joe $25,000 to deliver to the "person"; About twenty minutes later Joe returned and said Petitioner took the money and "disappeared into the night". [On the same day affiant proceeded to have Petitioner charged with theft.]

(b) On June 16, 1964 the Governor of Louisiana issued a signed document stating that he was informed Petitioner had taken refuge in Arkansas; that he had made an application to the Governor of Arkansas for the surrender of Petitioner, and had appointed an Agent to take Petitioner in custody. [All the above mentioned documents were forwarded to the Governor of Arkansas.]

For reasons, not made entirely clear in the record, the extradition proceedings were delayed until May 30, 1967 when the Governor of Louisiana made another application to the Governor of Arkansas, based on the documents previously mentioned.

Based on the above documents, it is our opinion that the trial court was correct, and that the extradition of Petitioner was justified and legal. Conceding that Lucia did not actually see Petitioner take his money, he did know and swear that Petitioner was an active participant in the scheme to deprive him of his money. This fact would make Petitioner a participant in the crime charged. Ark. Stat. Ann. § 43-3002 (Repl. 1964), in part reads:

> ". . . it is the duty of the Governor of this state to have arrested and delivered up to the Executive Authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state."

The pertinent Louisiana law is clear. L. S. A. § 14:23 reads:

"The parties to crimes are classified as (1) Principals and (2) Accessories after the fact."

L. S. A. § 14:24 reads:

"All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals."

Three. Again we are unable to agree with the contention that this proceeding violates due process under the doctrine of res judicata. Petitioner here relies on the alleged fact that previously an attempt was made to have him extradited but failed because of a lack of sufficient evidence.

Conceding the above allegation to be true it would not, in our opinion, constitute res judicata. Black's Law Dictionary defines "Res judicata" as: "A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." In Am. Jur. (Extradition) § 57, there appears this statement:

"Where a first application for extradition is refused on the ground that the evidence presented is insufficient, it leaves the proceeding in the same condition as in other cases of preliminary examination, and there may be a second inquiry. The release of a person on the ground of informality or mistake in the proceedings is not a bar to a subsequent arrest on perfected papers or legal proceedings."

The case of *Letwick* v. *State*, 211 Ark. 1, 198 S. W. 2d 830, dealt with this issue on facts similar to those of this case, and the Court said:

"There is no question of former jeopardy in this case. Indeed the question is whether appellant shall

be returned for a trial to the state where the offense is alleged to have been committed."

The Petition is denied.

ARKANSAS BEST FREIGHT SYSTEM, INC.
v. WALTER BROOKS

5-4449 424 S. W. 2nd 377

Opinion delivered February 26, 1968

Harper, Young, Durden & Smith, for appellant.

Shaw, Jones & Shaw, for appellee.

LYLE BROWN, Justice. The trial court affirmed a finding of the Workmen's Compensation Commission

that appellee, Walter Brooks, was totally disabled. The employer-appellant, Arkansas Best Freight System, Inc., controverted any disability in excess of fifty per cent to the body as a whole, that being the highest medical disability in evidence. Appellant contends there is not sufficient competent evidence to warrant an award based on total and permanent disability. The attorney's fee is also questioned.

On the issue of degree of disability we shall examine the facts in the light most favorable to the Commission's findings. Brooks was fifty-two years old at the time of the accident. He attended school some two or three years and thinks he "made it through the second grade." For thirty-six years he had been a truck driver, sixteen years for ABF. He sustained injuries in an accident on February 28, 1962, while operating a tractor-trailer unit. Principally the lower back and neck were injured. Because of the injuries he was able to work only intermittently under medication from the time of the accident until late in October. Surgery was performed in early November. The vertebral laminae on one side were removed; because of the "hour-glass constriction" at the L-3 and L-4 interspaces it was performed bilaterally; a ruptured intervertebral disc at the right L-4 interspace was removed, as well as the disc at L-3. His medical and hospital expenses have been approximately $3,000. While he was under therapy after the operation he was advised by the doctor to try driving. He went out on a few runs for ABF but stated that the pain was unbearable even under medication. Since those experiences he has not been able to do any physical labor. He tried to run a power lawnmower in the summer of 1966 but was unable to do so. In early 1967, he testified, he lifted his granddaughter, who weighed about seventeen pounds, and the strain placed him in traction. He says he is presently unable to drive his own car. He has been on medication continuously since the accident. A few hours in a sitting position causes pain and causes the right leg to go to sleep. Bed rest is required twice daily.

Brooks and two other truck drivers of long experience described the usual duties of truck transport operators. Besides actual driving they load and unload freight at terminals along their route; they change trailers, which involves rolling "the dolly wheels down and get the pin open on the fifth wheel"; sometimes it is a two-man job; the turning of corners with a heavy load requires substantial physical exertion; some trips take up to fifteen hours, including driving, loading, and unloading.

Two surgeons, one an orthopedic and the other a neurological surgeon, estimated Brooks' disability. The latter performed Brooks' surgery. He estimated Brooks' disability to be 25 per cent to 30 per cent to the body as a whole and stated that the disability prevented claimant from driving a transport truck and performing the incidental duties. As to functional disability the orthopedist assessed 25 per cent and estimated "that for additional matters this might be doubled to 50%." The additional disability was described as "psychophysiological," a term used to describe a reaction by the patient based on both his emotional and physical state. The doctor found no evidence of malingering. He was further of the opinion that Brooks would be running a risk if he lifted more than forty or fifty pounds.

The pronouncement in *Glass* v. *Edens,* 233 Ark. 786, 346 S. W. 2d 685 (1961), settled the law with reference to non-scheduled injuries. "Loss of the use of the body as a whole" involves two factors. The first is the functional or anatomical loss. That percentage is fixed by medical evidence. Secondly, there is the wage-loss factor, that is, the degree to which the injury has affected claimant's ability to earn a livelihood. As stated in *Mann* v. *Potlatch Forests,* 237 Ark. 8, 371 S. W. 2d 9 (1963), the second element is to be determined by the Commission, based on medical evidence, age, education, experience, and other matters reasonably expected to affect the earning power. We might add that whether an

injured claimant can be trained to perform other work is ofttimes a factor.

Actually, the rule in *Edens* is far from new to jurisprudence. It is stated that "Arkansas was one of the last states to give consideration to loss of wages or diminution of earning capacity as an element in determining awards for disability." It is by far the majority rule, as pointed out by Prof. Robert R. Wright in "Compensation for Loss of Earning Capacity," Ark. L. Rev. 269 (1965).

Had a jury reached the same conclusion as did the Commission, we could not say there was no substantial evidence to support it. That is the test. Considering the medical testimony, age, experience, and education (all of which have been described), we hold the Commission's findings to be substantially supported.

The remaining question concerns allowance of the attorney's fee. For thirty-nine weeks ABF paid temporary total disability. Then for 124 weeks Brooks was paid for permanent partial disability based on 27½ per cent permanent partial disability to the body as a whole. Under date of October 19, 1966, ABF gave notice of suspension of compensation. That was the proper expiration date if its liability did not exceed the formula based on 27½ per cent disability. Objection was made either by the claimant or by his attorney and the matter was set for hearing. One week before the hearing, counsel for ABF advised Brooks' attorney that ABF would accept an evaluation of 50 per cent permanent partial disability. It is ABF's contention that it has never controverted 50 per cent partial; Brooks contends that it controverted any amount over 27½ per cent partial. The Commission found that ABF had in fact controverted any disability exceeding 27½ per cent. For 124 weeks ABF contended that was the maximum disability and suspended payments when it had met that liability. After Brooks employed counsel to protect his rights, and just one week before the scheduled hearing, ABF raised the figure to

50 per cent. ABF's suspension of payments amounted to a declaration that it considered its obligation completed and intended to pay no more. Brooks protested. Therefore the issue was joined. Dr. Stanton advised ABF under date of June 6, 1966, that he fixed the medical disability at 50 per cent. Notwithstanding, ABF continued to make payments on the basis of 27½ per cent until October, at which time notice of final payment was given. We cannot say the Commission erred.

Affirmed.

ELZIE HEFLIN *v.* PEPSI COLA BOTTLING CO. ET AL

5-4414 424 S. W. 2d 365

Opinion delivered February 26, 1968

Sibas H. Brewer Jr., for appellant.

Barrett, Wheatley, Smith & Deacon, for appellees.

JOHN A. FOGLEMAN, Justice. The issue here is whether appellant's claim for additional compensation is barred by the terms of Ark. Stat. Ann. § 81-1318(b) (Repl. 1960). The subsection reads:

> "Additional compensation. 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 [1] year from the date of the last payment of compensation, or two [2] years from the date of accident, whichever is greater."

Appellant suffered a compensable injury on May 7, 1960. He was examined and treated by Dr. Richard M. Logue over a period extending from June 15, 1960, until his discharge on January 15, 1963. On January 21, 1963, the doctor made a report in letter form to United States Fidelity & Guaranty Company, the insurance carrier. The concluding paragraph includes a statement that a bill for services is enclosed. The final payment to appellant for temporary total and permanent partial disability was made on May 6, 1964, and the Workmen's Compensation Commission showed the matter closed on September 17, 1964. On November 1, 1965, Dr. Logue sent claimant a statement for $715.00 for medical services rendered during the period from January 2, 1962, to January 15, 1963. The statement was not sent to the Commission, but was paid by the carrier on November 19, 1965, without any order of the Commission ever having been made. Subsequently, Dr. Logue rendered a statement for $10.00 for an examination of appellant on January 18, 1965. Appellees did not know of this examination and did not pay the bill therefor. Appellant filed a claim for additional compensation on April 26, 1966. The referee, Commission and circuit court all held that the claim was barred by § 81-1318(b).

Appellant contends that the payment of the bill for medical services on November 19, 1965, was the "last payment of compensation" in the sense of the statutory provision, so that his claim was well within the statutory period. We do not agree.

The employer (or his insurance carrier) is required to furnish medical service to an injured employee. Ark. Stat. Ann. § 81-1311. Compensation under the act includes such medical services. Section 81-1302(i); *Ragon* v. *Great American Indemnity Co.,* 224 Ark. 387, 273 S. W. 2d 524. Appellant says that the holding of this court in *Reynolds Metals Co.* v. *Brumley,* 226 Ark. 388, 290 S. W. 2d 211, supports his contention. We do not so construe this decision. The opinion in that case points out that the holding in the *Ragon* case followed the general rule that the *furnishing* of medical services constitutes payment of compensation within the meaning of § 81-1318(b) and that such "payment" suspends the running of the time for filing a claim for compensation. The decision is not in any respect based on the time at which the medical bills were paid. This holding is sound because the claimant is "compensated" by the furnishing of the services and not by the payment of the charges therefor.

Later, in *Phillips* v. *Bray,* 234 Ark. 190, 351 S. W. 2d 147, this court held that a position identical to that of appellant here was erroneous. The claimant there sought to avoid the bar of the statute by showing that a doctor's bill had not been paid by the employer. The Workmen's Compensation Commission and the Grant Circuit Court found that the bill had not been, but should be, paid. In holding against the claimant's contention, this court said:

> "* * * Although appellant has not specifically pointed out just how and why this would toll the statute, we assume it is because medical bills are a part of compensation and therefore the one year

limitation would not begin to run until the last bill is paid. If this contention is sound, then appellant still has time in which to file his new claim. For reasons set out below, we have concluded that the above contention is not tenable."

The court then interpreted § 81-1311 to require a doctor to present his charges to the Workmen's Compensation Commission for approval before the claim is finally processed. The opinion states that the burden was on the claimant to show that the unpaid medical bill had been duly filed with the Commission, since "otherwise his claim was obviously barred by the one year statute of limitations." No effort was made here to show that Dr. Logue's bill had ever been presented to the Commission. We cannot see how the payment of this just bill for medical services furnished more than one year prior to the filing of appellant's claim for additional compensation changes the situation prevailing in the *Phillips* case. That it does not do so is plainly indicated by the court's affirmance of the trial court and the Commission there. The court clearly stated that there was no inconsistency in its opinion and the findings of the Commission and the circuit court that the employer was indebted to the doctor for the amount of his unpaid bill. The opinion stated that the Commission had the authority to order payment of a just bill whether filed in accordance with the statute or not, but nevertheless held that claimant was barred.

Appellants cite cases from other jurisdictions claiming support for their position. While we find it unnecessary to resort to these holdings, in view of our own decisions, it is noted that most of them also recognize that it is the furnishing of the medical service, not the payment therefor, which constitutes the "payment of compensation."

The judgment is affirmed.

B. A. ADKINS *v.* SAM KELLEY D/B/A KELLEY'S GRILL

5-4447 424 S. W. 2d 373

Opinion delivered February 26, 1968

Henry & Boyett, for appellant.

Lightle & Tedder, for appellee.

J. Fred Jones, Justice. B. A. Adkins filed suit in the White County Circuit Court against Sam Kelley, doing business as Kelley's Grill. The suit was for $25,000.00 compensatory and $25,000.00 punitive damages for personal injuries alleged by Adkins as a result of injuries he sustained in an altercation with Kelley's employees in the kitchen of Kelley's Grill. A jury trial resulted in a verdict upon which judgment was entered in favor of Adkins for $300.00 compensatory damage and nothing for punitive damage, and Adkins has appealed. The only question presented to us is whether the trial court erred in instructing the jury. Appellant contends that there was such error, and he relies on the following points for reversal:

> "In modifying plaintiff's (appellant's) instruction No. 7 on damages and in giving the court's modified version:
>
> "The trial court erred in holding as a matter of law that AMI 2202 was not a measure or element of damages, rather a factor in determining other elements.
>
> "The trial court erred in modifying AMI 2208 to limit, as a matter of law this element or measure of damages to any embarrassment or mental anguish suffered as a result of any scars and disfigurement or visible results of the injury."

The facts very briefly are these: The appellant, Adkins, had been a regular customer in taking meals at appellee Kelley's Grill. On the evening of August 7, 1963, appellant met some invited guests at Kelley's Grill for dinner. A waitress at the Grill took their orders and when the food was not served after a considerable period of time, they were advised by the waitress, upon inquiry, that the cooks in the kitchen of the Grill had refused to prepare their orders. Appellee,

Kelley, was away on business and had left his brother in charge of the cafe. The brother was temporarily off the premises, so appellant went into the kitchen to determine why the cooks had refused to prepare the food. An altercation ensued and one of the cooks struck appellant with a large knife or meat cleaver, resulting in a rather extensive laceration, about eight inches in length, extending along the left side of appellant's neck from up in the hair line near the occipital protuberance to near the left clavicle.

At the trial of the case, Dr. T. L. Adair, who treated Mr. Adkins, testified that Mr. Adkins has some residual limitation of motion in his neck because of the injury, and as to the specific cause of this, Dr. Adair testified as follows:

> "Q. What, doctor, medically would be the cause of that?
>
> A. Probably scar formation, or shortening. Atrophy from disuse and shortening, and scar.
>
> Q. If it were scar formation, would it be that that is visible, or that beneath the skin?
>
> A. It would probably be the scar to the muscle fascia, or sheath, muscle sheath and fascia. The skin might limit him some. I mean it might limit him some, but I don't think the scar is big enough for that."

The trial court refused to give appellant's requested instruction No. 7, on the measure of damages, as offered by appellant, but did give it as modified by the court, and this is the error complained of by the appellant on this appeal.

Appellant's requested instruction No. 7 followed the general instructions laid down in AMI 2201 in setting out the elements of damage to be considered. It followed AMI 2202 (B) in paragraph 1 as to the nature, extent,

duration, and permanency of any injury, and followed AMI 2208 in paragraph 6 as to scars, disfigurement, and visible results of injury.

Appellant requested instruction No. 7, as follows:

"If you find for the plaintiff, you must then fix the amount of money which you find will reasonably and fairly compensate him for any of the following elements of damages:

1. The nature, extent, duration and permanency of the injury.

2. The reasonable expense of any necessary medical care, treatment and services received.

3. Any pain, suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.

4. The value of any earnings lost or reasonably certain to be lost in the future.*

5. The present value of any loss of earning capacity or ability to earn in the future.*

6. Any scars and disfigurement or visible results of his injury."

The trial court gave appellant's instruction No. 7 in a modified form, as follows:

"If you find for the plaintiff, you must then fix the amount of money which you find will reasonably and fairly compensate him for any of the following elements of damages:

1. The reasonable expense of any necessary medical care, treatment and services received.

*We do not imply that *both* of these instructions, AMI 2206 and AMI 2207, should have been given in the form requested. (See note on use AMI 2207.)

2. Any pain, suffering and mental anguish experienced in the past and reasonably certain to be experienced in the future.

3. The value of any earnings lost.

4. The present value of any loss of earning capacity or ability to earn in the future.

5. Any embarrassment or mental anguish suffered by reason of any scars and disfigurements or visible results of his injury.

In arriving at these amounts, you may take into consideration the nature, extent, duration and permanency of his injuries.

Whether any of these things have been proved is for you to decide."

Thus, we see by modifying paragraph 1 of the instructions requested by the appellant (AMI 2202), the trial court eliminated the jury's consideration of "nature, extent, duration and permanency of the injury" as elements of damage, but confined the jury's consideration of these elements as *factors to be considered* in assessing the "*amounts*" of the other elements of damage. In this, we conclude, the court erred.

In volume 18 of Arkansas Law Review, at p. 305, is found the following statement:

"Loss of earning capacity as an element of damages is sometimes confused with *permanency of the injury, which is universally recognized as a separate element of damage.* A lawyer or minister might lose an arm with no loss of earning capacity, but he would still be entitled to recover for the permanency of his injury. A hopeless mental defective with no earning capacity can recover for loss of his sight, because he has sustained a permanent injury. A recent Oklahoma decision makes plain the distinction between these two *separate elements* of damages

against the contention that a double recovery was being allowed. It has been said that a permanent injury is one that deprives plaintiff of his right to live his life in comfort and ease without added inconvenience or diminution of physical vigor, but there may be no pecuniary loss or loss of earning capacity in conjunction." (Emphasis supplied.)

This Law Review article is replete with footnotes citing many cases from this and other jurisdictions, including *Shebester, Inc.* v. *Ford,* 361 P. 2d 200 (Okla. 1961). Also noted is 29 NACCA L. J. 195, with an exhaustive comment on the point. The comment in 29 NACCA Law Journal, cited in the footnote, supra, is comprehensive, with many pertinent citations on this point, and states on pages 198 and 200 in accordance with our own views, that:

"It is sometimes incautiously stated that a verdict awarding damages for future disability covers only pain and suffering, beyond the special items (expenses and loss of earning power). Such a view is inaccurate, because compensation is routinely awarded for *disability per se,* as the *Shebester* case (supra) points out, and also for the non-pecuniary, non-pain aspects of the disabled condition, such as deprivation of a normal life and of a chance to pursue non-economic hobbies or recreation.

* * *

As the principal case, *Shebester,* demonstrates, permanent and continuing disability is not only an element of damages itself but also a type of injury, which when satisfactorily proved, is the basis of award of the other elements of damages, such as loss of capacity to work or post-trial pain and suffering."

We are of the opinion that the trial court erred in its failure to give AMI 2202 as offered under paragraph

1 of appellant's requested instruction No. 7 and in modifying this instruction as pointed out, supra.

Appellee contends that since the permanency of the injury was in dispute, the instruction originally offered by appellant [AMI 2202 (B)] was not the proper instruction, but that AMI 2202 (C) should have been used. We note that if permanency was disputed by appellee here, it was only by the general denial in his answer to appellant's complaint and not by evidence presented to contradict the testimony of Dr. Adair, when he testified as follows:

> ". . . He has some residue. He's reached a plateau of improvement, and there is some residue to his injury. And those things that you mentioned, of scar and pain and limitation of motion are the residue. And I will say that he has reached a plateau, you know, he probably won't get any better from that."

Appellee also contends that even if there was error, it was harmless and not prejudicial to appellant. With this we cannot agree. A close inspection of the elements of damages in the instruction given, shows that none of these elements pertain to compensation for permanent injury. Limiting the consideration of the jury to permanency as a factor in the other elements of damage is not sufficient when permanency itself is an element. With this in mind, we cannot say that the error was harmless. The evidence was sufficient for the jury to be charged on permanency of appellant's injury as an element of damages.

We conclude that the trial court erred, and this case must be reversed, because of the modification the trial court made in AMI 2208. Paragraph 5 of the instruction, as modified by the trial court, takes scars, disfigurement and visible results of injury, out of the elements of damage where they belong under AMI 2208 and where they have been at least since 1914. *Ferguson & Wheeler*

Land, Lumber & Handle Company v. *Good,* 112 Ark. 260, 165 S. W. 628. This instruction, as modified, limited the jury's consideration to *embarrassment and mental anguish* suffered by reason of any scars and disfigurement or visible results of the injury. Scars and disfigurement may be real *elements of damage* separate and apart from mere embarrassment or the mental anguish they may cause. (See *Volentine* v. *Wyatt,* 164 Ark. 172, 261 S. W. 308, and other cases cited in comment under AMI 2208). The appellant was entitled to AMI 2208, as requested under proof in this case, and the trial court erred in its refusal and in its modification.

We feel that this case calls for reiteration, with added emphasis, of the per curiam order of this court on April 19, 1965, wherein it was said:

> "If Arkansas Model Jury Instructions (AMI) contains an instruction applicable in a civil case, and the trial judge determines that the jury should be instructed on the subject, *the AMI instruction shall be used unless the trial judge finds that it does not accurately state the law. In that event he will state his reasons for refusing the AMI instruction.* Whenever AMI does not contain an instruction on a subject upon which the trial judge determines that the jury should be instructed, or when an AMI instruction cannot be modified to submit the issue, the instruction on that subject should be simple, brief, impartial, and free from argument." (Emphasis supplied.)

The purpose of the AMI was to save valuable time in settling instructions at the trial level, to attain uniformity, to reduce confusion, to allow composition of instructions by the courts and attorneys with confidence and ease, and insofar as possible, with such accuracy as to reduce the number and necessity of appeals. The per curiam requirement, supra, recognizes the necessity for flexibility in the use of AMI. Thus, the trial judge may modify if he feels that AMI does not accurately

state the law, and, by placing his reasons in the record, the attorneys in considering an appeal, and the appellate court, in considering the points relied upon, may go straight to the heart of the alleged error and adjudge the validity of the refusal or modification of the instruction with greater dispatch and with greater accuracy as to specific point relied upon. To accomplish the purposes of AMI we must insist upon its use where applicable; to hold otherwise, would place us back into the confusion and inaccuracy of the pre-AMI era and destroy the usefulness and purpose of AMI.

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

Reversed and remanded.

BROWN, J., concurs.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot see how there was any prejudice in the instruction on disfigurement as given by the court on the facts in this record. All the cases I have been able to find in this state base this element of damage on humiliation and embarrassment, and other elements covered in the instruction that was given, *Ferguson & Wheeler Land, Lumber & Handle Co.* v. *Good,* 112 Ark. 260, 165 S. W. 628; *Gaster* v. *Hicks,* 181 Ark. 299, 25 S. W. 2d 760; *Perkins Oil Co. of Delaware* v. *Fitzgerald,* 197 Ark. 14, 121 S. W. 2d 877.

I can conceive of many circumstances in which there will be additional damages, but I do feel that the AMI instruction as drawn permits, and actually suggests, double damages, particularly where the instruction is given to include the nature, extent, duration and permanency of the injury as an element. Whatever damages

may be recoverable for disfigurement that are not covered in the elements permitting recovery for earnings to be lost in the future, loss of earning capacity and pain and suffering and mental anguish are certainly included in the nature, extent, duration and permanency of the injury. It is quite reasonable to suppose that one could be disfigured so as to handicap him in earning a livelihood and to require future medical attention, but I cannot see why disfigurement should be considered separately any more than injuries to the back and neck in the usual whiplash case or non-disfiguring injuries to other parts of the body. If there is any element that is not covered in case of disfigurement in the usual elements of damage, then I cannot see how it would be any more than humility and embarrassment which I feel are covered by mental anguish. In this respect I dissent from the majority.

I submit that the model instruction should be reexamined and more specific guides given for use of "disfigurement" as an element of damages.

MRS. T. L. MASTERSON *v.* IRIS TOMLINSON

5-4475 424 S. W. 2d 380

Opinion delivered February 26, 1968

Rhine & *Rhine*, for appellant.

Cecil Grooms, for appellee.

CONLEY BYRD, Justice. This is an appeal from a decree divesting appellant, Mrs. T. L. Masterson, of title to an automobile replevied by her from appellee, Mrs. Iris Tomlinson. Appellant's husband, T. L. Masterson, executed a conditional sales contract for purchase of a 1960 Chevrolet from Horton Chevrolet Company, through GMAC. When the contract was paid out and certificate of title to the car was sent by GMAC to Masterson, he assigned the title to appellant. She then filed a replevin action and obtained possession of the car from appellee. Appellee's answer and successful motion to transfer to chancery alleged that appellee had purchased the car, that she had traded in her old car for the down payment, that GMAC had refused to finance the car for her because she was a waitress and her income was below the level required by GMAC, that as an accommodation Mr. Masterson had agreed to take legal title and to sign the necessary papers to permit her to finance the car through GMAC, and that she had made each and every payment until the lien was fully paid. Asserting equitable ownership of the title, which can not be asserted at law, she prayed for transfer of the cause to chancery and for damages for the wrongful taking.

The chancellor awarded the car to appellee, but denied her damages for the unlawful detention.

Appellant argues that the pleadings and evidence do not support the decree. Of course, legal title to the car was in Masterson when he assigned the title to appellant without consideration. However, appellee's allegation that Masterson signed the contract and took title in his name only as an accommodation was substantially corroborated by appellee's witness Holland, the car

salesman. He testified that appellee had come to the car lot several times, that she had traded in a 1956 Chevrolet for the down payment, that when he started to get her financial statement he had told her that "GMAC will not finance anyone who works in a beer joint" and suggested that the car be put in a friend's name. When Masterson came to the car lot, Holland explained that all the papers would be in Masterson's name, except that the application for insurance would show appellee's name, birth date and driver's license number as the driver. Holland testified that he had seen appellee make a number of payments at the car lot, which in turn were forwarded to GMAC, and that he had never seen Masterson make any payments. Appellee introduced a number of cash receipts for $54.55 each from Horton Chevrolet Company, as well as a current pink slip, all of which were made out to T. L. Masterson. Mr. Masterson did not testify, although present in the court room.

All in all, we find that there is sufficient evidence to support the chancellor's decree vesting legal as well as equitable title in appellee. As was pointed out in *House* v. *Hodges,* 227 Ark. 458, 299 S. W. 2d 201 (1957, and *Robinson* v. *Martin,* 231 Ark. 43, 328 S. W. 2d 260 (1959), "Certificate of title [to a motor vehicle] *is not title itself but only evidence of title.*" Appellant, being an assignee of the certificate without consideration, stands in no better position than her assignor. The evidence is sufficient to show a resulting trust existed in favor of appellee. "The rule rests on the doctrine of equitable consideration and on the presumption or implication of law of the intention of the purchaser that he intends the purchase for his own benefit and the conveyance in the name of another as a matter of convenience or arrangement for collateral purposes." 54 Am. Jur., Trust, § 207. *Mortensen* v. *Ballard,* 209 Ark. 1, 188 S. W. 2d 749 (1945).

On cross-appeal, appellee contends that the court erred in refusing to award her damages for detention

of her car. In its decree, the court found that appellee should be awarded damages, but failed to make proper proof to sustain an award. Review of the record sustains the chancellor's findings.

Affirmed.

HARRY A. BELFORD *v.* BRENDA HUMPHREY

5-4480 424 S. W. 2d 526

Opinion delivered February 26, 1968
[Rehearing denied March 18, 1968.]

Rose, Meek, House, Barron, Nash & Williamson, and *John D. Eldridge,* for appellant.

Fletcher Long, for appellee.

CONLEY BYRD, Justice. This appeal by Harry A. Belford puts before us the issues of the permanency of the injuries of appellee Brenda Humphrey and the excessiveness of the $78,000 jury verdict in her favor. The litigation stems from an automobile collision in which Belford's vehicle struck the rear of appellee's "Thunderbird" with such force that both sides were "bucked out" and the left front seat was broken.

Following the collision on June 3, 1965, appellee, age 25, was hospitalized under the care of Dr. H. G. Lanford until June 10, 1965. During hospitalization she was treated for a whiplash injury of her cervical spine. Her treatment consisted of cervical traction, muscle relaxants and medication for pain. She was removed from Crittenden Memorial Hospital in West Memphis, Arkansas, to her home in McCrory by ambulance.

The day following her return from the hospital the pain was so unbearable that she screamed when her bed was moved. A local doctor was called about 3:00 to 4:00 a.m., who gave her a shot to relieve the pain. The pain continued to such an extent that she was returned to the hospital on June 17, 1965, where she again was put in traction and given muscle relaxants and pain medicine. She was discharged on July 1, 1965. At the time of her August 26, 1965, visit to the doctor, she was unable to return to work. Dr. Lanford testified that at that time she had a severe whiplash injury and he did not know what would be the outcome. For eight to ten months thereafter she slept in traction. Exercise and weight lifting were subsequently prescribed. At the

time of trial on January 30, 1967, appellee still complained of pain when she bent her neck forward as one does when ironing and typing, she was still on muscle relaxants, and had an appointment with her doctor some two weeks hence. Hospital and medical bills had accumulated in excess of $1,426.63 and were still accruing.

Testimony showed that appellee had been self-sustaining from her high school graduation in 1959 to the date of the accident. At that time she had been working at the General Electric plant in Memphis, Tennessee, where she earned in excess of $300 per month. Her job had required the bending of her neck to look down while testing light bulbs. She was in touch with General Electric for a year after the accident before they mailed her her separation papers.

When the doctor advised appellee that she could try to work, some three months before trial, she applied for employment at the Little Rock employment office, Timex, the Little Rock Police Department as a meter maid, the Newport Telephone Company, and the Augusta Corporation. Each time application was made she was asked to state why she had left her last job and to give her physical history. By trial date, she had been unable to obtain employment although she understood she was first up for the next available meter maid job with the Little Rock Police Department at a monthly salary of $235.

Prior to the accident appellee enjoyed bowling, but this she cannot do any more. She also liked to hunt and fish, but is unable to do this without pain.

Dr. H. G. Lanford testified that appellee had had pain during the entire course of her treatment. This he based on both subjective and objective symptoms, so that he did not rely solely upon her credibility to determine that she had pain. Her first real improvement was in November 1966 and resulted from exercises de-

signed to strengthen her neck muscles. Dr. Lanford testified that he had examined her in January 1967 before the trial and that she had suffered a personality change; also, that with the history of her injury and the long recovery period involved, she would have difficulty in finding employment anywhere a physical examination was given. On cross examination he stated emphatically that she would have prolonged pain for several hours when she held her head forward for any period of time. The doctor believed appellee incapable of any work involving the bending of her neck forward or backward.

Appellant introduced evidence to the contrary, but because review of a jury finding is limited to the substantial evidence rule, we have stated the facts in the light most favorable to appellee.

The issue of permanency arises through an objection to the instructions on the issue of damages, the mortality table and present value. Appellant points to our cases such as *St. Louis, I. M. & S. Ry. Co.* v. *Bird,* 106 Ark. 177, 153 S. W. 104 (1913). and *Midwest Bus Lines* v. *Williams,* 243 Ark. 854, 422 S. W. 2d 869 (1968), and argues that the issue of permanency should not have been submitted to the jury in the absence of expert medical testimony that the injuries were permanent to a reasonable degree of certainty.

Appellee argues that the injury here was such that a permissible inference of permanency was demonstrated by the evidence. See *Missouri Pac. Transp. Co.* v. *Mitchell,* 199 Ark. 1045, 137 S. W. 2d 242 (1940), and *Bailey* v. *Bradford,* 244 Ark. 8, 423 S. W. 2d 565 (1968).

Where the injury is only subjective in character and of such a nature that laymen cannot with reasonable certainty know whether there will be future pain and suffering, it is obvious the courts must demand expert opinion testimony. On the other hand, when the injury is objective in nature, such as when a limb is severed,

it is obvious that expert opinion testimony is not a prerequisite to submission of the issue of permanency to the jury. See 31 Am. Jur. 2d, Expert and Opinion Evidence, § 119. Between the two extremes are gray areas in which the issue of permanency becomes a matter of judgment.

Here the injuries had persisted for some twenty months; appellee had suffered a personality change; she was unable to perform certain movements without pain; she will have difficulty obtaining employment where a physical examination is required; and she was still taking eight muscle relaxant pills per day at time of trial. After reviewing the record, we are unable to say that it was error to submit the issue of permanency to the jury.

Appellant also complains of error in submitting to the jury the issues of diminished earning capacity in the future and future medical expenses. We hold these contentions to be without merit. The record shows that appellee had sought employment before the trial date and that if she had been able to find employment within her capabilities, the remuneration would not have been equal to her income at the time of her injury. Regarding future medical expense, appellee was and had been continuously under the doctor's treatment—in fact she had an appointment with him two weeks following the trial. Since the jury had before it the medical expenses that had accrued, it would not have been pure speculation for the jury to calculate the future expense upon the history of the expense to the date of trial.

Appellant filed two motions for new trial. The first, in addition to the issues above discussed, raised the issue of excessiveness of the verdict. The second alleged that subsequent to the trial appellee, on March 1, 1967, went to work as a meter maid at the monthly rate of $235, and that she had not missed any work up to and including July 4, 1967. Except for the excessiveness of the verdict, hereinafter discussed, we hold that the trial

court did not abuse its discretion in overruling the motions for new trial.

On the excessive verdict issue, the record shows special damages in the nature of medical expense and lost wages in excess of $8,000. In addition appellee suffered the injuries heretofore set forth. After reviewing the record in detail, we are unable to find sufficient evidence to sustain a verdict in excess of $58,000. If appellee will enter a remittitur for $20,000 within seventeen juridical days, the judgment will be affirmed. Otherwise it will be reversed and remanded for new trial.

BROWN, FOGLEMAN AND JONES, JJ., dissent.

LYLE BROWN, Justice, dissenting. The trial court permitted the jury to award damages based on permanent injuries and to compensate for future medical expenses. I would hold the submission of these issues to have been erroneous.

Where an injury per se does not show permanency to a reasonable degree of medical certainty, and where there is absent a medical opinion reasonably indicating permanency, the question of permanency should not be submitted to the jury. See *St. L. I. M. & S. Ry. Co.* v. *Bird*, 106 Ark. 177, 153 S. W. 104 (1913); *Midwest Bus Lines* v. *Williams*, 243 Ark. 854; and 85 ALR 1022. The recited requirements are fully supported by a line of our holdings cited in the case of *Keaton* v. *McCook*, 210 F. Supp. 226 (1962); that is not to say that the certainty must be absolute, but it must preclude mere conjecture or even probability.

Miss Humphrey suffered a whiplash injury to the neck. Her doctor testified that in 1965 he found a muscle spasm which could not be faked. At that time it was his opinion that as a result of the injury she could turn her head to the right only partially and that the movement of the head upward was then limited by approximately fifteen per cent. Then upon examination in 1966,

he was "delighted" with her "dramatic changes for the better" and concluded that prescribed exercises resulted "in improvement." Later in his testimony he made this statement: "I think this girl will have difficulty finding employment anywhere a physical examination is given". Yet the doctor does not say just how long that situation, in his opinion, would continue.

Miss Humphrey testified, describing her difficulty in neck movements and headaches. Her visits to the doctor have been virtually discontinued. She takes some type of tablets to relieve her muscle spasms and headaches. In her last two job applications she has stated that she had no physical limitations.

Appellant offered the testimony of an orthopedic surgeon who had been called upon to examine Miss Humphrey for the Social Security Administration. The first examination was in 1965 and the only other examination was in 1967, the latter apparently being for the purpose of testifying. It was his finding that she had sustained a whiplash injury and had received excellent treatment. He found no permanent injury.

Miss Humphrey's doctor was conceded to be an outstanding surgeon. *He was not asked to give a medical opinion as to the permanency of the alleged injury.* That fact is particularly significant in view of the unqualified opinion of appellant's doctor that there was no permanency.

The conclusion of this dissent is not out of harmony with our recent holding in *Bailey* v. *Bradford,* 244 Ark. 8, 423 S. W. 2d 565 (opinion of February 5, 1968). There the jury had only lay testimony with which to evaluate permanency. However, the objective evidence of appellee's injuries in that case, together with medical testimony of severe brain damage, were sufficient to indicate the permanency of her injuries.

To permit appellee to recover for future medical expenses presents a still more serious error. The only testimony in that respect is that she was taking pain tablets, the cost of which is not found in the record. There was no medical prediction that she would ever have to undergo future surgery or hospitalization.

I would reverse and remand for new trial.

FOGLEMAN and JONES, JJ., join in this dissent.

JAMES HARRIS ET AL *v.* GUARANTY FINANCIAL CORPORATION

5-4243 424 S. W. 2d 355

Opinion delivered February 26, 1968

H. Clay Robinson and *Harry C. Robinson,* for appellants.

Griffin Smith, for appellee.

BRUCE H. SHAW, Special Justice. In this appeal appellants seek to void a promissory note on the ground of usury. The Chancellor entered a judgment on the promissory note against appellants in the sum of $5,941.00 with interest at the rate of 10% per annum from the date of the judgment until paid.

The pertinent facts as disclosed in the transcript are not disputed. On March 6, 1963, appellants, James Harris and his wife, Elsie Lee Harris, entered into a construction contract with Joe Lee Homes, Inc. for the construction of a shell home. The construction contract provided that the appellants would pay $10.00 in cash on signing the construction contract, receipt of which was acknowledged, and a balance of $5,825.00 payable in monthly installments of $69.61 each, beginning May 1, 1963. The construction contract also provided that the appellants would execute a promissory note and deed of trust.

The promissory note and deed of trust were also executed March 6, 1963. The note and deed of trust provided for an indebtedness of $5,825.00 with interest from

the date of execution until paid at the rate of 10% per annum, payable in 144 consecutive monthly installments of $69.61, the first installment due May 1, 1963. The note provided that in the event of default for a period of one month or more the entire principal indebtedness with accrued interest at the option of the holder would become due and payable. It also provided for payment of attorney's fees and cost of collection together with other provisions not material to the issues in this appeal. The promissory note and deed of trust was assigned by Joe Lee Homes, Inc. to appellant, Guaranty Financial Corporation. Appellants defaulted on the installment due August 1, 1965, and the principal balance due at that time was $5,216.36.

Appellants contend that the note was usurious for the reasons that:

(1) A 5% late charge was assessed on the monthly payments after default.

(2) That interest computed on a daily basis rendered the transaction usurious because of an improper credit of the escrow account.

(3) That a $50.00 charge for title work was improper and should be charged to interest.

(4) That the $10.00 cash down payment called for by the construction contract rendered the transaction usurious.

Appellee denies that the inclusion of any of the items mentioned rendered the transaction usurious.

After appellants' default on the August 1, 1965, payment, appellee, in its subsequent collection letter, assessed a charge for delinquency of an additional $3.83. The appellants contend this late charge should be included as interest to test the transaction for usury. In *Carney* v. *Matthewson,* 86 Ark. 25, 109 S. W. 1024, a promissory note with an interest rate at 10% per annum provided that if the interest was not paid annually it would

become a part of the principal and thereafter bear interest as principal. The Court held that the late charge provided in the instrument after delinquency was a penalty and did not render the transaction usurious. In *Phipps-Reynolds Co.* v. *McIlroy Bank & Trust Company,* 197 Ark. 621, 124 S. W. 2d 222, the Court held that the lender, in considering delinquent interest to be part of the principal and to also bear interest, did not thereby render a transaction usurious. The late charge in the instant action was not agreed upon between the parties to the note and construction contract. The attempt to collect the $3.83 in the collection letter which is in the nature of a penalty for delinquency does not render the transaction usurious.

After default appellee computed interest from August 1, 1965, until February 1, 1966, as $304.22. This interest computation, which is $1.43 daily, appellants contend renders the transaction usurious if the balance in the escrow account of $60.85 is credited against the unpaid principal of $5,216.36, thereby reducing it to $5,155.51. It is not disputed that the escrow account was properly maintained. Suffice it to say that any credit of the balance in the escrow account would be applied first to interest and then to principal. To test a note and interest for usury the escrow account cannot be credited against the unpaid principal because the transaction must be viewed at the time consummated and not in relation to a balance that might thereafter accumulate in the escrow account. Appellants cite no authority which would justify applying an escrow account balance in such a manner. In other words, the balance in the escrow account cannot be used to test the transaction for usury when the underlying note and the interest thereon is lawful and does not exceed the 10% per annum maximum limitation imposed by the Arkansas Constitution.

The proof reflects that a charge was made and agreed to of $50.00 for "title work"; that this $50.00

was expended by the lender as a premium for title insurance, insuring the title of the mortgaged property. In support of their contention that the $50.00 charge for title insurance premium and the $10.00 down payment used for a credit report were improper and rendered the transaction usurious, appellants cite *Schuck* v. *Murdock Acceptance Corp.,* 220 Ark. 56, 237 S. W. 2d 1 (1952), *Hare* v. *General Contract Purchase,* 220 Ark. 601, 249 S. W. 2d 973 (1952), and *Winston* v. *Personal Finance Company of Pine Bluff,* 220 Ark. 580, 249 S. W. 2d 315 (1952), and state that these cases establish a rule that a lender may not assess service charges and increase the cash price for merchandise. These three cases involve consumer purchases or consumer loans and are not construction contracts as presented here. In *Schuck* v. *Murdock, supra,* the Court found the seller and the finance company listed a cash price for an automobile and after allowance of a down-payment and a trade-in, added on certain charges. The Court found on the facts that the add-on was an unauthorized charge in an attempt to evade the usury prohibition.

In *Winston* v. *Personal Finance Company, supra,* a loan was made of $108.00 evidenced by a promissory note. The borrower, Winston, received only $95.04. The note was for twelve (12) months and payable at $9.00 per month with interest on each monthly installment. The evidence disclosed that interest was calculated to be $5.40 with a service charge of $7.56 resulting in the $12.96 difference between the face amount of the note and the $95.04 Winston received. The Court found that of the $7.56 labeled as service charge, $3.76 was received by the lender for services of its salaried employees. The Court specifically finds that the $3.76 exacted for services performed by the lender's employees and fifty cents for a credit report were in reality "nothing more or less than interest charge". The Court, at page 585 of 220 Ark. states the following expenses may be charged by a lender in addition to the principal balance:

"The items 'b' and 'c' were the ordinary incidental expenses incurred by Personal in the course of its business. They were not items paid by Personal to a third person for the benefit of Winston. They are not like the cost of (1) an abstract paid to a third person, or (2) a title opinion paid a lawyer, or (3) recording fees paid an official, or (4) insurance premiums paid a third party. These four numbered items just mentioned may be legal and valid charges when they are paid to a third party. We have upheld such fees in a number of cases, but the facts in each of those cases were different—in a most important particular—from those in the case at bar; because here, the fees, or 'service charges', were made by Personal to cover its own overhead costs and therefore were, in all essentials, interest on the money loaned."

The Winston case holds that whether a particular charge is improper depends upon the facts and circumstances of each case. The Winston case establishes guidelines to test a transaction to determine whether or not a particular charge is a proper one. On the particular facts in that case the Court held that the charge for a credit report was not proper and should be considered as interest in determining the question of usury. We do not interpret this case to hold as a matter of law charges for credit reports are never proper. Whether a given charge may be properly made is a question of fact. Whether or not a particular charge is for the sole benefit of the lender or the mutual benefit of both the lender and the borrower is one element to be considered in determining the propriety of the charge. Another element is whether the charge received by the lender was actually disbursed to a third party for services rendered in the loan procedure or pocketed by the lender as an application on his overhead for doing business. It can be readily seen that many charges which have been specifically approved by the Court, such as charges for title work, abstract opinions, are charges beneficial to the lender as is a credit report but no case has held that these

charges as a matter of law are improper solely because they benefit the lender.

The $50.00 charge for title work in the instant case is a proper one and includable in the selling price when specifically authorized by the purchaser-buyer. The parties in this contract specifically agreed that title work was to be done and its cost was included in the construction contract. We can see no distinction between expending the $50.00 for title insurance premium and the use of the agreed sum in abstract expense and other title expense incident to the transaction. It was not added on to the financed balance of the construction contract as an additional charge. Appellants cite *Universal C. I. T.* v. *Lackey,* 228 Ark. 101, 305 S. W. 2d 858, and *Lowrey* v. *General Contract Corporation,* 228 Ark. 685, 309 S. W. 2d 736, and contend that this charge for title work should be considered interest. These cases cited by appellants involve add-on charges in automobile transactions for credit life insurance and are not analogous to charges for title work in real estate transactions which have been specifically approved by this Court.

In *United Built Homes* v. *Knapp,* 239 Ark. 940, 396 S. W. 2d 40, the Court found that certain closing cost items rendered a transaction usurious when it appeared that charges for credit life insurance and appraisal fees were not expended. The Court, however, states that appraisal fees and other charges under proper circumstances can be collected as proper closing costs. In the instant case the record discloses that all of the charges were expended for specifically the items called for and were not used as a sham to increase the interest rate.

In *Mid-State Homes, Inc.* v. *Knight,* 237 Ark. 802, 376 S. W. 2d 556, appellant Finance Company was the holder of a note in the principal sum of $3,830.00 payable in 72 monthly payments of $53.20 each. The purchaser disputed certain items for materials and labor and contended the transaction was usurious. The Court found the builder's profit exceeded 10% of the contract price but that the profit on the underlying construction

contract had no bearing on the issue of usury. It was shown that the builder and the finance company had identical corporate structures and officed at the same address. The Court did not find the transaction to be usurious as it distinguished between a loan and a construction contract. The same situation is presented in the instant case. The construction contract in this action signed by the parties provides for a price of $5,835.00 with a $10.00 cash payment for a financed balance of $5,825.00. The terms of the note are identical to the terms of the construction contract as to the financial balance and does not exact a rate of interest that is usurious.

The $10.00 cash payment which is reflected in the contract signed by appellants was not added on to the financed balance in such a manner as to raise the financed balance $10.00 and include interest thereon. The contract clearly provides that the financed balance is $5,825.00 just as it appears on the promissory note. This same construction contract was presented to this Court in *Guaranty Financial Corporation* v. *Harden*, 242 Ark. 779, decided June 5, 1967. In that case the appellee here, who was the appellant then, relied upon a building contract, note and mortgage. The Court, in *Guaranty Finance Corporation* v. *Harden,* at page 780 of 242, states:

> "The building contract, note, and mortgage were all executed together on October 1, 1965. The building contract was the basic instrument. By that contract Joe-Lee Homes agreed to construct a specified dwelling house for the Hardens for $6,288.00. The contract, after reciting a down payment of $10.00, goes on to say: 'The balance of $6,278.00, plus interest, shall be paid in monthly installments of $75.01 beginning on the 1st day of January, 1966, and on the first day of each succeeding month thereafter until the whole of said indebtedness is paid. The Owner has concurrently herewith executed a

promissory note and mortgage to cover the balance.'

"When the building contract and promissory note are read as one contract, as our decisions require us to do, it is crystal clear that the original principal debt was $6,278.00, with interest which can readily be calculated to be slightly less than the legal rate of 10 per cent per annum. All that the plaintiffs seek to recover is the unpaid principal plus accrued interest. Hence, the case falls precisely within our holding in *Mid-State Homes* v. *Knight,* 237 Ark. 802, 376 S. W. 2d 556 (1964), where we said: 'The chancellor in holding the instrument to be usurious, apparently based his decision upon the fact that the appellant had exercised its option to accelerate the maturity of future payments and had filed suit for the full amount without making any deduction for the interest that had not yet accrued. This procedure, however, did not render the transaction usurious. In such a situation the court should merely refuse to permit the creditor to recover the unaccrued interest. *Eldred* v. *Hart,* 87 Ark. 534, 113 S. W. 21; *Sager* v. *American Investment Co.,* 170 Ark. 568, 380 S. W. 654.'"

The Court in that case recognized that the financed debt was $6,278.00 with a $10.00 down payment, or a total price of $6,288.00. The Court found the contract and note were not usurious because the interest calculated on the financed debt of $6,278.00 was less than the maximum legal rate of 10% per annum. To the same effect in this case the principal balance that is financed is $5,825.00 and is so recited in the contract and note. Assuming that the $10.00 item which is recited in this contract as cash down payment should be considered in testing the transaction for usury, the written contract provides that:

"In the event a credit report on the Owner unsatisfactory to the Builder is received prior to beginning construction of the house, Builder at its option

> may within ten (10) days thereafter cancel this agreement upon returning to Owner all of the deposit except the cost of the credit report and any recording fees."

The only proof with reference to the $10.00 charge having been expended for a credit report was the testimony by the lender's Vice President.

Assuming the burden of proof shifted to the lender to explain the charge as required by *Jones* v. *Jones,* 227 Ark. 836, 301 S. W. 2d 737 (1957), the trial court found that the $10.00 charge was not improper. The record contains no evidence which would support a contrary finding. The uncontradicted testimony of the lender's Vice President was that the customary practice of the business was to obtain a credit report and such affirmative testimony was not contradicted. The testimony on this point was meager but was sufficient for the trial court to find that the appellee had met its burden of explaining the Ten Dollar charge and there is no evidence in the record to the contrary. The credit report was specifically provided for in the construction contract and was not an add-on item which the appellee put in its pocket under the ruse of a service charge. The $10.00 was not included in the principal balance of the promissory note and there was no interest paid on it. There is nothing in the record that establishes any cash credit price differential as is sometimes present in consumer goods transactions. The inclusion of the $10.00 payment in the contract clearly provides for a financed balance of $5,825.00 as evidenced by the promissory note in almost identical terms as approved in *Guaranty Financial Corporation* v. *Harden, supra.*

For the reasons herein given, the decree of the Chancery Court is affirmed.

George Rose Smith, Brown and Byrd, JJ., dissent. Fogleman, J., disqualified.

CHARLES EDWARD TOWNSEND *v.* CITY OF HELENA

5309 424 S. W. 2d 856

Opinion delivered March 4, 1968
[Rehearing denied April 1, 1968.]

Harold B. Anderson, for appellant.

Gene Raff, David Solomon and *W. G. Dinning Jr.,* City Attorney, for appellee.

CARLETON HARRIS, Chief Justice. Charles Edward Townsend, appellant herein, was convicted in the Municipal Court of the city of Helena on four misdemeanor charges growing out of a disturbance on the main street of that city. These convictions were appealed to the Circuit Court of Phillips County, and the combined charges were tried on May 23, 1967, before a Phillips County jury. Townsend was found guilty of public drunkenness, disturbing the peace, resisting arrest, and assaulting an officer. On the first two counts, he was fined $25.00; on the third count he was fined $50.00 and given thirty days in the Helena jail, and on the final count was fined $75.00, and given six months in jail. From

the judgment entered on this verdict, appellant brings this appeal. For reversal, three points, all relating to the defense of insanity, are raised, the contention being that Townsend was insane at the time of the commission of the offenses.[1]

It is first asserted that the court erred in denying appellant's motion for an order directing the Superintendent of the Arkansas State Hospital to deliver to appellant's attorney and doctors all records on file with the hospital which pertained to appellant. The background of facts preceding this motion is as follows:

On January 6, 1966, eight or nine days after Townsend's Municipal Court convictions, appellant's mother, Beulah Ollway, called the constable of Clayburn Township, P. A. Mays, and, according to the constable, reported that her son was acting "peculiar," and was threatening bodily harm to himself; the mother desired that he be taken to the State Hospital. Mays, though obtaining no order of commitment, took appellant to the hospital where he was admitted. After Townsend stayed thirty days, the constable returned him to his home. This evidently occurred during the early part of February, 1966, but the matter of insanity was not mentioned until the filing of this motion, over a year later.[2] The motion reads as follows:

"That the defendant herein is charged with the misdemeanor. That the defendant voluntarily went to the

[1]There was no contention that he was insane at the time of trial.

[2]In March, 1966, appellant had filed a petition for removal to the United States District Court, alleging violation of his constitutional rights, but in the latter part of April of that year, the federal court ordered the cases remanded back to the Phillips County Circuit Court. An appeal was attempted to the United States Court of Appeals for The Eighth Circuit, but was subsequently dismissed. The proceedings in the federal courts probably account for the delay in bringing the cases to trial in the Circuit Court.

State Hospital for mental observation and he was returned as sane; that the defendant has entered a plea of insanity and it will be necessary to have access to the files of the State Hospital in order to properly prepare himself with the proof of insanity."[3]

The order directing the superintendent to deliver the records was then prayed for.

It was not error for the court to refuse to grant this motion. Townsend had not been committed to the hospital, but had gone on his own accord. There is no reason to believe that he could not have obtained the records himself, and certainly, without a showing that this could not be done, there was no reason for the court to order records of a private examination, *i. e.*, not made under court order, to be turned over to appellant's attorney and doctors.

It is next asserted that the "court erred in not committing the Appellant to Arkansas State Hospital when he pleaded not guilty by reason of Insanity as required by Arkansas Stat. 43-1301 [Repl. 1964]."[4] This statute provides that whenever a prosecution of any crime has been instituted in the Circuit Court by indictment or information,[5] and the defense of insanity is raised, "the judge shall postpone all other proceedings in the cause and shall forthwith commit the defendant to the Arkansas State Hospital for nervous diseases, where the defendant shall remain under observation for such time as the court shall direct, not exceeding one month."

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[3]Though this motion states "that the defendant *has entered* a plea of insanity," it appears from the record that this was the first mention of such a plea.

[4]This section is part of Initiated Act No. 3, adopted by the people in 1936.

[5]Technically speaking, it is doubtful that the prosecution was "instituted" in the Circuit Court, since these were appeals from the Municipal Court; however, we treat the cases as though commenced in the Circuit Court.

However, in 1949, Act 256 was passed, such act comprising Ark. Stat. Ann. § 43-1304 through 1309 (Repl. 1964). Section 43-1304 provides the procedure to be followed when a defendant is informed against or indicted on a *felony* charge (rather than crime); the statute likewise largely places the question of whether a defendant should be committed within the discretion of the trial judge, rather than making the committal requirement mandatory.[6]

The court did not commit error. In the first place, the defendant was not charged with a felony. We are

[6]"Section 43-1304: Whenever a defendant has been held for trial by a magistrate, informed against or indicted on a felony charge and the defense of insanity is to be made an issue in his behalf, such defendant, or some person for him, shall file in the office of the clerk of the Circuit Court, a motion or request for an order of examination and the clerk shall immediately give notice in writing of the filing thereof to the Prosecuting Attorney or his deputy; and such motion or request shall be immediately presented to the Circuit Judge, who is hereby authorized to act upon the request during vacation of such court or during any session in another county. If the court has reason to believe that the defendant should be examined and observed by reason of the suggestion of the Prosecuting Attorney or other court official or those interested in the defendant, he may enter such order on his own motion; however, if the defendant be held for trial, informed against or indicted at a time more than thirty [30] days prior to the opening of the first term of court, after his having been legally charged, or prior to any adjourned day of said court at which an adjournment was made prior to such defendant's having been held for trial, informed against or indicted, and the issue be not raised more than thirty [30] days prior to said convening, the court shall exercise his discretion in the granting of an order for observation and examination of the defendant in the Arkansas Hospital for Nervous Diseases and shall not be required to enter an order committing the defendant for such observation and examination unless and until the defendant shall have been examined by two [2] reputable doctors of medicine appointed by the court and the court informed by them that there are reasonable grounds to believe the defendant insane. In such cases the examining fee for such doctors shall be Ten Dollars [$10.00] each, to be paid by the defendant, unless he shall be a pauper and shall have made and filed a pauper's oath, or unless said physicians shall report that there are reasonable grounds for believing the defendant insane, in which cases said fee shall be taxed as costs."

aware of no case, and none has been pointed out to us, in which even § 43-1301 has been construed to cover misdemeanors. But if that was the intent of the people, it certainly was changed by Act 256 of 1949,[7] for Section 7 of said act repeals all laws and parts of laws in conflict, and Act 256 definitely relates only to felonies.

In the next place, no motion or request for an order of examination was filed in the Circuit Court; nor was the court asked to appoint two doctors to examine appellant as a matter of determining if there were reasonable grounds to believe him insane.[8] Summarizing, we hold that the statutory requirements, relative to committing an accused to the State Hospital for observation, apply only where a defendant has been charged with a felony, and furthermore, that the court is given discretion in issuing such an order, as set forth in § 43-1304.

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[7]Section 43-1301 was part of an initiated act, but the General Assembly in enacting Act 256 in 1949, passed the measure by a 2/3 vote. The vote in the Senate was 25 to 1, with 9 not voting, and the House vote was 67 to 10, with 23 not voting. This was sufficient to repeal any conflict. See Amendment No. 7 to the Arkansas Constitution.

[8]An interesting article appears in 11 Ark. L. R. 124-125, by Dr. Robert A. Leflar, Distinguished Professor of Law, and a former member of this court. Relative to this feature of the case, Dr. Leflar states:

"The only major change in this procedure, since 1936, was made by the 1949 legislature. There had come to be abuse of the compulsory feature of the examination requirement by sane defendants who, desiring postponement of their trials, would at the last minute plead insanity thus compelling the court, instead of going forward with trial, to send the defendant to the State Hospital for a useless examination. The 1949 enactment minimized this dilatory device by requiring that the defendant raise the issue by motion or request at least thirty days before the beginning of the next term of court, otherwise permitting the court in its discretion to commit the defendant for examination only if there be reasonable grounds for believing that the defendant might be insane, the court being allowed to appoint two reputable physicians to advise it in the matter. Since 1949 there appears to have been little abuse of the procedure."

Finally, it is urged that the court erred in instructing the jury that there was not sufficient evidence "to sustain a verdict of insanity."

There was no error in this instruction. What was the proof offered by appellant on the question of insanity? Creole Hall, a sister of Townsend, testified that she and her brother had formerly lived in Milwaukee, Wisconsin, and that appellant was admitted to the Milwaukee Health Center in 1960, staying there almost a year; he was then released to her custody, but was readmitted in 1962. Thereafter, he was again released, and returned to his home in Phillips County. The following statement was offered in evidence:

CHRIS J. BUSCAGLIA, M.D.
MEDICAL DIRECTOR ex 2-573

TO WHOM IT MAY CONCERN: June 7, 1962

RE: Charles Townsend
Hosp. No. 08-46-76

Mr. Charles Townsend was discharged from this hospital on June 7, 1962 and received a ten day supply of medication. Upon discharge he was on Thorazine mg 100 q.i.d.

Very truly yours,
Bernice C. Fabian
(Miss) Bernice C. Fabian
Psychiatric Social Worker

BCF: AW
Dictated by
Michael Yatso, M.D.
Staff Physician

This was the only documentary evidence offered and there was apparently no effort by appellant to obtain any records from this hospital, or to take the deposition of any of the people mentioned in the statement. It would seem that this could have been done without great difficulty or expense.

Certainly there is nothing in the statement, nor in the testimony of the sister that establishes that this man was insane at the time of the commission of the offenses of which he was convicted; to the contrary, it would appear that, if he had mental difficulties at the time of entering the Milwaukee hospital, his condition in June of 1962 was such that he was eligible for release.

It has been earlier pointed out that the transcript does not reflect that any effort was made by appellant to obtain his records from the Arkansas State Hospital; nor is it shown that he endeavored to take the deposition of any doctor therein; furthermore, the motion (earlier mentioned) filed on behalf of appellant sets out that he was "returned as sane," and there is nothing in the record to denote that the doctors found him otherwise when he voluntarily presented himself for admission. In fact he was only kept at the hospital for thirty days, which, in itself, somewhat indicates that no evidence of mental illness was found. The only other testimony that, in any way, touches upon the question of mental incompetence was that of appellant's mother. She stated that, "Here of late he would have trouble with his head. His head was giving him lots of trouble and I had tried different tablets for his pain and they didn't help him and he was talking about killing himself, that was why I had him put there [State Hospital]." She said that she had taken her son to a doctor (about three months before the Circuit Court trial), and the doctor had given Townsend "nerve tablets, rest tablets." The testimony was insufficient to raise the issue of insanity.

Finding no reversible error, the judgment is affirmed.

CHARLES BURNETT *v.* MILLARD NIX ET AL

5-4450 424 S. W. 2d 537

Opinion delivered March 4, 1968

Cockrill, Laser, McGehee, Sharp & Boswell and *Fred E. Briner,* for appellees.

GEORGE ROSE SMITH, Justice. This is a taxpayer's suit brought by the appellant to enjoin six Saline county school districts from continuing to employ the seventh appellee, Millard Nix, as the districts' tax representative. The appellant contends that there is no statutory authority for the districts to engage a person to perform the duties assigned to Nix, which are said to be partly a duplication of duties imposed by law upon

the county assessor. The chancellor upheld the contract of employment.

We agree with the chancellor. School boards have broad statutory authority to employ such employees as may be necessary for the proper conduct of the schools and to do "all things necessary and lawful for the conduct of an efficient free public school or schools." Ark Stat. Ann. § 80-509 (d) and (m) (Repl. 1960). Where such a wide discretion is vested in the school directors we have held that one who seeks relief in the chancery court has the burden of proving by clear and convincing evidence that there has been a manifest abuse of the board's discretion. *Safferstone* v. *Tucker,* 235 Ark. 70, 357 S. W. 2d 3 (1962). We are unable to say that the appellant has sustained his heavy burden of proof.

According to the record, within the past five or six years these districts were confronted with serious financial problems. Statutory changes mandatorily allocated a certain portion of the districts' revenues to the payment of teachers' salaries. Moreover, by 1965 the ratio of assessed property values within the county had fallen to 15 percent of market values, so that the county found it necessary to employ professional assistance in the reappraisal of the taxable property within the county. See Ark. Stat. Ann. §§ 84-468 *et seq.* (Repl. 1960).

In that critical situation the school directors concluded that additional revenues had to be found if the schools were to remain open. The six appellee districts joined together in the employment of Nix, contributing proportionately to the payment of his salary and expenses.

Nix's duties are twofold. First, he prepares for each district the list of taxpayers that must be filed with the county assessor. Ark. Stat. Ann. § 84-405. The appellant concedes that the statute expressly authorizes

the districts to pay the expense of compiling the lists, but he insists that the greater part of Nix's time is devoted to the other phase of his work, which is said to be a duplication of the county assessor's functions.

The proof does not support that contention. The second category of Nix's contractual duties includes the discovery of new construction and other property not listed for taxation, the appraisal of such property, and the submission of that information to the appropriate district. At the trial in May of 1967 Nix testified that since the preceding January 1 he had discovered unassessed properties having a value of about one and a quarter million dollars.

According to the districts' testimony, the information being supplied by Nix cannot be obtained from the county assessor's office until a year later. Yet the early acquisition of the information is important to the districts, because it enables them to plan the operation of the schools with knowledge of the revenues that will be available. Moreover, Nix supplies information not furnished by the assessor, such as the location of new residential subdivisions that must eventually be served by the districts. That kind of data assists the school boards in planning the construction of new school buildings where they will be most needed.

In employing Nix the school directors also intended for his activity to play a part in preventing assessed values from falling below the minimum percentage required by law for the receipt of all available state-aid funds. It cannot be doubted that the maintenance of adequate assessed values will be of direct financial benefit to the districts. We are not convinced by the appellant's insistence that if there is any dissatisfaction with the county assessor's appraisals, the sole remedy is at the ballot box when he seeks re-election. In the first place, the statutes already encourage citizens to discover and report property that has been overlooked by

the county assessor. Ark. Stat. Ann. § 84-444. And, secondly, the directors might understandably have some doubt about the incumbent assessor's defeat at the polls by an opponent running upon a platform of higher assessments and hence higher taxes.

For the reasons stated, we conclude that the appellant failed to show by clear and convincing proof that there was a manifest abuse of discretion on the part of the school directors in their decision to employ Nix to perform the duties assigned to him.

Affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, I respectfully dissent because I believe the majority is in error in ascribing such broad authority to the board of directors of a school district.

School districts derive all of their powers from the General Assembly. They can exercise only such powers as are expressly granted and such incidental powers as are necessary to the proper exercise of powers granted. *Arkansas Nat'l Bank* v. *School District No.* 99, 152 Ark. 507, 238 S. W. 630; *Casey* v. *Smith,* 185 Ark. 149, 46 S. W. 2d 38; *Scott* v. *Magazine Sp. School Dist. No.* 15, 173 Ark. 1077, 294 S. W. 365; *Lynn School Dist. No.* 76 v. *Smithville School Dist. No.* 31, 213 Ark. 268, 211 S. W. 2d 641. Powers are implied only when they are clearly necessary to perform the duties legally imposed. *A. H. Andrews Co.* v. *Delight Sp. School Dist.,* 95 Ark. 26, 128 S. W. 361; *American Exchange Trust Co.* v. *Truman Sp. School Dist.,* 183 Ark. 1041, 40 S. W. 2d 770.

School district directors can only enter into agreements which bind their districts and the inhabitants thereof by reason of express statutory authority. *School Dist. No.* 18 v. *Grubbs Sp. School Dist.,* 184

Ark. 863, 43 S. W. 2d 765; *Brown* v. *Gardner,* 232 Ark. 197, 334 S. W. 2d 889.

A contract entered into by school districts which is beyond the powers conferred upon them by statute is void. *First Nat'l Bank* v. *Whisenhunt,* 94 Ark. 583, 127 S. W. 968; *A. H. Andrews Co.* v. *Delight Sp. School Dist.,* 95 Ark. 26, 128 S. W. 361.

The rule that the courts will not interfere with school boards in the exercise of their discretion unless it is shown by clear and convincing evidence that there has been an abuse of discretion has been applied only where the board has express or necessarily implied powers, more particularly in matters pertaining to the operation, conduct, government or administration of schools. Among cases where statutory authority, express or clearly implied, was found is *Connelly* v. *Earl Frazier Sp. School Dist.,* 167 Ark. 49, 266 S. W. 929.

Cases where operation, conduct, government or administration of schools was involved include: *Pugsley* v. *Sellmeyer,* 158 Ark. 247, 250 S. W. 538, 30 ALR 1212; *State* v. *School Dist. No.* 16, 154 Ark. 176, 242 S. W. 545; *Merritt* v. *Dermott Sp. School Dist.,* 188 Ark. 243, 65 S. W. 2d 33, *Safferstone* v. *Tucker,* 235 Ark. 70, 357 S. W. 2d 3.

The contract with appellant recites that he is employed as "school tax representative pursuant to provisions set forth in attached proposal dated March 17, 1966." The proposal, in pertinent part, recites:

> "Whereas, the Board of Directors of the various school districts of Saline County, Arkansas, desire to employ a qualified representative to assist in maintaining the standard of real and personal property appraisals as required by law, which shall constitute the following:
>
> 1. Each school district shall appoint one member of a standing committee which committee shall

contract with this representative for the performance of duties hereinafter mentioned.

* * *

5. The committee shall use its discretion in hiring a qualified man who has been approved as a competent appraiser by the Assessment Co-Ordination Department of the State of Arkansas. In the event the committee is unable to hire such a qualified individual, they shall hire a person most closely meeting the requirements of said Assessment Co-Ordination Department and who is in the process of being approved.

6. The representative shall work closely with the tax assessor, employees in the tax assessor's office, the Equalization Board and employees of the Equalization Board to see that all real and personal property of the County is placed and maintained on the tax books at its proper valuation and in performing such work shall comply with the mandate, criteria, forms and methods as required by the Assessment Co-Ordination Department.

7. The representative shall, in performing his work, attempt to devote his time among the respective school districts according to the percentage of cost which will be paid by each respective district. The representative shall send a written report to all school boards at their regular meeting each month of his work performed and the results achieved therefrom on appropriate forms as may be required by the committee. Automobile expenses shall be paid by the districts to the representative at the rate of 10c per mile, which expenses shall be considered as a cost of this undertaking, travel forms to be provided by the committee. The representative shall devote full time to the duties hereinabove set forth and shall be respon-

sible to the above named committee and no other taxing unit. The contract shall require performance of the duties hereinabove set forth and may be terminated by two-thirds vote of the committee upon default of same or for just cause.

* * *

8. The representative shall keep a file of work performed and results achieved as a further check for achieving equalization of real and personal taxes."

While there is testimony that part of the duties of Nix relates to preparing a list of taxpayers, required by Ark. Stat. Ann. § 84-405 (Repl. 1960) there is no mention of this function in the contract. All of the testimony indicates that his principal duties are those enumerated in the proposal.

The duties covered by the contract with Nix and for which he is being paid are certainly nowhere expressly authorized by statute. Nor do I find any powers granted to the district for the proper performance of which this kind of work could be said to be necessary. The very duties called for by this contract are required of the county tax assessor. For the performance of these duties, the county assessor and his deputies and assistants are paid from a fund to which each of these school districts contributes from its tax collections on a pro rata basis. Ark. Stat. Ann. §§ 12-806 and 12-807 (Repl. 1956). These districts are paying twice for the same work. If expert appraisers are needed, they may be employed for any or all of these school districts under Ark. Stat. Ann. § 84-468 (Repl. 1960).

Certainly it cannot be said that the work contracted for has anything to do with the operation, conduct, government and administration of the schools.

There simply is no power given the school boards which calls for the exercise of any discretion in this

case. If the school boards want to employ Nix to compile a list of taxpayers required by § 84-405, they have a legal right to do so. If the General Assembly had intended that there be a duplication of the tax assessor's functions, they would have said so.

I would reverse and remand for the entry of a decree declaring the contract null and void and enjoining the school districts from paying out any school funds on the contract.

[redacted]

JONES FURNITURE MFG. CO. ET AL *v.* WILLIAM EARL EVANS

5-4467 424 S. W. 2d 880

Opinion delivered March 4, 1968
[Rehearing denied April 1, 1968.]

[redacted]

Terral, Rawlings, Matthews & Purtle, for appellants.

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

Milham & Wied, for appellee.

PAUL WARD, Justice. This is a consolidation of two Workmen Compensation cases, wherein appellee (William Earl Evans) filed a claim against appellant (Jones Furniture Manufacturing Co.) and a claim against appellant (Adams Farm Supply Co.). In each case the insurance carrier is an appellant, but, for brevity, we hereafter refer to the first named appellant as "Jones" and to the other as "Adams".

The issues presented on appeal arise out of the facts summarized below.

(a) On May 13, 1964, appellee, while in the employment of Jones, was injured. When appellee filed a claim before the Commission Jones agreed to an assessment of 7½% disability to the body as a whole and agreed to pay appellee $33.80 a week for twenty weeks and five days (based on temporary total disability) and for an additional thirty-four weeks (based on permanent partial disability).

(b) On June 16, 1966, appellee filed another claim for additional compensation against Jones, and was awarded a 30% permanent partial disability as a result of his original injury on May 13, 1964.

(c) Also, on June 16, 1966, appellee perfected a claim with the Commission against Adams based on an injury on September 25, 1965 while in the employment of Adams. The Commission awarded appellee compensation based on a 10% partial disability. The awards under (b) and (c) were appealed to, and affirmed by, the circuit court.

On appeal here, appellants urge a reversal on the grounds discussed hereafter.

One. Jones seeks a reversal for two separate reasons: (1) There is no substantial evidence to support the Commission's finding that appellee suffered a total 30% permanent partial disability as a result of the May 13, 1964 injury, and; (2) The claim filed on June 16, 1966 is barred by the statute.

(1) Here Jones pointed out that the Commission found appellee suffered a 30% permanent partial disability in 1964 while in his employment and a 10% disability in 1965 while in the employment of Adams—a total of 40%. Then it is pointed out that the highest degree of disability supported by any medical testimony is only 35%. It is then concluded that these facts (undisputed by appellee) logically and necessarily mean there is no substantial evidence to support the findings of the Commission.

The above conclusion is not supported by decisions of this Court. In *Glass* v. *Edens,* 233 Ark. 786; 346 S. W. 2d 683 we said:

> "The maximum medical rating of disability in this case was 40%, which was allowed by the referee and affirmed by the Full Commission. Apparently, they also considered only medical evidence and this we consider error. Under the rule as set out in Larson, consideration should have been given, along with the medical evidence, to the appellant's age, education, experience, and other matters affecting wage loss."

To the same effect, see *Wilson & Co., Inc.* v. *John Christman* (decided by this Court February 19, 1968) and *Arkansas Best Freight System, Inc.* v. *Walter Brooks* decided February 26, 1968).

There is other evidence in the record here which, under the above rule, the Commission had a right and duty to consider in arriving at the extent of appellee's

disability. It is not disputed: that he was injured in 1964, and unable to work for nearly a year; that in 1965 he tried to work for Owosso but was not physically able to do so; that then he went to work for Adams but had to lay off for a while before he was injured again, that; while he was able to perform strenuous labor in 1964, he was never thereafter able to do so; that he is approaching sixty years of age, is uneducated, and is fitted only to do manual labor. Considering, as we must, that the Commission's findings have the force and effect of a jury's finding we are unable to say there is no substantial evidence to support its finding in this instance.

(2) It is next contended by Jones that appellee's claim was not filed with the Commission within the time provided by 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."

As previously stated, appellee's claim was filed June 16, 1966. According to Jones' calculations [which, for the purpose of this opinion, we concede to be true] the last payment *due* appellee (for the 1964 injury) was June 4, 1965. It is therefore contended by Jones that, under the statute, appellee had to file his claim on or before June 4, 1966. For reasons stated below we do not agree.

It is not disputed that, as a matter of fact, appellee received his last payment on June 17, 1965, which was less than one year before he filed his claim on June 16, 1966, being one day before it was barred under the statute quoted above. Even though, according to appellant's calculation, the last payment was *due* on

June 4, 1965, still the *due* date is not controlling under the statute. The record discloses that the payment made on June 17, 1965, was in fact the *first* payment due appellee in 1964 but had been overlooked by *appellant* (not by appellee or the Commission) because of an office error. Basically, it would not be right to penalize appellee for something over which he had no control.

The facts in this case distinguish it from the case of *Phillips* v. *Bray*, 234 Ark. 190, 351 S. W. 2d 147, where we held the one year limitation could not be extended because of a delayed payment of a doctor's bill. The reason for so holding was that the doctor's bill was not presented to or approved by the Commission before the *one year* had expired—which is not the situation here. In so holding we there said:

> "It seems perfectly obvious that the primary purpose of the one year statute of limitations is to give the claimant that much extra time in which to decide whether he has been fully compensated for his injury, and not for the purpose of paying belated medical bills."

Two. We find no merit in the contention here made by Adams that there is no substantial evidence to support the Commission's finding appellee suffered a 10% permanent partial disability as the result of his injury on September 25, 1965, while in the employment of Adams.

Replying to the above contention we adopt, without repeating, all we have heretofore said about "substantial evidence" in connection with the claim against Jones. In addition, we point out other pertinent facts disclosed by the record.

While in the employment of Adams appellee injured his back when he attempted to lift a 100 pound sack. This happened on Saturday and he tried, but was

unable, to resume work on the following Monday. He has been unable to work up to the time of the hearing before the Commission. There is nothing in the record to indicate appellee had been malingering, but, to the contrary, it indicates he has made every reasonable effort to work to support his family. Also there is substantial medical evidence that appellee's disability was partially attributable to the injury suffered while working for Adams. Dr. Carruthers testified that, in his opinion, appellee's injury on September 25, 1965 (while working for Adams) could result in a functional disability of 20%. The doctor further stated that he examined appellee on March 1, 1966 and was of the opinion that it was questionable whether additional treatment would be of further benefit to him.

The Commission, in its findings, referred to and relied upon the facts mentioned above in reaching its decision, and we think it was justified in doing so.

Affirmed.

FOGLEMAN, J., disqualified.

OSCEOLA HOUSING AUTHORITY *v.* NELLA DUNN GILLESPIE

5-4469 424 S. W. 2d 521

Opinion delivered March 4, 1968

James E. Hyatt, Jr., for appellant.

Oscar Fendler and *Leon Burrow,* for appellee.

LYLE BROWN, Justice. This is a condemnation case brought by the Housing Authority of Osceola, Arkansas, to acquire seven town lots to be used in a low-rent housing project. The appellee-owner, Nella D. Gillespie, was awarded $35,000 as just compensation. The basis for appeal by the Authority is set out in three points which will be enumerated and discussed in sequence.

Point I. *The landowner and her witness used "cost of replacement" and "capitalization" as the measure of damages.* Appellant challenges the use of those ap-

proaches to prove property values. Appellant relies on *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S.W. 2d 30 (1958). There it was held that replacement costs are not determinative of damages, "but we do conclude that it is admissible as an element or circumstance to be considered along with all other circumstances in arriving at a proper award."

Most of appellant's argument under Point I is aimed at Mrs. Gillespie's testimony. She showed a detailed acquaintance with the property, having for many years personally handled the rentals, repairs, taxes, insurance, and all the other duties incumbent on a landlady. The meaning of "fair market value" was explained to her and she said she understood it. She went into detail as to replacement costs and net rentals. She had recently bought property just across the street and testified, without objection, that she took that purchase into consideration. Under those circumstances her opinion of fair market value was admissible.

Witness D. S. Laney had known the property for at least twenty years. He buys, sells, and develops real estate in Osceola. His approach to the fair market value did not follow the customary detailed procedure of an expert appraiser in preparation for trial. However, he did base his opinion on his knowledge of the property, his awareness of some comparable sales, and his personal knowledge of values gained from his extensive dealings with Osceola properties.

Witness L. C. B. Young, being in Florida, testified by deposition. He did not have his appraisal file with him and testified from personal recollection. He had viewed the property with Mr. Laney before going to Florida. He frankly stated that he relied mostly on Mr. Laney's judgment because he is "something of an expert on residential property in that area of Osceola." He did not recall the exact figure, but did recollect that

the two men agreed that the minimum value would be at least $30,000. Mr. Young is a licensed attorney but has devoted the past several years to banking. He is presently the chief executive officer of Planters Bank in Osceola and has been evaluating real estate in Osceola for sixteen years. He testified that he did in fact consider Mrs. Gillespie's capitalization data; however, comparable sales were discussed, the properties were inspected, and effort was made "to consider all factors."

Witness E. M. Terry also qualified as an expert. He considered the assessment records, checked comparable sales, talked to several people, and used Mrs. Gillespie's capitalization figures after deducting 15 per cent for vacancy.

Point II. *The verdict was a result of prejudice against the Housing Authority and sympathy for the landowner-appellee.* In support of the contention appellant first cites extensive testimony of Mrs. Gillespie concerning her many worthy civic activities and her sentimental attachment to the property. There was never any objection to that testimony, nor was the court requested to restrict it.

Our attention is next called to a number of questions propounded by Mrs. Gillespie's counsel. The purpose of those questions, says appellant was to show that the housing costs were coming from unlimited federal funds rather than the town of Osceola. Mr. Fendler asked a series of not more than three questions concerning the source of funds. On each occasion objection was made and properly sustained. A conference on the subject followed and that action apparently caused a cessation in the objectionable line of questioning.

III. *The verdict is excessive.* On this point appellant emphasizes the extensive period of study of the

property made by its qualified appraisers. Those three witnesses estimated the landowner's just compensation to be $12,500, $19,900, and $19,900 respectively. The jury verdict was $35,000. Returning to the landowner's appraisal for comparison, they were: Dave Laney, between $35,000 and $40,000; L. C. B. Young, minimum of $30,000; E. M. Terry, $26,000; and Mrs. Gillespie, $50,000. One of the purposes in here summarizing the testimony of the landowner's witnesses was to reveal substantial evidence to support the jury verdict. The disparity between the appraisals is very common in eminent domain cases and is unfortunate. Yet the only rule we can follow is the substantial evidence rule.

We conclude that the three points are without merit.

Affirmed.

BEULAH W. TAYLOR DOSS ET AL *v.* H. E. TAYLOR JR.

5-4492 424 S. W. 2d 541

Opinion delivered March 4, 1968

Paul K. Roberts, for appellants.

Huey & Vittitow, for appellee.

JOHN A. FOGLEMAN, Justice. This appeal requires that we determine whether the Chancery Court or Probate Court of Bradley County has jurisdiction of the

sale of certain lands of decedent, H. E. Taylor, Sr., who died intestate, a resident of that county, on June 16, 1964. Taylor left as survivors: his widow, Beulah W. Taylor Doss; the appellee, a son by a previous marriage; and a minor daughter, of whom the widow is guardian. The widow was also appointed administratrix. She filed her inventory, listing the real estate involved, on August 28, 1964. On December 3, 1965, the probate court made statutory allowances to the widow and minor child. It also made an "Order of Partial Distribution." That order recited that there were no unpaid claims pending against the estate and that the real property was already vested in the heirs subject to the widow's dower of one-third for life. The order closed with this sentence:

> "The possession of said property is not susceptible of partition in kind and the personal representative, or any interested person should file a proper petition in this court to seek the sale of said property for the purpose of distribution."

Nothing in the record indicates that appellant has ever filed a final account as administratrix.

On March 22, 1967, appellee filed a petition for partition in the chancery court, alleging that the real estate was not susceptible to division in kind. He prayed that the property be partitioned or sold and the proceeds of sale divided among the parties according to their respective interests after the payment of attorney's fee and costs. Appellant demurred to this petition individually, as administratrix and as guardian. The grounds of demurrer included contentions that there was another action pending between the same parties for the same cause and that the chancery court had no jurisdiction of the subject matter.

On June 2, 1967, appellant, as administratrix, filed a petition in probate court for the sale of this real prop-

erty. Appellee demurred to this petition on the ground that the petition for partition was pending in the chancery court. On June 12, 1967, appellee amended his petition for partition, seeking an accounting for the rents collected by appellant as administratrix. On the same day, the chancery court passed appellant's demurrer "to be heard after the consolidation of the petition to sell land filed by the Administratrix * * *." No motion to transfer this petition or to consolidate the petitions had been filed by either party, but the probate court, on the same day, over the objections of the appellant, transferred and removed appellant's petition for sale and the demurrer thereto to the chancery court and consolidated it with the partition proceeding. The next day appellant filed a motion to dismiss the suit on the ground that the court did not have subject matter jurisdiction of the property of which partition was sought. On June 14th, the probate court entered its order finding that the administratrix possessed the property and had collected rents, paid taxes, and kept the property insured under the authority of the order of partial distribution. The chancery court, on the same day, consolidated the probate proceedings with the chancery proceedings for final adjudication, overruled appellant's demurrer and motion to dismiss, both being considered as a demurrer to the record as it then stood. Appellant elected to stand on her demurrers, so the chancery court entered a decree ordering sale of the lands for partition but directing that further proceedings be withheld pending disposition of this appeal. The partition decree contained findings that the administration had not been closed, that the personal representative had been, and then was, in possession of the real estate for the purpose of collecting rentals and preserving the property, and that the property was not susceptible to division in kind without great prejudice to the owners. The decree provided for sale upon three months' credit. It barred the dower of appellant. Fixing of attorney's fees, assessment of costs and expenses of sale, distribution of proceeds and accounting for rents were all continued pending the sale.

It is clear beyond doubt that the probate court had exclusive jurisdiction of the accounting by appellant as administratrix. In *Phillips* v. *Phillips,* 143 Ark. 240, 220 S. W. 52, an action in chancery to construe a will, it was held that the chancery court should have refused to entertain any jurisdiction to state accounts between an executor and certain legatees and devisees while the administration of the estate was still pending, there having been no final settlement of the accounts of the executor and no allegations or proof of fraud in the settlement of his accounts. It was clearly said that these matters were exclusively within the jurisdiction of the probate court. Under the direct holding in the cited case, the Probate Court of Bradley County had original and exclusive jurisdiction of the affairs of the Taylor estate relating to the accounts and settlements of the administratrix, and the chancery court erred in taking jurisdiction of the accounting.

In considering the jurisdiction of the chancery court for the purpose of partition, we must determine just what jurisdiction each of the courts could exercise over this property. There can be no doubt that when lands are released to the heirs early in a probate proceeding and there is no reason for the exercise of probate jurisdiction over them, the pendency of the probate proceedings does not preclude the maintenance of a partition suit in chancery. *Boyd* v. *Bradley,* 239 Ark. 120, 388 S. W. 2d 107. While the court there only mentions specifically that there was no claim that the lands were needed for payment of debts in treating of the exercise of probate jurisdiction, there was no indication that the lands in that case were needed for any probate purpose. One of the authorities cited there was Ark. Stat. Ann. § 62-2401 (Supp. 1963). It had previously been said in *Cranna* v. *Long,* 225 Ark. 153, 279 S. W. 2d 828, another of the authorities cited in the *Boyd* case, that real property was an asset in the hands of a personal representative only when needed to pay debts or expenses of administration under § 94, Act 140 of 1949, then Ark. Stat.

Ann. § 62-2401.[1] It was recognized in the *Cranna* case that, if Ark. Stat. Ann. § 62-2714 (for the sale, mortgage or lease of real estate) had been invoked, the status of the real property as an asset of the estate might have been changed. Since that decision, however, § 62-2401 has been amended by Act 424 of 1961 to provide that real property of decedent shall be an asset in the hands of the personal representative when the court finds that it should be sold for *any purpose* enumerated in § 127 of Act 140 (§ 62-2704). Thus, since the passage of the 1961 Act, title to the real estate of an intestate vests in his heirs at law upon his death, subject to the widow's dower and sale for the payment of debts, the preservation or protection of the assets of the estate, the distribution of the estate, or any other purpose in the best interest of the estate. Ark. Stat. Ann. §§ 62-2401, 62-2704 (Supp. 1967).

Under § 62-2714, the probate court is authorized to order sale of real estate upon petition of an administrator. In determining what property shall be sold for distribution of an estate or for any other purpose in the best interest of the estate of an intestate, there is no priority as between real and personal property, and it is no longer necessary that one class of property be exhausted before resort is had to the other for these purposes. Ark. Stat. Ann. § 62-2701 (Supp. 1967). When real property has become an asset in the hands of an administrator, or when the court finds it necessary for the preservation of the property, for protection of the rights and interests of persons having interests therein or for the benefit of the estate, the personal representative may collect rents, pay taxes, make repairs, maintain and preserve the property, protect it by insurance, and maintain or defend an action for possession

[1]The same statements are quoted and followed in *Calmese* v. *Weinstein*, 234 Ark. 237, 351 S. W. 2d 437, decided November 27, 1961, but the decree appealed from was rendered before the passage of the Act to which reference is later made.

or to determine or protect the title, until the property is sold or delivered to the distributees or until the estate is settled. Ark. Stat. Ann. § 62-2401 (Supp. 1967).

The provisions of the probate court's order of partial distribution clearly constitute a finding that the real estate should be sold for distribution. This finding is supported by the probate court's order of June 14, 1962, declaring that the appellant, as administratrix, was and had been in possession of the property under the authority of that order. Consequently, the real property in question has been an asset in the hands of appellant, as administratrix, at least since the date of the order of partial distribution. Clearly, the probate court had, by these steps, assumed jurisdiction over these lands and the sale thereof.

In case of concurrent jurisdiction in different tribunals, the first exercising jurisdiction rightfully acquires control to the exclusion of, and without the interference of, the other. *State* v. *Devers,* 34 Ark. 188; *Town of Salem* v. *Colley,* 70 Ark. 71, 66 S. W. 195; *Taylor* v. *Nelson,* 184 Ark. 1005, 44 S. W. 2d 357; *Jones* v. *Garratt,* 199 Ark. 737, 135 S. W. 2d 859; *Schirmer* v. *Cockrill,* 223 Ark. 817, 269 S. W. 2d 300. In applying this principle to the present case, it seems clear that the two courts would have concurrent jurisdiction to sell the real estate: the chancery court for partition; the probate court for distribution or any other purpose in the best interest of the estate.

A close parallel is found in cases involving assignment of dower. Probate jurisdiction is given by Ark. Stat. Ann. § 62-704 et seq. Yet these statutes do not deprive the chancery court of its inherent jurisdiction. *Johnson* v. *Johnson,* 84 Ark. 307, 105 S. W. 869. The jurisdiction of the probate and chancery courts to assign dower in both real estate and personalty is concurrent. *Shields* v. *Shields,* 183 Ark. 44, 34 S. W. 2d 1068; *Drennan* v. *McCarthy,* 213 Ark. 286, 210 S. W. 2d

791. In the *Shields* case, an administrator had made and reported a partial assignment of a dower in personalty and undertook to state the balance due the widow thereon in his final settlement. It was held that the approval of the report was an assumption of jurisdiction by the probate court and the action of the chancery court in attempting to assign dower in the personal property on the petition of the widow was held to be an erroneous interference with the exercise of the concurrent probate jurisdiction. The chancery decree was reversed and the cause remanded with directions to dismiss the complaint and remit the parties to their remedies in probate.

It has also been held that proceedings for the assignment of dower in a probate court were not abated by the filing of a suit in equity by an heir seeking partition sale of lands of the decedent, on authority of the *Shields* case. *Marsh* v. *Marsh,* 230 Ark. 59, 320 S. W. 2d 754.

The exercise of jurisdiction of the chancery court is not prevented by reason of the widow's unassigned dower under our present partition statute which authorizes partition of lands held as assigned or unassigned dower. Ark. Stat. Ann. § 34-1801 (Supp. 1967); *Smith* v. *Smith,* 235 Ark. 932, 362 S. W. 2d 719. Although the suit in the cited case was brought by the widow, no reason is seen why the same right is not given an heir by the inclusion of any persons having any interest in such lands among those who can petition for partition. In *Goodlett* v. *Goodlett,* 209 Ark. 297, 190 S. W. 2d 14, it was held that where a divorced wife was awarded an undivided one-third interest for life in certain real estate, with the remainder in the husband, there was such a tenancy in common as would authorize a partition suit by the husband. On the other hand, the widow claiming dower in real estate is a distributee in probate. Ark. Stat. Ann. § 62-2003 (Supp. 1967).

There are some differences in procedures in the proceedings in the two courts. For instance, the probate

sale can only be after an appraisement is made. Ark. Stat. Ann. § 62-2716 (Supp. 1967). No appraisal is required in a partition sale. The probate sale may be at public or private sale. A public sale may not be for less than three-fourths of the appraised value and a private one for not less than the appraised value. The court may specify other reservations, restrictions, terms, and conditions. No probate sale may be held more than six months after the order therefor without a new appraisal within thirty days preceding the sale. Ark. Stat. Ann. § 62-2717. None of these safeguards surround a partition sale. A probate sale may be upon credit for not to exceed 75% of the purchase price for not more than one year. Ark. Stat. Ann. § 62-2707. The court making the order of sale for partition determines the terms and conditions of sale and the credit to be given. It seems that both are basically for sale of the real estate and distribution of the proceeds, however, so that the jurisdiction is concurrent.

The probate court assumed jurisdiction first, so the chancery court has erroneously undertaken to exercise jurisdiction. The decree of the chancery court is reversed and the cause is remanded with directions to dismiss the petition for partition and remit the parties to their remedies in the probate court.

ALVIN J. INGRAM *v.* TROY LUTHER ET AL

5-4331 424 S. W. 2d 546

Opinion delivered March 4, 1968

Howard Mayes and *Wils Davis,* for appellant.

Rhine & Rhine, for appellees.

J. FRED JONES, Justice. This appeal is from a decree of the Greene County Chancery Court setting aside a previous decree and confirming and quieting title to all that portion of Lots 4, 7 and 8 east of the St. Francis Levee in Section 32, Township 18 North, Range 8 East in Greene County, Arkansas. For conven-

ience these lots will hereafter be referred to by number except where a fuller description is necessary.

The first decree in chancery case No. 8366 was entered on December 20, 1961, and confirmed title in the appellant who was the plaintiff in that case. The second decree in chancery case No. 8881 was entered on November 7, 1966. This second decree set aside the first decree and confirmed title in the appellees who were defendants in the first case and plaintiffs in the second case. The entire record of the trial in the first case was made a part of the record in the trial of the second case. On this appeal from the second decree, the appellant relies on the following points for reversal:

> "1. The lower court should not have set aside, cancelled and held for naught the decree of the Greene County Chancery Court in Cause No. 8366 because the proof in this case is contrary to the Court's finding that no service of any kind was had on Troy Luther and Lula Mae Luther, his wife.
>
> "2. The lower court should not have decreed that title to all that part of Lots 4, 7 and 8 lying East of the St. Francis Levee and Drainage ditch in Section 32, Township 18 North, Range 8 East, be quieted in Troy Luther and Lula Mae Luther, his wife, as against Alvin J. Ingram because such finding was contrary to law.
>
> "3. Payment of taxes on land under color of title is deemed to be possession.
>
> "4. Payment of taxes on unimproved land for a period of fifteen consecutive years creates presumption of color of title.
>
> "5. Redemption of land from tax sale is not payment of taxes within the meaning of the law."

The pertinent facts in the record before us are as follows: In 1940, a Mr. Barnes who owned all of Lots 4, 5, 6, 7 and 8, sold Lots 5 and 6 and all that part of Lots 4, 7 and 8 *west* of the St. Francis Levee to a Mr. Donaldson. In 1941, Barnes sold that portion of Lots 4, 7 and 8 *east* of the levee to a Mr. Austin, and in 1954, appellees purchased Lots 4, 7 and 8 *east* of the levee from the Austin heirs.

Donaldson sold Lots 4, 7 and 8 *west* of the levee to Hudson, who in turn sold to Kent who quitclaimed to W. T. Kitchen in 1951 under description as follows: "Lots 8, 4, 5, 6 and 7 in accordance with recent survey and plat replatting lands south and east of re-established meander line and north and *west of original levee,* of Section 32, Township 18 North, Range 8 East." In 1952, W. T. Kitchen transferred by quitclaim deed this property by this same description to Kitchen Farms Company. In 1958, Kitchen Farms Company transferred to Mrs. Effie C. Kitchen under description as follows:

> "Lots Four (4), Five (5), Six (6), Seven (7) and Eight (8), according to plat of new survey of 1922, and in what would be section thirty-two (32) if the lines were extended."

In 1959, Effie C. Kitchen sold to appellant, Alvin J. Ingram, under the following description: "Lots 4, 5, 6, 7 and 8 of said Section 32, according to resurvey of 1922."

In November 1959, the appellee, Troy Luther, executed an instrument in form of timber deed, but designated "Bill of Sale," conveying the timber on that portion of Lots 4, 7 and 8 east of the levee to one William Leach, and Leach proceeded to cut timber using a steel barge and other equipment in the process.

In May 1960, appellant Ingram filed a verified complaint in the Greene County Chancery Court against Troy Luther and William Leach alleging ownership in certain described lands in Greene County including

> "All of Lots 1, 2, 3, 4, 5, 6, 7, 8 and 9 according to plat of new survey of 1922, and in what would be, if the section lines were extended, Section 32."

In deraigning title in his complaint, appellant recited an unbroken chain of deed conveyances from Barnes through Donaldson, Hudson, Kent, W. T. Kitchen, Kitchen Farms, and Effie C. Kitchen. The complaint then alleged that Leach had trespassed and cut timber from the lands described in the complaint under claim of timber deed from Luther, notwithstanding the fact that Leach had been advised that the land from which the timber was cut did not belong to Luther, *"and that Troy Luther only claimed that part of Lots* 4, 7 *and* 8 *east of the Old St. Francis Levee."* (Emphasis supplied).

The complaint prayed a restraining order against Leach, a judgment against Leach for $3,750.00 and an order of attachment against the barge and equipment belonging to Leach. The complaint then prayed that the court

> ". . . enter a decree quieting title to said Lots 4, 5, 6, 7, and 8 in this plaintiff, divesting any right, title or interest in said lots out of the defendant Troy Luther and vesting the title thereto in this plaintiff."

On June 9, 1960, amendment was filed to the complaint alleging payment of taxes for more than fifteen years. On May 27, 1960, a warning order was filed by the chancery clerk warning the defendants to appear within thirty days and answer the complaint of the plaintiff, Alvin J. Ingram.

An attorney ad litem was appointed and publication of the warning order was completed on August 10, 1960, but proof of its publication was not filed until December 20, 1961. The attorney ad litem filed his report on August 10, 1960, setting out that on July 8, 1960, he wrote a letter to Bill Leach and "copies of the same letter to Mr. Troy Luther, General Delivery, Marysville, California;" and that the copies to Luther were returned. The copy of the letter was filed with the report and the pertinent parts of the letter are as follows:

> "Suit has been filed against you in Chancery Court here in Greene County, Arkansas, by the above named plaintiff, *claiming title to certain lands in Greene County, Arkansas,* and alleging that you have jointly cut timber on said lands and damaged the plaintiff to the extent of $3,750.00, and has attached a steel barge with all equipment thereon in Greene County. The prayer of the complaint is that *title be quieted in the plaintiff to the lands described in the complaint* for judgment against *the two of you jointly* in the amount of $3,750.00, and for injunction against you enjoining you from further trespassing upon the land.
>
> "*I am enclosing a copy of the temporary restraining order* issued in this case. . ." (Emphasis supplied.)

The restraining order did not mention Lots 4, 7 and 8, but only mentioned,

> "Fractional Section 32 lying south and east of the *New* St. Francis River Levee and Lots 1, 2, 3, 5, 6 and 9 according to the plat of New Survey of 1922, and which said lots would be in Section 32 if the section line were extended, all in Township 18 North, Range 9 East, Greene County, Arkansas." (Emphasis supplied.)

On January 8, 1961, a warning order was issued warning *Lula Mae Luther* to appear within thirty days and answer the complaint. One month later, on Febru-

ary 8, 1961, Lula Mae Luther was made a party defendant, by amendment to the complaint, alleging that:

> ". . .[T]he said Lula Mae Luther is the wife of Troy Luther *and that the deed dated November* 12, 1954, *recorded in Record Book* 126, *page* 61, *of the records of Greene County, Arkansas, under which the said Troy Luther claimed title,* was made jointly to the said Troy Luther and defendant Lula Mae Luther and, therefore, all of the allegations made in the original complaint against Troy Luther are equally applicable to the defendant Lula Mae Luther." (Emphasis supplied.)

The amendment then alleged that Mr. and Mrs. Luther aided and abetted Leach in cutting timber from the lands described in the original complaint and prayed judgment against Mr. and Mrs. Luther for $1,000.00 and for *attachment* against ". . . all of Lots 4, 7 and 8 resurvey of Section 32, in Township 18 North, Range 8 East, Greene County, Arkansas, east of the Old St. Francis River Levee."

The attorney ad litem mailed letters to Mrs. Luther c/o Emery Horner, Yuba City, California and c/o General Delivery Marysville, California (the same address he had used six months earlier for Mr. Luther). The letter mailed to Mrs. Luther imparts exactly the same information to her as the one written to Mr. Luther, including reference to enclosed copy of the temporary restraining order. The amendment to the complaint and the attachment on the land were not mentioned in the letter.

The letters mailed to the appellees were not received by them but were returned to the attorney ad litem. No answer was filed by the appellees and on December 20, 1961, hearing was had on appellant's complaint. The appellant offered proof to the effect that the land involved was wild and unimproved; that taxes

had been paid by Kent, W. T. Kitchen, Kitchen Farms, and appellant, from 1950 through 1961, and the chancellor entered a decree finding among other things,

> "That the plaintiff, Alvin J. Ingram, is the owner of Lots 4, 5, 6, 7 and 8, Section 32, Township 18 North, Range 8 East, in Greene County, Arkansas; that said land is wild and unimproved; that the plaintiff and his grantors have held said land under color of title for more than seven (7) years and have continuously paid the taxes thereon during that time; that there is no adverse occupant of said land; that due *notice of the filing of this action has been given as required by law*; that Troy Luther and Lula Mae Luther, two of the above named defendants, are non-residents of the State of Arkansas, and although *having been duly served, as by law required,* came not but made default." (Emphasis supplied).

The chancellor then decreed:

> "[T]hat the title to the said land, to-wit: Lots 4, 5, 6, 7 and 8, Section 32, Township 18 North, Range 8 East, Greene County, Arkansas, be and the same is hereby forever quieted and confirmed in the said Alvin J. Ingram, and any claim of defendants Troy Luther and Lula Mae Luther of any interest in said land is hereby cancelled as a cloud upon the title to said land as vested in the plaintiff, Alvin J. Ingram."

On February 6, 1963, appellees filed a complaint against appellant to set aside the original decree and to quiet their own title to:

> "All that portion of Lot 4, Lot 7 and Lot 8 East of the St. Francis Levy [sic] and Drainage Ditch in Section 32, Township 18 North, Range 8 East."

The appellant filed a general denial to the complaint

and prayed that the complaint be dismissed and that he be awarded "such general and equitable relief as to which he may be entitled."

On November 7, 1966, after hearing evidence on the issues thus joined, the chancellor set aside the original decree and quieted title in appellees, "for the reason no service of any kind was had on Troy Luther and Lula Mae Luther, his wife, and said decree is void and of no effect."

Appellant obviously attempted to follow Ark. Stat. Ann. § 27-354 (Repl. 1962) in attempting service on appellees. This section provides:

> "Where it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commencement of the action, that he had made diligent inquiry, and that it is his information and belief that the defendant is * * *a non-resident of this state; * * *the clerk shall make and file with the papers in the case, an order warning such defendant to appear in the action within thirty [30] days from the time of making the order."

Ark. Stat. Ann. § 27-357 (Repl. 1962) provides as follows:

> "A defendant against whom a warning order has been made and published shall, upon completion of the publication of the warning order for the four [4] weeks required by law, be deemed to have been constructively summoned upon the date of making the order."

Something more than the mere publication of a warning order is required in subjecting a nonresident, or his interest in land, to the jurisdiction of the court under a proceeding to *quiet and confirm title*, and the case be-

fore us is an excellent example of the good reason why that is so.

The rights and procedure for quieting title to lands in Arkansas are set out in Title 34, Chapter 19 of Arkansas Statutes Annotated §§ 34-1901-1925 (Repl. 1962). Section 34-1901 provides that any person claiming to own land, may bring an action to confirm and quiet title by proceeding in the manner set out. Section 34-1902 provides for the filing of petition in the office of the chancery clerk in the county where the land is located, and for the issuance of summons.

Ark. Stat. Ann. § 34-1905 provides as follows:

> "Upon the filing of such petition the clerk of the court shall publish, on the same day of each week, for four (4) weeks in some newspaper published in the county, if one there be, and if not, then in some newspaper having circulation in the county, *a notice of the filing of the petition describing the land* and the calling upon all persons who claim any interest in the land or lien thereon to appear in said court and show cause why the title of the petitioner should not be confirmed. The chancery court within proper county is hereby authorized and empowered under said notice to find apparent existing liens on said real estate to be barred by the laws of limitation or laches, and decree the cancellation of said liens and the records thereof." (Emphasis supplied.)

Section 34-1906 provides for the hearing, proof and decree "*after proof of publication of the notice aforesaid has* been filed. . ." (Emphasis supplied.)

Section 34-1909 is as follows:

> "The decree in the cause *shall not bar or affect the rights* of any person who claims by, through, under or by virtue of any contract with the petition-

er, or who was an adverse occupant of the land at the time the petition was filed, *or any person who within seven* [7] *years preceding had paid the taxes on the land,* or a remainderman, unless such person shall have been made a defendant in the petition *and personally summoned to answer the same.* (Emphasis supplied.)

Section 34-1910 provides as follows:

"Any person may appear within three [3] years and set aside the decree if he shall offer to file a meritorious defense, and every person laboring under the disability of infancy, lunacy, idiocy, [or] married women under the disability of coverture and those claiming under them may set aside the decree at any time within [3] years after the removal of such disability."

Had appellees received everything mailed to them by the attorney ad litem, they would have only been advised that appellant had filed a suit in Greene County to quiet and confirm title to some unspecified land he owned in that county; that Leach, to whom they had sold some timber, had trespassed on the land belonging to appellant and had cut some timber therefrom; that appellees were being sued, along with Leach, for damages in trespass; and that Leach was being restrained from cutting timber from the land belonging to appellant and in which appellees had no interest and claimed none. A copy of the complaint was not mailed to appellees, but apparently for the purpose of allaying any curiosity appellees might entertain as to exactly what lands were involved, in the event they should receive the letters, the attorney ad litem enclosed a copy of the restraining order on section 32 *east* of the *new* St. Francis River levee and Lots 1, 2, 3, 5, 6 and 9. Appellees' land east of the *old* St. Francis River levee was not mentioned in the restraining order, neither was any part of Lots 4, 7 and 8 mentioned in the restraining

order or in anything else mailed to appellees. Had appellees seen the warning orders published by appellant, they would have only been informed that they had thirty days in which to answer the complaint filed against them for damages caused by Mr. Leach's trespass on land belonging to appellant and cutting timber which they did not sell to Leach, and on land never claimed by the appellees.

It would appear, from the overall record in this case, that appellant attempted to quiet title to appellees' land by alleging adverse possession through the payment of taxes in a complaint disguised as an adversary proceeding for money judgment in damage for trespass. The record indicates that an effort was made to submerge a quiet title action in a complaint for damages in trespass requiring nothing more than a thirty day warning order for service on appellees, who are out of state owners of the land involved. Instead of doing everything possible to advise appellees that a suit had been filed to quiet title in their land, the attorney ad litem appears to have made a concerted effort to avoid doing so, and he made no effort whatever to advise appellees that their title was being questioned. If the attorney ad litem knew that appellant was claiming title to the land involved, the information he mailed to appellees could only have been designed to mislead appellees as to the nature of the law suit filed against them, and to lull them into a sense of false security in the event appellees should receive the information he mailed to them. In the amendment to the complaint making Mrs. Luther a party defendant, the complaint even prayed an attachment before judgment against the very land appellant claimed to own in his original complaint.

Appellees alleged fraud on the court in that appellant concealed from the trial court the fact known to him that appellees had record title to the property and had paid the taxes thereon. A part of appellant's veri-

fied answer to the complaint in cause No. 8881 is as follows:

> "In this connection defendant alleges that in the argument to the Court counsel for this defendant stated to the Court that on a part of said area claimed by plaintiff in Cause No. 8366 said parties *had on a few occasions attempted to pay taxes* on a portion of said land. . ." (Emphasis supplied.)

A few excerpts from the testimony of appellant's own attorney speaks plainly on this point:

> "Q. Mr. Davis, just tell what efforts you made to locate the defendant in that law suit?
>
> A. I was very much interested personally in this property because I represented, me and my firm, represented Mrs. Effie Kitchens who had received from the Kitchens Farm Company, for her stock, one-half interest in the Kitchens estate. She had received all of the land that is shown on Exhibit "A" that we filed here.
>
> * * *
>
> *I handled the sales, personally,* of all of that property that Mrs. Kitchens received out of the Kitchens estate. . .Now Dr. Ingram is my son-in-law and I prevailed on him to buy this land from Mrs. Kitchens and because of the fact that he is my son-in-law and the further fact that I had gotten him to buy this land, I was vitally interested in the title. I had the abstract made and brought down to date and *I had never heard of Troy Luther until a Mr. William Leach started cutting timber over there and Dr. Ingram's tenant called me and told me.*
>
> * * *
>
> I did know Mr. Luther was paying taxes occasionally and then letting them go and redeeming them. *I found that from the record.*
>
> * * *

I knew *from the deed from Mrs. Kitchens* that Luther was claiming it.

Q. At the time you got your deed from Mrs. Kitchens to the lots that are involved in this law suit, you were on notice that Troy Luther had been paying taxes on these particular lots for more than fifteen years?

A. *From the standpoint of the record, yes. But from the standpoint of personal knowledge, no.*

Q. You knew when you filed that law suit Troy Luther had a warranty deed and record vested title to the property in question to he and his wife?

A. *Certainly I knew it at that time.* (Emphasis supplied.)

Appellant here was his attorney's son-in-law. He is charged with the knowledge of his attorney. Appellant's attorney knew *from the deed and tax records,* that appellees had record title to the property involved and had been paying their taxes thereon for fifteen years when his suit for damages in trespass and to quiet title was filed. He was bound to have known that Kitchens Farms had no title to this land when it was deeded to Effie Kitchens—he represented Effie Kitchens at that time and personally handled the transaction whereby she acquired her deed.

If appellant did not know of appellees' title and continuous payment of taxes when the complaint was filed in case No. 8366, the quiet title portion of that law suit was not such adversary proceeding that would support a confirmation decree on constructive service on an out of state owner without notice, or notice filed, and without personal service.

If appellant did have full knowledge of appellees' record title and payment of taxes, then certainly in the

light of the misleading information mailed to appellees by the attorney ad litem, appellant's statement, through his attorney, to the trial court that appellees "had on a *few occasions attempted to pay taxes* on a portion of said land" as alleged in his verified answer, was misleading and smacks of fraud, and will not be condoned by this court on appeal, where we try equity cases de novo.

We conclude that the decree entered in case No. 8366, insofar as it confirmed appellant's title in appellees' land, was void for several reasons. It was void for the reason that the notice was not published as required by Ark. Stat. Ann. § 34-1905, supra, and as recited in the decree as having been done. The decree was void because it was rendered *before* proof of publication of the aforesaid notice had been filed. Even if the notice had been published as required by § 34-1905, supra, and the decree had been rendered after proof of the publication of notice had been filed as provided in § 34-1906, supra, still appellees' rights would not have been affected by the decree, because appellees had paid the taxes on the land, not only within seven years, but for fifteen years preceding, and they were not *personally summoned to answer* the petition in which they were made defendants, as provided in § 34-1909, supra.

Even if all the statutory requirements had been met and complied with and the first decree had been a perfectly valid decree, still under § 34-1910, supra, appellees had three years from the entry of the decree in which to appear and set aside the decree by offering to file a meritorious defense.

Appellant joined the issues by general denial in his answer. The record in the first case was consolidated with the record in the second, and for all practical purposes the separately numbered cases were consolidated at the trial of the second numbered case, and no objections were made by the appellant to this procedure.

We are of the opinion that the chancellor was correct in setting aside his original decree. We are also of the opinion that the chancellor's decree, quieting and confirming appellees' title to the property involved, is not against the preponderance of the evidence and should be affirmed.

Affirmed.

HARRIS, C. J., concurs in the result.

BROWN and BYRD, JJ., concur.

GEORGE ROSE SMITH and FOGLEMAN, JJ., dissent.

CONLEY BYRD, Justice, concurring. I concur in the result reached in the majority opinion but not for the reasons therein stated. To me, the decree in case No. 8366 in the Greene Chancery Court was void for lack of strict compliance with the constructive service statutes. Ark. Stat. Ann. § 29-404 provides:

> "Before judgment is rendered against a defendant constructively summoned, and who has not appeared, it shall be necessary—
>
> "First. An attorney be appointed at least thirty [30] days before the judgment is rendered to defend for the defendant and inform him of the action and of such other matters as may be useful to him in preparing for his defense. . . ."

The notice mailed to Mrs. Luther, c/o General Delivery, Marysville, California, by the attorney ad litem is as follows:

> "Dear Mrs. Luther:
>
> "Suit has been filed against you in Chancery Court here in Greene County, Arkansas, by the above named plaintiff, claiming title to certain lands in

Greene County, Arkansas, and alleging that you have jointly cut timber on said lands and damaged the plaintiff to the extent of $3,750.00; and has attached a steel barge with all equipment thereon in Greene County. The prayer of the complaint is that title be quieted in the plaintiff to the lands described in the complaint for judgment against the defendants jointly in the amount of $3,750.00 and for injunction against you enjoining you from further trespassing upon the land.

"My duty as attorney ad litem is to write you this letter and inform you of the existence of the said law suit; and to warn you that unless you file an answer within thirty days from the first publication of the warning order, or thirty days from the date of this letter, that judgment will be taken against you, and titles to the lands quieted in the plaintiff.

"If you desire to make a defense to this action, you should contact me or some other attorney in this area and prepare your defense.

"I am enclosing a copy of the temporary restraining order issued in this case which bears the signature of Chancellor C. M. Buck."

The letters to Mrs. Luther and Mr. Luther are identical. Neither the letter nor the temporary restraining order forwarded with it describes any portion of Lots 4, 7 and 8 in Section 32. Obviously, had the Luthers received the letters, they would not have been given enough information to employ an attorney to represent them in the quiet title phase of the litigation.

Furthermore, the mailing of the letter "c/o General Delivery, Marysville, California," is an indication to the postmaster that the addressee will call for the letter at the postoffice. The postoffice in every town has, in addition to its street addresses and postoffice box addresses, a section known as "General Delivery,"

which is usually kept in alphabetical order for those persons who are expected to call at the postoffice for their mail. The record here shows no reason why the attorney ad litem should expect Mr. and Mrs. Luther to call at the postoffice for mail addressed to General Delivery. On the contrary, the record shows that they had a street address.

We have consistently held that a strict compliance with constructive service statutes is a prerequisite to the validity of a judgment. *Missouri Pac. R. R. Co.* v. *McLendon,* 195 Ark. 204, 46 S. W. 2d 626 (1932); *Swartz* v. *Drinker,* 192 Ark. 198, 90 S. W. 2d 483 (1936); *United Equitable Ins. Co* v. *Karbar,* 243 *Ark.* 631, 421 S. W. 2d 338 (1967).

Therefore, I agree with the trial court that the constructive service as shown by this record was void, and that the decree was subject to the collateral attack.

BROWN, J., joins in concurrence.

JOHN A. FOGLEMAN, Justice. I respectfully dissent. In order to consider the case in proper perspective, I will from time to time call attention to certain premises of the majority opinion that I do not feel to be justified.

First, there are statements indicating that the first case was consolidated with the second case, without objection by the appellant. The record in the first case was offered in evidence as was appropriate in a proceeding to attack the decree therein, but there was in no sense any consolidation of the actions, or of the records.

It is clear that the original proceeding was an adversary proceeding by appellant against appellees et al, to litigate conflicting claims on the assertion that appellant's title should be quieted as the superior one.[1]

[1]Perhaps it might be more appropriate to say that the action was one to cancel any claim of appellees as a cloud on the title of appellant. If there is a distinction, common usage has so blurred it that it is not now regarded as having any significance.

Under these circumstances none of the statutes on the subject can in any way control or limit the power of the chancery court. See 6 Ark. Law Review 86, 103, 104, 105.

An early case settling this point was *Knauff* v. *National Cooperage & Woodenware Co.,* 87 Ark. 494, 113 S. W. 28. While the statute there provided a procedure for confirming tax titles, the identical principle was involved. Appellant in that case sought to quiet his title under a clerk's tax deed against a claim of the appellee who was paying taxes on the land in dispute. Appellee defended by demurrer on the ground that appellant had not alleged that he had paid taxes on the lands for at least two years after the expiration of the right of redemption in compliance with the statute, then Kirby's Digest §§ 661-675, now Ark. Stat. Ann. § 34-1918 to § 34-1925 (Repl. 1962). In disposing of this contention, this court said:

> "* * *The vice of this contention is that it seeks to apply the requirements of the statute to adversary suits, such as this one, between parties for the purpose of litigating conflicting titles and quieting the superior one. The statute does not control in such suits, as the jurisdiction of chancery courts over such subjects is exercised independently of statute. The statute, in so far as it confers jurisdiction in such cases over which courts of equity formerly exercised jurisdiction, is to that extent merely declaratory of existing powers, and not a grant of additional powers. *Hempstead* v. *Watkins,* 6 Ark. 317, 42 Am. Dec. 696; *Boyce* v. *Grundy,* 3 Pet. 210, 7 L. Ed. 655.
>
> The complaint alleges that the land is unoccupied by an adverse claimant and that appellee is asserting title thereto and paying taxes on the land. This states a cause of action in an adversary suit, and,

if sustained by proof, is sufficient to entitle appellant to relief. The court should, under that state of the case, grant the relief prayed for by removing the alleged cloud and quieting appellant's title. Even if appellant is not entitled under the statute to a general decree for confirmation of the tax sale, the complaint states a case for relief in this adversary suit against appellee, and it was error to sustain a demurrer to the complaint, which is at least good to the extent that it states grounds for equitable relief against appellee."

Thus, it is crystal clear that the statutes in such cases are designed to provide a means for a general quieting of titles, or, as is sometimes said, to declare a title to be in a plaintiff as against the world. The adversary proceeding simply establishes the superiority of the title of one party as against that of the other. The doctrine that the statutes do not control was recognized and applied in *Patterson* v. *McKay*, 199 Ark. 140, 134 S. W. 2d 543. There it was asserted that the court of equity had no jurisdiction to cancel a tax sale and donation certificate because the defendant was in possession of the land in question. The defendant relied on § 1 of Act 79 of 1899 [now Ark. Stat Ann. § 34-1901 (Repl. 1962)], the same act which the majority applies to affirm the lower court. In rejecting this contention, the court, speaking through Mr. Justice Baker, said:

"* * *The defendant in this action was in possession and on account of his possession he pleaded a lack of jurisdiction in the trial court to grant any relief to the plaintiff, by first filing a motion to dismiss, which being denied, he pleaded the same fact of his possession as an answer. Appellant insists that this suit is one to quiet title and that since appellee is not in possession he may not invoke the jurisdiction of the chancery court. For the position taken the appellant insists the suit must be regard-

ed as a statutory proceeding, provided for by section 10958 et seq., Pope's Digest. This is an erroneous conception of the intent and purpose of these statutes providing for the exercise of chancery jurisdiction to quiet title to real property. A recognition that such statutes (Chapter 136, Pope's Digest) do not grant jurisdiction but only establish a statutory method of exercising a jurisdiction already existing, prior to the enactment of the statutes mentioned, will make clear and understandable many seeming inconsistencies in decisions of the courts."

The situation is no different because the service of process is by constructive service. A state has the power to provide for adjudication of titles to real estate within its limits against non-residents who are brought into court by constructive service. *Arendt* v. *Griggs,* 134 U. S. 316, 10 S. Ct. 557, 33 L. Ed. 918.

A decree setting aside a deed and cancelling a title of a non-resident defendant summoned only by warning order is valid as an action in rem, the title being established by mere force of the decree. *McLaughlin* v. *McCrory,* 55 Ark. 442, 18 S. W. 762. The statutes relied upon to give *in rem* jurisdiction under the rule in the *Arendt* case were §§ 3953-3954, Mansfield's Digest [Rev. Stat. Ch. 23, §§ 123-124; Ark. Stat. Ann. §§ 29-126, 29-127 (Repl. 1962)].

In Frank v. *Frank,* 175 Ark. 285, 298 S. W. 2d 1026, it is clearly demonstrated that two different and totally unrelated functions are served by (1) service on a defendant by publication of warning order and (2) publication of notice calling upon all persons claiming any interest in the lands described to show cause why petitioner's title should not be confirmed. Even though the action to quiet title was a statutory one in that case, this court said that no jurisdiction of a named defend-

ant was acquired by publication of the notice required by statute, as there was no service upon him. According to the opinion in that case, the only way to acquire jurisdiction over named defendants is by publication of warning order for the requisite period, by appointment of an attorney ad litem at least thirty days prior to the court's action, and by the filing of a report by the attorney ad litem. This clearly demonstrates that the publication of statutory notice which would be required by the majority opinion would serve no function at all where defendants are named—even in a statutory action to quiet title.

The finding of the trial court that there was no service on appellees in the original action by appellant to quiet title is clearly erroneous. This is revealed when the record in that case is examined. A warning order was published for four weeks as required by statute. An attorney ad litem was appointed more than thirty days prior to the rendition of the decree attacked in this proceeding. He filed his report before the decree was rendered. Thus, the trial court had jurisdiction to render the original decree.

The decree attacked contains specific findings that appellees were duly served as required by law and that due notice of the filing of the action had been given as required by law. Recitals such as these are conclusive on that subject, on collateral attack, unless the record itself contradicts the finding. *Pattison* v. *Smith,* 94 Ark. 588, 127 S. W. 983; *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10; *Turley* v. *Owen,* 188 Ark. 1067, 69 S. W. 2d 882; *Kindrick* v. *Capps,* 196 Ark. 1169, 121 S. W. 2d 515. There is a conclusive presumption in such cases that sufficient and competent evidence was before the court to justify the findings. *McLain* v. *Duncan,* 57 Ark. 49, 20 S. W. 597; *Price* v. *Gunn,* 114 Ark. 551, 170 S. W. 247; *Matthews* v. *Williamson,* 143 Ark. 281, 220 S. W. 58.

Judgments or decrees entered upon constructive service by publication will be given the same conclusive effect and are entitled to the benefit of the same favorable presumptions in this regard as those on personal service. *Crittenden Lbr. Co.* v. *McDougal,* 101 Ark. 390, 142 S. W. 836; *Hobbs* v. *Lenon,* 191 Ark. 509, 87 S. W. 2d 6.

Appellees' complaint sought not only to cancel the decree in appellant's original action, but to quiet title to a portion of the lands in themselves and to recover judgment against appellant for the sum of $3,750.00.[2] As such, it was a collateral attack on the former decree. Ordinarily, except in cases where an attack upon a judgment is authorized by statute,[3] it is necessary, in order to constitute a direct attack, that some step be taken to impeach its validity in the action itself, such as by appeal or motion to vacate or modify. *State* v. *Wilson,* 181 Ark. 683, 27 S. W. 2d 106. In an action to have title to lands quieted or confirmed, a default decree quieting title in a defendant against plaintiff in an earlier action was held conclusive, even though erroneous, until reversed on appeal or set aside in a direct pro-

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[2]The decree appealed from granted all this relief except for the money judgment.

[3]The only statutory authorization for an independent proceeding to vacate a judgment is contained in Ark. Stat. Ann. § 29-508 (Repl. 1962) which is § 573, Civil Code. The grounds on which such a proceeding is authorized are contained in the 4th, 5th, 6th, 7th and 8th subdivisions of Ark. Stat. Ann. § 29-506 (Repl. 1962) which is § 571, Civil Code. There is no allegation in the complaint of appellees which could be said, even remotely, to suggest a basis for vacating the decree here under the 5th, 6th, 7th or 8th subdivisions. While there is an allegation that the original decree was obtained by fraudulent and untrue representations made to the court, there was no finding that such was true by the chancellor and there was no evidence to justify such a finding. It is at least doubtful that the allegations of fraud in the pleading are proper grounds under the act because they relate to the truth or falsity of evidence on the issues made in appellant's pleading.

ceeding brought in the same action for that purpose. *Hooper* v. *Wist,* 138 Ark. 289, 211 S. W. 143.

In a case strikingly similar to the one now before us in that the complaint contained allegations of fraud in obtaining a default judgment not supported by evidence, it was held that the attack was a collateral one, not being within the purview of § 29-506, because of failure to prove the allegations as to fraud. *Turley* v. *Owen,* 188 Ark. 1067, 69 S. W. 2d 882.[4] In that opinion this court quoted with approval, and applied, definitions given in the *Hooper* case, saying:

> "In *Hooper* v. *Wist,* 138 Ark. 289, 211 S. W. 143, 145, we held: 'This brings us to a consideration of whether the present case is a direct or collateral attack on the former chancery decree. A "direct attack on a judgment" is usually defined as an attempt to reform or vacate it in a suit brought in the same action and in the same court for that purpose. On the other hand, a "collateral attack upon a judgment" has been defined to mean any proceeding in which the integrity of a judgment is challenged, except those made in the action wherein the judgment is rendered, or by appeal, and except suits brought to obtain decrees declaring judgments to be void ab initio. 15 R.C.L. 838, par. 311. This is the effect of our decisions in the cases above cited as well as numerous other decisions of the court.' "

See, also, *Wilder* v. *Harris,* 205 Ark. 341, 168 S. W. 2d 804, wherein the attack was made by filing a motion in the action in which the questioned judgment had been rendered.

Appellees' attack was not made in the action in which the decree they seek to have vacated was ren-

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[4]The judgment attacked in that case did not reflect the giving of the required notice.

dered, nor was it under any statutory ground for an independent proceeding. Unless it could be said that it was brought for the purpose of having the judgment declared void ab initio for want of service on appellees (as was the case in *Brick* v. *The Sovereign Grand Lodge,* 196 Ark. 372, 117 S. W. 2d 1060) and not in a proceeding contemplating some other relief or result, it is a collateral one. *Brooks* v. *Baker,* 208 Ark. 654, 187 S. W. 2d 169. Appellees' complaint in this case does contemplate other relief. It first deraigns title in appellees. It then cites particulars in which they contend that the earlier decree is erroneous and that the errors were because of fraudulent representations on behalf of appellant. While appellees ask that the former decree be set aside and vacated, the prayer for quieting of title in appellees and for a money judgment in their favor certainly contemplates other relief.

The majority apparently justifies the attack on the original decree by saying that constructive service was improper. Even if the attack here can be said to be a direct one, it must fail. The finding of the trial court that there was no service on appellees in the original action by appellant to quiet title is clearly erroneous. The record reveals that an attorney ad litem was appointed for Troy Luther on July 8, 1960. Warning order made July 2, 1960, for Troy Luther, upon proper affidavit, was published four times, the first insertion having been on July 20, 1960, and the last on August 10, 1960. Although the record indicates that warning order was made for Lula Mae Luther on January 8, 1961, and that the attorney ad litem for her accepted his appointment on the same date, the amendment to the complaint by which she was made a party bears a filing endorsement of February 8, 1961. The verification of that amendment and the affidavit for warning order were dated January 20, 1961. The warning order and appointment of attorney ad litem appeared in the transcript of the original proceeding between the amendment to the complaint and an attachment bond which also bears a filing

endorsement of February 8th. It is obvious that the warning order and appointment of attorney ad litem were attached to the amendment to the complaint, in blank, at the time of filing with the clerk and that it was contemplated at the time of preparation of these instruments that they would be filed in the month of January. It is also obvious that the clerk, in issuing the warning order, and the attorney ad litem in accepting his appointment, filled in the day of the month without changing the designation of the month. The conclusion seems inescapable to me that the warning order was actually issued on February 8th and the attorney ad litem accepted his appointment on the same date. The warning order for Lula Mae Luther was published four times, the first publication having been on March 7, 1961, and the last on March 29, 1961. Report of the attorney ad litem as to Troy Luther was filed August 10, 1960, and as to Lula Mae Luther on May 8, 1961. The decree was not rendered until December 20, 1961. Thus, the requirements for constructive service were met. See Ark. Stat. Ann. §§ 27-354, 27-355, 27-357, 29-404 (Repl. 1962); *Frank* v. *Frank,* 175 Ark. 285, 298 S. W. 1026; *May* v. *National Bank of Eastern Arkansas,* 231 Ark. 588, 331 S. W. 2d 697. The failure of the attorney ad litem to correspond with the appellees does not affect the validity of the decree, although there might be a question as to his right to compensation. *Brown* v. *Early,* 63 Ky. (2 Duvall) 369 (1866); *Thomas* v. *Mahone,* 72 Ky. (9 Bush) 111 (1872).[5]

I disagree with the statement by the majority that the warning order in the case would have led the appellees to believe that they were only called upon to de-

[5]The first case, having been decided before our adoption of the Civil Code, is binding, since § 29-404, with insignificant amendments, is § 445 of the Code which was adopted from the Kentucky Code. The latter case is persuasive. See Crawford, Civil Code of Arkansas; *State* v. *Arkansas Brick & Mfg. Co.,* 98 Ark. 125, 135 S. W. 843; *Hanson* v. *Hodges,* 109 Ark. 479, 160 S. W. 392; *St. Louis S. W. Ry. Co.* v. *Russell,* 113 Ark. 552, 168 S. W. 1083.

fend an action for damages for timber removed and trespass on lands they never owned. The warning orders read:

> "The defendants are warned to appear in this court within thirty (30) days and answer the Complaint of Plaintiff, Alvin J. Ingram."
>
> "Defendant Lula Mae Luther, is warned to appear in this court within thirty (30) days and answer the complaint of the plaintiff, Alvin J. Ingram."

They are in proper form and do not mention any land.

The majority also suggests that the decree in the original action was void because a proof of publication of warning order bears a filing endorsement one day after the decree was rendered. A decree upon service by publication is not void merely because proof of publication was not made in the manner required by statute. *Johnson* v. *Lesser,* 76 Ark. 465, 91 S. W. 763. Where the warning order has been published, failure to make proof of publication in the manner required by statute is an irregularity only and does not affect the jurisdiction of the court. *Clay* v. *Bilby,* 72 Ark. 101, 78 S. W. 749. Service is complete when the warning order has been published, not when proof is made. Ark. Stat. Ann. § 27-357 (Repl. 1962); *Blackwell Oil & Gas Co.* v. *Maddux,* 181 Ark. 726; 27 S. W. 2d 514. There is no contention that the warning order was not published. The statute providing for a means of proof of publication [Ark. Stat. Ann. § 15-105 (Repl. 1956)] is by no means intended to make that method the sole or exclusive means of showing publication. *Allen* v. *Allen,* 126 Ark. 164, 189 S. W. 841; *Straughan* v. *Bennett,* 153 Ark. 254, 240 S. W. 30; *Mahan* v. *Wilson,* 169 Ark. 117, 273 S. W. 383. Furthermore, the fact that such proof was not filed until after the judgment is not fatal. Where proof of publication fails to show that a warning order was published the requisite number of times, an amendment cor-

recting the proof of publication after judgment is proper. In *Blackwell Oil & Gas Co.* v. *Maddux, supra,* this court said there was no reason why the amendment could not be filed after, as well as before, judgment. I find nothing incomplete or insufficient in the warning order.

The statement that the record indicates an effort to "submerge" an action to quiet title in a complaint for damages in trespass is not borne out by the record. The very first allegation in the complaint is a statement of the ownership of a large tract of land of which the portion Luther was alleged to have some interest in was only a part. This was followed by a deraignment of title to tracts of land including, but not limited to, the lands in which appellant said Luther claimed some interest. These are primary allegations for an adversary action to quiet title. The allegations as to trespass and timber cutting by Leach then follow. The prayer of the complaint clearly asks for a decree quieting title against Luther. How can this primary phase of the litigation be said to be "submerged?" I submit that the original action against Leach was incidental to the quieting of title.

Nor do I see how it can be said that the attorney ad litem attempted to conceal the true purpose of the original action from the Luthers. In this connection the letter from the attorney ad litem clearly states that "[s]uit has been filed *** by *** plaintiff claiming title to certain land in Greene County* * *" and that "[T]he prayer of the complaint is that title be quieted in the plaintiff to the lands described in the complaint * * *." Of course, appellees have never claimed they were misled by the letters. They just said they did not get them, and the report of the attorney ad litem confirms their testimony. This was a fact known to the court when the decree was rendered in the original action.

The only allegation of fraud in the complaint in the present case is that the recitals of the deraignment of

title constitute fraud and that appellant did not disclose to the court that Luther had paid taxes on the land. No proof of fraud is shown. The majority opinion seems to imply that there was some collusion between appellant and the attorney ad litem to see that the notice from the latter would not be received by the Luthers. Yet, there is no such allegation or proof. I find nothing whatever to indicate that either appellant or the attorney ad litem knew the street address of appellees. Someone showed some diligence, as indicated by a correct post office address. If there had been a deliberate attempt to prevent the Luthers from getting the letters, it seems unlikely that they would have been addressed to the proper post office. In considering this point, the majority opinion quotes some of the testimony of appellant's attorney. There is other testimony that is much more to the point which I deem necessary to quote in this opinion:

> "It was hard for me to get anything out of Leach, I tried to get Mr. Luther's address from him and all he would give me was Maryville, California. That's all I could find. Dr. Ingram had a doctor friend who lived at Cardwell and I went with him to see this doctor and later I went by myself back to see the doctor and the doctor was trying to get me those addresses. I did not know Mrs. Luther was included in it at first and I could [see] she was in the deed, included as an owner and I made her a party likewise and I did everything possible to acquaint the attorney ad litem with the true residence of these defendants."

It seems that the majority finds an alternate basis for setting aside the decree for fraud practiced upon the court. This is founded upon the premise that false pleadings were filed and false testimony was given in the original proceeding. Even if this were so, it would constitute no basis for setting aside a decree after the ex-

piration of the term at which it was rendered. The fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the case and does not consist of any false or fraudulent act or testimony, the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment. *Parker* v. *Sims*, 185 Ark. 1111, 51 S. W. 2d 517; *Pattillio* v. *Toler*, 210 Ark. 231, 196 S. W. 2d 224; *Croswell* v. *Linder*, 226 Ark. 853, 294 S. W. 2d 493. In *Alexander* v. *Alexander*, 217 Ark. 230, 229 S. W. 2d 234, I find a particularly applicable quotation from *Hendrickson* v. *Farmers' Bank & Trust Co.*, 189 Ark. 423, 73 S. W. 2d 725, 726, which is as follows:

> "* * * 'The fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. It is not sufficient to show that the court reached its conclusion upon false or incompetent evidence or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, in issue in the proceeding before the court which resulted in the decree assailed. *James* v. *Gibson*, 73 Ark. 440, 84 S. W. 485; *Johnson* v. *Johnson*, 169 Ark. 1151, 277 S. W. 535; *Boynton* v. *Ashabranner*, 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20.' "

There is a proper method for an attack of this sort. Appellees might have sought a new trial within two years under Ark. Stat. Ann. § 27-1907 (Repl. 1962) without even being required to show a meritorious defense and without being required to assume the burden of proof. *Owen* v. *Union Central Life Insurance Co.*, 191 Ark. 1014, 88 S. W. 2d 1002; *Wright* v. *Kaufman*,

192 Ark. 400, 91 S. W. 2d 596; *Wright* v. *Burlison,* 198 Ark. 187, 128 S. W. 2d 238.[6]

I would reverse the decree of the lower court and dismiss the action.

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

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[6]I am not unaware of the holding that one constructively summoned in an action to quiet title may appear within three years and have a retrial of the case upon making a cost bond and showing a meritorious defense. *Lawyer* v. *Carpenter*, 80 Ark. 411, 97 S. W. 662; *Abbott* v. *Butler*, 211 Ark. 681, 201 S. W. 2d 1001. I submit that a close examination of these cases will show that in each the original action was a statutory one, and not an adversary one under the inherent powers of equity. This is quite clear in the latter case and the implication is strong that the former also involved a statutory action. In view of the clear holdings cited herein to the effect that the statute has no application to an adversary action, I think the conclusion that these cases were brought under the statute is inescapable.

JERRY DALE CULLUM *v.* THE STATE OF ARKANSAS

5317 424 S. W. 2d 523

Opinion delivered March 4, 1968

Kenneth Coffelt, for appellant.

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

J. FRED JONES, Justice. On October 3, 1966, the appellant, Jerry Dale Cullum, was charged in an information filed by the prosecuting attorney of Saline County with petit larceny and burglary, consisting of burglarizing the home of Albro Taylor in Saline County and stealing a Texaco Credit Card. On October 13, 1966, he entered a plea of guilty in the Saline County Circuit Court and was sentenced to the state penitentiary for a period of two years under a commitment reciting that he had specifically and intelligently waived counsel. On August 10, 1967, he filed a motion in the Saline County Circuit Court praying that the sentence be vacated and set aside and that he be permitted to enter a plea of

not guilty to charges in the information, and that he be given a jury trial.

Appellant's motion was treated as a petition for relief under Criminal Procedure Rule No. 1, and he testified in support of his petition at a hearing granted by the Saline County Circuit Court. The trial court held that appellant had intelligently waived the benefit of counsel when he entered his plea of guilty and appellant's motion was overruled and his petition denied. On appeal to this court the appellant relies on the following points for reversal:

> "The denial of the motion by the lower court violates defendant's legal and constitutional rights, because:
>
> A. He was not represented by counsel when a plea was entered.
>
> B. The plea was entered because of promises of reward and protection made to him by representatives of the state and prosecution which promises were relied on by the appellant, and which were not kept making the plea legally involuntary, and the trial court accepts the truth of this in its finding of facts.
>
> C. Appellant says he is not guilty of the charge, and the trial court accepts the truth of his statement in the findings of fact."

The record reveals that appellant was on probation under a seven year suspended sentence from the Conway County Circuit Court on a felony charge of false pretense in connection with mortgaging his mother's cattle. While free under this suspended sentence, appellant purchased gasoline in Conway County on a credit card issued to Albro Taylor, a resident of Saline County. He was arrested at his home in Van Buren County

by the state police and was subsequently charged in Conway County with the unlawful use of the credit card, and in Saline County with obtaining it through burglary and larceny committed in that county.

Following appellant's plea of guilty and sentence in the Saline County Circuit Court, he was returned to Conway County where the charge on the unlawful use of the credit card was dismissed, but the suspension of the seven year sentence on the false pretense charge was revoked and he was committed to the penitentiary to serve the two year sentence from Saline County concurrently with the seven year sentence from Conway County.

The appellant's testimony was the only evidence offered at the hearing on the Rule 1 petition, and as to the promises made to him in connection with his plea of guilty, he testified as follows:

"Q. What did they tell you about the case at Morrilton? I am talking about the credit card case?

A. They told me they would give me two years on it and they was supposed to give me two years at Benton and run them concurrent and I would have to go for eight months.

Q. The agreement, so to speak, between you and the Prosecuting Attorney and Mitchell at Morrilton was you was to enter a plea to the credit card case there?

A. Yes.

Q. And come down here and enter a plea in this case here?

A. Yes.

Q. And they said you would get two years on each count and they would run concurrent?

A. Yes.

Q. And you would get out in how long?

A. Eight months.

Q. Now then, what if anything did Mitchell and the Prosecuting Attorney at Morrilton say to you with reference to the seven year sentence which you was already under by reason of a probationary sentence in the false pretense case?

A. As I said, Bill Mitchell called the Prosecuting Attorney. He got my record and brought it up there and he said, 'This won't even be brought up. This we will just forget that.'

* * *

Q. Was that what induced you to come down here and enter the plea in Saline County?

A. Yes. He told me if I took it to court and everything, the seven years would be provoked [sic.] He couldn't keep it from being provoked [sic].

Q. If you would get that out of the way by a plea, the seven years wouldn't be bothered?

A. Yes, sir.

Q. You say Mitchell and the Prosecuting Attorney both told you that?

A. Yes, sir.

Q. Was it on that promise you came down and entered a plea of guilty in this Court?

A. Yes, sir. It was set up before I arrived at Benton."

At the close of the hearing, the trial court denied the petition of appellant's motion upon the following findings of fact:

"On the basis of his testimony, and I am going to consider everything he said is the truth, except for the fact he testified that I didn't offer to appoint counsel for him, and I am not considering that point because I know I did. I am going to consider every word he said is the truth, and I am saying no constitutional right of his has been violated in this case."

The trial court's finding to the effect that appellant waived the benefit of counsel is sustained by the evidence. The commitment recites this fact, the appellant heard the court advise other defendants as to their right to counsel, but didn't hear the court so advise him. The trial judge did remember that he did so advise the appellant, and his holding on this point is not error.

The prejudicial error occurred in this case before appellant was represented by counsel and before he was advised of his right to counsel. The error lies in what appellant says was told to him by the state police officer, Bill Mitchell, who arrested him, and by the prosecuting attorney of Conway County after a telephone conversation with the prosecuting attorney of Saline County, before he was ever arraigned on the charges either in Conway County or in Saline County. Appellant testified that "they told me they would give me two years at Benton and run them concurrent and I would have to go just for eight months. ***He told me if I took it to court and everything, the seven years would be provoked [sic]. He couldn't keep it from being provoked [sic]."

It does not appear from the record that the trial judge of the Saline County Circuit Court or the trial

judge of the Conway County Circuit Court knew anything at all of the arrangement between the arresting officer, the appellant, and the prosecuting attorneys until after the pleas of guilty were entered and sentence imposed in the Saline County Circuit Court. Appellant testified that he was not guilty of charges in Saline County and that he only entered his plea of guilty in that county in order to avoid the revocation of the seven year suspended sentence in Conway County, which the arresting officer could not prevent in the event he stood trial. In other words, appellant was trading the revocation of a seven year sentence in Conway County for a two year sentence from Saline County, and if appellant testified truthfully as to these promises and his reliance thereon, his plea of guilty was not voluntary. The testimony of the appellant on this point was not controverted or impeached by the state and the trial court accepted it as true. Apparently the trial court was under the impression that the promises made to appellant by the arresting officer all related only to the charges filed against him in Conway County. We do not so interpret the record.

Appellant testified that he was promised by the state police officer and by the prosecuting attorney of Conway County, after a telephone conversation with the prosecuting attorney of Saline County, that if he would enter pleas of guilty to the charges in both Saline County and Conway County, he would receive two year sentences on each of these charges, to run concurrently with each other, and that the suspension of the previous seven year sentence would not be revoked. Appellant testified further that he relied upon this agreement and was thereby induced to enter a plea of guilty to crimes which he says he did not commit in order to avoid revocation of the seven year suspended sentence. Although the appellant named the officers who made the promises upon which he says he relied, his testimony was not controverted. Accepting the appellant's testimony as true as the trial court did, and as we must do on the record here,

we conclude that appellant's plea of guilty was not voluntary and that the trial court should have vacated the sentence thereunder and granted the appellant a trial on the charges against him.

We are of the opinion that the order of the trial court should be reversed on appellant's point "B" and that appellant should be granted a trial on the charges of burglary and petit larceny. We find no merit in appellant's points "A" and "C".

Reversed and remanded.

BROWN and FOGLEMAN, JJ., dissent in part.

JOHN A. FOGLEMAN, Justice, dissenting. I agree that this case must be reversed and remanded. I do not agree that it is necessary that a new trial be granted to appellant automatically upon remand. After appellant testified, the trial court disposed of this case on its own motion, much as if the matter were before it on a demurrer to evidence. Appellant had corroborating witnesses to offer. The state was not given any opportunity to offer testimony contradicting appellant. The State of Arkansas, as a party in these cases, is not just the prosecuting attorney and the law enforcement officers. It is the people of the state. They, too, are entitled to a day in court. I would remand this case with directions that the State of Arkansas have the option of further hearing on the motion or a new trial. If the state elected further consideration of the motion, then appellant should be first permitted to offer any other competent evidence he desires, after which the state should offer its evidence.

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

MARSHALL WADE, D/B/A WADE CONSTRUCTION CO. *v.* PIONEER CONTRACTING CO., INC.

5-4385 424 S. W. 2d 852

Opinion delivered March 4, 1968

Bruce Ivy and *Wright, Lindsey & Jennings,* for appellant.

William V. Alexander and *Henry J. Swift,* for appellee.

CONLEY BYRD, Justice. Appellant Marshall Wade, d/b/a Wade Construction Company, appeals from a

judgment in favor of Pioneer Contracting Company, Inc., rendered upon Wade's alleged nonperformance of his subcontract with Pioneer for the common excavation and low-grade embankment material on a two-mile section of Interstate Highway 55 in Mississippi County, Arkansas. Sections 2 and 3 of the subcontract, being the two items here involved, provided:

"Section 2. Subcontractor and contractor agree that the items of work to be performed by subcontractor on the above general contract and the prices the subcontractor is to receive are as follows:

ITEM NO.	APPROX. QTY.	UNIT	DESCRIPTION	UNIT PRICE	TOTAL PRICE
SP&103	112,937*	CY	Common Excavation	$ .30	$33,879.90*
SP&105	64,729*	CY	Embankment Material	$ .40	$25,891.60*

*The figures given under approximate quantities and the extended total price are approximate ones and represent all of the described items between station 350/00 to station 464/00 on the above described general contract, and is exclusive of all upgraded material.

Section 3. Subcontractor agrees to complete the above items of work promptly and in such manner that other items of work under the general contract will not be delayed. If such a delay in the completion of the general contract be caused by subcontractor, and such delay shall result in liquidated or other damages being assessed against contractor on such general contract, the subcontractor agrees to be liable for and to pay such damages for which he is directly responsible and any expense of the contractor incident thereto."

Wade commenced the job in 1960 and moved most of the dirt yardage involved, except on the north 200 feet thereof, which was held up because of a culvert or bridge that had not been completed by another subcon-

tractor. He returned to the job in 1961 and left it in October of that year. The testimony is conflicting as to whether Wade had finished his job when he left in 1961, but a preponderance thereof shows that there remained work to be done on grades, the cutting of median ditches, and the finishing of slopes. Pioneer did not complete its contract with the Highway Department until May 1963. Of course, during the intervening time some deterioration occurred which required additional work by Wade.

It is undisputed that the yardages estimated by the Highway Department prior to construction, set out in Section 2 of the subcontract, were greatly overestimated. The final cross sections show that 104,568 cubic yards of common excavation and 9,301 cubic yards of low-grade embankment were moved in complying with sections 103 and 105 of the Highway Commission specifications.

The matter was referred to a special master, who allowed Wade credits for $3,955.39 in retainage; $1,125 for right-of-way clearing not in the contract; and $1,-115.68 wrongfully withheld by Pioneer for drainage work. In making this computation the master disallowed all moving expense claimed by Wade and the item of $3,260 expended by Wade for removal of mud and dirt placed in Wade's drainage ditch by the bridge contractor. He computed the items alleged in Pioneer's cross-complaint as follows:

Section No.	Item of Damage	Amount
(a)	Cutting trench and riprap excavation	$ 5,096.00
(b)	Clearing underbrush	908.48
(c)	Completion of Wade's work	16,986.16
(d)	Deterioration of Pioneer's portion of job	17,445.42

(e)	10% of total overhead	9,905.91
(f)	Deterioration of sand	11,065.91
		$61,407.48
	Less Wade's credits	6,196.07
		$55,211.41

I

Since Pioneer's general contract with the State Highway Commission contained a $150-per-day liquidated damages provision if Pioneer failed to complete the work within 320 working days, Wade contends here that this provision was incorporated into his subcontract by section 3 above. Upon this premise he then contends, citing 22 Am. Jur. 2d *Damages* § 235 (1965), that a liquidated damages clause substitutes the amount agreed upon as liquidated damages for the actual damages, and that no sum larger or smaller than the amount stipulated in the contract can be awarded.

Based upon this contention, Wade contends that the foregoing items of damages (d), (e) and (f), as determined by the special master and awarded by the chancellor, are delay damages that Pioneer is not entitled to collect, since Wade's performance did not result in liquidated damages being assessed against Pioneer.

Wade's basic premise is not supported by section 3 of the subcontract. The second sentence is cumulative and was apparently inserted to prevent any controversy on Pioneer's right to recover delay assessments made against it by the Highway Department. See *Kentucky Consumers Oil Co.* v. *General Bonded Warehouse Corp.*, 299 Ky. 161, 184 S. W. 2d 972 (1945). Therefore we affirm the chancellor as to items (d), (e) and (f) in the master's report.

II

With respect to item (b), appellant makes the same contention on delay that is set forth above regarding

items (d), (e) and (f). We find this contention without merit for the reasons there stated.

In addition appellant argues that item (b), in the amount of $908.48 for clearing underbrush, comes within section 102 of the Highway Commission specifications. Section 102 is applicable only to clearing the right-of-way of trees and is a matter that is required to be completed before the excavation is undertaken. The proof shows that item (b), $908.48, covered work done by Pioneer in Wade's absence to clear the right-of-way of weeds and other undergrowth. Therefore we hold that the chancellor properly allowed item (b), in the amount of $908.48 for clearing underbrush, under section 103.5 of the specifications.

III

Under item (a) of the damages the court allowed, in toto, the sum of $5,096 for equipment rental in cutting trench to grade, setting trench bottom, and excavation for structural riprap for the period from August 22, 1961 through August 31, 1961. In neither pleadings nor testimony are the equipment rental and labor broken down among these three items. All of Pioneer's expenses on the three items are listed without allocation.

Appellant contends that where there is evidence as to damage from various causes, a portion of which Wade could not be held responsible for, and no evidence on pro-ration of the damage resulting from the separate causes, then the proof is too uncertain to permit the allocation to Pioneer of part or all of the proved damages. 25 C. J. S. *Damages* § 28 (1966).

Appellee agrees with appellant's theory of the law but contends that in this instance the theory is not applicable because the excavation for structural riprap was an item to be paid for under item 103.5 of the specifications. Item 103.5 provides as follows:

"103.5 Basis of Payment. The yardage of 'Roadway Excavation' measured as provided above, shall be paid for at the contract unit price per cubic yard bid for 'Solid Rock Excavation', 'Common Excavation' or 'Unclassified Excavation', as the case may be, which price shall be full compensation for all light clearing and light grubbing; *for all excavation;* for all drilling and blasting; for formation of embankment; for all compaction where Special Compaction of Earthwork (Section 107) is not specified as a pay item; for all watering and aerating of soil; for trimming of slopes; for disposal of surplus material; for all hauling within the free haul limits; for preparation and completion of subgrades and shoulders of roadway; for final clearing up of the right-of-way; and for all labor, tools, equipment and incidentals necessary to complete the work." (Emphasis supplied.)

Appellant, on the other hand, contends that the structural riprap is an item to be paid for under "riprap." Section 909.5 of the general contract provides as follows:

"909.5 Basis of Payment. Riprap placed and accepted and measured as provided above, shall be paid for at the contract unit price per cubic yard bid for 'Riprap,' which price shall be full compensation for furnishing and hauling all material, for all quarrying involved, *for necessary excavation* and back fill, and for all labor, equipment, tools and incidentals necessary to complete the work." (Emphasis supplied.)

We agree with appellant that the excavation for structural riprap is an item to be paid for under section 909.5. We are led to this because common excavation and riprap excavation would not necessarily carry the same price, and section 909.5 specifically points out that the payment for riprap includes the payment for necessary excavation and backfill in connection therewith. Therefore we hold that the chancellor improperly allowed the

sum of $5,096 under item (a) of the damages as against appellant.

IV

Included within the $16,986.16 allowed under item (c) is $6,172.50 paid to Harvey Durham for completing a portion of Wade's subcontract. In this connection Durham testified that as part of his work in finishing Wade's subcontract he also finished the upgrade portion of the embankment for Pioneer. Pioneer readily concedes that the upgraded portion of the embankment was its responsibility and not Wade's. Since no allocation of charges was made by Durham between work done for Wade and work done in performing Pioneer's portion of the upgraded embankment, we hold that the trial court erred in allowing the item of $6,172.50.

Therefore, we reduce item (c) of the damages allowable to Pioneer to the amount of $10,813.66.

V

On the $3,260 Wade expended to clear the bridge contractor's waste material from the right-of-way, the only basis shown for disallowing this item is the master's finding that if Wade expended the money therefor his cause of action would be against the bridge subcontractor and not Pioneer. All the evidence shows that Wade did spend $3,260 to remove the waste material from the ditches in addition to the yardage he moved under his subcontract. It appears to us that such removal would have been necessary in the performance of Wade's contract and that as between Wade and Pioneer, Wade was entitled to charge the cost thereof against Pioneer.

Therefore, we hold that Wade is entitled to an additional credit of $3,260.

VI

Wade argues that the court erred in determining that he breached his contract. As we view the facts it is definitely established that Wade did not completely perform his contract, and that the work he did was not done promptly within the terms of the contract. It is undisputed that Wade went out of business, having sold his equipment in 1962 before the job was finished.

Therefore, we conclude that the chancellor properly ruled in favor of Pioneer on this issue.

Wade contends that he was entitled to the difference between the actual quantities moved and the estimated quantities contained in his contract. This contention is without merit, for section 2 of the contract clearly provides for payment on a unit price rather than a total consideration.

ELAINE DAVIS WILKINS *v.* BOBBY GENE DAVIS ET AL

5-4485 424 S. W. 2d 530

Opinion delivered March 4, 1968

Bart Mullis, for appellant.

Wilton Steed, for appellees.

CONLEY BYRD, Justice. Elaine Davis Wilkins appeals from the dismissal of her petition to change custody of her son from his paternal grandmother, Martha Davis. In 1962, she filed her complaint for divorce from appellee Bobby Gene Davis. The chancellor, after hearing a number of witnesses for both parties, granted Davis a divorce on his cross-complaint and awarded custody of their year-old son to his mother, Martha Davis. After appellant remarried, she sought change of custody. On February 4, 1963, after a hearing, the court in effect denied the petition by continuing the matter for six months. No further action was taken on that petition. The testimony of the first two hearings is not in the record.

In 1966, Mrs. Wilkins filed the petition here appealed from, in which Martha Davis, the grandmother, was named a party defendant. After hearing the testimony of the parties and their witnesses, the court observed that there was no evidence of any change of circumstances, and entered its decree dismissing her petition.

For reversal, Mrs. Wilkins urges that the trial court erred in refusing to change the custody of the minor child to her, the natural mother. Without the transcripts of the 1962 divorce hearing, at which the chancellor refused to give custody of the baby to either parent and awarded it to Mrs. Martha Davis, and the 1963 custody hearing resulting in the court order continuing the matter for six months, we have no inkling of the evidence that prompted the chancellor's original custody order. However, these were final orders from which no appeals were taken. The general rule in this jurisdiction relative to change of custody is that there must be proof of change of circumstances. Appellant demonstrated that she is making a good home for her husband and two children, but there is no evidence in the record

that this was a change in circumstances from evidence adduced at the prior hearings, or that the welfare of the child would best be served by a change in custody from the stable home of Mrs. Davis where he has remained for a number of years. *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47 (1921). Under this state of the record, we cannot say the chancellor erred in refusing to change custody.

Appellant next urges that the court erred in refusing to make specific order for overnight and weekend visitation of the boy with his mother. The court order simply stated that "custody should remain vested in Martha Davis subject to the right of reasonable visitations of Elaine Davis Wilkins and her husband, and Bobby Gene Davis and his wife." The court's oral findings obviously contemplate overnight and longer visits with his parents, "to be controlled by the way the child develops." The chancellor, of course, has continuing jurisdiction to make such further orders as may be needed. However, from a review of the testimony it certainly appears that such visitation can be handled among the parties on a workable, reasonable basis, in a climate of cooperation, without necessity for further court order.

Affirmed.

CARL WIDMER *v.* R. G. WOOD

5-4445 425 S. W. 2d 514

Opinion delivered March 11, 1968
[Rehearing denied April 15, 1968.]

Carl Widmer, pro se.

Hardin, Barton, Hardin & Jesson, for appellee.

CARLETON HARRIS, Chief Justice. R. G. Wood, appellee herein, filed suit against Carl Widmer, appellant herein, seeking judgment for the recovery of an abstract of title. Appellant entered a special appearance for the purpose of quashing summons, and setting aside the purported service. This motion was denied on November 17, 1966, and a motion was then filed to vacate this order of the 17th. The motion to vacate was likewise denied by the trial court on December 21, 1966. There-

after appellant filed an answer and submitted requests for admission of facts to appellee. With reference to the last, Wood filed a motion to quash. On April 28, 1967, appellant filed a motion for summary judgment of dismissal, together with his own affidavit in support of the motion, and a response was filed by appellee on May 12. On that date, the trial, without jury, was held and, after hearing testimony, the court directed that the abstract of title be returned to appellee, or, if same was lost, appellee should have judgment in the amount of $400.00 as damages. From the judgment, appellant brings this appeal. For reversal, it is first asserted that the trial court erred in not granting the motion to abate the complaint; to quash summons, and set aside the purported service, and it is then contended that the court erred in not granting appellant's motion for summary judgment of dismissal.

We find no merit in the first point. Widmer's contention is based on the allegation that the summons served upon him directs that he answer within twenty days after service, whereas the statute, Ark. Stat. Ann. § 27-1135 (Repl. 1962) provides twenty-one days in which to answer or plead. Appellant has no cause to complain, for his first pleading (special appearance and motion to abate) was filed sixteen days after being served; in other words, Widmer was not deceived or misled in any way to his detriment, whatever the status of the service had upon him. As pointed out in 72 C. J. S. *Process* § 14, page 1009, an error in stating the time at which process is returnable is not fatal where a defendant was not misled to his detriment or prejudice.

As to his second point, relating to the summary judgment, Widmer relies in large measure upon the fact that he served sixteen requests for admission of facts upon appellee, which were never answered. However, appellee did file a "motion to quash," stating that same were irrelevant and otherwise improper. We held in *Widmer* v. *Wood,* 243 Ark. 617, 421 S. W. 2d 872, that

a similar motion by the appellee constituted written objections[1]. Appellant further points out that the statute provides that a notice of hearing on objections shall be given at the earliest practicable time, and that no such notice was given by appellee. In *Widmer* v. *Wood,* 243 Ark. 457 (the first Widmer-Wood case to reach this court), the same argument was presented. We held it to be without merit, stating:

"***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."

Appellant also asserts that the affidavit he filed, along with his motion for summary judgment, was sufficient within itself to supply the facts essential to justify the granting of his motion for summary judgment. We do not agree, and in fact appellant's statements on the day of trial are contrary to this assertion. Let it be borne in mind that the only matter involved in this suit is whether Wood is entitled to the abstract of title; Widmer's affidavit relates to his contention that Wood breached the contract for the sale of the land. In determining the issues that would be presented to the court, the judge asked appellant if he had any statement to make. Widmer replied:

"I've read this complaint, I've read the answer and I've read the exhibits attached to it and no where do I find anywhere a mention of an abstract or conditions upon which it was to be turned over to Mr. Widmer or returned by Mr. Widmer, or kept by Mr. Widmer. *There is nothing in here that shows and the court's got to have proof this morning as to the agreement regarding the abstract transaction.* [Emphasis supplied.] Now, of

[1]This is the third lawsuit between Widmer and Wood to reach this court, and in the second case we pointed out that nearly all of the requests for admissions were similar to those set forth in the first case. Here too, most are substantially the same.

course, it would depend on, if there hadn't been a default there wouldn't have been any law suit, but regardless of who's fault it is, I am unable at this time to see where that question of fault in not carrying it out has anything to do with the agreement to the abstract. That's a separate agreement, and I'm interested in hearing only what the agreement is with respect to this abstract, not going into the long winded business here to determine who's fault it is for breaching this contract."

The court then proceeded to hear proof, and three witnesses testified, at the conclusion of which the court rendered its judgment in favor of appellee.

Affirmed.

L. O. MAKIN *v.* ETHEL ADINA MAKIN

5-4495 424 S. W. 2d 875

Opinion delivered March 11, 1968

Curtis E. Rickard, for appellant.

Hall & Tucker and *John F. Lovell Jr.,* for appellee.

GEORGE ROSE SMITH, Justice. In 1965 the appellee obtained a divorce from the appellant. The decree awarded custody of the couple's four children to the appellee and directed the appellant to support the children by making weekly payments of $12.50 for each child during its minority.

In 1967 the appellant, upon his own initiative, began paying only half the amount fixed by the decree. In response to a citation requiring him to show cause why he should not be punished for contempt, the appellant filed a petition denying that he was the father of the two younger children and asking that the original decree be modified to relieve him from the duty of supporting those two children. This appeal is from an order which in effect sustained a demurrer to that petition, for its failure to state a cause of action, and dismissed it.

The court was right. The petition for a modification of the decree after the expiration of the term was based upon the wife's asserted fraud on the court. Ark. Stat. Ann. § 29-506 (4) (Repl. 1962). The petition stated that more than a year before the birth of the third child the husband underwent an operation for sterilization. Owing to the subsequent birth of two children he believed at first that the operation had failed. Shortly before filing his petition for modification of the decree he assertedly learned that the operation had really been successful, so that he could not have been the father of the two younger children. For that reason he asked to be relieved of their support.

The petition was demurrable. Actionable fraud on the court, under the statute, must relate to some extrinsic matter and must be something more than false or fraudulent acts or testimony relating to the original cause of action, the truth of which was or might have been in issue.

Several decisions on the point were reviewed in *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234

(1950), a case decidedly similar to this one. There the divorce decree directed the husband to support a child whom the couple had adopted. The details of obtaining the adoption order had been left to the wife. Later on the husband sought a modification of the support order, asserting a fraud on the court in that the adoption proceeding was void. The husband accordingly alleged that the child was not his either by blood or by adoption, so that he should be exempt from the burden of its support. We rejected that contention, holding that the petition for modification of the support order did not assert an actionable extrinsic fraud on the court. The principle of that decision governs the case at bar.

Affirmed.

WALTER J. SARDIN *v.* E. W. ROBERTS

5-4490 424 S. W. 2d 889

Opinion delivered March 11, 1968

W. M. Herndon, for appellant.

Smith, Williams, Friday & Bowen, for appellee.

PAUL WARD, Justice. Walter J. Sardin (appellant) sued E. W. Roberts (appellee) to recover for personal

injuries, allegedly caused by the negligence of appellee in an automobile collision. The trial resulted in a jury verdict in favor of appellee.

Appellant was driving a Cadillac automobile across Broadway bridge toward North Little Rock and appellee was following in a Volkswagen. When appellant reached the end of the bridge he turned to his right and appellee followed in the same lane a short distance behind, both cars traveling approximately fifteen miles per hour. Shortly after the turn was made the left front fender of appellee's car collided with the right back bumper of appellant's car.

On appeal appellant seeks a reversal on the sole ground that there was no substantial evidence to support the jury verdict.

Appellant and appellee were the only eye witnesses who testified as to what caused the collision. In substance, appellant stated: It had snowed the night before and I didn't know whether the streets were still slick or not so when I came off the bridge I slowed down to go around the curve when appellee's car struck my car from the rear; by the time I set my brakes "my car stopped some thirty feet or so from where I was struck"; I was moving very slowly at the time my car was struck; my car didn't appear to be damaged at all.

A city policeman, who arrived at the scene shortly after the collision, testified: I found the two cars entangled; it did not appear that appellant's vehicle had moved any substantial distance after the impact; it appeared to have stopped on impact. He further stated that appellee appeared to be drunk at the time but later learned this was not true, and that he had been taking medicine for an ailment.

Appellee, in substance, testified: The turn at the end of the bridge had been completed but before we got

leveled out appellant stopped his car and I couldn't stop, so I swerved to the right to avoid hitting him but my left front fender caught his right back bumper; appellant gave no signal that he was going to stop; his car was not knocked forward, but stayed right where they hit and they stayed there until the policeman arrived; both cars were traveling between twelve and fifteen miles per hour.

The above conflicting testimony presented a question of fact for the jury to resolve. On appeal we view the evidence "in the light most favorable to the jury verdict", as stated in *Whiteside* v. *Tyner,* 238 Ark. 985 (p. 987), 386 S. W. 2d 239. Therefore, in view of the above, we are unwilling to say there was no substantial evidence to support the jury verdict in this case.

ALBERT HARRIS *v.* STATE OF ARKANSAS

5314 425 S. W. 2d 293

Opinion delivered March 11, 1968

[Rehearing denied April 8, 1968.]

George Howard, for appellant.

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

LYLE BROWN, Justice. Appellant Albert Harris received a death sentence in April 1963. That sentence was here affirmed in *Trotter* and *Harris* v. *State,* 237 Ark. 820, 377 S. W. 2d 14 (1964). Certiorari was denied by the United States Supreme Court. Shortly thereafter, *Jackson* v. *Denno,* 378 U. S. 368 (1964) held that Jackson's case should be remanded because the same jury passed on both his guilt and the voluntariness of his confession. On the strength of that pronouncement in *Denno,* Harris filed a petition in the United States District Court, alleging error because the record in his trial showed that the voluntariness of his alleged confessions, together with the question of guilt or innocence, were submitted to the same jury. Pursuant to the directive of the Federal Court, the State trial court conducted a hearing to determine the voluntariness of Harris' oral admissions. Harris brings this appeal from an adverse ruling.

It is not necessary to reconstruct the entire case. The facts are detailed in our *Trotter* and *Harris* deci-

sion. We are here concerned with two rather brief instances in which Harris is alleged to have made admissions pointing to his guilt. The first episode occurred at his home just before daylight and about four hours after the rape. As a result of there being questioned by officers, Harris was placed under arrest for investigation and taken to the city jail in Monticello. About two hours later he was there questioned by Jerry Wilson, the escort of the rape victim, who went to the jail for the purpose of identifying the prisoner. For clarity the testimony concerning those two episodes will be discussed in sequence.

1. *The Incident at the Harris Home.* After apprehending Trotter, the officers received information that Harris and Trotter had been together that night. Two men were alleged to have committed the crime in concert. Sheriff Towler, State Patrolman Griffin, and City Officer Newton proceeded to Harris' home in Monticello. They had no search warrant. Harris and his wife were in bed and the lights were out. After several knocks on the door the wife responded and the officers entered. There is considerable variance between Harris' and the State's version of the conversations and transactions.

Harris was his only witness at the *Denno* hearing. The essential parts of his testimony were as follows:

> "That morning when they come to my house and knocked on the door, my wife opened the door and they just came on in. Ain't nobody asked them in. I was laying on the bed . . . . Lieutenant Griffin . . . said 'nigger, get up out of that bed.' I just got up and he had his hand in his coat pocket and I seen a pistol. The Sheriff told him that there ain't going to be no rough stuff . . . . The Sheriff, he said he knew my wife, he said he's been knowing her so many years and wanted to talk to us private. . . . We went back in the kitchen and closed the door. He said 'Albert, you are in a bad fix.' I said, 'Mr.

> Jack, what do you mean by a bad fix?' He said that Trotter said that me and him attacked Joyce Binns. . . . He told me, 'Trotter is a bad boy, he's getting into trouble all the time.' He said, 'I can help you, but I can't help him.' . . . I said, 'I want to see an attorney.' He said, 'Well, you give me time and you'll see one.' He never advised me of no kind of rights at all. He told me, he said, 'If you want any help, you got to cooperate with me.' I said, 'I don't see why I have to cooperate with you when I haven't done anything. I've been in bed with my wife.' . . . He told my wife, 'I'm going to take him down to the city hall and I'll bring him right back.' He said he was carrying me down for investigation. . . . I haven't seen no watch, no more than my wife's watch. . . I didn't have no watch in my wallet in the first place. . . . I never admitted nothing to no one."

On cross-examination Harris testified he was not struck; no one cursed him; the Sheriff did not speak disrespectfully; and the discussion was in normal tones.

The State offered as witnesses the three officers who went to the Harris home. The Sheriff's version was that the wife, who answered the door, was advised that they wanted to talk to her husband and that she invited them in the house; the Sheriff had known Harris' wife a number of years; Harris propped himself in bed and the Sheriff inquired where he had been during the night and with whom he came home; Harris replied that he had been to Dermott and had ridden back to Monticello with one Sonny Hall; the Sheriff asked to see the clothing he had worn during the night; Harris pointed to a pair of trousers on a hanger in the corner; inspection disclosed that they had not been recently worn; Harris was admonished to produce the right clothing; he got out of bed and started to the kitchen and the Sheriff and Harris' wife followed; Harris picked up a pair of trousers from a table and handed them to the Sheriff;

blood was observed on the fly of the pants; when the Sheriff took the pants he felt a billfold in the pocket with a "bulge" in it. The bulge proved to be a lady's wristwatch. Harris' wife stated that it was not her watch; at that point the Sheriff told Harris the presence of the watch required "some explaining"; the Sheriff told Harris "he didn't have to tell me anything and that if he did it probably would be held against him in court"; Harris said he was willing to tell him and explained that he received it from Orion Trotter; he admitted he was with Trotter at the time of the crime; that the two of them put Joyce Binns in Trotter's car and drove away; he said he drove the car but denied having raped the girl; the Sheriff then opened the door and called in the other two officers; in their presence he again advised Harris of his rights and asked Harris if he would repeat his statement.

Officers Newton and Griffin corroborated the testimony of Sheriff Towler. Officer Newton's testimony varied with that of Towler and Griffin with respect to Sheriff Towler having a private conference with Harris. Newton's best recollection was to the effect that all present heard the first conversation; however, he conceded that the lapse of time (four years) could have well affected his recollection of details. The only difference of note is that Sheriff Towler made no reference to suggesting to Harris that he could talk to a lawyer; on the other hand, the other two officers testified they heard the Sheriff so advised Harris.

2. *The Incident at the City Jail.* After being questioned at his home, Harris was taken to the Monticello city jail at approximately six o'clock of the same morning. There Officer Newton was placed in charge of the prisoner. Harris testified the cell was comfortable and he was not abused.

Jerry Wilson, a college senior and escort of Miss Binns, was treated for injuries received in resisting her

assailants and was discharged. He learned of Harris' arrest in approximately two hours after Harris was jailed. Apparently on his own initiative he went to the jail to see if he could identify the accused. Jerry testified that he was admitted "reluctantly" by Officer Newton.

> ". . . I looked through the door at the defendant Harris. I asked him had he ever seen me before. He said, 'Yes, I saw you last night.'
>
> "Q. That was your conversation?
>
> "A. Yes, it was. I asked him again if they planned what had happened and he said, 'No, we didn't.' "

The only other statement Jerry recalled was by Officer Newton. As the two men were about to leave the jail, Newton advised Harris to stand away from the window "for his own safety." Officer Newton corroborated all of Jerry Wilson's testimony. The only variance in their versions of the incident was that Newton said he gave the admonition about Harris standing in front of the window *before* Harris' conversation with Jerry.

Harris gave a different version of the incidents at the jail. Summarizing, he said when he was brought to jail, Newton told him to "stay away from the window if you don't want your head blowed off, because people are mad around here"; shortly, Jerry Wilson came to the jail "and was raising sand"; Newton took Jerry by the arm and opened the door to where Harris and Jerry could see each other. Harris continued:

> ". . . The white boy asked did I know him and I said, 'No, this is the first time I ever seen you.' He said, 'You don't know me from last night?' I said, 'How can I know you. I was at home.' . . .

> Officer Newton told me, he said, 'Be sure and stay away from that window, because people around here is mad.'"

It was conceded that no "warnings" were given Harris as a preface to the two questions propounded by Jerry Wilson. Officer Newton was in uniform and armed.

When the voluntary nature of a confession is disputed on federal constitutional grounds, the weight ordinarily given to a factual determination by the trial judge cannot be applied. It becomes the duty of the appellate court "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis* v. *North Carolina,* 384 U. S. 737 (1966). That does not mean that the findings of the trial judge must be shunned. They are entitled to considerable weight in resolving evidentiary conflicts and to respectful consideration on the crucial issue of voluntariness. However, that respect cannot be permitted to frustrate the independent responsibility of the appellate court to determine the voluntariness of a confession. See *Haynes* v. *Washington,* 373 U. S. 503, 515 (1963). Because of the recited requirements we have searched the entire record and narrated the essential testimony.

The prerequisites for the admission in evidence of any statements made by a defendant when he is in custody of officers are found in *Boyd* and *Byrd* v. *State,* 230 Ark. 991, 328 S. W. 2d 122 (1959). There is a presumption that it is involuntary; and the burden is on the State to show the statement to have been voluntary, that is, freely and understandably made without hope of reward or fear of punishment. In making those determinations the court looks "to the whole situation and surroundings of the accused." Although *Miranda* v. *Arizona,* 384 U. S. 436 (1966), was subsequent to the defendant Harris' trial, the nonretroactivity of *Miranda* "does not affect the duty of courts to consider claims

that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo . . .*" *Davis* v. *North Carolina, supra.*

The record in this case has been examined in light of all the cited precedents and we are convinced that the trial court was correct in holding Harris' statements to have been voluntary. Further, we have examined the cases, state and federal, cited by appellant. Those cases were reversed because confessions were tainted with such incidents as prolonged questioning, inspiring fear, questioning mentally retarded persons, and holding out hope of clemency. Appellant relies heavily on *Payne* v. *State,* 231 Ark. 727, 332 S. W. 2d 233 (1960); and *Payne* v. *Arkansas,* 356 U. S. 560 (1958). In *Payne* v. *Arkansas* the court emphasized the *totality* of treatment of a mentally dull 19-year-old youth. He was arrested without a warrant, did not have a hearing before a magistrate, was not advised of any rights, held incommunicado for three days, denied food for long periods, and was told that a mob was approaching.

A comparison of Harris' overall situation with that of Payne is appropriate. But first we must resolve the conflict in evidence. For three reasons we think the State's evidence is more credible: (1) To say that Harris, under his own testimony, ever became excited, would be without foundation; (2) he was contradicted in most of his accusations of mistreatment by from two to three witnesses; and (3) the trial judge is "closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony." *Haynes* v. *Washington, supra.*

Harris' age and education are not shown in the record. It does show him to have been a married man. The manner in which he conducted himself under examination leaves no doubt as to his mental alertness. Harris' arrest and the search of his apartment are dis-

cussed in *Trotter* and *Harris* v. *Stephens,* 241 F. Supp. 33 (1965). Harris attacked the legality of his arrest and the search. Judge Young rejected both points, and we think correctly so. With reference to being advised before making any statement, three witnesses testified Harris was informed that he did not have to make any statement and that if he did, that statement could be used against him in court; and that after being so advised, Harris stated he was willing to explain his participation. Further, two witnesses testified that he was asked if he wanted to first talk to a lawyer. Unlike Payne, Harris made his statements in the course of brief questioning. There is no credible evidence of threatened mob violence. Harris was advised at the jail to stand away from the window for his own safety. That precaution could just as well have been motivated by the enormity of the crimes which had been committed, namely, the armed robbery of two persons and the criminal assault of one of them. If Harris heard or saw a crowd he did not so testify. Officer Griffin was asked by Harris' counsel whether people were milling around outside. He answered, "Just some people out there. I don't think there were too many at that time."

Appellant contends that his statements at the city jail were induced by threats of mob violence, and further that he was not advised of his right to remain silent. When Jerry Wilson, a private citizen as opposed to an officer, went to the jail to see Harris, it was for the purpose of identification. We have not been cited to any rule of law which would require that Harris be informed that Jerry was about to ask him a question. If Jerry had an intent at the time he entered the jail to ask a question, we are convinced that Officer Newton was not aware of it. In fact, Jerry requested "to *see* the little Negro." Notwithstanding Harris testified Jerry came in "raising sand," no fear was aroused in Harris. He testified that he told Officer Newton to "let him on in the cell."

Other than questioning the voluntariness of Harris' admissions, only one other point is raised. Sheriff Towler's death intervened between the jury trial in 1963 and the Denno hearing in 1967. The trial judge permitted the introduction of Sheriff Towler's testimony which was given at the trial. Harris was adequately represented at the 1963 trial and his counsel had the opportunity to cross-examine the Sheriff. Harris' present counsel contends that his inability to cross-examine Sheriff Towler at the hearing deprives his client of due process. We are cited no authority. All the statutory requirements for the admission of testimony from a prior trial were present. The original transcript was introduced, the death of the witness was established, the defendant and his counsel were present at the 1963 trial, and they had the opportunity to cross-examine the witness. Ark. Stat. Ann. § 28-713 (Repl. 1962).

Affirmed.

BYRD, J., disqualified and not participating.

CITY OF LITTLE ROCK *v.* ROBERT MARTIN

5-4503 424 S. W. 2d 869

Opinion delivered March 11, 1968

City Attorney, *Joseph C. Kemp; Perry Whitmore,* Asst. City Attorney, for appellant.

Spitzberg, Mitchell & Hays, for appellee.

LYLE BROWN, Justice. Robert Martin, for forty-four years a nonuniformed employee of the City of Little Rock, instituted this action to recover disability retirement benefits as provided by city ordinances. The chancellor awarded Martin 44.3 months disability pay and the City appeals. The City here contends that the disability payment authorized by the ordinances is a mere gratuity to be paid a disabled employee only if the City adjudged the payment to be warranted.

Ordinance No. 6775 was adopted in 1945. It "announces and adopts the following policy and procedure for those employees who, because of permanent disability, retire from the city's employ." Continuing, the ordinance states that a nonuniformed city employee who is compelled to retire because of sickness, or because of permanent disability growing out of an injury incurred in line of duty, shall be retained on the payroll. The period of retention is fixed at a number of months equal to the number of years of service.

Ordinance No. 10783 was enacted in 1958. It reiterated the policy of the City to continue to pay dis-

abled employees of the nonuniformed group as in the past "until such time as a better retirement plan is adopted." It is there required that the retiring employee furnish a certificate from his physician and submit to examination by the city health director. The latter must approve the request for retirement. The approval by the city health director could only mean that the director must find the employee physically disabled.

The City has not subsequently adopted any retirement plan to cover nonuniformed employees who are compelled to retire because of sickness or injury. It did, by resolution in 1960, approve a group retirement plan funded by an insurance company. The City and its employees pay the premiums and it enables participating employees who attain 65 years of age and meet other requirements to draw retirement pay. The insurance program is not a sickness and disability retirement plan and therefore does not affect the provisions of the recited ordinances. The plan is here mentioned because the City, in denying Martin's claim, stated (through its manager) as the reason "that there was no city policy to pay employees who have regular retirement." Martin was eligible to draw under the insurance plan at the time of his retirement. For reasons not here pertinent, Martin elected to take a lump sum payment, which amounted to a return of his premiums and a small rate of interest.

Martin supplied the City with a letter from his physician and submitted to examination by the public health director. The diagnosis was osteoarthritis, chronic and generalized arteriosclerosis, and "rapid and forceful heart beat." The health director stated Martin's condition to be chronic and progressive and ended with this conclusion: "I doubt that he can continue his present occupation." It was the duty of Coy Adams, City Personnel and Civil Service Director, to examine the documents, calculate the employee's years of service, and transmit the information to the city manager. Mr.

Adams testified that Martin conformed to, and met, all procedural requirements. Mr. Adams informed the city manager that "Robert ought to have his disability retirement." It was stipulated that Martin duly conformed to required procedures and that "he was compelled to retire from his employment due to sickness and permanent disability to perform his job."

Only one point for reversal is properly raised. Appellant contends that the lower court erred in ruling that Robert Martin is entitled to the 44.3 months disability pay as provided by the recited ordinances. Before discussing that issue we point out that generally before a board's decision will be reviewed it must be alleged that the board has acted arbitrarily. *Dunn* v. *Dauley,* 232 Ark. 17, 334 S. W. 2d 679 (1960). Appellee failed to allege in his complaint arbitrariness or capriciousness on the part of the Board. However, since appellants have at no time raised that point it is deemed waived.

We revert to the only reason shown by the trial record for disallowing Martin's claim, namely, not to pay employees who are eligible for old-age retirement pay under the insurance plan. The undisputed proof gleaned from the City's only witness (who was expertly qualified) is that the City has continued to pay disability retirement under the ordinances *since* the adoption of the old-age retirement plan, *including those employees who joined the insurance program* (old age retirement). So far as the record discloses, Robert Martin is being shunted aside while others in his identical category continue to be paid. We do not hesitate to label that action as creating differences in rights where there is absolutely no difference in situation. That action was condemned in *Application of Wallace,* 199 N. Y. S. 2d 526 (1960). The ordinances cannot be ravished to the detriment of one qualified employee by a mere resolution of the City Board of Directors which denies only that employee his authorized benefits.

We would emphasize that the single question here presented is whether, as a matter of law, Robert Martin has a vested right to disability benefits. Under the recited ordinances and the undisputed facts, Robert Martin qualified himself to be maintained on the payroll of the City of Little Rock for a period of 44.3 months from November 30, 1966, subject to approval of the Board of Directors. Since the Board's approval was denied arbitrarily, we hold that beginning with that date Martin became entitled of right to each periodic installment as it accrued, that obligation to continue at least so long as the ordinances remain in force.

Affirmed as modified.

SARAH K. GIBSON *v.* ELIZABETH (SCOTT) GIBSON

5-4471 424 S. W. 2d 871

Opinion delivered March 11, 1968

Arnold, Hamilton & Streetman, for appellant.

John F. Gibson, for appellee.

JOHN A. FOGLEMAN, Justice. This is a suit by the former wife of J. A. Gibson II against his present spouse seeking to recover damages for alienation of his affections. It was filed July 23, 1964. In *Gibson* v. *Gibson,* No. 5-3904, 240 Ark. 827, 402 S. W. 2d 647, it was held that the five-year statute of limitations was applicable in this case. Upon remand, appellee filed a motion to dismiss upon the ground that the cause of action was barred by this statute of limitations. This appeal is from the order of the trial court granting that motion.

The gist of an action such as this is loss of consortium, which includes the husband's society, companionship, love and affection, and aid. *Weber* v. *Weber,* 113 Ark. 471, 169 S. W. 318; *Watson* v. *Davidson,* 141 Ark.

591, 217 S. W. 777; *Hammond* v. *Peden,* 224 Ark. 1053, 278 S. W. 2d 96. The cause of action accrues when this loss occurs without reference to the date of the words or acts causing the loss. *Miller* v. *Miller,* 165 Md. 425, 169 Atl. 426 (1933).

Appellant alleged in her complaint that appellee engaged in acts of enticement and inducement directed toward J. A. Gibson II between January 1958 and June 1962, for the purpose of alienating his affections, resulting in abandonment of appellant, the institution of a suit for divorce by him, and the dissolution of the bonds of matrimony between them on June 29, 1962. A specific allegation is made with reference to conduct of appellee between August 3 and August 8, 1959, said by appellant to have been adulterous.

Prior to the filing of the motion appellant had admitted, in response to a request by appellee, that her former husband ceased to occupy the marital bed with her sometime in June 1958. She said, however that he neither left nor deserted their home then, but continued to reside with her for some period thereafter. She also admitted that he instituted a divorce suit on January 29, 1959, but stated that she felt and believed that a reconciliation could and would be effected, until the alleged acts in August 1959. She also stated that a divorce decree granted her husband December 18, 1960, was reversed and ultimately a divorce was granted her. In response to an additional request for admissions, appellant admitted that Gibson left the marital bed on or about June 13, 1958, but that she had no knowledge at that time that he intended to permanently abandon the home. She stated that he was in the home on numerous occasions, taking meals and occupying a bed until August 1959. She reiterated her belief that there was a possibility and hope of reconciliation until the August 1959 occurrences.

Hearing was held upon objections of appellee to these responses and a motion by her to require that ap-

pellant's complaint be made more definite and certain. The court overruled the motion and ordered the taking of a discovery deposition of appellant. In this deposition appellant stated that she had not slept in the same bed with her former husband since June 12, 1958, and that they had not cohabitated as husband and wife since that date. She admitted that he had not kissed her since that time, but said that up until his marriage to appellee, the meals he had eaten at their home were too numerous to count and named specifically Christmas and birthdays of children as special occasions. She testified that while they had not occupied the same bed at the same time, Gibson had slept in their bed and she had seen him asleep in bed with the children at the home both day and night. She did not recall having seen him with his clothes off on any of these occasions. According to her testimony when Gibson took a suitcase and left home on June 13, 1958, he said he was leaving because he had to get away for a while to think. She further stated that since that date they had discussed the possibility of his return to live with her as his wife, that he had asked permission to come to the home where she was residing many times, that she had tried to persuade him to come back and that he had actually come to the house many times, but not to live with her as his wife. She claimed to have first learned of adultery in August 1959. She said that she hoped and believed a reconciliation was possible until August of 1959 and actually until Mr. Gibson married appellee.

The plea of the statute of limitations must be raised by answer or demurrer. It can be raised by demurrer only when the pleading to which the demurrer is taken clearly shows that the cause of action is barred. *Herpin* v. *Webb,* 221 Ark. 798, 256 S. W. 2d 44. Where the bar of the statute of limitation does not appear upon the face of a complaint, the issue cannot be raised by demurrer. *Cranna* v. *Long,* 225 Ark. 153, 279 S. W. 2d 828. It cannot be raised by demurrer unless the complaint shows not only that sufficient time has elapsed to bar the ac-

tion, but that there are no facts or grounds for avoidance of the statute. *State* v. *McIlroy,* 196 Ark. 63, 116 S. W. 2d 601; *Rogers* v. *Ogburn,* 116 Ark. 233, 172 S. W. 867. For example, it was held that a complaint to cancel a contract for fraud, which did not indicate when the plaintiff discovered the fraud, did not show on its face that the cause of action was barred by limitations. *Driesbach* v. *Beckham,* 178 Ark. 816, 12 S. W. 2d 408. If appellee's motion to dismiss was considered as a demurrer, it should have been overruled as there is nothing in this complaint which shows that the cause of action was barred.

Generally, where the facts in a complaint do not show the action is barred by the statute of limitations, the defense must be raised by answer. *Sanders* v. *Flenniken,* 172 Ark. 454, 289 S. W. 485. In a proper case, however, a motion for summary judgment should be granted where it is clearly established that a claim is barred by the statute of limitations. *Norwood* v. *Allen,* 240 Ark. 232, 398 S. W. 2d 684. Since a discovery deposition was considered at the hearing of the motion and since appellant's attorney considered that the proceeding was one for summary judgment when the discovery deposition was taken, it seems that the trial court must have considered appellees motion to dismiss as a motion for summary judgment. But the dismissal of appellant's complaint was error because we find that there is a genuine issue of fact as to the time when this alleged cause of action accrued. According the weight of authority, the statute of limitations begins to run when the loss of affections or loss of consortium is sustained. It begins when alienation is fully accomplished, *i. e.,* when love and affection are finally lost. See, Annot., 173 ALR 772, 774. The law presumes that there is always a possibility of reconciliation of husband and wife and this the law encourages. *Amellin* v. *Leone,* 114 Conn. 478, 159 Atl. 293 (1932). The mere fact that the spouses separated prior to the acts complained of does not constitute a defense in such actions where

they are still married, as there might be a reconciliation. *Michael* v. *Dunkle,* 84 Ind. 544, 43 Am. St. Rep. 100 (1882). Since, even after a separation or estrangement, there is a possibility of reconciliation, an action will lie for conduct which prevents a reconciliation. Cooley on Torts, 4th Ed. § 167, p. 8. The actionable offense may consist of conduct which prevents a reconciliation. Cooley on Torts, 4th Ed. § 170, p. 22. A cause of action will not be defeated because a wife was estranged from her husband at the time of illicit relations with the husband, as the marriage relation and rights exist until the parties are separated by death or divorce. *Rott* v. *Goehring,* 33 N. D. 413, 157 N. W. 294, Anno. Cas. 1918 A. 643 (1916). See, also, *Miller* v. *Pearce,* 86 Vt. 322, 85 Atl. 620 (1912), 43 LRA (n. s.) 332 (1913). One spouse has the right to the possibility of regaining the conjugal society and affection of the other and a third person has no right to intermeddle between them even though they are estranged. 27 Am. Jur. 127, Husband & Wife, § 524.

This court has previously indicated that these marital rights do not survive divorce, by approving an instruction that acts and relationship after divorce of a husband and wife should not be considered as contributing to the alienation of affections. *Hardy* v. *Raines,* 228 Ark. 648, 310 S. W. 2d 494. It was said there that testimony as to such acts might, under the circumstances, be considered only as an aid to a determination of relationships prior to the divorce.

Inasmuch as the parties were divorced within five years next preceding the filing of this action, we cannot say that the cause of action is barred as a matter of law. Rather, the jury should determine as a question of fact when appellant lost her conjugal rights, including the right to regain the conjugal society and affection of her husband through reconciliation. We think that under the facts now before the court that this must have been sometime between the separation June 13, 1958, and the granting of the divorce to appellant, but other

facts will likely be developed from which a jury can make a proper determination.

Reversed and remanded for further proceedings not inconsistent with this opinion.

BYRD, J., dissents.

DALE E. SCATES and TERRELL BLAYLOCK
v. STATE OF ARKANSAS

5326 424 S. W. 2d 876

Opinion delivered March 11, 1968

Harry Robinson, for appellants.

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

J. Fred Jones, Justice. On December 9, 1966, the appellants, Dale Scates and Terrell Blaylock, were charged with the crime of burglary in an information filed by the prosecuting attorney of Pulaski County. They were tried and convicted on July 19, 1967, and have appealed.

The facts briefly are these: On June 4, 1966, at approximately 2:15 a.m., the North Little Rock police were advised that a burglary was in progress at the Southern Grill, 18 Railroad Avenue. Upon arrival at the cafe, the police found Terrell Blaylock, one of the appellants, inside the restroom of the cafe, behind the door, with a tire tool on the floor behind him. The owner of the cafe was called and she unlocked the back door. The officers searched the cafe and the appellant, Dale Scates, was found hiding under a raincoat in the kitchen inside the cafe. A window had been broken out about eight feet above ground level over the front door of the cafe and was of sufficient size to allow a man to enter through it. All doors were locked and the broken window was the only means of entrance found. An automobile belonging to appellant Blaylock's mother was found parked behind the building. The cafe owner testified that nothing inside the cafe was missing or broken into, but also testified that appellants had no permission to be inside the building.

Appellants were arraigned on January 4, 1967, and were informed of the nature of the charge against them. They entered their pleas of not guilty, waived a jury trial, and the cases were set for a court trial on

July 19, 1967. At the trial on July 19, 1967, the court found the appellants guilty of burglary and they were sentenced to two years each in the state penitentiary. On appeal to this court appellants urge the following three points for reversal:

> "There is no proof or semblance of proof in the record that the defendants entered the place at 18 and Railroad, North Little Rock, with the intention to commit a crime.
>
> "The Court should have granted a continuance.
>
> "The Court abused its discretion in refusing to give the defendants a jury trial."

As to the first point, we find no merit in appellants' contention that there is no proof of the requisite intent to commit a crime. Ark. Stat. Ann. § 41-1001 (Repl. 1964) defines burglary as follows:

> "Burglary is the unlawful breaking or entering a house, tenement, railroad car, automobile, airplane, or any other building, although not specially named herein, boat, vessel or water craft, by day or night, with the intent to commit any felony or larceny."

And Ark. Stat. Ann. § 41-1002 (Repl. 1964) provides as follows:

> "The manner of breaking or entering is not material, further than it may show the intent of the offender."

This court in the case of *Clay* v. *State,* 236 Ark. 398, 366 S. W. 2d 299, said:

> "We have held that the offense of burglary is complete even though the intention to commit a felony is not consumated. *Thomas* v. *State,* 107 Ark. 469, 155 S. W. 1165, and cases cited therein. * * * As

stated in *Duren* v. *State*, 156 Ark. 252, 245 S. W. 823, 'It is not essential that the state prove by direct evidence an intention to commit a felony, for this fact may be, and generally is, established by proof of circumstances which indicate the intention of the burglar. . .''

In the case at bar, we are of the opinion that a larcenous intent can fairly be inferred where the appellants were discovered, one with a tire tool and the other hiding under a raincoat, at 2:15 a.m. inside a locked cafe containing amusement and vending machines, and when they had no permission or lawful right or reason, to be inside the cafe. We are of the opinion that the correct law and proper conclusion was stated in the words of the trial court, as follows:

> ''I can assume their intent from their actions of being in the place in the middle of the night without permission, and with a tire tool. The logical conclusion would be that they hadn't had time to break into those machines, because I understand the officers' testimony was that somebody gave them a call about them breaking in just about the time they broke in the place, and they hadn't been in there long enough to do anything.''

Appellants' second point is based on their contention that a continuance should have been granted because one of the attorneys for appellants was employed only two or three days before the trial and that the prosecuting attorney had not assented to a waiver of trial by jury under Ark. Stat. Ann. § 43-2108 (Repl. 1964), which provides:

> ''In all criminal cases except where a sentence of death may be imposed, trial by a jury may be waived by the defendant, provided the prosecuting attorney gives his assent to such waiver. Such waiv-

er and the assent thereto shall be made in open court and entered of record. In the event of such waiver, the trial judge shall pass both upon the law and the facts."

With this contention we cannot agree. The docket shows that the appellants were represented by counsel at their arraignment on January 4, 1967, some six months prior to the trial, and that the appellants waived a jury trial with their counsel present. Although the record does not specifically set out that the prosecuting attorney *affirmatively* gave his assent, it does show that an assistant prosecuting attorney was present and did not object to the waiver, nor did counsel for appellants object to the absence of the prosecuting attorney's affirmative assent at that time. Furthermore, the proviso for the prosecuting attorney's assent is for the benefit of the state, and not the defendant who waives his right to a jury trial. Therefore, any error as a result of the prosecuting attorney's failure to assent to a defendant's waiver of his right to a jury trial would be an error against the state and not against the appellants. The prosecuting attorney's failure to assent to appellants' waiver of a jury trial does not constitute error prejudicial to the appellants and does not constitute error of such nature that appellants can complain. We have so often held that the granting of a continuance is within the sound discretion of the trial court, that citation of cases is not necessary. We cannot say that the trial court abused its discretion in the case at bar.

Under appellants' third point, they contend that the trial court erred in failing to allow appellants to withdraw their waiver of a jury trial. The motion to withdraw the waiver was not made until the date on which the trial was set, and the trial court denied the motion as being too late. We fail to find error in this holding.

While the Arkansas Constitution provides in Article 2, Section 7, for the right of trial by jury, it also

provides for waiver of this right under the same provision in accordance with Ark. Stat. Ann. § 43-2108, supra. After the defendant's right to trial by a jury has been duly waived, as in the case at bar, it is within the discretion of the trial court to permit or deny a withdrawal of such waiver.

The authorities are uniformly to the effect that a motion for withdrawal of waiver made *after* the commencement of the trial is not timely and should not be allowed. Whether the motion is timely when made *prior* to the actual commencement of the trial, is held to depend upon the facts and circumstances of the individual case. (See annotation in 46 ALR 2d 919 and cases there cited.)

In the case at bar, appellants made their waiver at a time when they were represented by counsel and some six months prior to the date set for trial. When this case came on for trial by the court, Mrs. Myrtle L. Wallace, who owned the cafe which had been burglarized, appeared in behalf of the appellants and recommended that the cases be dismissed. She had previously recommended suspended sentences. On this point Mrs. Wallace testified:

> "Q. What are your wishes about the matter? Do you wish to prosecute them?
>
> A. Well, they haven't harmed me. I don't want to cause them any trouble. I think they are sorry."

The appellants in this case were charged with the commission of the crime of burglary "*against the peace and dignity of the State of Arkansas,*" and not against the peace and dignity of Mrs. Wallace or the owner of the premises burglarized. The criminal laws of this state against burglary were not enacted for the benefit of Mrs. Wallace or any other particular individual or property owner, but such laws were enacted for the protec-

tion and benefit of the entire community. It was not necessary for the trial court to even hear, or consider at all, the recommendations of Mrs. Wallace in this case, but since the trial court apparently did *consider* the recommendations of Mrs. Wallace, the court was justified in taking judicial notice of previous burglary convictions of both of the appellants in considering the recommendations made by Mrs. Wallace.

Appellants did not seek a continuance nor did they attempt to withdraw their waiver of a jury until after the trial court refused to follow the recommendations of Mrs. Wallace on the day previously set for the trial of the case. The record bears out the trial court's lack of prejudice against appellants because of prior convictions. Both appellants were given minimum sentences of two years in the penitentiary when the statute provides for a maximum of twenty-one years. Ark. Stat. Ann. § 41-1003 (Repl. 1964).

The judgments are affirmed.

O. U. GREEN ET UX *v.* EDWIN P. HIGGINS ET UX

5-4416 424 S. W. 2d 882

Opinion delivered March 11, 1968

Murphy & Burch, for appellants.

Hugh R. Kincaid, for appellees.

CONLEY BYRD, Justice. This boundary dispute between appellants, O. U. Green et ux., and appellees, Edwin P. Higgins et ux., revolves around the location of the Wyman and Elkins Public Road in the SW ¼ of the NW¼ of Sec. 14, T 16 N, R 29 W, in Washington County, Arkansas.

The record shows an 1880 conveyance to Round Mountain School trustees of a portion of the said SW ¼ NW ¼ of Sec. 14 described as commencing 8 Rods South of NW corner, thence 20 Rods South, thence 16 Rods East, thence 20 Rods North, and thence West to the place of beginning. Thereafter Thomas C. Hastings, a common owner of both parties, on May 31, 1915, conveyed by warranty deed to J. M. Jackson as follows:

> "Part of the South West (¼) of the *South* West (¼) of Section (14) fourteen Township (16) Sixteen Range (29) West Beginning at the Corner Stone at S. W. of the S. W. of Section 14 as aforesaid, Running East 40 Rods to the 'Senter' of the road then North Westerly along the road (58) Rods to the School ground then West (16) Rods to the

Section Line then South to Corner or place of Beginning." (Emphasis supplied.)

That instrument was acknowledged before B. N. Wood, a Justice of the Peace. Thereafter before a Notary Public, on August 3, 1918, Hastings quitclaimed to W. M. Meredith the following lands:

> "A part of the South West quarter of the North West quarter of Section Fourteen (14), Township Sixteen (16) North, Range Twenty nine (29) West and more particularly described as—Beginning at the South West corner of said forty acre tract and running thence East Forty (40) rods, more or less, to the center of the Wyman and Elkins Public Road as the same now runs; thence in a North Westerly direction following the center of said Road, to the School House grounds, thence due West Sixteen (16) rods, more or less, to the West line of said forty acre tract and thence South Fifty two (52) rods, more or less, to the South West corner of said forty acre tract, the place of beginning—containing nine (9) acres, be the same more or less."

The quitclaim deed to Meredith obviously was given to correct the erroneous quarter section description in the deed to Jackson.

Appellants acquired their title to the lands here in dispute under the identical metes and bounds description set out in the quitclaim to Meredith.

On June 25, 1918, Thomas C. Hastings conveyed by warranty deed to Geo. Bartle under the following description:

> ". . . and the South West quarter of the North West quarter of Said Section—Except two acres out of the North West Corner of Said Forty acre Tract occupied as School house property and also Except

> the following tract of land, to-wit. Beginning at the South West Corner of said Forty acre Tract, running thence East Forty Rods to the Center of the road; thence North Westerly with the road fifty Eight rods to the School ground; thence West Sixteen rods to the Section line, thence South to the Place of Beginning, . . .''

All conveyances of the lands in appellees' title were made with this description until 11/17/1933 when N. W. Smith conveyed to Cora Lovelace under the following description:

> ''A part of the Southwest quarter of the Northwest quarter of Section Fourteen (14), described as follows, to-wit; beginning at a point which is forty (40) rods West of the South East corner of said forty acre tract, and running, thence North sixty-three (63) rods to the center of public road; thence West with the center of said road nineteen and one-half (19½) rods; thence Southwesterly seven (7) rods to the South East corner of the school ground; thence West with South line of School ground seven and three-fourths (7¾) rods to center of another public road; thence Southeasterly with the center of said road fifty-eight (58) rods to the place of beginning, containing eight (8) acres, more or less; . . .'

Conveyances thereafter carried this description up to and including a deed dated 12/20/60 from W. B. Higgins et ux. to appellees. For some reason not explained by the abstract of the record, W. B. Higgins et ux. on 8/18/65 again conveyed to appellees under the following description:

> ''. . . Part of the Southwest quarter of the Northwest quarter of Section 14, in Township 16 North, of Range 29 West, described as beginning 40 rods west of the South East corner of said forty acre tract, and running, thence North 604.5 feet, more or

less, to Myers South line; thence West 321.75 feet, more or less to the existing Wyman and Elkins Public Road; thence Southeasterly with said road to the point of beginning. Also, beginning at a point on the South line of a Public road which is 1039.50 feet North and 981.75 feet West of the South East corner of said forty acre tract, and running, West bearing South with said road 115.50 feet to the SE corner of the School Ground Lot; thence continuing Westerly with said road 127.875 feet to the Existing Wyman and Elkins Public Road; thence Southeasterly with said road to a point due South of the point of beginning; thence North to the point of beginning."

The only ownership claimed by appellees in this litigation is in the foregoing described lands. However, it will be noted that the Wyman to Elkins Public Road is the common boundary between the lands of appellees and their predecessors in title holding under Thomas C. Hastings, and those of appellants and their predecessors in title holding under the same common owner.

Some two years before appellees commenced this suit, appellants employed an engineer to survey their lands. He found that the center line of the existing county road from Wyman to Elkins crossed the southern boundary of the forty-acre tract 500 feet east of the SW corner and 820 feet west of the SE corner thereof. He also found that it meandered northwesterly until it crossed the southern boundary of the school property at a distance of 7.75 rods or 127.87 feet west of the SE corner of the school lot. He also discovered what he considered to be an old abandoned roadway which crossed the southern boundary of the forty-acre tract at a point 40 rods or 660 feet east and west of the respective SW and SE corners of the forty and meandered northwesterly to the SE corner of the school lot. Based upon the premise that the surveyor had found an old abandoned road which coincided with the metes and bounds descrip-

tions, appellants erected the fence along the same which precipitated this litigation.

William Duncan, age 86, testified that he had been acquainted with the Wyman-Elkins Road since 1900 and that it still ran in the same place that it had run every since he could remember. He referred to the old abandoned road found by the surveyor as a pathway used by "foot-backers" and folks on horseback when the regular road got muddy. He had never seen a vehicle on the old road or pathway. The southernmost end of the path left the "Wyman-Elkins Road pert near a quarter of a mile south of the schoolhouse, southeast."

Mrs. Fannie L. Calico, who has lived at Round Mountain for 65 years, testified that the Wyman-Elkins Road still ran the same place that it had run ever since she could remember, and that there was a path from the east side of the school ground that went up across the mountain and came out over there at a little store, but that it was at no time the Wyman-Elkins Road. Cows were driven down the path and it was a by-pass for school children when the main road was muddy.

Roxie Hastings Campbell, daughter of Thomas C. Hastings, testified that the Wyman-Elkins Road had always been located at the same place it is today. She stated that her father had sold the land on the southeast side of the Wyman-Elkins Road to Jackson. She referred to what the surveyor thought was an old abandoned roadway as a footpath across the hill, and was definite in stating that her father owned the land between the path and the Wyman-Elkins Road.

Witnesses on behalf of appellants stated that they had ridden horseback over the old abandoned road found by the surveyor and that they had seen wagons using it. They also stated that they had never heard the present public road referred to as the Wyman-Elkins Road until this lawsuit came up. Neither had they heard

the surveyor's old road referred to as the Wyman-Elkins Road.

The chancellor found that the present existing county road was the "Wyman-Elkins Road" and that it was the common boundary between the parties' lands. This finding is not contrary to a preponderance of the evidence.

Appellants point out that under the facts as developed, appellees' metes and bounds description, beginning with the deed from N. W. Smith to Cora Lovelace, lacked 160 feet in coming to a close, since the center of the road is 820 feet west of the SE corner of the forty and the point of beginning is only 40 rods or 660 feet west of the SE corner.

In contending the chancellor was in error, appellants make the following argument:

> "The property description in appellants' deed is four-sided. The beginning point is the *Southwest* corner of the Southwest Quarter (SW ¼) of the Northwest Quarter (NW¼) and the first call extends forty (40) rods East. This point is same as the point of beginning in the appellees' description, which is forty (40) rods West of the *Southeast* corner of the same forty (40) acre tract. The Court will take judicial notice that a quarter section is eighty (80) rods on each side, there being no evidence to the contrary. This places the appellants' Southeast corner and the appellees' point of beginning in the exact identical spot. The appellees' point of beginning is measured from the Southeast corner and the appellants' from the Southwest corner of the forty (40) acre tract, which further verifies the certainty of this identical point.
>
> "The point of conflict in the descriptions is the Northeast corner of appellants' property and the

> Northwest corner of appellees' triangularly shaped property. Both are, by t heir respective metes and bounds descriptions in the center of 'a road' (the appellants in the center of the 'Wyman and Elkins Public Road as the same now runs', and the appellees 'to center of another public road'). According to appellants' next to last call this point should be 16 rods east of the west side of the forty (40) acre tract, which coincides with the southeast corner of the School Grounds as shown by stipulated Exhibit No. 11. According to appellees' metes and bounds description the northwest corner of appellees' property would fall in the center of the 'public road.'
>
> Assuming this 'public road' is the Wyman-Elkins Road, by measurement, this point varies the 7¾ rods which is approximately the appellees' next to last call."

This argument ignores the fact that the courses and distances in appellants' chain of title are to and from an ascertainable monument and that consequently the distances given in their deed must yield to the monuments. *Rodger* v. *Crain,* 235 Ark. 211, 357 S. W. 2d 527 (1962). For this reason, we hold appellants'contention[1] to be without merit, and need not examine his "next to last call" argument which he bases on *Irby* v. *Drusch,* 220 Ark. 250, 247 S. W. 2d 204 (1952). From the whole record, it is obvious that appellants are not entitled to claim any land east of the Wyman-Elkins Road, and that appellees' predecessors in title owned the lands and were attempting to convey to appellees that land lying immediately east of the road.

Next, appellant argues that the trial court obviously erred because the two triangles described in its de-

[1]Their contention is to the effect that we should ignore that portion of the last call running "... Southeasterly with the Center of said road...," and return in a straight line from appellees' northeasternmost call to his point of beginning.

cree overlap and the decree encroaches upon the school property. We do not understand the description in the decree as encroaching upon the school property. Furthermore, the overlapping of land calls in appellees' deed would not prevent the removal of the fence, since the trial court's only responsibility in this respect would be to determine that appellants had fenced the land of appellees.

Lastly, appellants argue that the trial court erred in requiring them to meet the same burden of proof as appellees, the plaintiffs below. This argument results from a statement in the chancellor's memorandum opinion which we do not interpret in the same light as do appellants. Even if appellants were correct in their interpretation of the chancellor's statement, we would have to find it a harmless error since it went only to the issue of whether appellees owned the land fenced, and the overwhelming evidence is that appellees owned the lands east of the Wyman-Elkins Road fenced by appellants.

Affirmed.

WEST TREE SERVICE, INC. ET AL *v.* CARL D. HOPPER, EMPLOYEE

5-4477 425 S. W. 2d 300

Opinion delivered March 18, 1968

Wright, Lindsey & Jennings, for appellants.

Pearson & Pearson and *Fitton & Meadows,* for appellee.

CARLETON HARRIS, Chief Justice. This is a Workmen's Compensation case. Carl D. Hopper, appellee herein, was, on December 22, 1965, an employee of West Tree Service, Inc., and was working with a tree-trimming crew near Bentonville, Arkansas, engaged in trimming trees and brush along a telephone company right-of-way. The crew consisted of five persons, including claimant and the foreman, Lee Perry. After eating lunch together, and before returning to work, Perry took a .22 rifle from the truck the men were using in performing the work, and fired it at a tin can; the rifle was then handed to J. C. Jones, an employee, who also fired it, and handed it to appellee. When Hopper fired the rifle, the breech lock slipped, and a shell exploded, causing injury to, and eventual loss of sight of appel-

lee's right eye. Hopper filed a claim for compensation, which was denied by the referee. This finding was appealed to the full commission, which affirmed the decision of the referee, finding that the accident did not arise out of appellee's employment. On appeal to the Benton County Circuit Court, the commission was reversed, the court finding that the injury did arise out of the employment. From this judgment, appellants, West Tree Service and Tri-State Insurance Company, bring this appeal. For reversal, it is simply asserted that the commission's holding that the injury did not arise out of the employment is sustained by substantial evidence, and the Circuit Court, therefore, erred in reversing that finding.

On the aforementioned date, the crew had returned to the job site after having lunch, and Perry took the rifle from the truck (where he had placed it two or three days before) for the purpose of aligning the sights, if this adjustment were needed. He fired the rifle one time. According to Perry, Hopper asked if the others could shoot, and the foreman consented for this to be done. As previously stated, he passed the rifle to one of the crewmen, Jones, who fired it, and Jones then handed it to Hopper, who, upon firing it, received the injury. Hopper denied that he had asked to shoot the rifle, stating that he neither said that he wanted to shoot it or didn't want to shoot it; however, admittedly, he was not directed to fire it, and he agreed that he could have turned down the invitation to shoot if he had so desired. Most of the workmen testified that the suggestion for firing the gun came from Perry, and they said he gave each man a shell to be used, but it is apparent from the evidence given by the workers that the matter of shooting the rifle was a voluntary act on the part of these employees; *i. e.,* they did not feel that they were being ordered, or compelled, to discharge the firearm. The crew ordinarily took approximately thirty minutes for lunch; on this particular day, that time had been exceeded, but the foreman had not ordered the men

back to work. The rifle was the personal property of Perry, and there is no contention by appellee that it had previously been used in any manner by the members of the crew, either for recreation, or while engaged in trimming trees and bushes along the telephone company right-of-way.

In reversing the commission, the trial court held:

"The Court further finds that the injury arose out of the regular course of employment in that it would only be natural to expect young men working in the out-of-doors trimming trees to engage in normal recreation during rest periods, which are common and incident to out-of-doors living, including the firing of a .22 rifle.

"The Court further finds that the rifle belonged to the foreman of the claimant and that claimant was encouraged to participate in this form of rest, recreation and relaxation during the rest period and that such rest, recreation and relaxation during the rest period was of benefit to the employer."

We do not agree. There is nothing in the record to suggest that the company should have expected these employees to shoot at tin cans with a .22 rifle during either a work period or during a lunch break. It might also be pointed out that the evidence is conclusive that this activity had never been engaged in previously. Appellee cites the case of *Southern Cotton Oil Division* v. *Childress*, 237 Ark. 909, 377 S. W. 2d 167, which was a case involving the death of an employee while engaging in "horseplay" with a fellow employee. Strictly speaking, this is not a horseplay case, but if it be so considered, there are important distinctions between the two. In the first place, the work had commenced when the horseplay started between Childress and the other employee. In the next place, the instrument that caused the fatal injury was an air hose which was used in the employment. Still further, these employees had previously, on five or six occasions, engaged in these friend-

ly "scuffles." It is at once apparent that these circumstances, pertinent to recovery in the *Childress* case, are not here present, and it might also be added that no fellow employee caused Hopper to receive the injury since the firing of the weapon was a voluntary act on his part.

Appellee seems to depend, in large measure, upon the fact that the foreman was present, participating in, perhaps encouraging, but, at least, acquiescing in the act that precipitated this claim. Let it first be said that we attach no more significance to the fact that the foreman owned the rifle, and first commenced using it, than if it had been one of the other employees. Certainly, the firing of the rifle was not connected in any manner with the work of the crew or the foreman, nor did it in any manner advance the interests, or inure to the benefit, of the West Tree Service Company. Of course, an employer is charged with the knowledge of his representative *concerning matters within the scope of employment* of the employer's representative. In *Texarkana Telephone Company* v. *Pemberton,* 86 Ark. 329, 111 S. W. 257, this court said:

"Notice to the wire chief (he being a vice-principal) of the dangerous condition of the wires [the telephone lines] was notice to the company."

As stated in 35 Am. Jur., Master and Servant, § 364, p. 789:

"* * * The employer, also, is charged with the knowledge of such representative concerning the condition of the employer's plant, his appliances, etc., at least so far as that knowledge was gained in the course of employment and the representative is not acting adversely in such way as to rebut any presumption of divulgence to the employer."

However, the decisive and controlling point in this litigation is how we answer the question, "Did Hopper's

injury arise out of his employment?" The answer is definitely, "No." Numerous cases are cited by appellants involving injuries to employees sustained from firearms, and where claims for compensation were filed. In these cases, benefits were denied because of the fact that the accident bore no relationship whatever to the nature of the employment. In the Mississippi case of *Earnest* v. *Interstate Life and Accident Insurance Company,* 119 So. 2d 782, the appellant was employed by a life and accident insurance company to solicit and sell insurance policies. Earnest drove to the home of a prospect for the purpose of taking him to a doctor for a medical examination (pursuant to selling a policy). The prospect requested appellant to wait until he could shave. While waiting, appellant observed the prospect's son, with whom he had previously discussed a policy of insurance, working near the barn. He walked a short distance toward the son, then returned to his car, picked up his shotgun, and lifted the gun from the auto, for the admitted purpose of shooting a crow. After taking about four steps toward the son, the gun accidently discharged, and struck Earnest in the left ankle, as a result of which the lower part of the leg had to be amputated. The Workmen's Compensation Commission denied coverage, and on appeal, the Mississippi Supreme Court affirmed, stating:

"An injury arises out of the employment when there is a causal connection between it and the job. 58 Am. Jur., Workmen's Compensation, Sec. 211; *Brookhaven Steam Laundry* v. *Watts,* 1952, 214 Miss. 569, 55 So. 2d 381, 59 So. 2d 294. Claimant was not required to carry the gun. Its possession by him when it discharged was not connected with his employment. The injury did not arise out of the employment. * * *

"Earnest admitted he carried the gun for his own personal pleasure, and it had no connection with his job. The risk was unrelated to the employment* * *."

In the instant litigation, the aligning of the sights and firing of the rifle were entirely alien to the employment.

Our own case of *Woodmansee* v. *Frank Lyon Company,* 223 Ark. 222, 265 S. W. 2d 521, is somewhat pertinent to the case at hand. There, Woodmansee, a high-ranking employee, and some furniture salesmen for the company went on a duck hunt, and Woodmansee was injured. The background is set out in the court's opinion:

"Sometime during November, 1951, a duck hunt for the salesmen was proposed in lieu of one of the regular Saturday morning sales meetings. It is not clear whether appellant or the president of the Company originated this proposal but at any rate it was made with the consent of all concerned. O. A. Mallett, a vice president, said appellant first mentioned the hunt and appellant says he thinks Mr. Lyon did, although he was not positive. In all events appellant brought the matter up in one of the meetings and Saturday, December 1, 1951, was selected by all present as a convenient date for the hunt. While, as above stated, salesmen were required to attend the regular Saturday morning sales meetings yet it seems to be agreed that no salesman's job would have been materially affected if he had declined to go on the duck hunt. It is not seriously denied by anyone that such an outing by the salesmen would have some tendency to build up their morale.

"Just before leaving one of the salesmen decided that he could not make the trip because of illness, but appellant and the other four salesmen went in cars belonging to appellant and to Mr. O. A. Mallett. While appellant was engaged in hunting ducks he stumbled and fell, causing, as he contends, a serious injury to his back."

After a rather lengthy discussion, and the citing of numerous decisions, this court said:

"(a) Even though it was desirable on the part of appellant and the company that the salesmen should all go on the duck hunt, yet it can not be said that they were required to go, and it is not contended that the company required appellant to go. The Commission was justified in finding that appellant himself proposed the trip, and it also appears that all of the salesmen were enthusiastically in favor of it.

"(b) So far as the record reflects this is the first time that appellant and the salesmen had ever hunted ducks on the company's land. It can not be argued therefore that this recreational activity was a part of their employment or that it was a plan or system of recreation to be habitually indulged in. * * *

"In view of what has been said we affirm the judgment of the trial court which in turn affirmed the findings of the Commission."

In the case before us, to paraphrase *Woodmansee,* it is undisputed that Hopper was not required to fire the rifle, and, in fact, this is not even contended. The commission was justified in finding that this was a voluntary act on his part. The record reflects that this is the first time that this activity was engaged in, and it cannot be successfully argued that it was a part of the employment or that it was a plan or system of recreation to be consistently indulged in.

It is evident, from what has been said, that we are of the view that the court erred in reversing the commission.

Accordingly, the judgment of the Benton County Circuit Court is reversed, and the cause is remanded to that court with directions to reinstate the order of the commission.

LEE PARKER *v.* FRED JOHNSTON

5-4454 426 S. W. 2d 155

Opinion delivered March 18, 1968
[Rehearing denied April 29, 1968.]

McMillen, Teague, Bramhall & Davis, for appellant.

Reed & Blackburn, for appellee.

GEORGE ROSE SMITH, Justice. In October, 1965, Johnston sold to Parker a vending-machine business that Johnston had been operating in Cleburne county. The purchaser made a down payment of $20,000 and executed a monthly-installment note and a security agreement for the unpaid balance of $22,000. Within about six months Parker refused to make any further payments on the debt. Johnston brought this foreclosure suit to enforce the contract. By counterclaim Parker asked for

rescission and consequential damages. This appeal is from a decree granting relief to Johnston and rejecting Parker's counterclaim.

We can materially compress our discussion of the issues by explaining at the outset the posture of the case as it reaches us. At the trial Johnston rested after having made a prima facie case by introducing the note and security agreement and proving the amount due. Parker then introduced a great deal of testimony to establish his right to a rescission, for fraud. At that point counsel for the plaintiff asked that the counterclaim be dismissed, "because they have not established, by any clear, convincing proof, any misrepresentation of a material fact, any right to rely. . ." The chancellor, over the defendant's objections, sustained the motion to dismiss the counterclaim, which ended the trial.

As the case now stands our discussion of the issues must be prefaced by two observations. First, fraud such as that asserted by Parker need not be established by clear and convincing evidence; a preponderance of the proof suffices. That point was fully discussed and settled beyond any possibility of doubt in *Clay* v. *Brand*, 236 Ark. 236, 365 S. W. 2d 256 (1963). Secondly, under our decision in *Carrick* v. *Gorman,* 232 Ark. 729, 340 S. W. 2d 377 (1960), the plaintiff, at the stage of the case that was reached below, is not entitled to test the counterclaimant's proof by a demurrer to evidence. Such an attempt, when sustained by the chancellor, waives the plaintiff's right to adduce additional proof and brings the case to us for final trial *de novo* on the record made below. Hence in the case at bar Parker's proof, except for its own inherent weaknesses or contradictions, is substantially undisputed.

In September of 1965 Parker, a resident of California, came to Arkansas to visit a wartime friend and look for a ranch near Heber Springs, where excellent hunting and fishing are to be had. The real estate agents

that Parker consulted did not have a suitable ranch for sale, but they interested Parker in Johnston's vending-machine business, which Johnston had listed with them a few days earlier.

Negotiations were conducted from time to time over a period of more than a month. The vending-machine business consisted essentially of 33 juke boxes, 22 pin-ball machines, and 38 cigarette machines. Most of the machines were on location in cafes and other places; the rest were in a warehouse. Johnston represented the value of the machines to be equal to the $42,000 purchase price. According to the record, the machines were actually worth not more than $18,000 (less than the down payment) and perhaps as little as $5,000. Some of the machines were demonstrably worthless, such as 10-year-old juke boxes that would play only 78-rpm records, which are no longer made.

The prospective income from the business was of paramount concern to Parker. The 36 monthly principal payments were to be $668.68 each. Parker explained to Johnston that he knew nothing about the business and that he was relying on Johnston for correct information. According to the undisputed testimony of four witnesses—Parker and three of the real estate agents—Johnston assured Parker that the business would produce a net income of $1,200 to $1,600 during the summer months and of not less than $1,000 a month during the rest of the year, so that the $22,000 debt would be paid off within about fifteen months.

Upon the proof before us no conclusion is possible except that the representations were false, were material, and were relied upon by Parker. During the six months that elapsed before Parker made the second of the only two full-scale principal payments that he made, he was able to make a profit, above his expenses and depreciation, in only one month. The record indicates that the depreciation upon 93 secondhand machines, for

which Parker was to pay $42,000, must have been not far from the monthly allowance of $700 claimed by Parker as proper depreciation. We have no hesitancy in saying that Parker clearly established his right to rescission under the principles announced in several recent cases. *Clay* v. *Brand, supra; Miller* v. *Porter,* 218 Ark. 841, 238 S. W. 2d 940 (1951); *Kotz* v. *Rush,* 218 Ark. 692, 238 S. W. 2d 634 (1951).

We have studied the appellee's arguments for affirmance, but they are not convincing. The contention that a purchaser is not entitled to rely upon the seller's assurances about the past profits of a business, especially when the matter is peculiarly within the seller's knowledge, was rejected in the *Kotz* case, *supra.* Here, just as in that case, Parker asked to see the seller's records during the negotiations, but Johnston evaded the inquiry by saying that no records were available. We are not impressed by Johnston's suggestion that Parker should have obtained Johnston's past income tax returns by discovery procedure and introduced them in evidence. As we have seen, Parker made a strong case for relief upon his counterclaim. If the missing tax returns would have supported Johnston's assertions about past profits it was his duty to go forward with the evidence by producing them.

Finally, Parker did not waive his right to rescission by making all or part of two principal payments, one on March 30 and the other on May 2, 1966. His continual complaints to Johnston were met by assurances that the business would pick up, if given time. Johnston had repeatedly said that the summer months—the resort season in the county—would be especially profitable. We realize, of course, that in many instances a buyer who deliberately continues to make installment payments with full knowledge of the seller's misrepresentations may thereby waive his right to rescission. But here the issue is one of fact. Parker's position is fully as strong as that of the purchasers in the *Clay* case, *supra,*

who made three monthly payments before "they became convinced the water supply and sewage facilities were inadequate." The Uniform Commercial Code recognizes the buyer's right to revoke his acceptance of the goods under circumstances such as those present here. Ark. Stat. Ann. § 85-2-608 (Add. 1961). We cannot say that Parker slept on his rights.

The decree is reversed and the cause remanded for the entry of a decree rescinding the contract and restoring the parties to their original positions. We find no proof of consequential damages, which are denied.

HAROLD E. MEEK ET UX *v.* UNITED STATES RUBBER TIRE COMPANY ETC.

5-4508 425 S. W. 2d 323

Opinion delivered March 18, 1968

Harold C. Rains Jr., for appellants.

Daily & Woods, for appellee.

GEORGE ROSE SMITH, Justice. In 1963 Harold E. Meek and Clint Spencer organized a corporation, M & S Royal Tire Service, Inc., and entered the service station and tire business together. In order to establish the corporation's credit with United States Rubber Company the two men and their wives executed agreements with the latter company, guaranteeing to pay any amounts that might be owed by M & S Royal to United States Rubber Company for merchandise. In 1964 Meek withdrew from M & S Royal and sold his stock therein to Spencer. Thereafter M & S Royal was adjudicated a bankrupt and was discharged of its indebtedness.

United States Rubber Company then brought this action against the Meeks and the Spencers to enforce their guaranties with respect to the unpaid balance of the M & S Royal open account, amounting to $19,546.31. Upon facts established by requests for admissions the trial court granted a motion for summary judgment against all four defendants. The Meeks have appealed, urging three grounds for reversal.

First, it is contended that United States Rubber Tire Company is not the proper plaintiff, because the guaranty agreements were made with United States Rubber Company. The record does not support this contention. The complaint describes the plaintiff as "United States Rubber Tire Company, a Division of United States Rubber Company." There is no indication that United States Rubber Tire Company is a separate corporation. Quite the contrary. The complaint alleges that the defendants executed guaranty contracts with the plaintiff, a corporation. The guaranty contracts themselves, which are exhibits to the complaint, refer only to United States Rubber Company. Thus the complaint and the exhibits, construed together, identify the plain-

tiff as United States Rubber Company. Moreover, the Meeks' answer expressly admits that they executed a guaranty in favor of "the plaintiff." Inasmuch as the plaintiff's status as a corporation was not specifically denied, it must be taken as admitted. Ark. Stat. Ann. § 27-1121 (Repl. 1962). There is at most some slight elaboration of the plaintiff's exact corporate name, but such an error is immaterial when no separate party is actually involved. *Evans* v. *List,* 193 Ark. 13, 97 S. W. 2d 73 (1936).

Secondly, the Meeks argue that United States Rubber Company waived its rights under the guaranty contracts by asserting in its claim in the bankruptcy court that it was an unsecured creditor of M & S Royal. That statement, however, was true, because in bankruptcy law a secured creditor is one who holds a direct or indirect security interest in property of the bankrupt. The existence of a guaranty agreement by a third person, who holds no security interest in the bankrupt's property, does not render the primary creditor "secured." Collier on Bankruptcy, § 1.28 (14th Ed. 1967).

Thirdly, the Meeks insist that their liability under the guaranty contract was discharged when Mr. Meek sold his stock in M & S Royal and withdrew from the business, because in that transaction Meek and Spencer signed an agreement which recited that Spencer assumed the debts of the corporation and agreed to hold Meek "blameless and free" from any such liabilities. The trouble is that United States Rubber Company was not a party to that release and thus was not bound by its provisions. The Meeks argue in substance that United States Rubber Company was bound by the Meek-Spencer contract, because it knew about the transaction and nevertheless continued to deal with M & S Royal. Even so, the record is completely devoid of facts to indicate any conduct on the part of the appellee that would raise an estoppel or otherwise preclude it from enforc-

ing its guaranty contract. We find no merit in this defense.

Affirmed.

CHARLES BROWN AND JIM JENKINS *v.* CARL McDANIEL ET AL

5-4614 427 S. W. 2d 193

Opinion delivered March 18, 1968

Griffin Smith, for petitioners.

Prosecuting Attorney *R. B. Adkisson; Clay Robinson,* Asst. Pros. Atty., for respondents.

Steele Hays and Attorney General *Joe Purcell; Thomas A. Glaze*, Asst. Atty. Gen., Amici Curiae.

GEORGE ROSE SMITH, Justice. This began as a taxpayer's suit brought in the Pulaski Circuit Court by Camille Lamar to enjoin the Pulaski County Board of Election Commissioners from conducting an election on March 12, 1968, for the selection of two directors of the Little Rock school board. When the parties realized that the proposed election of school directors involved in itself no avoidable expenditure of tax money, because an election had to be held anyway to submit another matter to the people, the plaintiff, as a patron of the district, amended her complaint to seek a declaratory judgment with respect to the validity of the proposed election of school directors and, if appropriate, an injunction to prevent the submission of that issue to the voters.

On the merits the question for decision was whether two incumbent directors who had been elected to three-year terms in September, 1965, were required to run for re-election in March of this year as a result of the passage of Act 171 of 1967, which changed the date of the annual school election from the last Tuesday in September to the second Tuesday in March. Ark. Stat. Ann. § 80-301 (Supp. 1967).

The two incumbents and their opponents, the appellants, intervened in the case. The trial court concluded that the incumbents are not required to stand for reelection this month. Upon that finding he enjoined the commissioners from going ahead with the election of school directors. This appeal was lodged, argued, and submitted to this court within a period of three days after the circuit court's decision. At the outset we issued a temporary stay of the trial court's order, to provide for the possibility that the proposed election might be found to be lawful. A day later we handed down a per curiam order reversing the circuit court's judgment "on the ground that the courts are without authority to en-

join the holding of a regular election, regularly called." We stated that a formal opinion would follow. This is that opinion.

We have not decided this exact point in any earlier case. An analogous situation, also involving the assertion of excessive power over the election process, was presented in *Irby* v. *Barrett,* 204 Ark. 682, 163 S.W. 2d 512 (1942). There the chairman and secretary of the Democratic State Committee had refused to allow Irby to qualify as a candidate in the Democratic primary, because those party officials had decided that even if elected Irby would not be eligible to hold the office he sought. After concluding that the statutes did not vest in the party chairman and secretary the authority they attempted to exercise, we went on, in language appropriate to the case at bar, to explain *why* such sweeping power ought not to be conferred upon two persons:

"If the chairman and secretary of the committee have the right to say that because of the decision of this court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law, and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the chairman and secretary of the committee? It may be that such power can be conferred upon them by laws of this state or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the state and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and

this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the name of the candidate omitted, he have a holding by the court that the name should not have been omitted."

The situation now before us embraces an even greater threat to democratic government than that considered in the *Irby* case. If a court, trial or appellate, can at the eleventh hour prohibit a regular election, regularly called, it is at once apparent that the control of judges over the election process goes far beyond reasonable limits. In many states the courts themselves have been quick to recognize the absolute necessity of severe restrictions upon their own discretionary authority. We wholly agree with those decisions, as epitomized in the following quotations:

"The jurisdiction of any court, or of the whole judicial department of the government, to enjoin the expression of the popular will at a time and in the manner provided by statute, may well be doubted. If the election, when held, was not according to statute, or if the statute was enacted without any constitutional authority, the courts might very well hold the election invalid. But that is quite another thing from enjoining the people from peaceably assembling and casting their votes for or against any proposition submitted to them under the color of law." *Lamb* v. *The B., C. R. & M. R.R.,* 39 Iowa 333 (1874).

"But the attempt to check the free expression of opinion—to forbid the peaceable assemblage of the people—to obstruct the freedom of elections—if successful, would result in the overthrow of all liberty regulated by law. The mere effort to assume such power is dangerous to the rights of the citizen. If the courts can dictate to the officers of the people that they shall not

hold an election from fear of some imaginary wrong, then people and officers are entirely subservient to the courts, and the consequences are too fearful to contemplate.

"The principle which would authorize the mighty mandate of a court of chancery, in this case, would justify it in every election to be held by the people, and thus the whole administration of the government might be obstructed and all power and authority placed at the footstool of the judge." *Walton* v. *Develing,* 61 Ill. 201 (1871).

"The mere fact that the present suit was brought as a suit under the Uniform Declaratory Judgments Act . . . does not alter the situation, as it was not the purpose of such Act to extend the jurisdiction of the courts over matters which are purely political. The rule still obtains in this State that 'an election is essentially the exercise of political power, and, during its progress, is not subject to judicial control. This comprehends the whole election, including every step and proceeding necessary to its completion.'" *Killam* v. *Webb County,* Tex. Civ. App., 270 S. W. 2d 628 (1954).

We do not imply that a declaratory-judgment action or a taxpayer's suit might not in some instances be used to settle questions involved in an election to be held in the future. It is essential, however, that the proceeding be brought in sufficient time to permit the issues to be fully considered, on their merits, with adequate time for both sides to prepare and present their contentions. It may be remembered that in 1952 we dismissed an attack upon a referendum petition on the ground that the time remaining before the election was too short for the completion of testimony upon the issue of fraud. *Ellis* v. *Hall,* 221 Ark. 25, 251 S. W. 2d 809 (1952).

When the present case was presented to us, four days before the scheduled election, our only sound

course was to let the election be held, leaving the parties to their post-election remedies, which are unquestionably adequate. The attack upon the validity of the election came so late that there was no possibility whatever of our giving sufficient study to the merits of the parties' substantive contentions. Indeed, counsel for the appellants frankly admitted in oral argument that he was unprepared, owing to the extreme haste with which the case had been processed. Hence our per curiam order, reversing the trial court's decision, was expressly without prejudice to further proceedings in the matter.

The per curiam order of March 8, 1968, is confirmed.

ORES HEAD ET UX *v.* JESS FARNUM

5-4426 425 S. W. 2d 303

Opinion delivered March 18, 1968

Joe H. Hardegree, for appellants.

James R. Hale, for appellee.

PAUL WARD, Justice. This is an appeal from a judgment (based on a jury verdict) awarding Jess Farnum (appellee) a fee simple title in 120 acres of land. To better understand how the litigation arose and the issues raised, we set out below the background facts which are not in dispute.

Facts. (a) Jacob Stottler was the owner of the land in 1900. He died intestate in 1919, survived by his wife (now deceased) and by two sons and one daughter, viz: Edward, George, and Elizabeth.

(b) Elizabeth, in 1920, conveyed her one-third interest in the land to George. She married a Mr. Head and they had one son, named Ores Head, who is the appellant here.

(c) Edward died, intestate, in 1944, leaving no children.

(d) George, with his wife Florence, lived together on the land until he died, intestate, in 1953, leaving no offspring. At his death Florence (later married to Baucom) continued to live on the land for an undisclosed period of time, but conceded to be less than seven years. However, she continued to pay the taxes until 1963 when she deeded the land to Howard P. Yates, Jr. for $1,000. In the same year Yates deeded the land to appellee for $4,000.

Litigation. In 1966 appellee filed a complaint against Ores Head and wife, alleging: (a) Appellee is the owner in fee simple of the said 120 acres of land, based on the deed from Yates who had received the deed from Florence; (b) In 1965 Ores and his wife unlawfully entered upon the land and wrongfully cut and removed therefrom large amounts of timber valued at $2,000. The prayer was for (1) possession of the land, and all other proper relief, (2) and judgment for the timber removed. [Item (2) is not an issue here.]

In answer to the above complaint Ores entered a general denial, and further stated that he "owns and occupies the land in question by right of heirship and that he has a title superior to the title, if any, of the Plaintiff, to said lands". He also reserved the right to make further answer.

The trial court, over appellants' objections, allowed appellee to introduce testimony to show Florence obtained title to the land by adverse possession, and that she had a fee simple title when she deeded the land to Yates in 1963. Appellants' objection was based on the ground that appellee did not plead title based on that ground, but, under our view hereafter expressed, we deem it unnecessary to decide that issue. Thus the matter was tried, and then presented to the jury on the following instruction:

> "Do you find by a preponderance of the evidence that Florence Stottler Baucom held the lands in question by adverse possession for seven years or more from death of George Stottler in 1953 to sale of property in 1963?"

The jury's answer to the above interrogatory was "Yes". Then the court entered judgment in accord with the verdict, hence this appeal.

Seeking a reversal of the judgment, appellants rely on seven separate points. The first six points pertain to the instructions given by the trial court, to the right of appellee to introduce testimony as to adverse possession on the part of Florence, and to the court's refusal to direct a verdict in favor of appellants. We deem it unnecessary to discuss these points because we have concluded the case must be reversed on the seventh point, which challenges the sufficiency of the evidence to support the jury verdict.

The undisputed facts set out previously reveal that: Ores was the owner of an interest in the land. He in-

herited a 1/6th interest from Edward and he was the sole heir of George. The extent of this last interest depends on the extent of the interest which George held as an ancestral estate. See Ark. Stat. Ann. § 61-206 which gives Florence (his widow) one-half of the portion held by her husband as a new acquisition. From this it follows that while Florence remained on the land after the death of her husband she had a legal right to do so, as his widow, and she was also occupying the land as a co-tenant with Ores.

In view of the above situation it is our conclusion that the record reveals no substantial evidence to support the jury verdict. The pertinent parts of appellee's testimony is set out below.

Florence testified:

"Q. Did you claim to own it?

A. I did. I was his only heir.

Q. Now, you say after Mr. Stottler died, you claimed to own the property?

A. Well, I thought I did.

Q. You thought you owned it?

A. I sure did.

Q. How long did you think you owned it?

A. Well, after he passed away I was left as his heir. I was his widow and I'd be his heir and his mother told me and him both time and time again that for taking care of her, she wanted me to have her part.

Q. Well, you continued to think you owned it, as I understand it.

A. I did.

Q. Well, Mrs. Drain (Florence), you did say you claimed the property?

A. Yes, everybody told me it was mine.

Q. How long did you claim it?

A. After he died? Well, I claimed it as long as I paid taxes on it. I was told it was mine if I paid the taxes and I paid the taxes for about ten years before anybody come up and said they wanted it.

Q. Mrs. Drain, at the time you sold it to Howard and Billie Lou Yates, did you claim to own it?

A. I certainly did. I paid the taxes."

* * *

"Q. You took it? Yes, ma'am, you took it and you thought you had a right to sell it?

A. I certainly did."

Orville Yates, who was familiar with the land and knew George Stottler, testified:

"Q. Mr. Yates, following the death of George Stottler, do you know who claimed to own that land?

A. Well, his widow.

Q. Florence Baucom?

A. Yes.

Q. Did you ever know of anyone else making any claim to it at any time from the time of the death of George Stottler up until the time she sold it?

A. No, sir, I didn't."

The above testimony falls far short of meeting the requirements set out in many decisions of this Court, some of which are noted below.

In *Watson* v. *Hardin,* 97 Ark. 33 (p. 36), 132 S. W. 1002, this Court quoted with approval the following statement:

> '''It is well settled by the authorities that this possession must be actual, open, continuous, hostile, exclusive and be accompanied by an intent to hold adversely and in derogation of and not in conformity with the right of the true owner. . . It must be hostile in order to show that it is not held in subordination and subserviency to the title of the owner.'''

There, the Court also said:

> "The widow is entitled to the possession of the land as her homestead during her life; she holds the life estate and the heir the reversion; the possession of the widow is therefore not adverse to the heir."

In *Brinkley* v. *Taylor,* 111 (p. 309) Ark. 305, 163 S. W. 521, we find this statement:

> "It is settled that if a widow conveys her dower interest before it is assigned to her, the heir may recover the land from her vendee, and the statute of limitations is set in motion against the heir when her vendee enters into the possession."

In *Mills* v. *Pennington,* 213 Ark. 43 (p. 47), 209 S. W. 2d 281, we said:

> "The law is well settled that a life tenant is entitled to possession of premises to which the estate pertains, and it is the tenant's duty to pay taxes."

The Court also held that the heirs had a right to assume the widow's possession was under her marital right of unassigned dower until notice of her adverse holding

was notorious. To the same effect, it was stated in *Tennison* v. *Carroll*, 219 Ark. 658 (p. 663), 243 S. W. 2d 944, that:

> "Even if a widow disavows her homestead and claims as a tenant in common, her possession and occupancy is presumed to be permissive and not hostile to her co-tenants unless the fact of hostility affirmatively appears."

The judgment is reversed, and the case is remanded for any further requested proceedings consistent with this opinion.

P. O. LOFTIN ET UX *v.* MRS. GRACE GOZA

5-4428 425 S. W. 2d 291

Opinion delivered March 18, 1968

Chambers & Chambers, for appellants.

J. S. Brooks, for appellee.

LYLE BROWN, Justice. Mrs. Grace Goza brought this action in ejectment to obtain possession of a small strip of boundary land and against the contiguous landowners, P. O. Loftin and wife. The Loftins defended on a claim of title by adverse possession. The Loftins appeal from the finding of the chancellor that adverse possession was not established.

Appellee Goza is the record owner of the involved forty acres, less some two acres in the southwest corner which is owned by appellants, the Loftins. The dispute as to the location of the common boundaries seems to stem from an erroneous call in the Loftins' deed. Because of that error P. O. Loftin ordered a survey which utilized a description from a "county map." (We presume that map to be an ownership map prepared by some surveyor and utilized for reference by courthouse officials, abstractors, and attorneys.) The north boundary line, as determined by that survey, was not satisfactory to Loftin, so he moved that line farther north. There he established a new fence on what he alleges to have been an old fence line existing since 1948.

Mrs. Goza subsequently employed the county surveyor to fix the Loftin line, using the description in the Loftin deed. Surveyor Methvin described the erroneous call on the north boundary line as an error that is commonly found in old deeds. However, he testified those mistakes are corrected by harmonizing the entire metes and bounds description. The Methvin survey reduced the Loftin acreage on the east and north sides as fixed by the "county map" description.

As a result of the confusion in record title, Loftin built a new fence on the east and north sides. On the east he followed the county map line which he claimed corresponded to an old fence line, a continuation of the same 1948 fence which he said existed on the north side.

Mrs. Goza claimed the new fence encroached on her record title and denied the existence of an old fence on the two boundaries.

The confusion created by the Loftin description is helpful only to an understanding of the background of the litigation. The trial court accepted the Methvin survey as the true boundary line. The Loftins claim by adverse possession the lands lying north and east of the Methvin survey and up to the new fence. The single issue on appeal is whether the Loftins sustained their claim of adverse possession.

It would serve no useful purpose to detail the testimony of the twelve witnesses, who were equally divided between the parties. The testimony for the Loftins was directed toward their assertion that at the time of their purchase they were shown a boundary fence on the north and east sides; that the fence has been in existence since 1948; and that they had always treated the old fence as the line. The same number of witnesses testified for Mrs. Goza. Their testimony tended to support the positive testimony of Mr. Goza. He was born and reared on these lands. His mother deeded him the tract north and east of the Loftins in 1951 and he deeded it to his wife in 1961. Goza no longer lives on the property; he does live nearby and is on the land frequently. It was his testimony that the old fence to which Loftin and his witnesses testified was never in existence.

For reversal, appellants here urge that "the evidence is crystal clear" that the old fence existed continuously since 1948. Numerically, the greater number of witnesses gave positive testimony of the existence of an old fence. But the greater weight of the evidence is not determined by the number of witnesses testifying to a controverted fact. That is merely an element to be considered. Just as important is the credibility of the witnesses. In that respect the chancellor is in much better position to evaluate credibility than the appellate

court. It is apparent that the litigants had a "falling out" over this dispute. In that situation the vantage point of the chancellor is all the more important. See *Siebert* v. *Benson,* 243 Ark. 843, 422 S. W. 2d 683 (1968). Evidently the trial court was unusually conscious of *credibility* because in his findings he commented on the demeanor and credibility of the witnesses.

Appellants stress the fact that the majority of their witnesses gave positive testimony as to the existence of the old fence. They compare that evidence with the negative testimony of a majority of appellee's witnesses, "negative" in the sense that the latter witnesses could not remember having seen an old fence on the east line. Those witnesses showed years of familiarity with the property, including the existence of "patch" and "cross" fences. One answer to appellants' argument that we should accept the positive over the negative is that ofttimes positive testimony is over-positive, so much so that its credibility is affected. The recollection of dates and unimportant experiences in years past is a common example. The opportunity to evaluate positive testimony is mainly at the trial level. There the trial judge sizes up the witness, utilizing the numerous factors that are available only to one who hears and observes that witness.

Some of the testimony of appellants' positive witnesses was not so favorable to their claim of adverse possession. For example, P. O. Loftin gave testimony inconsistent with the required intent to claim beyond the true boundary. When the controversy arose over the building of the new fence, Loftin testified he told Goza he (Loftin) wanted no part of the Goza property—only those lands which he had bought. In that conversation, which was prior to any survey, Loftin said he offered to abide by the conclusions of any surveyor of Goza's choice. He concluded that line of testimony with this statement: "Since Mr. Goza has sued me and caused me to come to court, I will claim everything under fence."

The recited testimony could well have raised in the mind of the trial court a serious question as to just when Loftin formed an intent to claim beyond his true record boundary.

It is axiomatic that one claiming title by adverse possession as against a record title has the burden of establishing it by a greater weight of the evidence. In view of that burden, we are unable to say the chancellor's findings were against the greater weight of the evidence.

Affirmed.

BYRD, J., dissents.

ABE SCHNITT *v.* LYMAN S. McKELLAR ET AL

5-4208 427 S. W. 2d 202

Opinion delivered March 18, 1968
[As amended April 29, 1968.]

Simon, Carroll, Fitzgerald & Fraser, Shepherd, and *Arnold & Arnold,* for appellant.

McKay, Anderson & Crumpler, for appellees.

JOHN A. FOGLEMAN, Justice. This case involves a determination whether the trial court was correct in finding that certain instruments executed by certain McKellar heirs conveyed their interests in an undivided one-fourth working interest in oil, gas and minerals to J. H. Carmichael, Jr. and J. C. Stevens.

Appellant is the successor in interest to some of the McKellar heirs who were parties to these instruments. He filed this action for a declaratory judgment to determine the interests of Carmichael and Stevens and their respective wives under the instruments and for partition of all surface and mineral interests. Inasmuch as the

evidence bears out factual recitations contained in these instruments,[1] and the intention of the parties to the instrument must be gathered from its four corners, we set out pertinent portions thereof:

> "THIS CONTRACT, made and entered into on this 13 day of May, 1940, by and between* * *(hereinafter called clients) and J. H. Carmichael, Jr. and J. C. Stevens, Attorneys at Law, (hereinafter called attorneys) WITNESSETH: That the said Clients own the following described lands, to-wit: * * *
>
> THAT, Whereas, there were executed certain oil, gas, and mineral leases on said lands, and there was discovered oil on said lands, and said lessees and assigns have failed to carry out the terms and conditions, both expressed and implied, in connection with said lease agreements, and have failed to properly develop and operate said lease, which has caused the said Clients to suffer great loss and damage.
>
> THAT said failure on their part amounts practically to abandonment, for a period of over twelve (12) months. They have permitted said lands to be drained and said lease should forfeit to the original owners, and in addition they are entitled to damage in a large sum, sufficient to compensate them for all their loss.
>
> WHEREAS, the said Clients are desirous of prosecuting their claims in every way possible, in order to recover their seven-eighths (7/8) working interest in said lands and in addition all claims of damage, and all other matters connected with said property and the clearing of the title, and for these purposes the said Clients hereby employ J. H. Carmichael, Jr. and J. C. Stevens to represent them in

[1]There are two virtually identical documents, differing only in that some of the heirs signed one and some the other.

these matters and agree to pay them as their fee two-eighths (2/8) of their seven-eighths (7/8) interest, leaving said Clients five-eighths (5/8) working interest, and in addition agree to pay them the same proportionate amount of all sums recovered by way of damage or in any other way, said fee to be paid whether recovered in court action or by compromise.

SAID Attorneys are empowered and directed to take any and all steps they deem necessary to prosecute said claims and do any and all things desired in handling said matters. Said attorneys hereby accept the employment and fee as set out above and agree to represent said Clients to the best of their ability. NOW, THEREFORE: KNOW ALL MEN BY THESE PRESENTS:

That We,* * *for and in consideration of the sum of One Dollar ($1.00), cash in hand paid, receipt of which is hereby acknowledged, and other valuable consideration, do hereby grant, bargain, sell, and convey unto the said J. H. Carmichael, Jr. and J. C. Stevens, and unto their heirs and assigns forever, an undivided one-fourth (1/4) working interest as set out above, in and to all of the oil, gas, and other minerals in, under, and upon the following described lands lying within the County of Miller and State of Arkansas, to-wit* * *

TO HAVE AND TO HOLD the above described property, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said J. H. Carmichael, Jr. and J. C. Stevens, and unto their heirs and assigns forever.

And We,* * *for and in consideration of the said sum of money and other valuable consideration, do hereby join in the execution of the foregoing conveyance and do hereby release and relinquish unto

the said grantees all of our rights and claims to dower and homestead in and to the above described property, to the extent of the rights and interest hereinabove described.

WITNESS our hands and seals this 13 day of May, 1940.

* * * CLIENTS."

Carmichael and Stevens were associates in the practice of law at the time of the execution of the instruments. Carmichael testified that the two of them performed legal services for the heirs who signed the documents in proceedings in bankruptcy in the Federal Court in Little Rock and in a suit in the Chancery Court of Miller County to recover working interests given other parties by numerous standard oil, gas and mineral leases. He also stated that all services called for by the contract were performed by him and Stevens after the expenditure of years of time and thousands of dollars of money, for which they had received no compensation or reimbursement. The instruments were prepared by Carmichael and Stevens. Records in the Federal Court in Little Rock indicated that there was production of oil from the lands. Carmichael testified this was stopped at the time he and Stevens filed an intervention on behalf of their clients in the Federal Court. It is stipulated that neither Carmichael nor Stevens has ever attempted oil or gas development, executed or received leases or any agreement or contract with any other party dealing with the mineral interests. Carmichael said that he had paid taxes on the mineral rights for almost twenty years. There was no oil or gas lease on the property when this action was filed.

Appellant states twelve points on which he relies but all relate to the validity and construction of the instruments. He contends that the instruments are not deeds of conveyance but simply contracts of employment

not creating any present interest, but if they were, the interest transferred was simply a lease without a term which had been abandoned by failure of appellees to develop for oil, gas and minerals within a reasonable time. Other contentions are that if this lease has not been abandoned, appellees are obligated to develop the properties when called upon to do so and that the instruments were void as contravening the rule against perpetuities.

Appellant places stress upon the following factors to sustain his position that there was no conveyance, or, at best, only a conveyance in the nature of a lease:

1. The instruments are labeled "CONTRACT".

2. That all Carmichael and Stevens were to receive was a one-fourth "working interest" or two-sevenths of the rights the lessees had under leases in existence at the time of the employment—the right to develop for oil, gas and minerals and to retain seven-eighths of the proceeds.

3. That the only result of the activities of Carmichael and Stevens was the loss by the McKellar heirs of such production as they then had.

4. That the contract was drawn by Carmichael and Stevens and should be construed more strongly against them.

5. That the instruments were so vague and uncertain as to render them void and inoperative.

A deed, or any other contract, should be examined to determine the intention of the parties. *Smart* v. *Gunnels,* 234 Ark. 567, 353 S. W. 2d 153. We find that it was the intention of the parties that the instrument convey, and that it did convey the grantors' interests in an undivided one-fourth interest in the oil, gas and minerals under and upon the lands involved. The instrument names the parties as grantors and grantees.

It has a granting clause using the words "grant, bargain, sell and convey." The habendum clause is in the form commonly utilized in conveyances. The instrument conveys the grantors' interests in the one-fourth interest not only in oil and gas, but in other minerals in, under and upon the lands. There is no provision for a time when drilling shall be done or provision for delay payments contained in the usual oil lease. It is hardly reasonable to suppose that these lawyers would have accepted employment which they could reasonably assume would require their services over a long period of time and the expenditure of considerable sums of money for compensation contingent upon profitable production on the lands obtained, if at all, through their efforts and expenditures. Nor is it plausible that they would, after performing the required services, do nothing at all to obtain production if they had accepted such a contract. It seems unlikely that the parties who signed this agreement, being already dissatisfied with production by a lessee in the business, would be satisfied to risk their possibility of improvement to two lawyers. It is also unlikely that parties who were so anxious to cancel leases on which they had unsatisfactory production would delay so long in asking cancellation of a contract abandoned by the opposite party. It is the terms of an instrument, not its name, which determine its character.

A portion of the preamble to the instrument having significance is the clause setting out specifically what Carmichael and Stevens are to do—represent the signers in prosecuting certain claims. Nothing whatever is said about their doing anything else. The "whereas" clauses set forth the reasons or inducements for entering into a contract and must be considered in determining the true intentions of the parties thereto. *United States Fidelity & Guaranty Co.* v. *Sellers*, 160 Ark. 599, 255 S. W. 26. There is no language in the instrument that places any other responsibility on the lawyers. It seems logical to us that if they had also had the responsibility

of developing the lands for oil and gas, this would also have been stated somewhere in the preamble.

We recognize that in their ordinary use, the words "working interest" mean that interest acquired by a lessee. In this sense it is the lessee's interest in the oil and gas produced over and above the owner's interest or royalty interest. It is a settled doctrine of equity, however, that the form of a transaction will never preclude inquiry into its real nature and that the intention of the parties must govern, irrespective of the form. This court has applied this rule in holding what appeared to be absolute deeds to be mortgages only. *Coleman* v. *Volentine,* 211 Ark. 594, 201 S. W. 2d 592. By application of this maxim of equity it has been said that a "contract of sale" could actually be a mortgage. *Maners* v. *Walsh,* 180 Ark. 355, 22 S. W. 2d 12. Language used in the opinion in the case last cited is particularly appropriate here:

> "Another maxim of equity is that equity regards the substance rather than the form, or that equity regards the substance and intent, not the form. This principle is well established and is expressed in more or less similar language in many cases.* * * This maxim is as applicable at the present time as it was when it was first formulated. By force of principle equity goes behind the form of a transaction in order to give effect to the intention of the parties, either to aid an act abortive at law because formally defective or to impose a liability as against an evasion by a formal concealment of its true character. In the construction of a written instrument, equity always attempts to get at its substance, and to ascertain, uphold, and enforce the rights and duties that spring from the real intention of the parties. In doing so, while it will of course not change the words of the instrument, the court of equity will look into all the circumstances under which it was made, in order to determine the proper meaning of

> the transaction. It will do this not only to sustain a just claim but to defeat an unlawful demand. 21 C. J. 204, 205.
>
> Equity looks beyond the mere form in which the transaction is clothed and shapes its relief in such way as to carry out the true intent of the parties to the agreement, and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their relations to one another and to the subject-matter are subjects for consideration."

In construing a contract the court must, if possible, give effect to the intention of the parties as far as that can be done consistently with legal principles, and this intention must be ascertained from the whole contract. *Dent* v. *Industrial Oil & Gas Co.,* 197 Ark. 95, 122 S. W. 2d 162; *American Snuff Co.* v. *Stuckey,* 197 Ark. 540, 123 S. W. 2d 1063.

To arrive at the intention of the parties to a contract, courts may acquaint themselves with the persons and circumstances and place themselves in the same situation as the parties who made the contract. *American Snuff Co.* v. *Stuckey, supra.* This is so the court can view the circumstances as they viewed them, so as to judge the meaning of the words and the correct application of the language to the things described. *Taylor* v. *Taylor,* 240 Ark. 376, 399 S. W. 2d 498. The court should arrive at the sense in which the words used would naturally be understood, taking into consideration the circumstances surrounding the making of the contract, the situation and relation of the parties. *Scrinopskie* v. *Meidert,* 213 Ark. 336, 210 S. W. 2d 281. Doing this, it would not be unreasonable to believe that not only Carmichael and Stevens construed this instrument to convey the grantors' interests in an undivided one-fourth interest in oil, gas and minerals, but that the clients (grantors) and their successors in interest must have too. The construction that the parties have placed

on a contract is entitled to great weight in interpreting it. *Owen* v. *Merts,* 240 Ark. 1080, 405 S. W. 2d 273. The intention of the parties is to be gathered, not from some particular phrase, but from the whole context of the agreement. *Arkansas Power & Light Co.* v. *Murry,* 231 Ark. 559, 331 S. W. 2d 98. The language of a contract, as a whole, should be so construed as to make apparently conflicting provisions reasonable and consistent and so as not to give one of the parties an unfair and unreasonable advantage over the other. *Scrinopskie* v. *Miedert, supra.*

When we apply these well known rules of construction, we must come to the conclusion that there was a conveyance of an interest in the oil, gas and minerals.[2] As we have construed the instrument, there was a conveyance of a present interest so the rule against perpetuities is not applicable. *Hanson* v. *Ware,* 224 Ark. 430, 274 S. W. 2d 359.

Appellant contends alternatively that the court should have granted his prayer for partition and cites Ark. Stat. Ann. § 34-1801, et seq., (Repl. 1962). This statute provides for partition on petition of any person having any interest and desiring a division of land held in common. There can be no doubt that under our construction of the contract, the interest of appellees is an interest in land. This court has held that a mineral deed placed of record constitutes a constructive severance of the minerals from the surface and makes two titles, one

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[2]Treatment of the words "working interest" as meaning something other than their purely technical definition is not novel. In disposing of a similar problem, the Supreme Court of Oklahoma has given recognition to the fact that the term "working interest" is not always used in its technical sense and that it is often used to denote merely an interest in the mineral rights, particularly when a conveyance has specified the proportionate interest in royalty or mineral rights to be held by the grantor and the grantee, when consistent with the other provisions of the instrument as a whole. *Colonial Royalties Co.* v. *Keener,* 266 P. 2d 467 (Okla. 1953).

the surface and the other the mineral title. *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S. W. 2d 425. It has also been said that the sale of an undivided mineral interest operates as a severance of soil interest from the surface and creates two separate and distinct estates. *Neilson* v. *Hase,* 229 Ark. 231, 314 S. W. 2d 219. The interest of appellees would not be an interest held in common with the owners of the surface in the sense of § 34-1801. On the other hand, the ownership of the minerals would be such an interest and the statute would be applicable to a division of the mineral interests, on the petition of the owners of the surface and an undivided interest in the minerals. This holding seems to be in keeping with the weight of authority, it being generally held that minerals, as a part of the real estate, if held in cotenancy, may be the subject of partition.[3] See Annot., 173 ALR 854.

Generally, partition, either by partition in kind or by sale and division of proceeds, is something to which each contenant has an absolute and unconditional right, under both common law and statute. Freeman on Cotenancy and Partition, § 433, p. 571; Knapp on Partition, p. 27; Annot., 15 Ann. Cas. 778; 2 Williams & Meyers Oil & Gas Law, § 506.2, p. 601. The basis for such right is well expressed in *Dall* v. *Confidence Silver Mining Co.*, 3 Nev. 531, 93 Am. Dec. 419 (1867) where it was said:

> "* * *As the law deems it against good morals to compel joint owners to hold a thing in common, a decree of partition may always be insisted on as an absolute right. It is not necessarily founded upon any misconduct of the co-tenants or part owners. Hence, in decreeing a partition, the rights and equities of all the parties are respected, and the partition decreed so as to do the least possible injury to

[3]A discussion of judicial partition relating to oil and gas rights will be found in § 6.3, et seq., 1 Kuntz, Law of Oil & Gas.

> the several owners; and 'courts of equity,' says Mr. Story, 'may, with a view to the more convenient and perfect partition or allotment of the premises, decree a pecuniary compensation to one of the parties for owelty or equality of partition, so as to prevent any injustice or unavoidable inequality', Story's Eq. Jur., sec. 654."

See, also, *Holland* v. *Shaffer,* 162 Kan. 474, 178 P. 2d 235 (1947).

The fact that interests in oil, gas and minerals are involved does not change the problem. Of this situation, Kuntz, in The Law of Oil & Gas, § 5.7 at p. 121, says:

> "Where the ownership of oil and gas rights is divided among various owners, the possibility of an unknown or uncooperative cotenant presents difficult problems for a cotenant who wishes to develop the land for oil or gas purposes or who desires to lease it for operation by another."

See, also, *Allies Oil Co.* v. *Ayers,* 152 La. 19, 92 So. 720 (1922).

It has long been recognized in other states that the owners of undivided interests in minerals are entitled to either partition or sale against the remaining owners, even under statutes worded as § 34-1801 was before the 1941 amendment. *Canfield* v. *Ford,* 16 How. Pr. 473 (N. Y. 1857), 28 Barb. 336 (1858) *Brown* v. *Challis,* 23 Colo. 145, 46 Pac. 679 (1896). See, also, *Hughes* v. *Devlin,* 23 Cal. 501 (1863).

A Mississippi statute provided for partition by tenants in common of any joint interest in the freehold. The Supreme Court of Mississippi held that under this statute the owner of the entire surface and an undivided one-half interest in the minerals was entitled to have a partition of the mineral interest. *Wright* v. *Ingram-Day Lbr. Co.,* 195 Miss. 823, 17 So. 2d 196.

The Court of Appeals of Kentucky held that the owner of the surface in fee simple and of an undivided one-half in oil, gas and other minerals was entitled to partition of the mineral rights under their partition statute which required the showing of a vested possessory estate in land which is jointly held in any manner. *Terteling Bros., Inc.* v. *Bennett,* 287 S. W. 2d 607 (Ky. 1956).

The Texas Court of Appeals, in *Henderson* v. *Chesley,* 273 S. W. 299 (Tex. Civ. App. 1925), aff'd. 116 Tex. 355, 292 S. W. 156 (1927), held that the owner of an undivided one-half interest in mineral rights was entitled to partition against the owner of the fee and an undivided one-half interest in the minerals under a statute which gave any joint owner or claimant of any real estate or any interest therein the right to compel partition.[4]

It is suggested by appellees in their brief, however, that it would be a great injustice to them to partition the mineral interest in kind and that there is no need to require this interest to be sold. It has been said that this absolute or unconditional right cannot be defeated by showing that a partition would be inconvenient, injurious or even ruinous to a party in interest. Freeman on Cotenancy & Partition, § 433, pp. 569, 571; 2 Williams Oil & Gas Law, § 506.2, p. 601, § 506.3, p. 602.

The manifest hardship arising from division of property of an impartible nature has been generally and almost universally avoided by statutes authorizing sale of the property when its division in kind would tend to greatly depreciate its value or otherwise seriously prejudice the interests of cotenants. Freeman on Cotenancy

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[4]Although the statute had been amended, at the time of this decision, to specifically cover the interest involved, there was a contention that the amendment did not apply in this case. The court said that it made no difference which statute applied, because the original statute authorized the action.

& Partition, § 433, p. 571; Annot., 15 Ann. Cas. 778, 779; *Richardson* v. *Monson,* 23 Conn. 94 (1854). This was the object of such statutes. *Wilson* v. *Bogle,* 95 Tenn. 290, 32 S. W. 386 (1895). See, also, 2 Williams Oil & Gas Law, § 506.2, p. 601, § 506.3, p. 603. This purpose was reconized in *Sutton* v. *McClain* (on rehearing), 193 Ark. 49, 99 S. W. 2d 236, 241. This court has also recognized that, in any case to which Ark. Stat. Ann. § 34-1801 (Repl. 1962) is applicable, the right to partition or sale is absolute, no matter how small the interest of the owner seeking partition or how great the majority who object. *Overton* v. *Porterfield,* 206 Ark. 784, 177 S. W. 2d 735. We do not have here the type of partition suit provided by Ark. Stat. Ann. § 53-401 *et seq.* (Act 15 of 1935), which is designed to provide for a sale of the "oil and gas lease rights" or "leasehold estate only" and not of the interest in oil, gas and minerals which we have found were conveyed by the instrument in question here. The interest of appellees is clearly covered by the language of § 34-1801 and if there is any conflict, the present language of the latter section must control, for it was adopted in 1941.

Dictum in *Overton* v. *Porterfield, supra,* wherein partition and sale of the oil and gas leasehold were involved, expressed the thought that, in such case as was there involved, § 53-401 *et seq.* did not impose upon a court of equity the imperative duty to order a sale whenever a proper petition was filed. The court said that a rule adopted in Oklahoma might apply in this type of case under certain circumstances. That rule, quoted in the opinion from *Wolfe* v. *Stanford,* 179 Okla. 27, 64 P. 2d 335 (1937), is that the court should be vested with discretion to grant or deny relief in order to prevent the right to partition from becoming a weapon of oppression and fraud in the hands of the financially fortunate who might use the right as a means of foreclosure of an owner of limited means. The Oklahoma Court clearly qualified this discretion as existing only in cases where there was no disagreement between the parties

rendering co-ownership impractical and stated specifically that inability of a cotenant to purchase should not constitute a defense in the absence of approaching development or rapidly increasing values. The qualification was applied in *Henson* v. *Bryant,* 330 P. 2d 591 (Okla. 1958).

But even in those cases wherein the doctrine that the equity court has the discretion to deny either partition or sale to prevent the remedy from becoming an instrument of fraud or oppression, it is generally held that the matter is one of defense to be pleaded and proved as such. *Henson* v. *Bryant, supra; Colonial Royalties Co.* v. *Hinds,* 202 Okla. 660, 216 P. 2d 958 (1948); *Williams* v. *Neal,* 207 Okla. 552, 251 P. 2d 785 (1952); *Holland* v. *Shaffer,* 162 Kan. 474, 178 P. 2d 235 (1947); *Gillet* v. *Powell,* 174 Kan. 88, 254 P. 2d 258 (1953). In this case, appellees did not plead their present contention that a decree of partition or sale would constitute fraud or oppression against them, nor did they offer any evidence tending to support such a claim.

We therefore, modify the decree of the chancellor to award appellees an undivided one-fourth interest in oil, gas and minerals, to the extent of the undivided interest conveyed by the grantors in the "contracts." Appellees' interests were found by the trial court to be 13/27 of ¼ of ⅞. Neither party questions this finding. We affirm the decree as modified, except as to the failure to grant partition of the mineral estates. We remand the case for appropriate proceedings for partition of the mineral interests, either in kind or by sale. In its proceeding, the trial court should bear in mind the peculiar nature of the property rights involved. Upon remand, the trial court should correct its decree so as to conform to this opinion.

Affirmed as modified and remanded.

DOYCE H. STONE ET UX *v.* ELMER J. HALLIBURTON

5-4415 425 S. W. 2d 325

Opinion delivered March 18, 1968

James R. Howard, for appellants

Charles L. Carpenter, for appellee.

JOHN A. FOGLEMAN, Justice. This is the second appeal in this case. On the first appeal, we held that the lower court erred in sustaining a motion to dismiss

challenging the sufficiency of the evidence on behalf of appellants to make a prima facie case to establish a prescriptive easement for a road or driveway across the lot on which appellee's home is situated. *Stone* v. *Halliburton,* No. 5-4017, 241 Ark. 710, 409 S. W. 2d 829.

On remand, the trial court heard the testimony of witnesses offered by appellee and rebuttal testimony offered by appellants. The complaint of appellants was dismissed for want of equity. The only question for our determination is whether the chancellor's holding that appellants had not established a prescriptive easement for a way across appellee's lot is clearly against the preponderance of the evidence.

Appellants' east boundary is appellee's west boundary. Both tracts (along with a lot now owned by one Perry) were once owned by John Redding. The Perry lot lies immediately north of appellants' property. Bellwood Addition and Annex lie immediately west and south of the Stone property. Stone purchased his house and lot on September 19, 1962, from one Edwards. Mr. and Mrs. Edwards told him that he had a right of ingress and egress through the Halliburton property. One of Redding's children sold the Halliburton lot in 1957 to Marion Witkowsky, who sold it to appellee in 1959 or 1960. Mrs. Roe, a daughter of Redding, sold the Stone lot to Edwards.

Redding Lane runs in a westerly direction from the old Conway highway along the north side of appellee's property and is admitted to be a public way until it reaches a point near the northwest corner of appellee's lot. Appellants contend that this way continues on a curving route across the northwest corner of appellee's lot, the southeast corner of the Perry lot and near the north boundary of appellants' lot. This drive presently terminates at the western boundary of appellants' property, near which their home is situated. Appellee contends that the use of the portion of the way across his

property has been permissive and that he has withdrawn his permission for its use. He claims that he had the right to build a fence crossing the drive along his boundary.

Appellant, Doyce Stone, testified that the road or driveway was in the same condition as it was when he purchased his property until appellee built the fence in June 1965. He said that he had used the portion of the way across appellee's property all this time and that this is the only way of getting in and out of his property. Since the fence was built, he has crossed the Perry property. Stone saw a post on the boundary line when he first moved into his home. He referred to the way as his drive or driveway. According to him, the only persons, other than himself, using the part in question were Mrs. Perry, who used it as a circle on which to turn around, and those persons coming in to see him. At the time of his purchase he was told that he had a separate deed for a 20-foot drive. This deed was never produced. When Stone asked the mayor to pave Redding Lane, he also asked that the driveway be blacktopped. The mayor refused to do the latter because he considered the driveway to be private property. When appellant talked to Edwards after Halliburton blocked the drive, Edwards told him of having had the same trouble with Halliburton.

One A. M. Duncan testified that he first became familiar with this property in 1952. He said that he used the road in question to get into the territory to go squirrel hunting in the 1950's. He stated that the only part of the road that is different in any respect is the portion of Redding Lane that has been blacktopped (*i. e.,* the portion conceded to be a public way). He said that the road was used by John Redding to get in and out from his property and by the public to get back to the Redding house (now the Stone house). He admitted that Redding had told him that he could come in there.

Mrs. Bessie Turley, who has lived on Redding Lane since 1942, also testified. She stated that the road has passed her property and the Stone house and proceeded to the Witkowsky property, lying immediately west of the Redding property, since 1942. She said that no road was actually built in 1942, but that people just drove in and out. She testified that Redding was a contractor and kept his trucks on his property and that Mr. John Witkowsky had some cattle and hogs he kept beyond the Redding house. She said that everyone used the road to get in and out and to feed the stock and hogs. She called it a public road. She testified that Bellwood Addition had taken a part of the road, closing it at the west boundary of the Stone property. According to her, no one had ever tried to block the road except Mr. Halliburton who had blocked it three or four times. She said he had blocked it on Mrs. Roe, Mr. Edwards and Mr. Stone.

Sam Block, a real estate broker who had been familiar with the property since it was owned by Mrs. Roe, sought to help Edwards avoid litigation by obtaining an easement from Halliburton when the latter fenced off the way during Edwards' occupancy of the Stone tract. Block had handled the sale of the property by Mrs. Roe to Edwards.

Marion Witkowsky testified that at the time he purchased the Halliburton lot, there were several wagon trails and that he made an all weather road which ended at the edge of the Redding property (now the Perry lot). He stated that Mrs. Roe then owned both the Stone lot and the Perry lot. He recalled that somewhere around 1957 or 1958, Mrs. Redding (Roe?) sold the Perry lot to one John Perrin. Witkowsky then told Mrs. Roe that she was cutting herself off from the road by the sale of this property and suggested that she have some written agreement with the purchaser, but she relied on her friendship with her purchaser.

According to appellee's testimony: Mrs. Roe was living in the Stone house when he acquired his property and a man named Ratliff was living on the Perry property; at that time, Mrs. Roe was crossing his property via an old wagon trail near the present location of his garage, some 30 feet north of the disputed area; he built a fence extending out from his garage, and Mrs. Roe then started using the disputed area for ingress and egress; although he spoke to her about this, she did not change her route; she sold the Stone lot to Ratliff;[1] the use of the entry across his property ceased upon the sale to Ratliff and no one thereafter has crossed his property without his permission; Edwards put gravel on the drive up to the property line and Stone had the disputed area graveled; appellee put up a fence on the line when Edwards lived on the Stone lot; he had given Edwards permission to cross as long as there was no trouble; the fence was still up when Stone first moved there, but he told Stone he would take the fence down until they had trouble and that Stone could use the driveway until then.

Mrs. Halliburton, a part owner of the property, corroborated her husband's testimony about the means of ingress and egress used by Ratliff and said that appellee told her of giving Stone permission to cross the corner of the property.

George White testified in rebuttal. He said that he had been acquainted with the properties of the parties since 1924; that back as far as he could remember, the road of which Redding Lane was a part went all the way back to the river; that when he first knew the property there was a dairy at the site of the Stone house and that this road was used by many people such as fishermen who used it to get to Levy; that the road was used as a public road up until the Bellwood Subdivision went in.

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[1]This deed was dated February 6, 1959.

Although appellants contacted Edwards when this controversy arose, he did not testify. Apparently none of the property owners protested when the alleged way was closed on the west by the laying out of Bellwood Addition.

The determination of whether use of a way over the lands of another is adverse or permissive is a fact question. *Brundidge* v. *O'Neal,* 213 Ark. 213, 210 S. W. 2d 305; *St. Louis Southwestern Ry. Co.* v. *Wallace,* 217 Ark. 278, 229 S. W. 2d 659. Former decisions are rarely controlling on the factual issue of whether a particular use is permissive or adverse. *Duty* v. *Vinson,* 228 Ark. 617, 309 S. W. 2d 318. If the use of this way was permissive or if the circumstances were not such as to put appellee and his predecessors in title on notice that the way was being used under a claim of right, then appellants cannot prevail. The burden was on appellants to show by a preponderance of the evidence that there has been use of the disputed strip which had been adverse to appellee and his predecessors in title under a claim of right, and not permissive, for a period of at least seven years. *Duty* v. *Vinson, supra*; *Brundidge* v. *O'Neal, supra.*

Use which is permissive in its inception can never ripen into an adverse or hostile right no matter how long continued unless the statutory period has elapsed after notice of the adverse claim has been brought home to the owner. *Harper* v. *Hannibal,* 241 Ark. 508, 408 S. W. 2d 591. Some act or circumstance, in addition to, or in connection with, the use of a way across unenclosed lands of another and tending to indicate that the use was not merely permissive is required to establish a right by prescription. *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S. W. 2d 461.

An inference may well be drawn from the testimony of Marion Witkowsky that no use was being made of this disputed strip between his acquisition of the property in 1957 and his sale to appellee. There is evidence

tending to show clearly that appellee has at all times since his purchase of the property sought to exercise dominion and control over the disputed strip, that he granted permission to both Edwards and Stone to use the strip, and that, at one time before the present occasion, he withdrew that permission. The closing of the west end of this way without protest is also a factor to be considered in determining the fact question whether or not use has been permissive. *Abbene* v. *Cohen,* 228 Ark. 266, 306 S. W. 2d 857.

Furthermore, there is no evidence to indicate when the Halliburton residence was built or when, if ever, the lot was enclosed. Use of unoccupied and unenclosed lands for passage is presumed to be permissive until those using the way, by their open and notorious conduct, apprise the owner that they are claiming it as of right. *Boulliouu* v. *Constantine,* 186 Ark. 625, 54 S. W. 2d 986; *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S. W. 2d 461.

While not conclusive, the overtures made to appellee by Block in behalf of Edwards may properly be considered as a circumstance bearing on the nature of the use. *Martin* v. *Winston,* 209 Ark. 464, 190 S. W. 2d 962.

Not having had the advantage of seeing and hearing the witnesses, we are unable to say, on the conflicting testimony, that the finding of the chancellor is clearly against the preponderance of the evidence.

The decree is affirmed.

GEORGIA-PACIFIC CORPORATION *v.* LINDALL H. NORSWORTHY

5-4516 425 S. W. 2d 320

Opinion delivered March 18, 1968

Paul Sullins and *W. D. Rothwell,* for appellant.

Spencer & Spencer, for appellee.

CONLEY BYRD, Justice. Georgia-Pacific Corporation appeals from a determination by the circuit court affirming the Workmen's Compensation Commission's decision that the Commission's order of April 23, 1965, did not constitute a "FINAL SETTLEMENT" with appellee Lindall H. Norsworthy within the terms of Ark. Stat. Ann. § 81-1319(1) (Repl. 1960).

The record shows that Norsworthy sustained a compensable injury on May 29, 1963, for which he received compensation and medical benefits without objection from Georgia-Pacific until August 1, 1963. At that time his doctors released him for light work with an estimated permanent partial disability of 7½% to the body as a whole. Norsworthy did not accept the 7½% but instead

employed present counsel and applied for additional total temporary disability and medical treatment. Following an operation Dr. Hundley reported on August 17, 1964, that Norsworthy was able to resume his regular work and that his residual permanent partial disability was 20% of the body as a whole.

Because of a difference of opinion on the issues of when the healing period ended and the amount of permanent partial disability, Georgia-Pacific had the matter set for a hearing on April 28, 1965. Prior to that hearing Georgia-Pacific on April 20, 1965, wrote as follows to the Secretary of the Commission:

> "Dear Mr. Cowne:
>
> "The above captioned case, which is set for hearing before the full Commission on Wednesday, April 28, 1965, at 2:30 p.m., has been settled by mutual agreement between the parties on the following basis:
>
> PERMANENT PARTIAL DISABILITY: Computed at 20% resulting in 90 weeks at $35.00 per week or $3,150.00, less a credit due employer of $1,365.00 for compensation paid claimant after healing period ended on June 15, 1964, resulting in a net payment to claimant of $1,785.00. ADDITIONAL ATTORNEY'S FEES: Maximum attorney's fees based on amount of compensation controverted over 7½% and additional medical expenses, less certain credits for fees paid on compensation paid claimant subsequent to the end of the healing period, resulting in a net additional attorney's fee of $177.38.
>
> "We respectfully request that the full Commission enter its order approving the final settlement of this case on the above basis."

Mr. Cowne, Secretary of the Commission, replied:

"Dear Mr. Asher:

"I have your letter dated April 20, 1965, in which you advise that the above case which is set for a hearing before the Full Commission on Wednesday, April 28, 1965, at 2:30 p.m. has been settled by mutual agreement and request the Full Commission to enter an order approving the settlement based on the agreement in your letter.

"In view of your letter, this is to advise that we are cancelling the hearing scheduled in the above case for April 28, 1965, and are removing this case from our hearing docket at this time.

"Before we submit this case to the Full Commission for an order and so that our records might be complete, we are by copy of this letter requesting Attorney J. V. Spencer, Jr., to please confirm the agreement as set out in your letter of April 20, 1965.

"As soon as we have heard from Attorney J. V. Spencer, Jr. this matter will be submitted to the Full Commission for an order to be entered."

After receiving copies of both letters Mr. J. V. Spencer, Norsworthy's counsel, wrote the Commission:

"Dear Mr. Cowne:

"Pursuant to your letter of April 21, 1965, to Mr. Gerald E. Asher of Georgia-Pacific Corporation, a copy of which was forwarded to this office, this is to advise that the agreement outlined in Mr. Asher's letter of April 20, 1965, is satisfactory with us and with Mr. Norsworthy, and we hereby request that the full Commission enter its order approving this settlement."

On April 23, 1965, the Commission entered the following order:

"The parties hereto have entered into an agreement as set forth in Mr. Asher's letter of April 20, 1965, addressed to Secretary Cowne and confirmed by Mr. Spencer in his letter dated April 22, 1965, addressed to Secretary Cowne.

"Based upon the agreement the Commission herewith finds that claimant's healing period ended June 15, 1964; that as a result of instant injury claimant has sustained a 20% permanent partial disability to the body as a whole which is compensation for a period of 90 weeks producing a sum of $3,-150.00; however, respondent has paid claimant the sum of $1,365.00 to apply on his permanent partial disability leaving the sum of $1,785.00 due claimant. Claimant's attorney is entitled to a net additional attorney fee of $177.38.

"It is, therefore, the order of this Commission that respondent continue payment of compensation to claimant at the weekly rate of $35.00 until the remaining balance of $1,785.00 has been paid. Respondent shall also pay to Mr. J. V. Spencer, Jr. the sum of $177.38 as attorney's fees."

The present controversy arose when claim was made on Georgia-Pacific in August, 1966, for payment of services rendered to Norsworthy by Hundley Orthopedic Clinic and Hickerson Brace Company. The provisions of the Compensation Act dealing with settlements are Ark. Stat. Ann. §§ 81-1320(a) and 81-1319(1) (Repl. 1960). They provide:

"81-1320. *Contracts waiving rights void.*—(a) *Waiver of compensation.* No agreement by an employee to waive his right to compensation shall be valid, and no contract, regulation, or device whatsoever, shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this act [§§ 81-1301—81-1349,] except as specifically provided elsewhere in this act."

"81-1319. *Payment of compensation.*—. . . (1) *Joint petition.* Upon petition filed by the employer or carrier and the injured employee, requesting that a final settlement be had between the parties, the Commission shall hear the petition and take such testimony and make such investigations as may be necessary to determine whether a final settlement should be had. If the Commission decides it is for the best interests of the claimant that a final award be made, it may order such an award that shall be final as to the rights of all parties to said petition, and thereafter the Commission shall not have jurisdiction over any claim for the same injury or any results arising from same. If the Commission shall deny the petition, such denial shall be without prejudice to either party. No appeal shall lie from an order or award allowing or denying a joint petition."

The rule-making power of the Commission in Ark. Stat. Ann. § 81-1342(f) (Repl. 1960) provides:

"(f) *Administration of act.* For the purpose of administering the provisions of this act [§§ 81-1301—81-1349] the Commission is authorized (1) to make such rules and regulations as may be found necessary; (2) to appoint and fix the compensation of temporary technical assistants and medical and legal advisers and to appoint and to fix the compensation of clerical assistants and other officers and employees; and (3) to make such expenditures (including those for personal service, rent, books, periodicals, office equipment and supplies, and for printing and binding) as may be necessary. All expenditures of the Commission in the administration of this act shall be allowed and paid from the Workmen's Compensation Fund, upon the presentation of itemized vouchers therefor approved by the Commission."

Pursuant to this authority the Commission promulgated its Rule 19 which provides:

> "The Commission strongly discourages use of the Joint Petition as a means of settling cases except in unusual circumstances. No Joint Petition will be approved unless such Petition sets forth the nature of the unusual circumstances and unless such unusual circumstances are proved at a hearing. Such Joint Petition must set forth in detail the reasons its approval will be in the claimant's best interest as required by Section 19 (1) of the Workmen's Compensation Act.
>
> "Joint Petition settlements under Section 19 (1) of the Workmen's Compensation Act will be heard by the Full Commission at its offices in the Justice Building, Little Rock, Arkansas, unless the Commission determines it will be to the best interest of the parties to designate a referee to conduct said hearing for the Full Commission.
>
> "It shall be necessary for the claimant to appear and testify at any hearing. Petitions shall be signed by all parties, including the claimant, and must be verified.
>
> "Under certain circumstances, the Commission may designate referee to hold such hearing at a location convenient to the parties or may direct the taking of a claimant's testimony by deposition or interrogatories.
>
> "In all Joint Petitions where the claimant is represented by an attorney, the amount of agreed attorney's fee shall be set out in the petition. No attorney's fee shall be approved if it exceeds the limitations provided for in Section 32 of the Act."

Since Georgia-Pacific made no attempt to comply with Rule 19, above, we hold that the Commission was

justified in finding that its order of April 23, 1965, was not a final settlement within the meaning of Ark. Stat. Ann. § 81-1319(1), *supra.*

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION
v. WILLIAM J. DEAN ET AL

5-4269 425 S. W. 2d 306

Opinion delivered March 18, 1968

John R. Thompson and *Phillip N. Gowen,* for appellant.

Clark, Clark & Clark and *Guy H. Jones,* for appellees.

J. Fred Jones, Justice. This is a condemnation case arising out of the construction of Interstate 40 through Conway, in Faulkner County, Arkansas. By right of eminent domain, the state highway commission condemned a right-of-way across property belonging to appellees on the outskirts of Conway. Judgment was entered by the Faulkner County Circuit Court on a jury verdict of damages in favor of the appellees in the amount of $41,-500.00, and the commission has appealed.

Appellant has designated the following points relied upon for reversal:

> "The trial court erred in refusing to disqualify himself, and in refusing to quash the jury panel.
>
> The trial court erred in refusing to give plaintiff's (Appellant's) requested Instruction No. 10.
>
> The trial court erred in refusing to give plaintiff's (Appellant's) requested Instruction No. 8."

The record before us reveals the following facts: Prior to 1957, a study was made by the Arkansas Highway Department of a route for Interstate 40 Highway through Faulkner County. A proposed route east of Conway was surveyed and traced on county maps in 1956, and this route was recommended when the study was completed in 1957. In 1958, the proposed highway and the proposed route through Conway were discussed by officials of the highway department with the citizens of Conway at a public Chamber of Commerce meeting. Following this meeting, the Children's Colony north of Conway requested a change in the proposed alignment of the highway in order to miss some of the improvements at the Colony, and this change was made. The final survey for the alignment of the highway was completed in 1959, and the county and city maps, showing the proposed designated route, were brought up to date. In 1963, strip maps of the proposed highway right-of-way were furnished to Mr. Ott, a title abstracter in Conway, and on the basis of these maps he furnished re-

quested title information to the highway department on land along the proposed route. About February 1, 1964, the highway department started gathering sales information and making actual appraisals of the property to be condemned. The center line stakes for Interstate 40 were finally set by the highway department in February 1965, and actual negotiations for the purchase of right-of-way from the owners along this route were commenced in May 1965.

When the highway department actually started negotiating with property owners for the purchase of rights-of-way, other negotiations had already been under way for some time for highway *frontage* along the same route staked out by the highway department. On January 21, 1965, Continental Oil Company had taken three separate options to purchase nine lots adjacent to the right-of-way for the total price of $85,000.00. In January or February 1965, appellees were negotiating for the purchase of 47 acres of the land involved in this case from C. T. Ray, and Mr. Ott was their chief competitor. Mr. Ott was successful in obtaining an option to purchase this land for $137,500.00. On March 11, 1965, Pure Oil Company took an option to purchase from Mr. Ott, 12.9 acres of this land extending 1185 ft. along the right-of-way line of Interstate Highway 40, for the purchase price of $110,000.00, and Mr. Ott warranted to the Oil company that the exact description of the land involved was to be as described and *as shown on attached strip map prepared by the highway department.* Then on March 31, 1965, Mr. Ott exercised his option to purchase from Ray, and on the same day sold this land to appellees for $10,000.00 more than he paid Ray for it. The sale from Ott to the appellees was subject to the option held by the Pure Oil Company.

As to this purchase, appellee Henry testified:

"In either late January or early February, 1965, Mr. Dean and I began negotiating with Mr. Ray to

buy his property. We were finally successful in buying it, but not from Mr. Ray. We had to buy it from Mr. Bob Ott, because Mr. Ray had sold it to Mr. Ott. In talking to Mr. Ott about it, Mr. Ray told him that we were interested in it too. He told us there was an option on this 13 acres on the west side to Pure Oil Company for $110,000.00, that he had signed it and he gave me a copy of it, * * *.

Q. Mr. Henry, do you know anything about the Ott purchase of the Ray property—what has been referred to as the Ray property?

A. Yes, sir.

Q. Did he purchase that under contract first and then get a Deed, or how was it, or do you know?

A. I believe he had an option at first.

Q. To buy it from Mr. Ray?

A. Yes.

* * *

Q. Do you know that this option preceded Mr. Ott's option to Pure Oil?

A. Yes, sir. It did.

Q. And then subsequent to optioning it to Pure Oil, the property was then deeded to him. Is that correct?

A. Yes, sir.

Q. And on that very same day he deeded it to you and Mr. Dean?

A. Yes, sir.

* * *

Q. Did you know how much Mr. Ott had paid for the property when you purchased it?

A. Yes, sir, we sure did."

The Ray property, which appellees purchased from Ott, lies on both sides of the right-of-way line for Interstate 40. The main body of this tract is square in shape and was landlocked except for a strip containing eight or nine acres, less than two city blocks in width and about two blocks in length, extending south from the southwest corner of the main body to Highway 64. All of this strip is west of Interstate 40 right-of-way. Immediately east of the main body of the Ray tract, Helen R. Collier owned a 39 acre tract of land. This land lies in an approximate square shape and joins the Ray tract along the west side of the Collier tract. The Collier tract lies north and east of the Interstate 40 right-of-way and north of Highway 64. It was landlocked by the Ray tract on the west and by other land on the other three sides and was without access to Highway 64. The interchange right-of-way from U. S. 64 to Interstate 40 cuts across the southwest corner of the Collier tract and the right-of-way continues from where it crosses (overpasses) Highway 64 in a northwesterly direction and diagonally through the Ray tract.

Prior to March 1965, the highway department started negotiating a contract for the purchase of this right-of-way from Helen L. Collier. The contract was first made for the purchase of this right-of-way on May 11, 1965, and although this contract was dated February 16, 1966, it was proofread on March 2, 1965. On April 5, 1965, following the purchase of the 48 acre tract from Mr. Ott by appellees, Mrs. Collier offered to sell to appellees for $500.00 (later raised to $600.00) per acre that portion of her 39 acre tract which she had not already agreed to sell to the highway department. On this point Mr. Henry testified:

> "A. ***We went out there and talked to her, and she told us what she would sell us and what she would sell it to us for.

Q. And what did she say?

A. She said, 'I'll sell you the back part, everything that's north of the highway stakes.'

Q. Everything that's north of the highway stakes for Interstate 40?

A. Yes."

Appellees purchased this Collier tract for $600.00 per acre and the deed was delivered on May 14, 1965. Negotiations for purchase of rights-of-way were suspended by the highway department on May 13, 1965, and the landowners were advised of the suspension on May 14. The highway department later resumed negotiations for the purchase of right-of-way and finally closed the transaction with Mrs. Collier on March 2, 1966, by paying her $62,150.00 for 8.15 acres actually taken for right-of-way.

As to appellant's first point, there was some evidence in the record to the effect that the trial judge owned an interest in property subject to condemnation for Interstate 40 right-of-way in a separate action, and appellant contends that he should have disqualified in the trial of the case at bar. There also was some evidence that newspaper articles had been published pertaining to the trial judge's interest in similar litigation in another case in which he did disqualify, and appellant contends that the jury panel should be quashed. There was no evidence, or anything else, on either of these points abstracted by the appellant, as required by Rule 9 (d) of this court, so we find no error in the trial judge refusing to disqualify in the present case and in refusing to quash the jury panel.

We dispose of appellant's third point, as to its instruction No. 8, before considering its second point. Appellant's requested instruction No. 8 is as follows:

"You are instructed that the defendant had a duty to minimize the damages that they might sustain by

virtue of the taking by the Highway Commission, and to that end you are instructed that if you find that certain acts could have been done, or certain arrangements could have been made by the defendants that would have lessened the damages suffered by the defendants, then they are not entitled to claim those elements today, and you will disregard any element of damages claimed by these defendants for such items as they might have corrected or eliminated."

In connection with their proof on severance damages, appellees offered evidence that the cost of extending a sewer line across the right-of-way from appellees' property on the west and south side of Interstate 40 to their property north and east of Interstate 40, would be considerably more ($540.00 per acre) since the construction of Interstate 40 than it would have been before actual construction, and this evidence was submitted to the jury along with the other evidence of damage. This additional cost was in connection with driving or "jacking" a conduit under the highway without interfering with the use of the highway. There was also evidence offered by appellant that the Children's Colony did, and the appellees could have, mitigated this cost by constructing the conduit for a sewer across the right-of-way after it was acquired and before actual construction was begun, thus greatly mitigating their damages on this item. We conclude that under the evidence on this point, appellant's instruction No. 8 should have been given and that the trial court erred in refusing it.

The appellant's second point has given us considerable difficulty and no little concern. Appellant's requested instruction No. 10 was as follows:

"You are instructed that in your deliberation you are not to consider the property known as the Collier tract, either so far as damages are concerned, or as benefits are concerned, said tract being pur-

chased by the defendants with knowledge of the fact that the possible taking by the Highway Commission would leave the Collier Tract without access and cut off."

A great deal of the testimony was directed to the question of whether or not the appellees knew that the highway would be built across their land when they purchased it. They more or less admit that they knew that some of their land would be landlocked by the highway if it was built in the place it was built, but they deny that they *knew* where the highway would be built when they purchased their land.

On this point Mr. Henry testified:

"Q. And when did you say you got the Deed to the Ray property?

A. On March 31, 1965.

Q. Was your transaction with Miss Collier a one day affair, or had you previously agreed to purchase the property from her?

A. It took over a month to wind up the transaction.

Q. So that actually you had agreed to purchase it at some time prior to the actual date the Deed was delivered, is that right?

A. That's right.

Q. Mr. Henry, in Opening Statement counsel for the Highway Commission stated this property was purchased with your knowledge that the highway would go through there. Will you tell us what knowledge you had at the time you purchased this property of any location of this Interstate 40?

A. I had no knowledge whatever of any definite location. I knew that a number of surveys had been run, but from general knowledge."

Common sense is not to be completely abandoned by a trial jury, a trial judge, or this court on appeal, in estimating the extent of knowledge derived from established facts and circumstances.

If Mr. Ott did not *know* where Interstate 40 would be built when he took his option from Mr. Ray, he obviously *thought he knew* when he warranted its location in the option he sold to the Pure Oil Company on March 11, 1965, and subsequently assigned to appellees.

Appellee, Ray, testified that he knew there had been other property purchased by the highway department for right-of-way for Interstate 40 both north and south of the property he purchased from Mr. Ott before he purchased the property from Ott. Appellees purchased the Ray tract from Ott subject to the Pure Oil Company option (with the strip map attached). They knew that Mrs. Collier was only selling "everything that's north of the highway stakes for Interstate 40" when they purchased it. So it is obvious to us, from the record in this case, that if appellees did not *know* Interstate 40 would cross their land when they purchased it, they were certainly unreasonable if they assumed that it would not.

In the recent case of *Arkansas State Highway Commission* v. *Griffin,* 241 Ark. 1033, 411 S. W. 2d 495, we adopted the general rule from *Nichols on Eminent Domain,* Third Edition, 1962, Volume 4, Section 12.3151, pages 201-204, stated as follows:

> "The general rule is that any enhancement in value which is brought about in anticipation of and by reason of a proposed improvement is to be excluded in determining the market value of such land, although there is some authority which, contrariwise, unqualifiedly allows recovery for such enhanced value."

In the Griffin case we then said:

> "While, as pointed out, there is some authority to the contrary, we like the logic of the general rule, and align ourselves with those who have adopted that view."

In arriving at the true value of land taken and the damages to the land not taken, both sides, the landowner and the condemnor, obtain the services of readily available professional appraisers, all of them well versed in the three appraisal methods, all of them using the same approach, most of them licensed realtors of long experience, and all of them experts in land values.

Appellees argue that by constructing Interstate 40 across the 47 acre tract they purchased from Ott, the appellant has damaged their remaining property outside of the right-of-way in that the part of the 47 acre tract north and east of Interstate 40, and all of the 39 acre tract purchased from Collier, have been severed from that portion of the 47 acre tract lying south and west of Interstate 40, and from access to sewer connection and to Highway 64 at the southwest corner of the 47 acre tract. These were principal elements the expert witnesses took into consideration in arriving at their conclusions of $91,650.00 overall *damage* as testified by appellees' expert, Mr. Barnes, and $44,600.00 *enhancement* in value as testified by appellant's expert, Mr. Adams. This leaves a difference between the opinions of these two expert witnesses in the actual amount of $135,250.00 on these two pieces of property purchased for $170,900.00. Such variance in the opinion of experts on the value of real property simply does not make sense, and only points up the unreliable nature of expert opinion on real property appraisals.

Witness Barnes testified for appellees that he compared twenty-five comparable sales with appellees' land and arrived at a value at the time of taking of $265,000.00 and $173,350.00 after the taking, or a difference of $91,-650.00 as just compensation. This figure was broken

down to $26,357.00 as the value of the land actually taken and $65,293.00 for damages to the remainder. The residual damage as testified by Mr. Barnes consisted of $1,000.00 per acre severance damages to the residuals consisting of $260.00 for loss of access to Highway 64, $540.00 for additional cost of extending utilities and $200.00 for distortion of plottage.

According to Mr. Barnes' testimony, the building of the highway left appellees' property worth only $2,-450.00 more than they paid for it, but $91,650.00 less than it was actually worth. According to his testimony the 39 acres in the Collier tract, which was bounded by Interstate 40 right-of-way when appellees purchased it, had been damaged by the construction of the highway $400.00 more per acre than the appellees paid for it.

Appellee, Dean, valued the property at $265,000.00 before the taking and at $150,704.00 after the taking, leaving a difference of $114,196.00 as damage to the property. According to Mr. Dean's testimony, the market value of this land when he purchased it was $94,-100.00 more than he paid for it and that its market value was more than half destroyed by building the highway. He estimates that by building the highway his land is now worth $20,196.00 less than he paid for it and $114,-296.00 less than it was actually worth.

Twenty-five comparable sales were used by the expert witnesses in arriving at the value they placed on the land. No one testified as to the dates or amounts of these sales and no questions were asked as to the dates or prices paid, so we accept the land values, including that placed on the Collier tract, as correct. The residual or severance damage to the tract, however, is another matter. It is obvious to us that appellees knew, or certainly believed, that Interstate 40 would be built exactly where it was built when they purchased all of the Collier tract east of the right-of-way, and added that tract to the tract they purchased from Ott.

When appellees purchased the Collier tract, they only purchased "the back part . . . north of the highway stakes for Interstate 40." They were bound to have known what portion of this tract Mrs. Collier had agreed to sell to the highway department, and they were bound to have known that the Collier tract was landlocked when they purchased it and would remain so when Interstate 40 was completed across the tract they purchased from Ott.

The Kentucky Court of Appeals had a very similar case before it in *Commonwealth* v. *Raybourn,* 359 S. W. 2d 611. In that case Raybourn owned a motel on a .38 acre tract of land abutting on old Highway No. 60. They learned that the highway was to be changed and they purchased a 1.72 acre tract contiguous to their first tract and through which the new highway was to pass. Right-of-way was taken across the second tract by eminent domain. Treating the two tracts as a unit, the trial court awarded damages in the amount of $5,000.00 for the right-of-way taken in fee and $32,500.00 resulting damages to the remainder. In reversing the judgment of the trial court, the court of appeals said:

> "We therefore hold that when it has been proven that the owner of property, on which land is being taken by the power of eminent domain, has purchased such property with knowledge of that fact, he is not entitled, for the purpose of assessing damages, to have it considered a part of other property previously acquired by him."

There is no substantial evidence in the record before us that the Collier tract of land purchased by the appellees east and north of Interstate 40 was damaged at all by the construction of Interstate 40. We conclude that appellant's instruction No. 10 should have been given under the evidence submitted at the trial of this case, but since this case must be remanded for a new trial for error in refusing to instruct the jury on mini-

mization of damages as requested in appellant's instruction No. 8, we are unwilling to say that the Collier tract, as a matter of law, should be completely eliminated from consideration by the jury under proper instructions and under any and all circumstances that may arise at the re-trial of this case. For the errors indicated, this case is reversed and remanded to the Faulkner County Circuit Court for a new trial.

Reversed and remanded.

BYRD, J., not participating.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result but am compelled to dissent from a part of the court's action. In my opinion, the majority holding that appellant's requested Instruction No. 10 should have been given has, in effect, changed the law of eminent domain and has created a dilemma for property owners, whose rights as such have been declared higher than constitutional sanction.

This instruction would have foreclosed, as a matter of law, any consideration of the Collier tract by the jury because of a "*possible taking by the Highway Commission.*" [Emphasis mine] It would have also prevented the jury from determining a factual question on disputed testimony, assuming that the instruction was otherwise proper. I cannot bring myself to agree with the propriety of either effect which would result from the giving of this instruction.

While the result in this particular case might seem to some to be an appropriate one, I cannot help remembering that we are not only deciding cases, but are also establishing precedents. This precedent, I submit, is a dangerous one. It will permit condemnors to announce a proposed project far in advance, make some plans, run some surveys and sterilize the real estate which

might be affected. Then, when values are sufficiently depressed by reason of the inhibition of sale or development, the condemning agency may actually take the right-of-way, easement, or property needed and pay "just compensation" at the depressed price. Or, the condemnor may, at its own option, change its plans and leave a landowner with undeveloped property that might have been fully developed and utilized if the project had never been planned. The result reached by the majority makes the proposal of a highway through an owner's lands an incumbrance thereon and a virtual confiscation.

Appellant's real contention is that a 39-acre tract known as the Collier tract could not be considered, for the purposes of this case, to constitute a unit composed of it and the Thorpe tract. The basis of its contention is that the Collier tract was purchased by appellees with knowledge that appellant would, when it did condemn this right-of-way for Interstate Highway No. 40, cause this tract to be landlocked. I submit that this is erroneous if declared as a matter of law. If appellees did not purchase the Collier tract in good faith for the purpose of consolidating lands formerly held under separate ownerships as a unit for future development, but for the sole purpose of enhancing their damages to other lands remaining after the taking, they should not recover. But their knowledge and their motives should have been questions of fact for the jury and not determined as a matter of law as Instruction No. 10 would have done and as appellant argues should be the case. It should also be noted that Instruction No. 10 is based on appellees' knowledge of the *possibility* of a taking, not the *certainty* thereof. This in itself is erroneous.

The Thorpe tract of 47 acres was purchased by appellees from Robert L. Ott on March 31, 1965. The 39 acres were purchased from Mrs. Collier subsequently. She called appellee Henry on April 5, 1965, and appellees conferred with her. On the following day they en-

tered into a purchase contract with her, even though she raised her price $100 per acre over that she asked the preceding day. The transaction was not closed until May 14, 1965, when a deed was delivered to appellees. No proceedings for the taking of the highway right-of-way were instituted until June 6, 1966.

Appellant introduced evidence to show that the 1957 Arkansas recommendation for the Interstate System included a location for what is now known as Interstate Highway No. 40, east of Conway near its present location. It showed that a public meeting was held in Conway in 1958 to determine the economic impact of the highway location. In 1959, the proposed location was altered slightly at the request of the Arkansas Children's Colony. Appellant's witnesses say that they corresponded with the Conway Planning Commission about the location in 1962. It was 1963 before title work was started with Robert L. Ott, an abstractor. Appellant's evidence tended to show that the right-of-way was staked out in 1964. It was not until 1965 that negotiations with landowners for right-of-way were started, and it appears that appellant was only taking options at that time. It is undisputed that these negotiations were suspended in May 1965 and were not resumed until late 1965.

Appellee Dean is manager of the Steel Chevrolet Company. He said that he became interested in obtaining a new location because of problems of his company. He was looking for land from 1961 to May 1965. The purchase was made with the idea that his company would use a location on Highway No. 64 bordering the land. At the time of the purchase, Pure Oil Company had an option on a portion of the land purchased from Ott, but released it October 19, 1965. Dean said that Pure Oil Company released the option because it was unable to determine whether there would be a highway there. Dean and Henry testified about their efforts to pin down the location of the highway right-of-way. Hen-

ry testified that he was City Attorney and attorney for The Conway Corporation, a concern that operates the city light, water and sewer systems under lease. Neither the city nor the company had been given any specific information as to the location of the highway, to his knowledge. After the representative of the Pure Oil Company advised Dean that the option was released because he had been to Little Rock and found that the location of the highway was undetermined, Dean and Henry went to Little Rock to see the Director of Highways. About November 3, 1965, they conferred with the Director and Mr. Henry Gray, the head of the Right-Of-Way Department. According to appellees, they were advised that these officials did not know where the highway was going. Previously, on May 3rd, 4th, or 5th, 1965, an attorney for appellant had given Henry a strip map showing a general location of the highway and lands which would be traversed by it. The map bore a stamp carrying these words in capital letters: "DATA SHOWN IS PRELIMINARY AND ROUTE IS SUBJECT TO CHANGE." This notation was pointed out by the Highway Department attorney, who remarked that the map was preliminary, not final. Henry says that on May 18, 1965, four days after an announcement by the Highway Department that it was stopping negotiations for right-of-way, the same attorney was in Conway to settle a suit and Henry asked what they were going to do. He says that the attorney said: "They're going west."

In November or December 1965, Dean and Henry went to Searcy to see Truman Baker, one of the Highway Commissioners. Baker advised, according to appellees, that the Commission was still studying the matter and might go east or west of Conway. Later in December, appellees went to Clarksville to see Armil Taylor, another Highway Commissioner, and found that he would not tell them anything. It was not until a conference with the Director of Highways, the Chief Engineer, the Chief of the Right-Of-Way Division and a repre-

sentative of the Bureau of Public Roads in the spring of 1966 that they were told the highway would go through on the previously proposed route. It was not until April of 1966 that a highway department representative came to them to try to acquire right-of-way.

William B. Young, a representative of Gulf Oil Company who took options along the right-of-way for his company, was called as a witness by appellant. He testified that he took two options on December 3, 1965. One of them was executed by Robert L. Ott. It contained a clause making the option contingent upon preliminary plans for Interstate Highway No. 40 being approved by the Bureau of Public Roads and the right-of-way being acquired according to appellant's survey. The option would be rendered void if the highway were relocated. The options were not exercised until August 5, 1966. He said that he used the Highway Department as a source of information as to highway location and that on the date he took the options this location was indefinite. His company wanted to carry the matter into 1966 to be sure that its option was on the highway.

The Continental Oil Company also put a clause in its options dated January 21, 1965, extending them until the Highway Department had published its final plans.

None of the testimony of appellees about the uncertainty of the highway location disclosed to them is seriously contradicted. The Assistant Director of the Right-Of-Way Division said that no alternate route was ever seriously considered. None of the persons from whom appellees sought information testified. It is interesting to note, however, that the Chief of the Right-Of-Way Division testified at a pre-trial conference that at the time a certain newspaper article appeared in Conway on May 15, 1965, a "little" consideration was being given to a change in highway route. He said it was thought that the alignment might be moved to satisfy some people who were disgruntled about right-of-way. He said

that there was serious consideration of a change at the administrative level and by the Commission, but that when the amount of money already invested in the previous alignment was considered, a decision to proceed on the preliminary route was made before any new surveys were ordered. He admitted telling landowners that "temporarily we were not going to do anything out there." He also said that he told landowners with whom negotiations had been conducted that, temporarily, appellant would not give them letters of acceptance or contracts of sale and would not take possession in the immediate future.

The time for which the market value of property is to be determined is the date of taking. The right to deal with property until that time is absolute, and a deprivation of that right constitutes a violation of due process of law, in my opinion. I think that the correct rule in cases such as this is stated in *Krier* v. *Milwaukee Northern Ry. Co.,* 139 Wis. 207, 120 N. W. 847 (1909). There was evidence in that case that the owner purchased the property shortly before the partial taking with knowledge of the probability thereof. The jury was instructed that they were not to consider whether the owner or his grantor had knowledge as to when the railroad line in question was to be located. In affirming the action of the trial court, it was said:

> "A person has the undoubted right to buy or improve realty in the face of a probability that it may be invaded, as in this case. To do so is not evidence of bad faith. Furthermore, the property owner owes no duty to the prospective appropriator to consider its interests in what he shall do with his own. Whether, in any given case, he proceeds with the idea that the value of improvements made in the face of probable appropriation will enhance the damages he will contingently suffer or not, has nothing to do with the abstract question as to his right to full compensation if appropriation occurs. It is his con-

stitutional right to buy, hold and improve property as he sees fit and rely upon the fundamental guaranty that, to the extent he shall be deprived thereof under the power of eminent domain, he will, as a condition precedent, receive a full equivalent."

It should be kept in mind that it is the taking of property for which compensation is made, not the proposed taking or the contemplated taking.

In *Driver* v. *The Western Union Railroad Company,* 32 Wis. 569, 14 Am. Rep. 726 (1873), the landowners acquired their property after commissioners had been appointed at the request of the railroad company to estimate the value of property to be taken and damages to other lands. The property consisted of four lots. They were bought for the building of a factory and mill. The railroad crossed one corner of Lot 7 under license. After the contract of purchase, but before title was taken, the owners were notified that the railroad would need Lot 7 and a representative sought to negotiate for the lot. In spite of this, the owners completed their mill. When Lot 7 was taken, they claimed depreciation in value of the other three lots by reason of the taking of Lot 7. The railroad company contended that the jury should not consider the use to which the owners had put the property or the effect of the taking of the lot upon that use. The following statements of the court in rejecting that contention are most appropriate here:

"* * * And if the company neglected to exercise the right of eminent domain and acquire the property, it certainly could not insist that the owner should not use or improve it until it actually condemned it under its charter. Nor were the owners bound to await the action of the company, but could make their improvements in view, of course, of the contingency that a portion of the property might be taken for railroad purposes. But upon what principle it can be said the owners had no right to im-

prove their property and build their factory, even though the consequences might be to enhance the damages which the company would be compelled to pay when it finally condemned a portion of the land, we are at a loss to understand. There is no ground for saying that the plaintiffs proceeded in bad faith, and made an expensive improvement merely for the purpose of enhancing the damages which the company would have to pay. They improved their property as they had a perfect right to do, and when the company proceeded to condemn lot 7 under its charter, the plaintiffs insisted that it should pay the damages to the adjoining premises resulting from the taking of this lot for railroad purposes. It seems to us that the claim is a just and proper one; fully sustained by the spirit and language of the charter.

* * *

* * * But what could the plaintiffs do? They desired to improve and use those lots for their factory. True, they knew that the company had instituted proceedings to condemn lot 7, but those proceedings were wholly under the control of the company. The company might abandon them at any time before the commissioners made their award. The only thing they could do was, either to await the action of the company, which might neglect, as it had for years, to condemn the property, or to go on and improve and use it in that way which seemed most for their interests. And when the company should take any portion of such property for the use of its road, they might well rely upon the constitution and the charter for securing them compensation for all damages thereby occasioned. It is said they went forward with their eyes open, and, if they are subjected to inconvenience for the want of suitable room for the prosecution of the business of their mill, it is their own fault. The answer to all this is, that the plaintiffs had the legal and moral right to use and improve their property, and if the

> necessities of the company for the use of lot 7 were such that it could afford to pay them the damages resulting from its acquisition, then the company could acquire it by the proper proceedings. But we fail to see any ground for imputing to the plaintiffs any negligence or wrongful use of their own in what was done by them."

There is a very close analogy here to cases arising where an owner has made improvements on property after he has either been notified or has information that his property will be taken through eminent domain. The general rule in this regard is well stated at 27 Am. Jur. 2d 105, Eminent Domain, § 294, as follows:

> "As a general rule, knowledge of the fact that a public improvement is proposed which will result in the taking of his land does not deprive an owner from recovering the value of buildings subsequently erected, since even though preliminary steps have been taken, the making of the contemplated improvement may be abandoned, and it would be highly unjust to deprive an owner of the right to make in good faith the best use of his property except at his peril."

The rule is elaborated on somewhat in 4 Nichols on Eminent Domain 381, § 13.14:

> "There has been considerable discussion of the practice of 'planting' buildings upon land expected to be taken for the public use with the intention of making a claim for damages when the taking occurs. Merely because an owner of land is aware that a public improvement has been proposed which will result in the taking of his land, he is not to be deprived of the right to recover the value of buildings subsequently erected. It would be highly unjust to deprive an owner of the right to make the best use of his property except at his peril merely because

> it lies in the path of one of the many public improvements which are so often discussed and projected without being actually consummated for many years. In this view it has been held that even though the improvements were in an incomplete state at the time of the initiation of a condemnation proceeding but were completed prior to the time that title actually vested in the condemnor, the owner was entitled to the full value of such improvements."

In *State* v. *Carragan,* 36 N. J. 52 (1872), a landowner had been denied compensation because he erected buildings on the line of a street laid out by map and bridge commissioners as a part of a scheme for streets and avenues, the opening of which depended on a variety of circumstances. In reversing, the court said:

> "We do not think, while the opening of the street was thus in abeyance, the land owner was deprived of the right to use his property in any lawful manner. To so hold would be in substance to allow a taking of private property for public use without making just compensation therefor. If the improvements should be made in bad faith, with intent to throw an undue burden on the public, another element would enter into the consideration of the question, which might perhaps produce a different result. There is however no such question in this case."

Statutes denying compensation for buildings erected after the filing of a map of a proposed street across the land on which they were erected, even though condemnation proceedings have not been commenced, have been held unconstitutional. *Edwards* v. *Bruorton,* 184 Mass. 529, 69 N. E. 328 (1904); *Forster* v. *Scott,* 136 NY 577, 32 N. E. 976, 18 LRA 543 (1893); *Moale* v. *Mayor,* 5 Md. 314, 61 Am. Dec. 276 (1854).

The reasons given for holding these acts unconstitutional are appropriate here. For example, the Maryland court, in *Moale* v. *Mayor, supra,* said:

"* * * Under these two acts, those of 1817 and 1838, a person for an indefinite space of time may be deprived of the use of his property, because it lies on the bed of a street designated on the plot of the city, and eventually find that whilst he has paid taxes, and been denied the advantages to which he was entitled from the proper use of his land, that the street laid down on the plot has been abandoned. Such a state of things is repugnant to every notion of justice and cannot obtain our consent."

In *Forster* v. *Scott, supra,* where a prospective purchaser declined to purchase the property on the basis that the filing of the map showing a proposed street constituted an encumbrance, the New York court said:

"* * * Whenever a law deprives the owner of the beneficial use and free enjoyment of his property, or imposes restraints upon such use and enjoyment that materially affect its value, without legal process or compensation, it deprives him of his property, within the meaning of the constitution. All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession.

* * *

As the plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question, and as this circumstance obviously impaired its value, and interfered with his power of disposition, it was to that extent void as to him, and created no incumbrance upon it."

In *Edwards* v. *Bruorton, supra,* the Massachusetts court said:

"* * * This was intended to prevent any use of property inconsistent with the plan after the filing

> of a plan and before the laying out of a way. If it could have that effect it might materially interfere with the use which an owner might desire to make of his estate for many years, after the filing of a plan and before the laying out of a way. The statute prescribes no compensation for this interference with private property. The Legislature cannot constitutionally so interfere with the use of property without giving compensation to the owner."

A statute which would have denied compensation to an owner or occupier who erected a building or made any improvements within the limits of any proposed highway, after the width and lines thereof had been designated, approved by the Governor and recorded in the office of the recorder of deeds was recently held unconstitutional by the Pennsylvania Supreme Court. *Commonwealth Appeal,* 422 Pa. 72, 221 A. 2d 289 (1966).

The court there said:

> "All of these facts indicate, at least, extremely careless procedures by the Department of Highways. They could, at most, indicate an actual condemnation as appellees claim. While we are not unmindful of the maxim that things are what they are, not what they are said to be, we nevertheless hestitate to impute an exercise of the power of condemnation to the sovereign under the circumstances here of a longstanding practice not considered to be a 'taking' and of somewhat ambiguous statutory procedures. Rather, we believe it best to leave both parties as they began: the Commonwealth having done nothing to effect a 'taking' and appellees having full right to do whatever they wish with their property without detriment to their right to damages if the Commonwealth subsequently 'takes' their property."

There is also a close analogy to the planting of crops on lands, even after a petition for condemnation

has been filed but before the condemnor has become bound by the taking by paying compensation or otherwise. When this is done by an owner or tenant in good faith, and not with the sole purpose of enhancing damages, recovery of the value of such a crop destroyed or damaged by the condemnor upon actual taking is allowed. 27 Am. Jur. 2d 105, Eminent Domain, § 294.

A lessee, with notice of the fact that a railroad line had been located over the leased lands, was held to be entitled to recover for destruction of his crops by the entry of the railroad company on the premises. *Lafferty* v. *Schuylkill River East Side R. Co.,* 124 Pa. 297, 3 LRA 124 (1889). There the court said:

> "The reason for this is that it may be months or even years after the location of the line before the company will be ready to enter upon the land for purposes of construction or to take the steps necessary for the assessment of damages, and the owner has a right to remain in possession until actual appropriation of his land by the company. This was held in *Gilmore* v. *Pittsburgh Railroad Company,* 104 Pa. 275, and has been recognized in other cases."

Of course, if the owner's sole purpose is the enhancement of his damages upon a subsequent condemnation, he should not recover for such improvements. 27 Am. Jur. 2d 105, Eminent Domain, § 294; 4 Nichols on Eminent Domain 383, § 13.14.

Although there are cases holding that good faith is not material [e. g., *Briggs* v. *Labette County,* 39 Kan. 90, 17 Pac. 331 (1888); *In Re Baychester Avenue,* 105 NYS 241 (1907)], I think there is no doubt but what the good faith of the owner is material and should be considered in determining whether his actions were motivated by his desire to make the best use of his property and not to enhance his damages.

The question whether two adjoining lots or tracts shall be treated as one in a condemnation proceeding is

one of fact, unless the undisputed evidence as to their use and situation is such as to leave no room for different views upon the question. *In Re Queen Anne Boulevard,* 77 Wash. 91, 137 Pac. 435 (1913); *Pittsburg, C. C. & St. L. Ry. Co.* v. *Crockett,* 182 Ind. 490, 106 N. E. 875 (1914); *Paulson* v. *State Highway Commission,* 210 Iowa 651, 231 N. W. 296 (1930); *Rath* v. *Sanitary Dist. No.* 1 *of Lancaster County,* 156 Neb. 444, 56 N. W. 2d 741 (1953).

In the present background, this statement of the Supreme Court of Indiana in *State* v. *Stabb,* 226 Ind. 319, 79 N. E. 2d 392 (1948), is appropriate:

> "Appellant's tendered instruction No. 16 was to the effect that in an action involving damages to property it is the duty of the party claiming damages to mitigate or lessen damages by reasonable action rather than to increase the same; and that if the appellees, with knowledge of appellant's intent to acquire the property in question for the construction of a highway, did or performed acts that would tend to increase the amount of the damages, then any damages flowing from such acts could not be recovered. Appellant insists this instruction should have been given for the reason that the evidence discloses that the retail store was closed from 1942 until the spring of 1946, and that it was reopened only after appellees had been approached by the appellant with reference to the procuring of the property on which the store was located for the construction of the highway. All this evidence discloses is that appellees had knowledge of the fact that a public improvement was proposed which would result in the taking of their land. Such knowledge did not deprive the appellees of the right in good faith to make the best use of their property. 18 Am. Jur. Eminent Domain, § 256. There is not the slightest evidence of bad faith on the part of the appellees in so reopening their store."

In considering the factual situation here, it must be remembered that the purchases of the Thorpe and Collier tracts were virtually simultaneous.

Since appellant did not submit an instruction which permitted appropriate questions of fact with reference to the acquisition of the Collier tract to be determined by the jury, the action of the trial court was not error, in my opinion.

While I do not agree that there was no substantial evidence of damage to the Collier tract (treated as a part of a unit with the Thorpe tract), the significance of the lack of such evidence in relationship to the giving of appellant's Instruction No. 10 escapes me. That instruction is based upon purchase of the tract "with knowledge of the fact that the possible taking by the Highway Commission would leave the Collier tract without access and cut off." Upon retrial, if there should be a lack of evidence of any damage to the Collier tract as a part of the unit or a lack of evidence that the two tracts constituted a unit, the giving of the instruction might be harmless error, but I cannot conceive of its being a correct instruction because of the reason given therein. We should not indicate that the instruction should be given if the evidence is the same upon a retrial.

I further do not subscribe to the statement in the majority opinion as to the unreliability of expert testimony, even though there are often wide ranges which are difficult to harmonize.

I concur in the holding that a landowner is required to take any reasonable step to minimize damages to his remaining lands and in the absence of specific objections pointing out error in the wording of Instruction No. 8 itself, that it should have been given.

ARKANSAS VALLEY INDUSTRIES, INC. *v.* RUSSELL C. ROBERTS, JUDGE

5-4530 425 S. W. 2d 298

Opinion delivered March 18, 1968

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

Phil Stratton, for respondent.

CONLEY BYRD, Justice. This petition for writ of prohibition questions the venue of Faulkner County for the maintenance of a suit by Bill Graddy against petitioner, Arkansas Valley Industries, Inc., containing four counts: (1) abuse of prosecution, (2) malicious prosecution, (3) vexatious suit, and (4) false imprisonment.

In addition, the complaint alleges that Bill Graddy suffered injury to his person in the nature of heartache, mental anguish, nervousness, sleeplessness, nightmare and shock.

Arkansas Valley Industries, Inc. has no officer residing in Faulkner County and no branch office or other place of business there.

Petitioner contends that the venue is governed by Ark. Stat. Ann. §§ 27-347 and 27-605 (Repl. 1962), which provide:

> "27-347. *Service on corporate agent at branch office.*—Any and all foreign and domestic corporations who keep or maintain in any of the counties of this State a branch office or other place of business shall be subject to suits in any of the courts in any of said counties where said corporation so keeps or maintains such office or place of business, and service of summons or other process of law from any of the said courts held in said counties upon the agent, servant or employee in charge of said office or place of business shall be deemed good and sufficient service upon said corporations and shall be sufficient to give jurisdiction to any of the courts of this State held in the counties where said service of summons or other process of law is had upon said agent, servant or employee of said corporations. [Act Apr. 1, 1909, No. 98, § 1, p. 293; C. & M. Dig., § 1152; Pope's Dig., § 1369.]"

> "27-605. *Actions against corporations.*—An action, other than those in sections 84, 85 and 90 [§§ 27-601—27-603], against a corporation created by the laws of this State may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides; but if such corporation is a bank or insurance company, the action may be brought in the county in which there is a branch of the bank or agency of the company, where it arises out of a transaction of such branch or agency. [Civil Code, § 92; C. & M. Dig., § 1171; Pope's Dig., § 1393]."

The respondent contends that the action is governed by Ark. Stat. Ann. § 27-610 (Repl. 1962), which provides:

"27-610. *Actions for personal injury or death.*— 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. [Acts 1939, No. 314, § 1, p. 769.]"

In *Robinson* v. *Missouri Pac. Transp. Co.,* 218 Ark. 390, 236 S. W. 2d 575 (1951), Robinson alleged that Missouri Pacific Transportation Company had unlawfully and maliciously conspired to bring about his discharge by manufacturing false testimony and lodging false charges of breach of trust in failing to account for fares collected by Robinson; that as a result of said conspiracy he was deprived of his employment and his present and future earning capacity; and that the good name and reputation which he formerly enjoyed were thereby defamed, resulting in great shame, humiliation and mental anguish. The railroad company argued that the venue was controlled by Ark. Stat. Ann. § 27-610, *supra,* but in holding to the contrary we pointed out that in determining the applicability of § 27-610 this court had distinguished between actions for physical injuries to the body and those involving injuries resulting from malicious prosecution, libel and other actions for defamation of character in general.

In *Monk* v. *Ehret,* 192 Cal. 186, 219 Pac. 452 (1923), there was under consideration a statute similar to ours, and after reviewing the history of the enactment of such statutes, it was concluded that the term "personal injuries" in the statute was limited to corporeal or physical injuries by reason of any violence. That court, in *Plum* v. *Forgay Lumber Co.,* 118 Cal. App. 76, 4 P. 2d

804 (1931), followed the same construction of the term "personal injury" and held that an action for malicious prosecution and false arrest could not be maintained in the county in which the arrest occurred.

Other courts have held to the contrary. See *Hatcher* v. *Southern Ry. Co.*, 191 Ala. 634, 68 So. 55 (1915).

However, we feel that under *Robinson, supra,* we are committed to the view expressed by California in *Monk* v. *Ehret, supra,* and consequently find that the Faulkner Circuit Court is without venue. Nor can we find anything in the allegation with reference to mental anguish which would change this result, since this was also a factor involved in the *Robinson* case.

Therefore the temporary writ heretofore issued in this case is made permanent.

ARKANSAS POWER & LIGHT CO. *v.*
JOE A. MAYO, ET AL

5-4481 425 S. W. 2d 531

Opinion delivered March 25, 1968

Anderson & Anderson and *House, Holmes & Jewell,* for appellant.

Charles B. Roscopf, for appellee.

CARLETON HARRIS, Chief Justice. Appellees, Joe A. Mayo and wife, are the owners of a 240-acre farm in Phillips County, Arkansas, consisting of two tracts. Arkansas Power and Light Company, appellant herein, condemned a right-of-way, 1,572 feet in length and 125 feet in width, containing 4.51 acres, the right-of-way being off the northeast side of Tract No. 1, and the west side of Tract No. 2. In determining the amount of damages to be awarded appellee, the jury returned a verdict in the amount of $4,059.00. Appellant brings this appeal on the ground that the court committed error in its instructions as to damages.

The instructions complained of are the Defendants' Instruction No. 1, and the Court's Instruction No. 1, which reads as follows:

Defendants' Instruction No. 1

"You are instructed that Arkansas Power & Light Company acquires by this Condemnation Proceeding the power to make such use of the 4.51 acre right-of-way across the property of the Defendant as its present and future needs require for the purposes for which the right-of-way is condemned, and Arkansas Power & Light Company is liable to the landowners as though the lands were taken in fee simple or absolute title."

Court's Instruction No. 1

"The jury is instructed that in determining the amount of just compensation to be paid the Defendants in this case, you are to determine from the evidence in this case the fair market value of the whole farm, considering it as a unit immediately before the taking and then determine the fair market value of the whole farm,

considering it as a unit immediately after the taking and the difference between the fair market value before and after the taking is the amount of the just compensation you should award."

Appellant objected to the giving of the last instruction, and offered its own instruction as follows:

"You are instructed that the compensation to which the defendants are entitled in this cause is the fair market value of the lands within the right-of-way determined as of the date of taking, together with the difference, if any, in the fair market value of the remainder of the lands immediately before and immediately after the taking."

This instruction was refused by the court.

The company argues that the court clearly committed error in that the two instructions given, taken together, in effect directed the jury to compensate appellees twice for the same land. We think there is merit in appellant's argument, at least, to the extent that the jury may well have been misled by the two instructions.

In *Baucum* v. *Arkansas Power and Light Company*, 179 Ark. 154, 15 S. W. 2d 399, which also involved a right-of-way easement, this court held that compensation for the full market value of the land taken by condemnation is recoverable, and that damages to lands other than that taken is the difference, if any, between the market value of such land before construction and after construction. This rule was reiterated in *Arkansas Louisiana Gas Company* v. *Burkley*, 242 Ark. 662, 416 S. W. 2d 263.

In the case before us, Defendants' Instruction No. 1 told the jury that the power and light company was liable to the landowners as though the lands were taken in fee simple or absolute title, *i. e.*, the company was

liable for the full value of the 4.51 *acres* embraced in the condemned strip. Obviously, the Court's Instruction No. 1 also includes the value of the strip condemned, as well as compensation for damages to the remainder of the farm. We recognize that the first instruction may have been intended only to point out that the jury must consider the lands as being absolutely taken, instead of the company only acquiring an easement, but we are of the view that the two instructions, taken together, could have been quite confusing. Certainly, it is doubtful that members of a jury, untrained in the law, would fully understand that the method of fixing damages was covered entirely in the Court's Instruction No. 1, and that Defendants' Instruction No. 1 was not meant to be used for that purpose (if indeed such is the case). Actually, the proffered instruction by appellant more clearly expresses the law than the Court's Instruction No. 1, *albeit* that instruction, standing alone, was correct in stating the measure of damages.

As pointed out in *Dr. Pepper Company* v. *DeFreece,* 234 Ark. 450, 352 S. W. 2d 579, we cannot say, with certainty, that the jurors were confused under the instructions and because of that fact gave judgment for a larger sum than would otherwise have been granted (the appellant thus being prejudiced), but we are less sure that they were not.

The judgment is reversed, and the cause remanded for proceedings not inconsistent with this opinion.

FOGLEMAN, JONES and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. While I agree that the giving of defendant's Instruction No. 1, together with the instruction offered by appellant, would have been preferable, I cannot see how any prejudice could possibly have resulted from the instruction given by the trial judge. Nor can I see how defendant's Instruction No. 1 and the court's Instruction No. 1, given together, could possibly have caused confusion. Nor do

I see how they can be said to call for double compensation.

The rule of *Baucum* v. *Arkansas Power & Light Co.*, 179 Ark. 154, 15 S. W. 2d 399 (reiterated in *Arkansas Louisiana Gas Co.* v. *Burkley,* 242 Ark. 662, 416 S. W. 2d 263), is a proper one for the reasons given in the opinion announcing it. If a jury is not told that the taking must be treated as if it were in fee simple, there is a real danger that it will approach the determination of either the "fair market value of the whole farm, considering it as a unit immediately after the taking," or "the fair market value of the lands within the right-of-way" by attempting to evaluate the right-of-way on the basis of an easement rather than as a fee simple title. Such an evaluation would be proper where the easement does not give the condemnor virtually unlimited right to use the affected areas at any time. *Minkowitz* v. *City of West Memphis,* 241 Ark. 207, 406 S. W. 2d 887. In a case such as the one now before us, I feel that the trial court would have committed prejudicial error by failing to give an instruction such as defendant's Instruction No. 1.

I can find no satisfactory rationalization to distinguish between the court's Instruction No. 1 and the instruction offered by appellant in a case where the condemnor cannot or does not claim offsetting benefits. To determine the fair market value of the remaining lands would necessarily eliminate the fair market value of the lands taken. The basis for the determination would be the value of the remaining lands only. The fair market value of the unit before the taking would necessarily include the fair market value of the lands taken. I fail to see the difference between these two formulae:

1. (Fair market value of original unit)—(Fair market value of lands remaining) equals Just compensation;

2. (Value of lands taken) plus (Difference in fair market value of remaining lands immediately before and immediately after the taking) equals Just compensation.

The giving of defendant's Instruction No. 1 could not have stated the *Baucum* rule in simpler language. The majority does not say that either instruction given is erroneous. We should not say that the action of the trial court in giving two correct instructions is erroneous unless they are irreconcilably conflicting. Instructions should not be considered as in conflict where they can be harmonized, *Bain* v. *Fort Smith Light & Traction Co.*, 116 Ark. 125, 172 S. W. 843, LRA 1915D, 1021. I can find no more conflict here than there would be in giving an instruction to a jury that a tortfeasor is liable for *any* damages of which his negligence is a proximate cause and then following with an instruction telling the elements by which to measure the damages. A ready example is found in AMI No. 2401 which provides illustrative instructions for a right-angle automobile collision. In that suggested set of instructions, we find that the first two paragraphs of Instruction 13, read as follows:

> "If you should find that Mr. Miller was not guilty of negligence which was a proximate cause of the occurrence, then he is entitled to recover the full amount of any damages you may find he has sustained which were proximately caused by any negligence of Mr. Anderson.
>
> If you should find that Mr. Anderson was not guilty of negligence which was a proximate cause of the occurrence, then he is entitled to recover the full amount of any damages you may find he has sustained which were proximately caused by any negligence of Mr. Miller."

Then we find Instruction 14. telling the jury how to arrive at the amount of Miller's recovery and Instruction 15. telling the jury how to arrive at the amount of Anderson's recovery. Six elements of damage are listed for Miller's recovery and only four for Anderson. Cer-

tainly we would not say that the jury would be so confused that upon finding for Anderson they would measure his recovery by the elements listed for Miller. Nor would we say that the words "recover the full amount of *any* damages you may find he has sustained which were proximately caused by any negligence of Mr. Miller" were so confusing that the jury might allow him to recover non-compensable damages. [Emphasis mine] For example, a jury might feel that either Miller or Anderson was entitled to recover damages for the loss of use of his automobile under a broad application of the term "any damages." But this element is non-compensable. See *Kane* v. *Carper-Dover Merc. Co.,* 206 Ark. 674, 177 S. W. 2d 41. The jury could only include loss of the use of the automobile by ignoring the instruction on the measure of damages. Similarly, the jury here could only award "double damages" by ignoring the instruction on the measure of compensation given by the trial judge. I can see no real difference between this example and the present case.

It is common knowledge that juries are told that they are to follow the court's instructions as a whole and to avoid singling out any of them. See AMI 101 (b). I believe that the ordinary jury would be intelligent enough that confusion would not result from the two instructions given. We should not assume that a jury will disregard the court's cautionary instructions, as it would have to do to confuse the measure of compensation in the case at bar. I have not been able to find any case where reversal was based on the giving of two correct instructions. Cases holding that two conflicting instructions are misleading and prejudicial are based on situations where at least one of the instructions is incorrect. It is true that separate and distinct instructions, complete in themselves and irreconcilable with each other, cannot be read together so as to modify each other and present a harmonious whole. Even so, correct instructions which are apparently conflicting must be treated by us as a harmonious whole if, from the language used

or the relation which the instructions are made by the whole charge to bear toward each other, they can be so read. *St. Louis, I. M. & S. Ry. Co.* v. *Rogers,* 93 Ark. 564, 126 S. W. 375.

It is well known that the retrial of cases is expensive to litigants and to counties, and that it is difficult and trying for attorneys, judges, witnesses, and jurors as well as litigants. We should exercise great caution to find genuinely prejudicial error before we remand a case to a circuit court for retrial. Not only do I not find prejudice, but I cannot even find error. It is quite possible to harmonize the two instructions here.

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

CITY OF MANILA ET AL *v.* ROSE DOWNING

5-4532 425 S. W. 2d 528

Opinion delivered March 25, 1968

H. G. Partlow Jr., for appellants.

Oscar Fendler, for appellee.

GEORGE ROSE SMITH, Justice. This is a suit brought by the appellee, the duly elected recorder of the city of Manila, for a declaratory decree determining the validity of a 1967 ordinance by which the city attempted to reduce her salary during her term of office. The controlling issue is whether Act 124 of 1961 (a) merely amended a section of an 1875 statute on the subject, as Mrs. Downing contends, or (b) repealed it altogether, as the city contends. This appeal is from a declaratory decree upholding Mrs. Downing's contention that the 1875 statute, as far as cities of the second class are concerned, is still in force.

Manila is a city of the second class. The parties agree that before the passage of Act 124 of 1961 the governing statute, applicable to cities of the first and second classes and to towns, was a portion (the 6th to 8th sentences) of § 86 of Act 1 of 1875, adopted on March 9, 1875, which read as follows:

> "The emoluments of no officer whose election or appointment is required in this act, shall be increased or diminished during the term for which he shall have been elected or appointed. Nor shall any change of compensation affect any officer whose office shall be created by authority of this act, during his existing term, unless the office be abolished. No person, who shall have resigned or vacated any of-

fice, shall be eligible to the same during the period of time for which he was elected or appointed to serve, where, during the same time the emoluments have been increased." Ark. Stat. Ann. § 19-907 (Repl. 1956).

The question for our decision is the extent to which the foregoing statute was amended or repealed by Act 124 of 1961, which we quote in full:

"AN ACT to Amend Act March 9, 1875, No. 1, Section 86 (6th to 8th Sentences), Page 1 [Ark. Stats. (1947) Sections 19-907]; to Permit Increase of Salaries of Municipal Officials During Their Terms.

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

"SECTION 1. Act March 9, 1875, No. 1, Section 86 (6th to 8th sentences), Page 1 [Ark. Stats. (1947) Sections 19-907] is amended to read as follows:

" 'The salaries of officials of first class cities may be increased but not decreased during the term for which such officials have been elected or appointed.' "

"APPROVED: February 22, 1961." Ark. Stat. Ann. § 19-907 (Supp. 1967).

The city of Manila, citing *Brockman* v. *Board of Directors of Jefferson County Bridge Dist.*, 188 Ark. 396, 66 S. W. 2d 619 (1933), insists that whenever a section of an existing statute is "amended to read as follows," there is necessarily a repeal of any language in the earlier section that does not appear in the re-enactment.

That statement is usually true, but not always. Chief Justice McCulloch, in an opinion of great lucidity and persuasiveness, made the point in *State ex rel. Atty. Gen.* v. *Trulock*, 109 Ark. 556, 160 S. W. 516 (1913), that

even an amending-to-read-as-follows statute will not be construed to repeal omitted language in the earlier act if it clearly appears that no such repeal was intended by the legislature. The solution to this problem of interpretation always depends upon the answer to that central question to which all other principles of statutory construction are secondary: What was the intention of the legislature?

Here, as in the *Trulock* case, it is too plain for argument that the legislature did not mean to repeal the earlier section in its entirety. The 1875 enactment applied to *all* cities and towns and provided comprehensively that the emoluments of specified officers should not be increased or diminished and, in effect, that that statutory prohibition could not be evaded by the officer's resignation and reinstatement. By contrast, Act 124 of 1961 applies *only* to cities of the first class and simply declares, both in its title and in its text, that the salaries of officials in those cities may be increased but not decreased during their terms of office.

We find it impossible to believe that the members of the General Assembly, in approving Act 124, chose the single sentence in the body of that act as a roundabout way of saying not only that cities of the first class might increase but not diminish the compensation of their officers during their terms of office, but also that cities of the second class and incorporated towns should no longer be subject to the salutary prohibition against increasing or decreasing the salaries of their officers during their terms. We conclude, in harmony with the *Trulock* decision and the later cases that have followed it, that the 1961 act impliedly repealed the 1875 legislation only to the extent that the two are in conflict.

The appellants also argue that Act 124 is contrary to Article 5, § 23, of the Constitution, which provides that no law shall be revived or amended or the provisions thereof extended by reference to its title only. We

find no violation of that provision, which was intended to prohibit legislation drafted "in such form that the legislator could not determine what its provisions were from an inspection of it." *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S. W. 384 (1886). As we are interpreting Act 124, it contained no hidden meaning not apparent on the face of the act.

This same objection was made to the statute that we upheld in the *Trulock* case, *supra.* Judge McCulloch fully answered the objection by pointing out that "under the construction we place upon [the later statute], no part of the old section is revived or extended, but the part which is the subject of this controversy is, as we have already explained, left unamended. It is untouched by the amendatory statute, which is, as we have already said, only partial in its operation." That language exactly fits the case at bar.

Affirmed.

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

JOHN A. FOGLEMAN, Justice, dissenting. I cannot agree that the exception to the rule that amending a statute "to read as follows" repeals language not carried forward in the amending statute is applicable here.

The exception in *State* v. *Trulock,* 109 Ark. 556, 160 S. W. 516 (1913) is based on quite a different situation from that existing here. In that case, the intent of the legislative branch was clear. To have followed a literal interpretation of the amended section of the original act by omitting the language providing for the appointment of improvement district commissioners would have resulted in rendering inoperative not only the omitted language but other parts of the amending statute as well as other parts of the original act and thus abrogate the whole law on the subject of improvement districts. This effect was contrary to the apparent intent of the amending act because its subsequent sections

referred specifically to the commissioners and their duties. There the act did not state any intention to either amend or repeal the sections of the old act which would have been, in effect, repealed. The court there said that a literal construction would have effected a repeal of the entire statute on the subject of improvement districts rather than an amendment of them. It was said that this result would have been contrary to the intent affirmatively shown by the title to the act.

I cannot see a parallel situation here. I think that the language of the text of the act clearly shows an intention to prevent only cities of the first class from decreasing official salaries and to eliminate all other restriction on the raising or lowering of the emoluments of municipal officials. Certainly the title of the act is not controlling, but if resort is had to it because the legislative intent expressed in the body of the act is unclear, I cannot find any limitation of the act's effect to cities of the first class. As I read the title, the purpose is to amend the specific section (or sentences) quoted in the majority opinion *and* to permit increase of salaries of municipal officials. Of course, the scope of the words "municipal officials" includes officials of cities of the second class and incorporated towns.

Furthermore, a literal construction of this act does not conflict with other sections of the same act, nor with other sections of the act amended. It would only affect the particular sentences purported to be amended. This is quite different from the situation in the *Trulock* case.

The wisdom of the elimination of other restraints on cities which were contained in the original section is not for us, but for the General Assembly.

I would reverse the trial court.

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

TRENNON BOBO ET AL *v.* THE FIRST NATIONAL BANK OF HOPE, ARKANSAS

5-4500 425 S. W. 2d 521

Opinion delivered March 25, 1968

Shaver, Tackett & Jones; By: *Damon Young,* for appellants.

James H. Pilkinton, for appellee.

PAUL WARD, Justice. This appeal is taken from a chancery decree setting aside a warranty deed on the ground it was executed to defraud a creditor. Also, a matter of procedure is involved on cross-appeal. The appellants are Trennon Bobo, Donnie Bobo, and Ora Bobo. The appellee is the First National Bank of Hope, Arkansas. Hereafter, for brevity, we will refer to them in the above order as Trennon, Donnie, Ora, and the bank.

The background facts, set out below, are not in dispute.

Trennon and his brother Donnie executed a note to the bank for $2,780.50, payable as follows: $78 per month for the first thirty-five months and $50.75 for the thirty-sixth month. All payments were made up to May 10, 1966 when there was a default, and no other payments have been made. The note was secured by a mortgage on a 1966 Ford Mustang car. On the last named date Trennon conveyed, by warranty deed, twenty acres of land to Ora.

The bank filed suit in the chancery court to collect the balance due on the note, and to have the car sold and the proceeds applied as a credit. The decree of the court was in accord with the bank's complaint as to the above items, and no objection is here made by appellants.

Also, in the same complaint, the bank alleged that the deed to Ora was executed "in an effort to avoid payment of the said indebtedness . . .", and asked the court to declare the same "null and void as against plaintiff". The bank also asked "that title to said property (the land) should be declared in defendant, Trennon Bobo, for satisfaction of any judgment that may be rendered . . ."

For answer to the above complaint, appellants entered a general denial.

After a hearing the trial court held the deed to be a fraudulent conveyance, and void as to appellee. On appeal, appellants' only contention for a reversal is that "there was no evidence to support such a finding".

We are of the opinion that the trial court erred in holding the conveyance void since we find no evidence in the record to support such holding. There is no evidence to show, that Ora was related to Trennon, that the consideration paid by Ora was inadequate or, that

Trennon was financially embarrassed and unable to pay any judgment rendered against him in this litigation. All the above is virtually conceded by appellee, but it contends the case should be affirmed on our holding in *Keck* v. *Gentry,* 238 Ark. 672, 384 S. W. 2d 242. There we said, in effect, that when a person who is in debt makes a voluntary conveyance to a near relative, the transfer is presumed to be fraudulent. Patently the *Keck* case is not controlling here because appellee did not prove Ora was a "near relative" or that the conveyance was "voluntary".

Cross Appeal. During the trial below, when appellee had introduced its testimony appellant chose not to introduce any testimony—to the surprise of appellee. At that time appellee realized it had failed to show Ora (grantee in the deed) was the mother of Trennon (grantor in the deed), apparently thinking everyone (including the Judge) knew she was the mother of Trennon. Thereupon appellee (at the same term of court) filed a Motion, requesting the court to reopen the record to allow it to introduce testimony to show Ora was the mother of Trennon. The Motion was denied.

For reasons hereafter set forth, we conclude that the trial court erred in refusing to allow appellee to make the desired proof.

(a) It is apparent from the record that appellee, in good faith, believed it was understood that Ora was the mother of Trennon. The bank stated in its Motion that this was understood by counsel and the court from the beginning of the trial. This is confirmed by language in the court's "Memorandum Opinion" where we find this statement: ". . . he made a voluntary conveyance to his mother, Mrs. Ora Bobo".

(b) A showing by appellee that Ora was the mother of Trennon, together with other testimony in the record, would have made a *prima facie* case, shifting the burden on appellants to go forward with the evidence.

In the *Keck* case, supra, we quoted language to that effect. Also, in that case, we find this further statement:

> "These plaintiffs proved that Gentry owed a substantial sum of money and that he conveyed 680 acres to his wife. That proof was sufficient to make a *prima facie* case, shifting to the defendants the burden of going forward with the evidence."

In the case before us here it is undisputed that Trennon owed a substantial sum of money and that he conveyed the land to Ora. When, and if, appellee proves Ora was Trennon's mother, then the burden will be on appellants to go forward with the evidence to show Trennon was not insolvent.

The decree is reversed on direct and cross appeal, and the cause is remanded for further proceedings consistent with this opinion.

BYRD, J., dissents in part.

SNOW WILSON III *v.* MADELINE F. CAMPBELL

5-4517 425 S. W. 2d 518

Opinion delivered March 25, 1968

Swift & Alexander, for appellant.

D. Fred Taylor and *Ralph E. Young,* for appellee.

LYLE BROWN, Justice. This appeal comes from a judgment for $2,500 awarded the landlord on the basis of a crop rent note executed by the tenant. Appellee, Madeline F. Campbell, was the landlord, and appellant, Snow Wilson III, was the tenant. Wilson challenges the judgment on the ground that he purchased the leased lands at a foreclosure sale and before the annual rent note became due on November 15, 1965.

When Madeline Campbell bought the lands in 1963 by quitclaim deed, there was an outstanding mortgage in favor of Merchants Hotel Supply, Inc., for approximately $40,000. Madeline Campbell leased the lands to Wilson for the year 1965 on a cash rent basis. Wilson executed a note due November 15, 1965, went into possession, and made a crop. That crop was destroyed by hail, and Wilson collected $9,800 crop insurance in August. In February, 1965, Merchants filed a foreclosure suit. The principal defendants were Madeline Campbell's grantors, Ben and Eleanor Flannigan. Ap-

pellant and appellee were made parties, but did not answer. In May 1965 judgment was taken against the Flannigans and a lien was imposed on the lands. No receiver was requested, and crops were not mentioned. It was decreed that all right, title, and interest of appellant and appellee were barred. Tenant Snow Wilson was the successful bidder at the commissioner's sale, which was confirmed on October 8, 1965. Thereafter he held title beyond the due date of the crop note.

The principal question to be resolved is whether Snow Wilson is obligated to Madeline Campbell for the 1965 crop rent or any portion thereof. That problem poses the question as to when the rent accrued. In *Rogoski, Admr.* v. *McLaughlin,* 228 Ark. 1157, 312 S. W. 2d 912 (1958), we adhered to the common law rule that rent does not accrue from day to day, as does interest: "it is considered to accrue in its entirety on the day the payment is due." The common law rule is explained in Tiffany, *Landlord and Tenant,* § 176:

> "Rent is not, at common law, regarded as accruing from day to day, as interest does, but it is only upon the day fixed for payment that any part of it becomes due. The result of this principle is that, ordinarily, the person who is on that day the owner of the reversion is entitled to the entire installment of rent due on that day, though he may have been the owner of the reversion or rent but a part of the time which has elapsed since the last rent day. Conversely, one who has been the owner of the reversion or rent during a part of that period can claim no portion of the installment unless he is such owner at the time at which the installment is payable by the terms of the lease. The general rule in this regard is ordinarily expressed by saying that rent cannot be apportioned as to time."

The effect of the foreclosure on the lease was to extinguish it. The lease was subject to the mortgage. Lessor and lessee were made parties to the foreclosure

and the foreclosure decree barred appellant and appellee from any interest in the land. It may well be said that the lease therefore disappeared. Glenn on *Mortgages,* § 181.1, states it thusly: "The mortgagor has no claim under it [lease], and the only claim that remains is on the tenant's behalf, for breach of his landlord's covenant of quiet enjoyment. This breach took place when foreclosure came as a result of the landlord's default upon the underlying mortgage; but apart from that, the lease is dead for all operative purposes." To the same effect see McAdams on *Landlord and Tenant,* 5th Ed., § 76.

What we have said applies to the facts in the case at bar. We have a defaulting landlord who holds an annual rent note due near the end of the year; before the accrual date there is a foreclosure in which a receiver is not requested and no claim is made by the mortgagee as against the crops. The tenant purchases at the foreclosure sale, as is his right under such holdings as *Ray* v. *Stroud,* 204 Ark. 583, 163 S. W. 2d 173 (1942). (In that case we held that the tenant's purchase could be set up as a defense in a subsequent suit by the landlord for rents.)

As between grantor and grantee in a private sale of land, where the property is rented at the time of conveyance, rents which are not due until after the conveyance go to the grantee unless reserved in the deed. *Latham* v. *First National Bank,* 92 Ark. 315, 122 S. W. 992 (1909). In the case at bar the commissioner's deed is not in the record; however, it is clear from an examination of the foreclosure decree that the commissioner made no reservation of rents in his deed. We think the two situations are analogous.

To sustain the award of the chancellor, appellee first contends that the entire amount of the judgment should be affirmed on the theory that the due date of the note was accelerated by the destruction of the crop in August. It is her contention that the loss was due to

an unforeseen development which enabled her tenant to collect the insurance proceeds from the destroyed crop. She theorizes that the landlord should have a lien on the insurance proceeds. We cannot agree with that contention. No authorities were cited to support it, and no attempt was made to show that the tenant became unjustly enriched as a result of the collection of crop insurance. We are unable to find a case in our own jurisdiction which would approve or disapprove her theory; however, the case of *Roesch* v. *Johnson,* 69 Ark. 30, 62 S. W. 416 (1900), would indicate that appellee's contention is not tenable.

Alternatively, appellee insists that the rent should be apportioned. She relies principally on *Deming Investment Co.* v. *Bank of Judsonia,* 170 Ark. 65, 278 S. W. 634 (1926); *Purvis* v. *Elder,* 175 Ark. 780, 1 S. W. 2d 36 (1927); and *Free* v. *Harris,* 183 Ark. 233, 35 S. W. 2d 603 (1931).

Deming and *Purvis* are cases in which, pursuant to foreclosure, a receiver was appointed under the provisions of Ark. Stat. Ann. § 36-113 (Repl. 1962). The provision for appointment of a receiver was a part of our Civil Code. Our decisions are replete with cases prior to *Deming* and *Purvis* in which apportionment of rents was upheld in situations where the trial court appointed a receiver.

Section 36-113 is the tool used by trial courts to appoint a receiver in foreclosure and thus divert rents and profits of mortgaged premises from the person lawfully in possession. It gives the plaintiff in a foreclosure an equitable lien on the accrued and unpaid rents. As was stated in *Bank of Weiner* v. *Jonesboro Trust Co.,* 168 Ark. 859, 271 S. W. 952 (1925): "The rents and profits on the lands, after their sequestration by the institution of this suit and the appointment of a receiver, stand in the same category as the land itself."

This brings us to a comment on the holding in *Free* v. *Harris, supra.* A secondary issue in that case was the disposition of rents. There was a foreclosure without the appointment of a receiver and this court approved an apportionment of the crop rents, 7/12ths of the annual rent being awarded to the mortgagor and 5/12ths to the purchaser at the foreclosure sale. In approving that proration this court relied on the *Deming* and *Purvis* decisions. We have examined the briefs in *Free* v. *Harris* and find that Mrs. Harris argued for apportionment, citing extensively from *Deming* and *Purvis.* Mr. Free's argument against apportionment consisted of one paragraph containing a single sentence at the end of the brief. Preceding that short response were eight pages of argument meeting the points raised in the trial court. We surmise that Free's brief treatment of the subject led this court into error in relying on *Deming* and *Purvis,* those being cases in which receivers were appointed pursuant to Ark. Stat. Ann. § 36-113.

The holding of our court in *Rogoski, supra,* at least by inference, substantially nullified the holding in *Free* v. *Harris.* This is because the two holdings cannot be reconciled. We do not believe the common law rule governing accrual of rents should be abandoned, which would be the effort of following *Free* v. *Harris.*

Reversed and dismissed.

JOSE FIGEROA v. STATE OF ARKANSAS

5325 425 S. W. 2d 516

Opinion delivered March 25, 1968

Harry Robinson, for appellant.

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

JOHN A. FOGLEMAN, Justice. This is an appeal from the judgment of the Pulaski County Circuit Court convicting appellant of the crime of assault with intent to kill. The record reveals that, on the day set for trial, counsel for appellant requested a continuance for the alleged reason that, as appellant was of Mexican descent and unable to testify in his own behalf, additional time was needed to secure the assistance of an interpreter. The trial court overruled this motion. Following the presentation of the State's evidence, the appellant rested without offering any evidence, and the court, sitting as a jury, found appellant guilty of the crime as charged.

For reversal the appellant alleges that the trial court erred in overruling his motion for a continuance and that there is no substantial evidence to support the verdict. These points will be discussed in the order mentioned.

I

Whether a case should be continued or not is generally a matter resting within the sound discretion of the trial court, and unless it clearly appears that the refusal to grant a continuance is an abuse of discretion so as to operate as a denial of justice, the trial court's action does not constitute a ground for a new trial. *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409; *Smith* v. *State,* 219 Ark. 829, 245 S. W. 2d 226. Absent a showing by the moving party that he has exercised due diligence, the trial court will not be held to have abused its discretion in refusing to grant the motion. *Bullard* v. *State,* 159 Ark. 435, 252 S. W. 584; *Bowman* v. *State,* 213 Ark. 407, 210 S. W. 2d 798; *Gerlach* v. *State,* 217 Ark. 102, 229 S. W. 2d 37.

While it is fundamental that a defendant in a criminal prosecution should be afforded the opportunity to

testify in his own behalf, to be confronted with adverse witnesses and to call witnesses in defense of the charges against him, we find that the trial court committed no error in refusing to grant a continuance in this case. The appellant has made no attempt to show the exercise of due diligence on his part. No evidence has been offered to establish his alleged inability to speak or understand the English language. Further, there is no showing in the record before us that appellant was diligent in seeking the services of an interpreter. On the contrary, the record reflects that from the time of his plea of guilty on April 4, 1966, until the date of his trial on July 19, 1967, appellant was before the court with his attorney[1] no fewer than three times. On no occasion, prior to the day of the trial, was it suggested to the court by appellant or his attorney that an interpreter would be required for his defense. Finally, although appellant and his counsel were appraised on June 19, 1967, that the trial would be held on July 19, there is no showing of any effort to obtain the assistance of an interpreter, either at the time the trial date was set or during the following month. On this state of the record, we cannot say that due diligence has been exercised.

II

Appellant next contends that the evidence was not legally sufficient to support a finding that he intended to kill the complainant by his act. The State's evidence consisted wholly of the testimony of officer Lester Hall of the Little Rock Police Department. According to his report and testimony, he received a call to a disturbance at the T-Bone Inn on the David O. Dodd Road. Upon his arrival there he saw appellant sitting in a 1956 Mercury with the motor running. When the officer asked appellant to get out of the car, it at first appeared that he would comply; but as Hall approached the car, the appellant got back in the car and accelerated it toward him. It was necessary for Hall to "run to get out of

[1]The attorney who moved for a continuance was not the same attorney who had previously appeared with appellant.

the way to keep him from running me down"; he had to "hit the ground" in order to get out of the way.

Although an automobile is not ordinarily considered a "deadly weapon" in the criminal sense, it does not tax the imagination to see that appellant's car constituted such a weapon. Hall's life would have been in no greater danger if appellant had fired a gun at him. In *Morris* v. *State,* 226 Ark. 472, 290 S. W. 2d 624, we said: "No particular instrument or weapon need be employed in order to constitute an assault with intent to kill or murder. Such a crime is ordinarily committed by the use of a weapon, the employment of which is calculated to produce death, but the use of such a weapon is not requisite to the commission of the crime." Certainly it can be inferred from the use of appellant's automobile, as described by officer Hall, that appellant intended to kill the officer. As we said in *Craig* v. *State,* 205 Ark. 1100, 172 S. W. 2d 256, "While the intent to kill cannot be implied as a matter of law, it may be inferred from facts and circumstances of the assault . . . and all other facts and circumstances tending to reveal defendant's state of mind." See, also, *Davis* v. *State,* 206 Ark. 726, 177 S. W. 2d 190, and *Nunley* v. *State,* 223 Ark. 838, 270 S. W. 2d 904. As we must view the evidence in the light most favorable to the State in determining whether it is sufficient to support a finding of guilty (*Cook* v. *State,* 196 Ark. 1133, 121 S. W. 2d 87), we are unable to say that the facts here are insufficient to support an inference that appellant intended to kill by his act.

The judgment is affirmed.

A. R. CASSARD *v.* ANNIE HAYNES CAMPBELL ET AL

5-4528 425 S. W. 2d 523

Opinion delivered March 25, 1968

McKay, Anderson & Crumpler, for appellant.

Chambers & Chambers, for appellees.

J. FRED JONES, Justice. This appeal is from a decree of the Columbia County Chancery Court dismissing four complaints filed by the appellant, A. R. Cassard, against the appellees for cancellation of prior oil leases, or for refund of amounts paid by appellant to appellees for oil leases which were encumbered by the prior leases. The cases were consolidated for trial and are consolidated on appeal.

The appellees, Annie Haynes Campbell, Ettie Haynes Halterman and Rachel Haynes McDonald, owned undivided one-third interests in twenty acres of land in Columbia County. The appellees Cary Haynes and his wife, Ozela, owned a forty acre tract and Cary

Haynes was guardian of the estate of his father, J. W. Haynes, who also owned an additional twenty acre tract in the same area. Appellee, Naomi Haynes Wynne, also owned a twenty-acre tract in the same area.

On June 9, 1961, all the appellees executed oil and gas leases to J. Howard Hooper for a primary term of five years. The record is not perfectly clear, but apparently on June 12, 1961, Hooper assigned these leases to Continental Oil Company. On July 6, 1962, Continental assigned to Hunt Oil Company that part of the leases covering only the Pettit lime formation which is a shallow formation. The north Shongaloo Pettit Lime Reservoir was unitized under order of the Arkansas Oil and Gas Commission in October 1961, and appellees' land was included in this unit.

This being the situation, in June 1964, appellant took five year standard leases from the appellees and paid them $50.00 per lease acre for the leases. Upon concluding that the unitization order (referred to by some of the parties as "water drive") constituted a legal unitization, and apparently recognizing the perpetuation of the prior Hooper leases thereunder, appellant attempted to obtain releases from the assignees of the prior leases and being unable to do so, he filed suit in chancery praying an order requiring appellees to either deliver to appellant a release of the prior oil and gas leases, or refund to appellant the amounts he paid for the leases.

The chancellor dismissed the complaints for want of equity and on appeal to this court appellant relies on the following point for reversal, stated in question form, as follows:

> "Is a warranty clause in an oil and gas lease defeated by actual or constructive knowledge of a prior, valid oil and gas lease?"

The leases to the appellant contained warranty clauses as follows:

"Lessor here warrants and agrees to defend the title to the land herein described, and agrees that the lessee shall have the right at any time to redeem for lessor, by payment, and mortgages, [sic] taxes or other liens on the above described lands, in the event of default of payment by lessor, and be subrogated to the rights of the holder thereof."

Appellant testified that he did not know of the unitization, and in this connection testified as follows:

"Q. Did you know that there was unitization down there to the Pettit lime?

A. No, of course not. I had heard that, some of the people involved in this had mentioned the fact that there possibly could be.

Q. You say you didn't know about it and then you say that they told you about it?

A. They told me there was a possibility. However, I asked them if any consideration had been paid or if they were getting royalties or any rentals of any type, at least within the last 12 month period and they all told me no, so I presumed that certainly any valid water flood or any type unitization would have expired.

Q. In other words, you were aware that there was a unit down there at one time?

A. Yes, I didn't know exactly what it covered.

* * *

Q. Do you recall discussing with Mr. Cary Haynes and Mrs. Wynne the Pettit lime being connected with the water drive?

A. I don't particularly recall the discussion, I am not denying I had a discussion, I just don't recall it.

Q. Isn't it a fact that they were very hesitant to sign a lease and told you they didn't want to?

A. Yes, I do recall that.

Q. And didn't you insist that they sign the lease?

A. Possibly fifty dollars an acre might have done the insisting, I didn't.

Q. You talked with them considerably about it after they were hesitant to sign?

A. Yes, they were hesitant.

Q. And they were hesitant due to the fact that a lease was signed a few years before that they were in doubt about?

A. That was the prime reason."

Appellant's attorney, who examined the abstracts of title and prepared the leases, testified from his memory, as follows:

"Mr. Cassard mentioned to me that part of the leases down there were in this unitization but he said that the unit wasn't any good, that they hadn't been paid any money, they hadn't ever received any money, and that he was having it omitted from the abstracts, but the abstractor still placed a little notice in there that by request the unitization is there of record but at the request of the party for which they were preparing it, that they had omitted same and would furnish it upon request. * * * According to my recollection, he was sure that the unit was no good."

The testimony of all the appellees was substantially the same as that of Mr. Cary Haynes who testified on direct examination by his attorney as follows:

"Q. You know the Plaintiff, Mr. Cassard?

A. I do.

Q. Will you relate the conversations and business dealings you had with him pertaining to leases down there?

A. Well, Mr. Cassard came to me and wanted to lease the land. I told him I understood we couldn't lease the land, we had been forced under a water drive, you know, Mr. McKay and them, the attorneys and everybody, and we fought the water drive but the conservation people ruled for them. I told him that Continental had my lease down there, if you want the history, but they had failed to pay the rentals on it and Cassard told me, he said, 'As far as the water drive, I am not interested in it.' He said, 'I am interested in deep stuff and as far as the water drive, it's not worth the paper it's wrote on, you have got to have a unit to have a water drive, you have got to have so many wells to form a unit and you aint got that kind of wells here and it's not worth the paper it's wrote on and if you will sign a lease to me I have got fifty dollars an acre for you,' and I was fool enough to sign it. He brought me one form of lease, I believe oil and gas and mineral deed it called for, and I came to you and told you about it and you told me to change leases and I got an 88 1/8 form and went to his office and I told him the form changed and I wanted it put in there, 'Understanding there being a lease under a water drive,' and his secretary called Mr. Cassard and held it up and he said, 'That is all right, go ahead and fix it up,' and they did. . . .

* * *

Q. And then also, you did request him you said, to put in there 'Subject to the water drive'?

A. I certainly did."

The unitization order was of record in Union County and there is no question that all the parties, including the appellant, had actual knowledge as well as constructive notice of its existence. We do not have the prior

leases before us but apparently appellees thought they had expired under some rental provision of the leases. Appellant was *quite sure* they had expired if no delay rentals or royalty had been paid to the appellees for a period of one year. As a matter of fact, appellant was quite sure that the recorded unitization order was invalid.

As we view the record in this case, the existence, or the validity, of the "water drive" or unitization, is only important insofar as it affects the validity by perpetuation of the prior leases. Neither the Hooper leases nor their assignments to Continental and subsequent partial assignments to Hunt are in the record before us, so we are unable to determine what delay rentals, if any, were required to maintain the Hooper leases in force, and what attempt was made, if any, to vertically segregate that portion of the Hooper leases which was reassigned to Hunt within the unitized Pettit Lime Reservoir, from that portion of the Hooper leases retained by Continental outside the unitized Pettit Lime Reservoir. Consequently, we are unable to determine whether that portion of the Hooper leases retained by Continental remained subject to the payment of delay rentals after the unitization and assignment to Hunt, if in fact, the Hooper leases did contain delayed rental clauses at all.

It was stipulated, and the record indicates, that appellees were never paid any delayed rentals under the Hooper leases, but there is nothing in the record to show what delayed rentals, if any, should have been paid under these leases. The record indicates that the Pettit Lime Reservoir was being depleted and was unitized as a conservation measure under a water drive recovery method, and that production was being maintained from the unit outside the actual acreage belonging to appellees. In any event, throughout the trial of this case, all parties seemed to recognize that the appellees' land was within a pooled unit and that the unitization was legal and of full force and effect at the time of the trial.

Vertical segregation is not alleged or argued, so it would appear that all parties recognized the perpetuation of the original leases by the unitized production.

This being the situation, appellant got nothing for his money except some experience and the right to contest the legality of the prior leases, if he desired to do so. Appellant was not obligated to defend his title against the prior leases, this was an obligation appellees agreed to assume under the covenants of warranty in their leases to the appellant. Appellees followed their attorney's advice in demanding a change in the lease forms in leasing to appellant, but instead of leasing subject to the prior leases as their attorney advised them to do, they leased to appellant without restriction and they warranted title which they apparently now recognize that they did not own.

Appellees argue that appellant simply took a chance on becoming wealthy from the production he hoped to obtain from deep oil formation, and that he perpetrated a fraud upon appellees in procuring the leases. As we read the record, appellees were receiving no royalties under the prior leases and they would have become at least one-eighth as wealthy as appellant would have become under the terms of their leases to him. We fail to follow appellees' reasoning as to fraud practiced by appellant, when he was the one who had changed his position by paying to appellees $3,750.00 for something they had already sold and did not own.

There is no question in this case that all of the appellees knew that they were selling to appellant outright leases when they signed the forms, and there is no question that they knew that they had already leased the same minerals to Hooper when they leased to the appellant and accepted his money under covenants that they would warrant and defend their title. The evidence is quite clear in this case that appellees thought that perhaps the original leases to Hooper had terminated, or at least their validity was questionable, because of the

failure to pay delay rentals. There is no question that appellant knew of the prior leases and that he was even more sure than appellees that the prior leases had been abandoned, had terminated, or at least were invalid. Nevertheless, appellees warranted their title and agreed to defend it and it now appears that the appellant and appellees have concluded that the prior leases were valid when the leases to appellant were executed, or at least it is evident that they have concluded that litigation will be necessary to determine the validity of the prior leases, and the obligation rests on appellees to carry out that determination under the warranty clause of the leases they executed.

Appellant's knowledge of the prior leases does not relieve appellees from the obligations of their covenants of warranty and their obligation to defend the title to the oil and gas they sold to appellant under the terms of their leases to him. *Oklahoma City* v. *Harper et al,* 180 Pac. 2d 162; *Texas Co.* v. *Snow,* 172 Ark. 1128, 291 S. W. 826; *Gude* v. *Wright,* 232 Ark. 310, 335 S. W. 2d 727.

The evidence is convincing that appellant was fully advised of the unitization of appellees' lands under the so called "water drive" in the Pettit lime formation, but being interested in the deep production areas outside and beneath the unitized area or zone, he intended to lease the deep formation regardless of the status of the Pettit lime formation which he considered of little consequence as well as invalidly unitized. Aside from the covenants of warranty in this case, if the entire lease to Hooper is being perpetuated by unitized production, equity and good conscience demands that appellees either refund to appellant the money he paid to them, or that they deliver to him the title they warranted that they owned. Under the covenants of warranty, the law requires that this be done.

If the original leases to Hooper have been segregated as to deep and shallow oil pools or sand, and the

leases as to the deep oil have not been perpetuated by production from the unitized Pettit pool, and if the segregated portion of the Hooper lease has expired for nonpayment rentals, or for any other cause, it may be that appellees are in a position to deliver to appellant all that he was interested in (the deep oil) and all that he bargained for (beneath the unitized Pettit lime) when he procured the leases. Consequently, in such event, the appellees should have a reasonable time in which to clear their title to the minerals they leased to appellant before being required to refund the purchase price. If appellees are unable to deliver good title to at least the area beneath the Pettit lime formation within a reasonable time fixed by the court, appellees should be required to refund the amounts appellant paid them for the leases.

We are of the opinion that under the circumstances of this case, the appellant is not entitled to interest on any amount refunded and that all parties should bear their respective costs.

This cause is reversed and remanded for further proceedings not inconsistent with this opinion.

ALVIS HUDGENS *v.*
SOUTHERN EXTRUSIONS, INC. ET AL

5-4521 425 S. W. 2d 718

Opinion delivered April 1, 1968

Bernard Whetstone, for appellant.

Brown, Compton & Prewett and *Riddick Riffel,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Alvis Hudgens, suffered a hernia in May, 1963, arising out of his employment with appellee company. He was thereupon provided with medical treatment, including an operation to correct the hernia, and was paid compensation until he returned to work on September 2, 1963. On January 4, 1967, Hudgens filed another claim with the commission, alleging there had been a recurrence of the hernia. This claim was heard before a referee, who held that the hernia recurred in June of 1964, and that the claim was barred by the statute of limitations. The commission held that the recurrence was in October, 1964, and the claim was accordingly barred, since same was not filed for more than two years from the time of the recurrence. On appeal to the Columbia County Circuit Court, the commission's ruling was affirmed, and from the judgment so entered, appellant brings this appeal.

Hudgens testified that he began having symptoms of hernia trouble several months after his operation in 1963. He said that he had some trouble in February of 1964, and went to see Dr. Bryon Grimmett, a medical doctor practicing at Waldo. He testified that he again went to see Dr. Grimmett on June 11, 1964, and was told that he had a recurring hernia. He stated that in June, 1965, he had a severe pain that made him sick, forcing him to leave the job, and he was taken to Dr. Grimmett by the press foreman. Claimant said that he dreaded having an operation, and this was not performed until August of 1966. The operation was on the same side as the operation that was performed in 1963. Hudgens testified that the June, 1965, occurrence was the only time that he had to leave work because of pain involved.

Dr. Grimmett testified that the first hernia operation was performed by Dr. Weber, and that Hudgens returned to his work in September, 1963; claimant went to Grimmett in February of 1964, complaining of a bulge. He returned in June of the same year, and at that time the doctor found a "small hernia to one-third down the inguinal canal." Grimmett testified that Hudgens told him at this time that "he was handling a billet and it started to slip and he grabbed it or something.* * *

"Well, Alvis told me that his job consisted of lifting billets that weighed fifty pounds, the best I remember, I didn't put all this down, and I felt like the lifting, when he said the billets were hot at the time they were lifted by tongs or something, I felt like it was directly related to his work."

Grimmett first stated that claimant suffered a recurrence of the hernia in June, 1964, though, at another point in his evidence, he said that it was not until October, 1964, that he could definitely say that Hudgens had a "true hernia."[1] The doctor further testified that

[1]According to the doctor, "A true hernia is the protrusion through the wall of the abdomen outside the abdominal cavity."

in June, 1965, appellee had to leave his work because he was having symptoms of strangulation or incarcerated hernia. Dr. Grimmett gave him medicine for pain and suggested that he return to work, using, as much as possible, his leg muscles, instead of his back muscles. In January, 1966, Hudgens still complained of having a lot of pain in the inguinal area from the hernia, and in August, 1966, it was decided that another operation should be performed.

Ark. Stat. Ann. § 81-1318 (Repl. 1960) provides:

"A claim for compensation for disability on account of an injury (other than an occupational disease and occupational infection) shall be barred unless filed with the Commission within two [2] years from the date of the accident."

Section 81-1313 (e) sets out that:

"* * *Recurrence of the hernia following radical operation thereof shall be considered a separate hernia and the provisions and limitations regarding the original hernia shall apply."

Appellee argues that Hudgens did not suffer an industrially caused hernia, as defined in the act, until June 11, 1965; that this was the date of the recurrence of the hernia, caused by a severe strain in the hernia region, while working, and with pain so intense that he had to cease work immediately; further, that notice of the occurrence was given to the employer within forty-eight hours thereafter, and his distress was such as to require the attendance of a licensed physician within forty-eight hours after the occurrence. Here, appellant is referring to the requirements set forth in "Claims for Hernia" in Section 81-1313, and he mentions the case of *Crossett Company* v. *Childers,* 234 Ark. 320, 351 S. W. 2d 841, as supporting his position. We disagree. That case does not hold that an industrially caused hernia only occurs when these five requirements

are brought into play. The language merely explains why special requirements are incorporated into the compensation act pertaining to hernia claims. The case has no bearing upon the statutory period allowed for filing a claim. Certainly, one who has sustained a hernia which arises out of his employment does not have to wait until some complication arises before filing his claim. *Crossett Company* v. *Childers,* supra, makes that very clear. The court said:

"* * *There can be no doubt that it was Childers' work and working conditions that caused his congenital weakness to be converted into an actual case of hernia. Under the appellant's theory Childers' injury could never have been compensable, for the incident of February 9 did not cause him to cease work, as the statute demands, and by February 12 it was too late for him to require the attendance of a physician within the limit of forty-eight hours."

It is thus evident that the taking of these steps is not essential to the filing of a claim, and the case also makes clear that one can sustain a hernia on the job without these experiences. The testimony is positive that Hudgens had a recurrence of his hernia, following operation, no later than October, 1964, and since no claim was filed until January, 1967, same was barred by the statute of limitations.

Affirmed.

GUY H. JONES *v.* FRANCIS T. DONOVAN

5-4474 426 S. W. 2d 390

Opinion delivered April 1, 1968
[Rehearing denied May 6, 1968.]

Jones & Stratton, for appellant.

Francis T. Donovan, pro se.

GEORGE ROSE SMITH, Justice. This is a dispute between two lawyers, practicing in Conway, about the division of a $14,605.33 attorneys' fee which they earned in *T.I.M.E. Freight* v. *McNew,* 241 Ark. 1048, 411 S. W. 2d 500 (1967). When the present controversy arose the bank that had been disbursing the proceeds of the *McNew* judgment filed this bill of interpleader and deposited the disputed funds in court. After a hearing the chancellor directed that the two lawyers share the fee

equally. For reversal Jones contends that Donovan is entitled to only $5,000—the sum that the chancellor would have awarded Donovan if his fee had been determined on *quantum meruit.*

The testimony is not before us. Jones, in appealing, failed to bring up the testimony and filed instead a "stipulation," signed by his attorney only, in which Jones agreed that "the facts recited in the trial court's memorandum opinion are true and correct." Donovan did not sign that stipulation, but he has not insisted that the testimony be produced. That procedure enables us to state the facts in a few sentences.

Throughout a decade, ending about April, 1964, these two lawyers had worked harmoniously together in about a hundred tort cases. When either was employed in such a case he would engage the other's assistance as co-counsel. It does not appear that the division of the fees in those cases was ever fixed by a written agreement between the two men. It was, however, tacitly understood all along that every fee would be shared equally, regardless of whose office originated the case and regardless of the particular services contributed by each lawyer to the litigation.

For some reason not disclosed by the record, but apparently having to do with political differences, the two men discontinued their association in 1964. A year or so later Jones was employed in the *McNew* case. Before drafting the complaint he happened to meet Donovan in a hallway and asked him to take part in the case. Donovan accepted the offer. Nothing was said about how the fee would be divided if the litigation ended in success, as it did.

Counsel for Jones, in seeking to limit Donovan to a fee fixed by *quantum meruit,* presents a two-step argument: First, the chancellor found that there was no "implied contract" for the division of the McNew fee. Secondly, in the absence of a controlling contract, this court

(counsel insists) follows the minority rule by which the fee of the lawyer brought into the case is determined by *quantum meruit* rather than by the majority rule of equal division. Counsel, in insisting that we have adopted the minority rule, cites *Dudley* v. *Adams*, 227 Ark. 376, 298 S. W. 2d 701 (1957), and *Terral* v. *Poe*, 190 Ark. 346, 79 S. W. 2d 69 (1935).

The chancellor, in dividing the fee equally, took the position that the *Dudley* and *Terral* cases did not definitely commit us to either rule. There is much to be said for that view. In the *Dudley* case an express contract was found to exist; so the present question did not arise. In the *Terral* case the retained co-counsel was asserting a contract for only a fourth of the fee; so there was never any contention by either side that the fee should be divided equally.

We need not, however, decide the majority-minority rule question, because we find in the case at bar that there was a tacit agreement to share the fee equally. Although the chancellor, at the conclusion of the hearing, apparently made an oral finding that there was no implied contract between the two lawyers, in a supplemental written opinion he pretty well receded from that view and gave effect, we think properly, to the ten-year course of dealing between Jones and Donovan. In directing that the fee be shared equally the chancellor went on to say in his written opinion:

"This is supported by the general practice that existed between these two lawyers for ten years. It was logical for Donovan to conclude that this custom would continue. Senator Jones had a duty, I feel in equity, to advise Donovan to the contrary, if he did not so intend. Actually, I believe he so unconsciously intended till political differences reared its ugly head. I realize I held there was no implied contract."

There can be no doubt that the parties' prior course of dealing is to be considered in determining whether a

tacit but still actual contract comes into existence. Corbin, Contracts, § 97 (1963); *Southern Pub. Ass'n* v. *Clements Paper Co.,* 139 Tenn. 429, 201 S. W. 745 (1917). Justice Holmes put his finger on the point in *Hobbs* v. *Massasoit Whip Co.,* 158 Mass. 194, 33 N. E. 495 (1893). There the plaintiff, a trapper, had sent eel skins to the defendant, a manufacturing company, on four or five occasions. Although there was no contract between the two the defendant had accepted and paid for the skins. The litigation arose when the defendant received another batch of skins and kept them for some time before they were destroyed. In holding that the manufacturer was bound by contract to pay for the skins the court summarized the law in a sentence: "The proposition stands on the general principle that conduct which imports acceptance or assent *is* acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party." (Our italics.)

In resting our conclusion upon the existence of a contract we are not overlooking the parties' agreement to submit the case upon the chancellor's opinion, which included a statement that he had found no implied contract. That statement, however, was not so much a finding of fact as a conclusion of law stemming from facts already found. Needless to say, the parties' stipulation does not bind us to accept that conclusion of law, any more than it binds us to accept the chancellor's construction of the *Dudley* and *Terral* opinions. This must be true, for otherwise our appellate function in the case would be limited to that of placing an approving rubber stamp upon the chancellor's decree.

Affirmed.

HARRIS, C. J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. As I interpret the record, the two attorneys stipulated that the facts recited by the trial court in its findings are correct. It is true that this stipulation was only signed by appel-

lant, but appellee, in his brief, makes clear (in my view) that he is, likewise, in agreement.

Among other things, the court found that there was no agreement, express or implied, between the two attorneys as to a division of the fee. On Page 25 of appellee's brief, though referring to another particular finding by the court, appellee states, "And, Jones and Stratton, have stipulated that these findings are true and correct." Accordingly, I am of the opinion that the parties have agreed that the trial court's fact findings were true and correct, and we therefore have no right to decide the litigation on the basis of an implied contract.

I respectfully dissent.

HOUSING AUTHORITY OF THE CITY OF LITTLE ROCK, ARKANSAS, ET AL *v.* J. H. PETERS AND ELIZABETH PETERS

5-4418 425 S. W. 2d 720

Opinion delivered April 1, 1968

Spitzberg, Bonner, Mitchell & Hays and *Smith, Williams, Friday & Bowen*; by *Michael G. Thompson,* for appellants.

U. A. Gentry, S. Hubert Mayes Jr. and *Charles Mott Jr.,* for appellees.

PAUL WARD, Justice. This is an appeal from a chancery decree which held two grantors mentally incapable of executing a deed. Other issues are also raised. The background facts set out below are not in dispute.

Facts. On October 27, 1961 J. H. Peters and his sister executed a deed to J. S. Kirkpatrick and his wife conveying to them a house and lot at 1408 Bishop Street in Little Rock. The purchase price was $4,000, of which $2,000 was paid in cash and the balance in monthly installments secured by a vendor's lien. The Kirkpatricks substantially improved the property and then went into possession.

On September 22, 1964 the Kirkpatricks conveyed, by deed, the property to Housing Authority of Little Rock for $10,000, less the amount due the Peterses. When the Authority offered to pay the Peterses they refused to accept the money and satisfy the lien.

When the Authority filed suit to remove the lien on the property held by the Peterses they alleged that at the time they executed the deed to Mr. and Mrs. Kirkpatrick they were of unsound mind and incapable of doing so. Thereupon the court appointed Murt J. Donahue guardian ad litem for Elizabeth Peters and Mrs. E. J. Epps as guardian ad litem for J. H. Peters.

The issues of mental incapacity were presented to the Chancellor who held both Elizabeth and J. H. Peters were incompetent to execute the deed to Mr. and Mrs. Kirkpatrick, and canceled the same. Numerous other issues were also raised at the trial and decided by the court, but these issues need not be discussed since we have concluded the trial court erred in canceling the

deed in question. The decisive issue therefore is whether the court's finding of incompetency is supported by the weight of the evidence.

The rule for testing the mentality required of a person before he can execute a valid deed, in the absence of fraud, duress or undue influence, has been well established by many decisions of this Court. In *Pledger* v. *Birkhead,* 156 Ark. 443 (p. 455) 246 S. W. 510, there appears the following statement:

> "If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what consideration, then he possesses sufficient mental capacity to execute such instrument."

The exact statement copied above was approved in *Petree* v. *Petree,* 211 Ark. 654, 201 S. W. 2d 1009. In *Donaldson* v. *Johnson,* 235 Ark. 348, 359 S. W. 2d 310, a Mrs. Donaldson, 81 years old and suffering from "diabetes, arteriosclerosis, leukemia, secondary uremia and other diseases of old age", executed a deed to her daughter for "$1.00 and other valuable consideration", and then died nine days later. A son sued to cancel the deed on the grounds that the daughter "exercised undue influence on Mrs. Donaldson to secure the deed and also that Mrs. Donaldson was incompetent to execute the deed". This Court in rejecting the above grounds, stated:

> "The proof before the chancellor fails to show undue influence or lack of mental capacity *at the time the deed was executed.*" (Emphasis added.)

In the case here under consideration we think the weight of evidence does support a finding that Elizabeth and J. H. Peters did have sufficient capacity to retain in their memory, without prompting, the extent and

condition of their property, to whom it was conveyed, and for what consideration *at the time* of the conveyance. Since practically all the testimony pertained to the mental incapacity of Elizabeth, we will examine only that part of the testimony.

Elizabeth and her brother, J. H., lived on the property for many years; they dealt with a realtor in selling to the Kirkpatricks; they refused two previous offers before accepting $4,000 on October 27, 1961. Then they purchased a home in the country where they desired to live. After the Kirkpatricks had made substantial improvements they sold to the Housing Authority for $10,000. The extent of the improvements is not revealed. It was established that Elizabeth's actions were peculiar or unusual in that neighbors heard her make loud noises and often saw her scantily dressed—probably the result of drinking to excess. The essence of the testimony offered to show Elizabeth's incapacity to execute the deed is set out below.

A Mrs. Mayes, who knew her in 1960, said she was some times incoherent, didn't go to church, but was normal at times, and she knew nothing about her condition when the deed was made. Mrs. Nally knew her for twenty-seven years, but not since 1959, and knew nothing about her capacity when the deed was made. Mrs. Myers knew her but hadn't seen her since 1955. Her guardian ad litem knew nothing about her from the year 1951 until after the sale was made. Dr. Elizabeth Fletcher, who saw her briefly in 1953, wrote a letter in 1958 having her committed to the State Hospital for a short time. The doctor was not positive that she actually saw her at that time. Dr. McMillan interviewed her at the time the deed was made when she applied to the welfare department for a job, and didn't think she was suited for gainful employment. He didn't have any record pertaining to mental incapacity, and he was not a psychiatrist.

On the other hand, five or six witnesses testified Elizabeth was at times normal and mentally competent, and that she fully understood all about the transaction with the Kirkpatricks. Moreover, at the time of the negotiation when the question of her mental capacity was raised, interested parties arranged for a hearing in Probate Court before Paul X. Williams (then a chancery judge on exchange) who pronounced her mentally competent.

We therefore hold that, under legal rules previously mentioned, the weight of the testimony does not support the finding Elizabeth Peters and J. H. Peters were not, at the time the deed was executed, mentally competent. In view of this conclusion it is not necessary to decide the other issues raised on appeal.

The decree of the trial court is reversed, but it will have jurisdiction to take further necessary action consistent with this opinion.

BROWN, J., concurs.

BYRD, J., disqualified.

LYLE BROWN, Justice, concurring. I would decide this suit on the point of law raised by the Housing Authority. Its contention is that, as a bona fide purchaser of the property from the grantees of incompetents who have not been so adjudicated, its title should be protected. That position is the better rule of property law and is the rule in most jurisdictions. *Goldberg* v. *McCord,* 251 N. Y. 28, 166 N. E. 793 (1929); *Brown* v. *Khoury,* 346 Mich. 97, 77 N. W. 2d 336 (1956); and *Christian* v. *Waialua Agriculture Co.,* 33 Haw. 34 (1934). The cited cases are based on case law, not statutes. There are numerous holdings to the same effect in Kentucky but they are backed by statute.

Since our rule on this point appears unsettled, and since we have no holdings to the contrary, that rule

should be adopted. To hold otherwise, or not to rule on the point at all, will result in uncertainty of titles. Moreover, a remote grantee could be forced to defend his title against the alleged incapacity of anyone of a long line of grantors.

MARY JANE RIEGLER *v.* N. W. RIEGLER Jr.

5-4536 426 S. W. 2d 789

Opinion delivered April 1, 1968
[Rehearing denied May 13, 1968.]

H. B. Stubblefield, for appellant.

Howell, Price & Worsham, for appellee.

PAUL WARD, Justice. In 1965 Mrs. Riegler (appellant) and her husband (appellee) signed a note payable

to the Worthen Bank & Trust Company, and on May 11, 1966 they were divorced. In December of that year the bank filed suit on the note and secured judgment for $4,887.30 against both parties. Neither party contested that judgment, but in the trial below appellant contended, and here contends, that appellee (as between themselves) is obligated to pay all of the judgment.

Appellant (by proper pleadings) contended that she was not obligated to pay any part of the judgment because: (a) she was only an "accommodation" signer on the note and received no benefits from the proceeds thereof, and; (b) her liability on the note was negated in a previous chancery proceeding. Appellee contended that Mrs. Riegler was a "co-signer" of the note, that she received part of the proceeds, and that the matter was not res judicata.

The above conflicting contentions were presented to the trial court (sitting as a jury by agreement), and the trial court found and adjudged:

> One, the prior chancery proceeding "was not res judicata as to any issue here involved".
>
> Two, appellant is not an "accommodation" signer of the note, and both parties are jointly liable to pay the judgment rendered against them.

For a reversal of the above findings and judgments of the trial court appellant relies on two points: *One,* her plea of res judicata "is supported by the undisputed evidence", and; *Two,* she was an accommodation maker and is not liable to appellee for any part of said note.

One. The record reveals: The parties were married in 1943; they owned a home by the entirety; they executed a note to the bank in 1965; this note has been renewed twenty-one times—the last renewal being on May 5, 1966 which is the note in question here; on May 8, 1965 the chancery court, in a suit between the parties,

ordered (among other things) that a "joint account" in the bank in the amount of $4,000 be applied to the bank's note. It this proceeding in chancery nothing was said or decided about the joint liability of the parties on the note, and no appeal was perfected by either party. The parties were divorced on May 11, 1966, and again no issue was raised as to joint liability on the note. The home (held by the entirety) was ordered sold and the proceeds were divided equally between the parties.

We fail to find in the record any evidence showing where the chancery court at any time considered or had any opportunity to decide whether appellant was a "co-signer" or an "accommodation signer" of the note sued on, or that she had discharged her liability on the note if she was in fact a co-signer.

Appellant cites *Robertson* v. *Evans,* 180 Ark. 420, 21 S. W. 2d 610, as holding:

> "The test in determining a plea of res judicata is not alone whether the matters presented in a subsequent suit were litigated in a former suit between the same parties, but whether such matters were necessarily within the issues and might have been litigated in the former suit."

Conceding the announced rule to be correct, appellant fails to point out, and we fail to find, where the issues here "were necessarily within the issues" in the prior chancery proceedings. Therefore we hold that the trial court (sitting as a jury) was justified in finding and holding as it did on the question of res judicata.

Two. Here, appellant contends the trial court erred in holding she was not an "accommodation" signer of the note, but again we do not agree with that contention.

The trial court based its decision on the ground that appellant did receive benefits from the proceeds of the

note and, therefore, she was a co-signer and *not* an accommodation signer. We think that is the correct rule, and we also find in the record substantial evidence to support that finding of fact.

On the "fact" issue appellant testified, in essence: I assume we borrowed money to build our house; we borrowed some money from an aunt for that purpose; I did not put any money in the house but did receive a half interest in it; I do not remember what the note to the bank was for; I cannot swear I did not receive any benefits from the note to the bank.

The burden was on appellant to prove she received no benefits. It was so held in the case of *Fisher* v. *The Rice Growers Bank,* 122 Ark. 600, 184 S. W. 36 and in *McArthur* v. *Cannon,* 229 A. 2d 372 (1967). Appellant appears to take the position it is immaterial as to whether or not she received benefits from the proceeds of the note, since the U. C. C. eliminated that element. The section of the U. C. C. relied on is Ark. Stat. Ann. § 85-3-415 (1) (Add. 1961) which reads:

> "An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it."

However, in the *McArthur* case, cited above, the court held that a signer who received benefits *from the proceeds of the note* was not an accommodation signer. The above *emphasized* words are, we think, the key to a correct interpretation of the Code. In other words, if, in this case, appellee had paid appellant for signing the note to the bank and she had received no *benefits from the note,* then she would still be an accommodation signer even though she did receive some money or benefits for the use of her name. This is explained in comment 2 under the section quoted above.

Affirmed.

BYRD, J., disqualified.

JIMMIE HOLT ET UX *v.* P. C. MINOR ET UX

5-4539 426 S. W. 2d 163

Opinion delivered April 1, 1968

James E. Evans, for appellants.

Joe B. Reed and *Charles E. Davis,* for appellees.

LYLE BROWN, Justice. P. C. and Eva Minor sued Jimmie and Maxine Holt to recover judgment on a note in the principal sum of $1400. The defendants countered with an allegation of usury. The jury awarded Mr. and Mrs. Minor judgment for $1400 and the Holts appeal. Six points are raised for reversal. We shall treat only the issue of usury because that issue resolves the lawsuit.

We summarize the essential facts in the light most favorable to the lenders. P. C. Minor had charge of a house in Springdale owned by Mrs. Ryan. She gave Minor the authority to rent the house and generally look after it until it might be sold. Minor obtained as tenants these appellants, Jimmie and Maxine Holt. The tenants became interested in buying the property. In negotiating with Mrs. Ryan they reached an agreement that she

would accept $1400 for her equity. The Holts were unable to raise the money through regular credit channels. Minor agreed to advance the $1400. Minor borrowed $1400 from the First State Bank of Springdale and executed his note, due in 360 days, and bearing interest at the rate of six per cent per annum.

On the same day Jimmie and Maxine Holt executed two notes in favor of P. C. and Eva Minor. One of the notes was for $1400. Minor gave Holt a check for that amount. Mrs. Minor testified that although that note called for ten per cent interest, the Minors had no intention of collecting interest unless the note became delinquent. The other note was for the principal sum of $220 (it is apparently conceded that the note should have been for $224). Mr. Minor testified that the amount of that note was arrived at in this manner: he charged $140 for his services in raising the needed funds; and the balance of $84 was added to cover the interest that Minor would be obliged to pay on his note at the First State Bank of Springdale. Holt liquidated the smaller note by direct payments to Minor.

Accepting the recited testimony of the Minors at face value, it is readily perceived that the Holt-to-Minor loan called for a charge well in excess of ten per cent per annum. We hasten to point out that P. C. Minor was clearly a lender, as opposed to an agent of the Holts. He cannot be classified as one employed by the Holts to negotiate a loan for them. It was his proposal to lend them the money and take as security for that loan two notes made payable to P. C. or Eva Minor. The manner in which he chose to obtain the funds was of no particular concern to the borrowers. In fact, it was not necessary that he borrow the money from the bank; the Minors owned a certificate of deposit in the principal amount of $4300. Instead of cashing that certificate, Minor used it as collateral to borrow the $1400. In that manner his certificate continued to draw interest and the Holts were supplying the money to pay the interest on the capital Minor used to make his loan to the Holts.

The situation here is not unlike the practice condemned by our court in *Smith* v. *Eason,* 223 Ark. 747, 268 S. W. 2d 389 (1954). There the lender, Smith, withheld from the loan funds $42 which he incurred in borrowing the money to be advanced to Eason. This court said those expenses were obviously not for the benefit of Eason and therefore were not legitimate charges.

It is common knowledge that most lending institutions operate on borrowed capital, or on money on deposit which draws interest. If such an institution charged one of its borrowers four per cent which the money cost the institution and added seven per cent for itself, usury would certainly have to be conceded. That is the very practice which Minor invoked. He charged the Holts ten per cent ($140) on his loan to the Holts, and added six per cent ($84) to cover his cost of raising the capital.

Reversed and dismissed.

DELTA DISCOUNT COMPANY *v.* GEORGE R. FRYER ET AL

5-4509 426 S. W. 2d 788

Opinion delivered April 1, 1968

McKnight & Blackburn, for appellant.

Harold Sharpe, for appellees.

JOHN A. FOGLEMAN, Justice. Appellant asserts error on the part of the trial court in granting a motion for summary judgment. It contends that its answer to a request for admissions, even though verified by its attorney only, constituted a denial and thus preserved questions of fact for determination.

Appellant, a corporation, brought this action for foreclosure of a deed of trust executed by appellees to secure the payment of a promissory note executed by appellees to K-V Builders, Inc. While the note was payable to the order of K-V Builders, Inc., the deed of trust secured appellant, Delta Discount Company. Appellees first filed a general denial and then an amendment. The amendment asserted that the contract appellant sought to enforce was usurious and that neither appellant nor the payee in the note was incorporated under the laws of the State of Arkansas or authorized to do business in the state as a foreign corporation on the date of the execution of the note or deed of trust or on the date the amendment was filed. Appellees asked that the note and deed of trust be declared void for usury, that the complaint be dismissed and that they have judgment for payments made. Appellees filed and served three separate requests for admissions. The last request asked appellant to admit that neither appellant nor K-V Builders, Inc. was incorporated or authorized to do business under the Arkansas statutes on the date of execution of the note and deed of trust, or on January 31, 1966. The answer to this request was signed and verified by

one of appellant's attorneys. Appellees, on January 25, 1967, filed and served a motion for summary judgment based upon the assertion that failure of appellant to properly verify its response to the request for admission constituted a failure to answer and left no genuine material issues of fact. No response was made to this motion which was granted on September 21, 1967.[1]

The sole argument for reversal is that this court has adopted the rule that answers to requests for admissions must be verified by the responding party, rather than by his attorney, upon an erroneous assumption that this view is supported by the weight of authority. Appellant asserts that the weight of authority supports the view that a sworn statement by the attorney for the party whose admissions are requested constitutes a sufficient response.

While it appears that there is a division of authority on the question, we need not now engage in a process of weighing these authorities for the rule has been clearly stated, adopted and followed in this state. *Young* v. *Dodson,* 239 Ark. 143, 388 S. W. 2d 94; *B & P, Inc.* v. *Norment,* 241 Ark. 1092, 411 S. W. 2d 506. Appellant argues that our adherence to the rule does not give proper consideration to the fact that a corporation can act only through its officers, agents and employees and that the particular questions involved here could only be answered by attorneys. Perhaps it is necessary in many instances that there be consultation between a party (either individual or corporate) and his attorney before such requests may properly be answered, but we see no reason why the requests could not have been answered by an officer of the corporation who had knowledge of the *facts.* We previously applied the rule to a corporate plaintiff who was served with virtually

[1]It should be noted that during this eight-month period appellant made no effort to obtain permission to properly verify its answer, as permitted under the authority of *Kingrey* v. *Wilson,* 227 Ark. 690, 301 S. W. 2d 23.

identical requests for admissions in *B & P, Inc.* v. *Norment, supra.*

Since it must be taken as admitted that both appellant and K-V Builders, Inc. are foreign corporations, not authorized to do business in Arkansas, the decree is affirmed.

MRS. ARTALEE WEBB *v.* A. F. LACEFIELD AND DONALD LACEFIELD

5-4515 426 S. W. 2d 154

Opinion delivered April 1, 1968

Roscopf & Raff, for appellant.

Reid, Burge & Prevallett, for appellees.

J. FRED JONES, Justice. Mrs. Artalee Webb filed suit in the Monroe County Circuit Court against A. F. Lacefield alleging damages as a result of personal injuries sustained by Mrs. Webb in an automobile collision caused by the negligence of Mr. Lacefield. Lacefield denied liability and pleaded contributory negligence. A jury trial resulted in a verdict and judgment for Mrs. Webb in the amount of $300.00. Upon denial of a motion for a new trial, based on inadequacy of the award, Mrs.

Webb appeals to this court, relying upon the following point for reversal:

> "The court erred in denying appellant's motion for new trial because the jury verdict was contrary to the law and evidence, in that said verdict was inadequate and was less than the uncontroverted and actual out-of-pocket medical expenses incurred by the appellant and therefore was plainly the result of mistake, passion and prejudice as a matter of law. Further, that the verdict of the jury completely disregarded the instructions of the trial court with respect to awarding compensation for pain and suffering and lost wages."

The injuries complained of occurred when appellant drove her automobile into a parking lot at a grocery store and the appellee backed his pickup truck from a parking space and struck the left front fender and door of appellant's automobile. There is considerable conflict in the testimony as to the force of the impact and as to the severity, extent, and duration of appellant's injuries. The evidence is not conclusive that appellant's expenditure of $530.00 for drugs and medical treatment was entirely for treatment as a result of her injuries.

The jury verdict, as reflected in the judgment on page 18 of the transcript, referred to by appellant, is as follows:

> "We the jury, find for the plaintiff, Mrs. Artalee Webb and assess her damages at $300.00."

Without objection, the trial court gave its own instruction No. 2, as follows:

> "If you find for the plaintiff the form of your verdict should be: 'We, the jury, find for the plaintiff, Mrs. Artalee Webb and assess her damages at the amount you think she is entitled to receive under the proof of this case.' "

Ark. Stat. Ann. § 27-1902 (Repl. 1962) provides as follows:

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

This court has held when the undisputed evidence shows that plaintiff is entitled to recover substantial damages, a judgment will be reversed which awards only nominal damages, because a judgment for nominal damages is, in effect, a refusal to assess damages. *Dunbar* v. *Cowger,* 68 Ark. 444, 59 S. W. 951. The rule is otherwise where substantial damages, rather than mere nominal damages are awarded. We have not deviated from the rule reiterated in the case of *Smith* v. *Arkansas Power & Light Co.,* 191 Ark. 389, 86 S. W. 2d 411, where we said:

> "Where substantial damages are awarded, a judgment will not be reversed because of inadequacy, if there be no other error than that committed by the jury in measuring the damages."

The evidence as to damages is not undisputed in the case at bar, and the verdict for $300.00 damages was for more than a nominal amount in this case. We find no abuse of the trial court's discretion in denying appellant's motion for a new trial, and we conclude that the judgment of the trial court should be affirmed.

Affirmed.

JOHN B. MAY CO., INC., *v.* DORIS McCASTLAIN (B. BRYAN LAREY) COMMISSIONER OF REVENUES, STATE OF ARKANSAS

5-4453 426 S. W. 2d 158

Opinion delivered April 1, 1968

Floyd Sharp, for appellant.

Lyle Williams, L. Phillip McClendon and *Hugh L. Brown,* for appellee.

J. Fred Jones, Justice. This is an appeal from a declaratory judgment decree of the Pulaski County Chancery Court and involves the interpretation of two sections of the Arkansas Gross Receipts Tax Act (Act 386 of 1941).

On March 18, 1966, John B. May Company, Inc. entered into a construction contract with the Board of Trustees of the University of Arkansas to install air-conditioning equipment and perform other construction work at the University of Arkansas Medical Center in Little Rock, Arkansas. Under a provision in the contract, the Arkansas Gross Receipts (Sales) Tax of 3% was not added to, or included in, the original bid price, but it was agreed that if it should later become necessary for the May Company to pay such tax on the materials and equipment used in fulfilling this contract, the contract would be reopened and the amount of the tax added to the original price.

Under an administrative ruling by the Commissioner of Revenues, the equipment was held taxable as a consumption by the contractor. The parties to the contract joined in a petition to the Pulaski County Chancery Court for a declaratory judgment naming the appellee, Commissioner of Revenues, as defendant. The Commissioner responded to the petition and the case was submitted to the chancellor on an agreed stipulation of facts, which included the stipulation that the University Medical Center is a State-owned, tax-supported hospital.

The chancellor found that under the contract involved, contractor May was not an agent of the Medical Center but that under the Act he was the consumer of all machinery and goods used in the performance of a contract, and that the assessment of the tax against him

was valid and legal. From the chancellor's decision John B. May Co. appeals.

The definition section of the Gross Receipts Act (Ark. Stat. Ann. § 84-1902 [Repl. 1960]) subsection (i) provides as follows:

> "Consumer—User: The term 'consumer' or 'user' means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this act."

The exemption section of the act (Ark. Stat. Ann. § 84-1904 [Repl. 1960]) provides as follows:

> "There is hereby specifically exempted from the tax imposed by this act the following:
>
> * * *
>
> (p) Gross receipts or gross proceeds derived from the sale of any tangible personal property or services as herein specifically provided to any hospital or sanitarium operated for charitable and nonprofit purposes; provided, however, that gross proceeds and gross receipts derived from the sale of materials used in the original construction or repair or further extension of such hospital or sanitarium, *except State-owned, tax-supported hospitals and sanitariums,* shall not be exempt from this act; *provided that no unpaid tax imposed by Act* 386 *of* 1941 *on the gross receipts or gross proceeds derived from the sale of such materials to State-owned and tax-supported hospitals and sanitariums shall be collected after the passage of this Act* [February 19, 1947]." [Italicized portions added to Act 386 of 1941 by amendment Act 102 of 1947.]

Appellant argues that it was the plain legislative intent, by Act 102 of 1947, to exempt State-owned, tax-supported hospitals and sanitariums from paying the sales tax on construction materials, either directly or indirectly; that the Legislature knew that such institutions were required by law to let such construction contracts to the lowest responsible bidder; that it was the intention of the Legislature by Act 102 of 1947 to repeal the definition of a contractor as a consumer whenever said contractor is doing business with a State-owned, tax-supported hospital or sanitarium; that the contractor, for purposes of the tax exemption, is nothing more or less than an agent of the tax exempt institution, buying and installing specified material and equipment for them at an agreed price; and that if it is held otherwise, Act 102 of 1947 will become a complete nullity.

Appellee argues that the intention and effect of Act 102 of 1947 was to provide an exemption only on sales made directly to State-owned, tax-supported hospitals and sanitariums; that the Act declares a contractor to be a consumer of goods used in his contract; and that the exemption doesn't apply to contractors.

We agree with the appellee and have reached the conclusion that the chancellor's decision must be affirmed. In determining the legislative intent, we look to the language of the whole Act. *Tolleson* v. *McMillan,* 192 Ark. 111, 90 S. W. 2d 990. If the language is ambiguous or uncertain, we may also look to the subject matter of the Act, the object to be accomplished, or the purpose intended, as well as other extrinsic matters which shed light on the legislative intent. *McDonald* v. *Wasson,* 188 Ark. 782, 67 S. W. 2d 722. But, in the case at bar, we find no ambiguity.

Prior to the amendment by Act 102 of 1947, § 84-1904 (p), supra, exempted receipts or proceeds derived from the sale of any tangible personal property or services to any hospital or sanitarium operated for charita-

ble or nonprofit purpose, but specifically did not exempt the sale of materials used in the original construction or repair or further extension of such hospital or sanitarium. By the amendatory Act 102 of 1947, the Legislature excepted the State-owned, tax-supported hospitals and sanitariums from the proviso of the Act taxing the materials used in the construction, repair, or further extension of charitable nonprofit hospitals and sanitariums, thus making the State-owned, tax-supported hospitals and sanitariums exempt in cases of sales to such hospital or sanitarium for original construction, repair, or further extension.

In construing tax exemption statutes strictly, as we must do (*Scurlock, Comm. of Rev.* v. *Henderson,* 223 Ark. 727, 268 S. W. 2d 619), we conclude from the wording used by the Legislature that the sale must be directly *to* such hospital or sanitarium to be exempt. This interpretation is further supported by the legislative wording in the proviso added by Act 102 of 1947, that no unpaid tax on receipts or proceeds derived from the "sale of such materials *to* State-owned, tax-supported hospitals and sanitariums shall be collected after the passage of this Act."

Thus, the statute in clear and unambiguous terms requires the sale to be directly to the tax-exempt institution. Appellant contends that the contractor in this case is merely an agent of the institution, buying and installing specified material and equipment at an agreed price, and thus the sale would be *to* the institution. We cannot agree with this contention in light of § 84-1902 (i), supra. To do so would imply an agency when the Act clearly makes the contractor the consumer of "all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract. . . ."

This same contention was advanced and rejected in the case of *Alabama* v. *King & Boozer,* 314 U. S. 1, 62

S. Ct. 43, 86 L. Ed. 3, where King and Boozer sold lumber on the order of contractors to be used by the latter in constructing an army camp for the United States. The Alabama Supreme Court had found the sale nontaxable, concluding that although the contractors were indebted to the seller for the purchase price of the lumber, they were so related by their contract to the Government's undertaking to build a camp, and were so far acting for the Government in the accomplishment of the governmental purpose, that the tax was in effect "laid on a transaction by which the United States secures the things derived for governmental purposes," so as to infringe the constitutional immunity. The U. S. Supreme Court reversed, stating:

> "[T]he contractors were to purchase in their own names and on their own credit all the material required, unless the Government should elect to furnish them; that the Government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.
>
> * * *
>
> [T]he legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors, which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors, who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber, within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors, in a loose and general sense, were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic

burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.

* * *

But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit."

Appellant also contends that § 84-1902 (i), supra, pertains only to hand tools, construction equipment, etc. The *King & Boozer* case, supra, also refutes this argument. It could hardly be said that the lumber involved in that case fits in the category of hand tools, construction equipment, etc., but, to the contrary, it is clearly seen that lumber in that case, as air conditioners in the case at bar, becomes an integral part of the construction, yet is consumed by the contractor, for taxation purposes, in fulfilling his contract.

Even though Act 102 of 1947 contained a clause providing for the repeal of "all laws and parts of laws in conflict herewith," we find no inconsistency between § 84-1902 (i) and § 84-1904 (p). Thus, there is no repeal thereby as appellant urges, as a general clause repealing all laws in conflict does not operate to repeal any laws not in conflict. *Jones* v. *Oldham,* 109 Ark. 24, 158 S. W. 1075.

Appellant also contends that the chancellor erred in failing to properly interpret the cases of *Kern-Limerick* v. *Scurlock,* 347 U. S. 110, 74 S. Ct. 403, 98 L. Ed. 546, which arose in Arkansas (see *Parker* v. *Kern-Limerick, Inc.,* 221 Ark. 439, 254 S. W. 2d 454 and 223 Ark. 464, 266 S. W. 2d 298), and *Alabama* v. *King & Boozer,* supra. In his brief, appellant states that: "A study of the *Parker* v. *Kern-Limerick* case shows the

final decision to be that where a Government Agency has a statutory sales exemption that a contractor, though defined as a consumer, becomes an agent for the owning agency for the tax exemption purposes." We find that it is the appellant's interpretation, and not the chancellor's, that is incorrect. The *King & Boozer* case refused to *imply an agency for purchase* into the contract. In the *Kern-Limerick* case an agency for purchase was expressly created by the terms of the contract. Both cases recognized the same economic effect on the United States, but found the difference in the result to lie in the form of the contract. As stated in the *Kern-Limerick* case:

> "Under these circumstances, it is clear that the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction. [This was found to be the opposite in the *King & Boozer* case.]
>
> * * *
>
> We find that the purchaser under this contract was the United States. Thus, *King & Boozer* is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States.
>
> "*But since purchases by independent contractors of supplies for Government construction or other activities do not have federal immunity from taxation, the form of contracts,* when governmental immunity is not waived by Congress, *may determine the effect of state taxation on federal agencies,* for decisions consistently prohibit taxes levied on the property or purchases of the Government itself." (Emphasis supplied.)

The latter proposition was equally stated in the *King & Boozer* case:

> "The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it."

The appellant in the case at bar was not made an agent for the purchase of materials as was done in the *Kern-Limerick* case where the contract called for the contractor to act as purchasing agent for the Government, and title to the articles purchased passed directly from the vendor to the Government, and the Government was directly liable to the vendor for payment of the purchase price. These elements are not persent in the case at bar.

We agree with the chancellor's finding that the relationship in the case at bar was one of independent contractor, not agency, and therefore the appellant was a consumer, or user, of the items involved within the meaning of the Act. The chancellor was correct in finding that the sale was to the contractor in this case and in holding that the sale to the contractor was taxable. The decree of the chancellor is affirmed.

JOE F. RUSHTON, M. D. *v.* FIRST NATIONAL BANK OF MAGNOLIA

5-4417 426 S. W. 2d 378

Opinion delivered April 1, 1968
[Rehearing denied May 6, 1968.]

Harry B. Colay, Chambers & Chambers, and *Warren & Bullion,* for appellant.

Keith, Clegg & Eckert and *Gaughan & Laney,* for appellee.

CONLEY BYRD, Justice. This appeal by Joe F. Rushton, M. D., is one of a number of lawsuits arising from the dismissal of W. C. Blewster as president of appellee First National Bank of Magnolia. Dr. Rushton contends that in endorsing certain notes for Numark Manufacturing Company he was acting as trustee for the benefit of the bank. The trial court found against Dr. Rushton because (1) the acts, if they had occurred, would be ultra vires and not binding on the bank; (2) Dr. Rushton failed to prove the facts alleged; (3) Dr. Rushton was barred by the "clean hands" doctrine; (4) Dr. Rushton, having recognized his liability as personal, was estopped to assert the trusteeship or guaranty of the bank; and (5) Dr. Rushton's claim was barred by the statute of frauds. In addition to denying relief, the trial court entered judgment against Dr. Rushton upon the bank's counterclaim for $158,230.47, which included a note for $97,787.77, dated April 3, 1963, and signed by Dr. Rushton as trustee.

For reversal Dr. Rushton relies upon several points, but since there was error that calls for a complete new trial, we deal only with the alleged error of the trial court in permitting William A. Eckert, Jr., an attorney of record, to testify over Dr. Rushton's objection that the rule had been invoked and that Mr. Eckert had remained in the courtroom throughout the trial.

UNCONTROVERTED FACTS

The record fairly establishes the following facts:

1. W. C. Blewster was president of the First National Bank of Magnolia from July 1942 until his termination on November 1, 1964. During his tenure the bank

had suffered no large losses and had foreclosed only twice prior to the foreclosure of the Magnolia Wood Products property. The bank had grown from $856,000 when he became active manager to $22,550,000 at the time of his termination. Mr. Blewster spent much of his time as bank president in trying to secure industries for Magnolia. In the words of Mr. T. A. Monroe, who succeeded Mr. Blewster as bank president, "Mr. Blewster ran the First National Bank of Magnolia. It was substantially a one-man banking operation."

2. Appellant Dr. Joe F. Rushton was a physician and surgeon in Magnolia, Arkansas. He had been a stockholder in the First National Bank of Magnolia since 1936 and a director since 1937 or 1938. He engaged in a number of enterprises—some with W. C. Blewster and some with Congressman Oren Harris, now U. S. District Judge for the Eastern District of Arkansas. His financial statement, as prepared by the First National Bank of Magnolia, on October 1, 1963, showed a net worth of $1,701,493.00.

3. T. A. Monroe, an insurance man, had been a director of the bank since 1951 and vice president from 1956 to 1964. Upon Mr. Blewster's termination, Mr. Monroe became president and served until September 1965. As president, he was a member of the bank's Executive Committee along with Mr. Eckert.

4. William A. Eckert, Jr., of Magnolia, Arkansas, had been attorney for the bank some fourteen years and a director since 1957. He served on the bank's Executive Committee along with Mr. Monroe, after Mr. Blewster's termination. He signed some of the pleadings herein as attorney for the bank, but most of the subsequent pleadings were signed by Gaughan & Laney. He did not examine any witnesses during the trial, but is shown here as counsel for appellee bank.

5. Odyssey Trailer Company was a corporation which Mr. Blewster was instrumental in organizing to

build trailers. At one time Mr. Blewster prevailed upon Dr. Rushton to take $2,500 in stock and later asked him to please take another $2,500, as that was all the city of Magnolia lacked to get the company started. After Odyssey was organized, Mr. Blewster and others prevailed upon the Columbia County Industrial Commission to erect a building for it through a bond issue. Odyssey was financed through the First National Bank of Magnolia. After some forty trailers had been built, it became apparent that their cost was too high and the company was a sick industry. Dr. Rushton and Mr. Blewster were on Odyssey's board of directors and had personally endorsed a note for $35,000 to the Republic National Bank of Dallas which was renewed several times.

6. Magnolia Wood Products Company was another industry that Mr. Blewster secured for Magnolia and that was financed by the First National Bank of Magnolia. This industry became sick, too; a friendly foreclosure was had; and on January 11, 1963, the foreclosure sale to First National Bank of Magnolia for the amount of its judgment debt of $52,705.45 plus interest and attorney's fee was confirmed.

7. Numark Manufacturing Company was the name given to the new venture resulting from a merger between Odyssey and Magnolia Wood Products Company. The Numark stockholders were the same as the stockholders of Odyssey and Magnolia. Dr. Rushton was elected president in his absence and urged to serve in that capacity by Mr. Blewster. Mr. Blewster was also on its board of directors. Numark obtained government contracts and operated until after Blewster's dismissal as president of the bank. It went into bankruptcy some time before trial of this case.

8. The minutes of the January 16, 1963, meeting of the Numark board of directors, with reference to the issues here involved, showed the following:

"W. C. Blewster stated that the First National Bank of Magnolia, Magnolia, Arkansas, had, by foreclosure proceedings, acquired title to all of the assets of Magnolia Wood Products Company, and that the bank is leasing the property to the corporation for a rental of $250 per month. He further stated that he and Mr. Drew had high hopes of arranging for the company to obtain an ARA loan so as to enable the corporation to purchase all of the assets of the old Magnolia Wood Products Company from the bank."

The minutes of the special meeting of the Numark board of directors on March 6, 1963, reflected the following:

"Mr. Blewster stated that the First National Bank of Magnolia had conveyed all assets of the old Magnolia Wood Products Company to Joe F. Rushton, Trustee, that Numark Manufacturing Company was in possession of the old Magnolia Wood Products properties under a lease agreement entered into by and between Joe F. Rushton, Trustee, as lessor, and Numark Manufacturing Company, as lessee. It was explained that it was anticipated that Numark should attempt to obtain from the Area Redevelopment Administration a loan in the amount of $200,000, so that the corporation might purchase from the Trustee all assets of the Old Wood Products Company. After a full and complete discussion of the matter, a motion was made by Charles Viering and seconded by Felton Roberson that the corporation should attempt to borrow $200,000 from ARA, with which to purchase all of the assets of Magnolia Wood Products Company and other property related thereto, title to which is now in Joe F. Rushton, Trustee."

9. On March 1, 1963, the First National Bank of Magnolia conveyed to Dr. Joe F. Rushton, Trustee, the property acquired in the Magnolia Wood Products Company foreclosure.

10. On April 3, 1963, Dr. Joe F. Rushton, Trustee, executed a deed of trust to Carl Black, Trustee for First National Bank of Magnolia, covering the property acquired from Magnolia Wood Products Company. This deed of trust was given to secure a note due 120 days from date, in the amount of $97,787.77, and signed by Joe F. Rushton, Trustee.

11. On April 3, 1963, Numark Manufacturing Company executed a note to the Texarkana National Bank for $35,000. This note was endorsed by Dr. Rushton and Mr. Blewster.

12. From April 3, 1963, to September 26, 1964, Numark was financed by First National Bank of Magnolia through overdrafts which had accrued in the amount of $225,000 as of September 26, 1964. On that date Numark executed a note for $225,000 to the First National Bank of Magnolia. Texarkana National Bank participated in the $225,000 note to the extent of $125,000 upon a personal guaranty of Dr. Rushton and Mr. Blewster. In addition Dr. Rushton pledged as collateral 24,675 shares of Berry Asphalt Company.

13. On October 26, 1964, Numark executed a note for $35,000 to Texarkana National Bank. This note was endorsed by Dr. Rushton and Mr. Blewster.

14. On November 1, 1964, Mr. Blewster was dismissed as president of the bank.

15. On November 23, 1964, Numark executed to Republic National Bank of Dallas, Texas, a note for $35,000, endorsed by Dr. Rushton and Mr. Blewster.

16. After Mr. Blewster's dismissal, Mr. T. A. Monroe found in Blewster's desk drawer an unexecuted instrument wherein Numark was mortgaging the Magnolia Wood Products to First National Bank as security for the $225,000 note. Realizing that the bank had no

security for its part of the $225,000 note and that title to the property was in Joe F. Rushton, Trustee, the bank, at Mr. Eckert's suggestion, joined with Joe F. Rushton, Trustee, in conveying by deed on December 20, 1964, the Magnolia Wood Products Company property to Numark Manufacturing Company, and simultaneously caused the unexecuted deed of trust from Numark in favor of the bank to be executed. This removed this security from the $97,787.77 note signed by Dr. Rushton as Trustee and placed it on the $225,000 note of Numark.

17. On December 28, 1964, Numark executed to Republic National Bank of Dallas its note for $37,390.69, endorsed by Dr. Rushton and Mr. Blewster.

18. On January 25, 1965, Numark executed to Republic National Bank of Dallas its note for $19,000, also endorsed by Dr. Rushton and Mr. Blewster.

19. On February 25, 1965, Dr. Rushton signed an instrument acknowledging that he was indebted to the First National Bank for, among other things, the $97,-787.77 note as trustee. In addition he pledged as collateral security 10,500 shares of Berry Petroleum Company capital stock and 140 shares of Magnolia Broadcasting Company capital stock.

20. After Dr. Rushton had parted with the 10,500 shares of Berry Petroleum stock and 140 shares of Magnolia Broadcasting stock, W. A. Eckert, Jr., the bank's attorney, suggested to Dr. Rushton that he should employ his own counsel.

21. From the time Mr. Blewster was dismissed from the bank until Dr. Rushton made his collateral pledge with the bank, all transactions between the bank and Dr. Rushton were handled by T. A. Monroe and W. A. Eckert, Jr., usually together.

CONTROVERTED FACTS

W. C. Blewster on direct examination testified that Dr. Rushton became trustee in the transaction leading up to and involved in this lawsuit because he, as president of First National Bank, asked him to act as trustee; that in attempting to keep Numark going he was trying to prevent First National Bank from having a substantial loss; that this transaction was for the bank's benefit and at his suggestion, and it was not his intention for Dr. Rushton to be personally liable; and that up until this Numark transaction First National Bank had never sustained large losses and everything was going well until the ARA ran out of money and he was forced to resign. Mr. Blewster stated that First National Bank had had other trusteeships to work out situations like this one and they had never been questioned by the bank examiners.

Dr. Rushton testified that when it became apparent that Odyssey was not going to make a go of the trailer business, he told the board of directors that the best thing to do was to shut it down and let it fold up. Mr. Blewster then suggested that Mr. Drew, manager of Odyssey, take a look at the Magnolia Wood Products property and see if business could be continued with a merger of the two companies. The bank had taken a loss in both companies and Mr. Blewster did not want to see that happen. At Mr. Blewster's suggestion, Mr. Drew decided that perhaps he could put the two companies together, go into wood products manufacturing and pull the situation out of the fire. Dr. Rushton stated that he could not attend the meeting after the merger because of surgery, and that when he called Mr. Blewster to see what they had decided, he found that they had elected him president. He reluctantly accepted the office at Mr. Blewster's request. Mr. Blewster told him that through Hamilton Moses they were going to arrange an ARA loan; that Mr. Blewster wanted him to act as trustee to make loans to this new company so the bank could get

its money back from the ARA loan. Dr. Rushton stated that his position as trustee was explained at a meeting of the bank's board of directors; that the bank had asked him to act as trustee for it so the bank could arrange for him to pay off its indebtedness on notes it was about to lose; that this was the same arrangement the bank had used before with Mr. Shanehouse and Mr. Varner and one or two others who had served in the same capacity as had Dr. Rushton; that all the time endeavors were being made to secure an ARA loan and that while he himself had nothing to do with it, he knew it was being done because the bank had helped in filling out the forms.

With respect to the February 25, 1965, collateral pledge (see item 20 above) Dr. Rushton testified.[1]

After Mr. W. C. Blewster had resigned, I put up my stock in Magnolia Broadcasting Company and the rest of the stock I had in Berry Petroleum Company to secure the $97,000 mortgage. I did not receive any money or consideration for the warranty deed to Numark Manufacturing. The reason I put up this security for the trustee mortgage in 1963 was that T. A. Monroe called me to come to the Bank. I went down there and Mr. Eckert told me I was in serious trouble. He said that W. C. Blewster was going to the penitentiary and I might be going with him. He said I had better clear my name at the First National Bank; that I was part of the whole thing. He asked me what I did with the money, and I said I never got any of the money, and he said the money is somewhere and you might be investigated by the Federal Government and you will lose everything you have; your home and clinic and everything, and I thought I was doing the right thing. I followed the advice of the Bank's attorney and put up this security. I was subsequently advised by legal counsel that I

[1]For brevity, we have used appellant's abstract of Dr. Rushton's and Mr. Monroe's testimony on this point.

did not have to do that. I put up my stock in Magnolia Broadcasting Company and about 10,500 shares of Berry Petroleum. This was after the blowup at the Bank. I did not put up any security in 1961 when I signed the Odyssey note. The Magnolia Broadcasting Company stock and the Berry Petroleum stock was typed on that note without my consent, and I did not know it was on there.

I was coerced into putting up the security on the Bank note. Mr. Eckert was acting as my legal advisor while he was acting as legal advisor for the Bank. I was not paying him any fee. We had been close friends for 10 or 15 years and I had no reason not to trust him.

Mr. T. A. Monroe testified:

In some ways, the whole board of directors had been derelict in their duty but in other ways they did not fail because they did not know some of the things that were going on. . . I did not tell Dr. Rushton in the executive meetings between myself, Mr. Eckert and Dr. Rushton that his activities were in violation of federal law and he was in serious trouble. I did not hear Mr. Eckert tell him that. I might have gone out of the meetings or been called out. I don't know. But Mr. Eckert was advising Dr. Rushton on his legal liability . . . We told him if he put up securities it would be his free and voluntary act. . . We merely asked him to secure the loan to prevent him from being embarrassed before the board of directors. We wanted the securities brought in but I don't think we mentioned voluntary. . . It was more just appealing to him to help us get his loan straight. We did not tell him it would be his free and voluntary act.

Later Mr. Monroe testified:

I don't recall saying to Dr. Rushton "what did you do with that money" a number of times. It did come up on one or two occasions. I didn't emphasize. A statement like that might carry its own emphasis. I told Dr. Rush-

ton the FBI was investigating the bank, but if he put up property and securities, it would take the heat off. I don't think Dr. Rushton was threatened to the extent of being intimidated.

"Q. When was the first time you heard Doctor Rushton state to anyone in your presence that he was acting as trustee for the First National Bank of Magnolia, in taking this Numark property?

A. That was in our first meeting with him.

Q. That was in your first meeting with Doctor Rushton?

A. Yes sir.

Q. When Mr. Laney asked you this question on direct examination, every time he asked you this question you answered 'no.' You had heard him tell other people in your presence that he was acting as trustee for the bank, had you not?

A. Yes sir, but not in a Board Meeting. Mr. Laney asked me if I had heard him say that in a Board Meeting.

Q. Then all of your answers of 'no' pertained only to Board Meetings, Mr. Monroe?

A. Yes sir.

Q. Mr. Laney told you that he was going to ask those questions and would put in the word 'Board Meetings'?

A. Yes, but I knew he would have to ask that."

Following Mr. Monroe's testimony, W. A. Eckert was called as a witness to testify for defendant. At the

time he was called, counsel for Dr. Rushton made the following objection:

> "I want to object to Mr. Eckert testifying. He has sat here during the entire testimony and we asked for the rule on the witnesses and he did not leave the Courtroom, Your Honor."

The court overruled this objection and thereupon Mr. Eckert testified that he was at several conferences with Dr. Rushton over a period of time from December 1964 to February 1965 and the first time he ever heard about Dr. Rushton claiming he had been authorized to act as agent or trustee for the bank was when the complaint was filed in the instant suit; and that no one had ever coerced anyone in his presence in connection with the Dr. Rushton affairs. Mr. Eckert stated that he had regularly attended the bank's board meetings and had never heard any discussion at any of them that the bank had agreed to hold Dr. Rushton harmless in connection with his endorsement of papers or notes for Numark.

Following direct examination of Mr. Eckert, counsel for Dr. Rushton refused to cross-examine him and made the following motion:

> "Your Honor, we ask that the testimony of this witness be stricken from the record. By his own testimony, he has admitted that he is Counsel for the bank and, therefore, he is ineligible to testify. He was a known witness and he was allowed to remain in the Courtroom. Mr. Rogers was announced to be the representative of the defendant bank, Your Honor, not Mr. Eckert."

Appellant's argument with reference to the rule is as follows:

> "At the beginning of this case the plaintiff asked 'the rule' on the witnesses. The defendant announced that the president of the bank, Mr. Rogers, would be the representative of the defendant cor-

poration who was permitted to remain in the court room. Counsel for Dr. Rushton pointed out that Mr. W. A. Eckert was sitting at the counsel's table and that Mr. Eckert had participated in a number of these transactions and would undoubtedly be called as a witness. Counsel for the bank announced that Mr. Eckert would participate as an attorney and would not be called as a witness."

* * *

"We recognize that the trial court has a great deal of discretion in applying the rule but that discretion is not without limitation. When it is called to the attention of the Court and counsel that an obvious witness is in the courtroom and specific objection is made to that witness, it is an abuse of discretion for the trial court to permit that witness to participate in the trial of the case and then take the witness stand and testify."

Appellee in its argument states the matter as follows:

"It is true this case was conducted under 'the rule.' This did not exclude Mr. Eckert who was an attorney of record for the Appellee. He had every right to be present and it was his duty to be there having been the bank's attorney through all the years during which the involved transactions occurred. The actual trial of the case was conducted by other counsel.

"As we see it the only question which could possibly be involved is whether Mr. Eckert's testifying was proper under Canon 19 of the Canons of Professional Ethics. This Canon reads:

'When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like he should leave the trial of the case to other counsel. Except

when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.'

"In the opinion of bank's counsel conducting the trial it was 'essential to the ends of justice' that Mr. Eckert testify and he was called as a witness. If trial counsel was in error in his appraisal of what was 'essential to the ends of justice' then he is subject to criticism but we fail to see anything else involved."

CONCLUSION

The participation of counsel and his partners in a case in which one of them is a witness is dealt with at length in Formal Opinion 220 of the American Bar Association's "Opinions of the Committee on Professional Ethics."[2] As there pointed out, it puts counsel in the position of both advocate and witness, one of which requires the lawyer to be partisan and the other of which requires him to be factual. It thus robs the trial of that appearance of fairness which should characterize every court hearing. *Morgan* v. *Roberts,* 38 Ill. 65 (1865); *Gajewski* v. *United States,* 321 F. 2d 261 (1963).

Ark. Stat. Ann. § 28-702 (Repl. 1962) provides, "If either party requires it, the judge may exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of the other witness." In construing this statute, *Arkansas Motor Coaches, Ltd.* v. *Williams,* 196 Ark. 48, 116 S. W. 2d 585 (1938) and *Oakes* v. *State,* 135 Ark. 221, 205 S. W. 305 (1918), we have consistently held that it is within the discretion of the trial court to permit a lawyer to testify in a case even though the rule has been invoked. The above cases, however, do not show the situation that developed in this case. Here the record conclusively establishes that Mr. Eckert was one of only

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[2]Formal Opinion 220 is attached hereto as an addendum.

three key witnesses in this lawsuit from the beginning. Nor can we agree with appellee that it became necessary to the ends of justice during the trial for Mr. Eckert to testify. Rather, it appears that the bank took a calculated risk that Dr. Rushton could not make out a case.

Upon both grounds we hold that the trial court abused its discretion in permitting Mr. Eckert to testify, for Dr. Rushton's whole lawsuit depended upon the credibility of the testimony of Dr. Rushton, T. A. Monroe and W. A. Eckert during the meetings held from December to February.

Usually chancery cases such as this are tried de novo in this court but in such instances we have the benefit of a complete record. Here it is obvious that the bank would like to have the testimony of Mr. Eckert. Furthermore, according to Dr. Rushton's reply brief, he would like to have the opportunity to show that the bank has taken Dr. Rushton's position in a lawsuit against U. S. Fidelity & Guaranty Company in the U. S. District Court for the Eastern District of Arkansas, Western Division. Thus we find that we are in much the same position as that involved in *Cline* v. *Miller,* 239 Ark. 104, 387 S. W. 2d 609 (1965). Therefore, we are reversing and remanding the case for a complete new trial unprejudiced by any findings heretofore made.

Reversed and remanded.

ADDENDUM
FORMAL OPINION 220

(July 12, 1941)

CANONS INTERPRETED: PROFESSIONAL ETHICS 6, 19

The opinion of the committee was stated by Mr. Drinker, Messrs. Miller, Phillips, Brown, and Jackson concurring, Mr. Houghton and Mr. Brand dissent.

A former member of this Committee has questioned the soundness of certain generalizations in our *Opinions* 33, 50, and 185 relating to the conduct by a lawyer of litigation in which one of his partners has been or may be a material witness, and has propounded to us the following specific questions:

A member of a law firm has represented a decedent in connection with a gift subject to federal gift tax, having drawn all the papers, calculated and paid the tax, and given an opinion to his client that the gift was proper and not made in contemplation of death. The lawyer also represented the decedent in connection with the drafting of his Will, and was expected by the decedent to represent his estate, which the Executor and the family of the decedent also desired.

After the client's death, the attorney and his firm are retained to represent the estate. Subsequently, claim is made by the Federal Government that the gift was made in contemplation of death, and a tax is assessed. The attorney who represented the decedent is a necessary witness to defend the gift.

Is it unethical for his partner to continue to represent the estate in opposing the claim of the Federal Government?

In cases involving the question as to whether one member of a firm may represent a client in a case where his partner is a necessary witness, should a distinction be drawn between:

(a) Cases where the lawyer must take a position *adverse* to that supported by his partner as a witness, and cases where the lawyer supports his partner's testimony?

(b) Cases in which the partner is required to testify in connection with matters concerning his *professional* duties, as distinguished from cases involving testimony relative to other matters?

Is not the problem involving participation by a lawyer in litigation where his partner is a necessary witness, one which should not be covered by a general rule of ethics, but by a more flexible provision such as would involve the addition to Canon 19 of the following paragraph?

"It is improper for an attorney to act as counsel in a matter as to which he or his partner has testified or will be required to testify, except by special permission of the tribunal in which he is to appear as counsel."

Canon 19 provides as follows:

"When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

In *Opinion* 33 we held that where a law firm had represented an imbecile in procuring relief for her by reason of her imbecility, it was unethical for any member of the firm subsequently to accept employment involving the assertion that she was not an imbecile. We there said that

> The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment, that any one member of the firm is prohibited from taking.

In *Opinion* 50, without stating the facts of the case before us, we referred to Court decisions condemning generally, as a breach of the rules of professional conduct, the acceptance of employment by a lawyer who knows that he will be a material witness for his client, or his testifying, where already employed, "except in those rare cases where, from some unforeseen event occurring in the progress of a trial, his testimony becomes indispensable to prevent an injustice."

We further said that, even though his zeal as a lawyer might not influence his testimony as a witness, the public might suspect that it would,—a situation which the lawyer should avoid. After referring to the principle of *Opinion* 33 that a lawyer is precluded from accepting or continuing in a case in which any of his partners could not properly be employed, we stated broadly that a lawyer may not properly accept a case in which he has reason to believe that he or any of his partners will be a material witness and must ordinarily withdraw if and when, in the course of the proceedings, such becomes apparent.

In *Opinion* 185 we held, referring to *Opinions* 33 and 50, that it was improper for a lawyer to accept employment in a case where it would be his duty to attack the essential testimony to be given by his partner on behalf of the other side.

On February 10, 1941, the Committee on Professional Guidance of the Philadelphia Bar Association rendered an opinion on facts substantially similar to those involved in the case now submitted to this Committee. The Philadelphia Committee discussed our *Canon* 19 and our *Opinions* 33, 50, and 185. While expressing high regard for our Opinions, the Philadelphia Committee declined to follow the statements in *Opinion* 50 whereby a lawyer is broadly precluded from accepting or continuing employment in a case in which his partner has been or will be a material witness. The Philadelphia Committee agrees with the conclusions in our *Opinions* 33 and 185 that a lawyer may not assume or continue a position adverse to that for which his partner has been or will be a witness, and agrees that a lawyer should not himself conduct a litigation in which he himself must be a witness, unless the ends of justice clearly require it. The Philadelphia Committee constructs *Canon* 19 as not, on its face, precluding the "other counsel" from being a member of the partnership with which the witness is affiliated. It holds, however,

> We are unable to agree with the reasoning which attaches any impropriety to the participation of a lawyer as a witness and his partner as trial counsel in a matter where the partners have represented the client from the outset and where they are not engaged upon opposing or conflicting sides of the controversy.
>
> This committee is also of the opinion that the opposing counsel and trial judge should be advised as to the status of the partner as a witness.

The Philadelphia Committee further holds that, in cases in which a partner appears as a witness, it would be improper for the lawyer to conduct the case for a contingent fee.

With the decisions in *Opinions* 33 and 185, where the lawyer would have been required to attack his own testimony or that of his partner, we are still in entire accord. To accept or continue such employment would necessarily place the lawyer in the inconsistent position condemned by *Canon* 6.

We are also in accord with the position that where a lawyer will necessarily be a material witness as to matters not relating to his professional duties, he should not, in the first instance, accept employment in the case.

The Committee as at present constituted is of opinion, however, that a distinction may often properly be drawn in cases where a partner's testimony relates to matters occurring in the course of his professional duties, and also in cases where the lawyer has long and intimate familiarity with the details of the matter in litigation, so that his withdrawal will necessarily deprive his client of knowledge and experience of peculiar and irreplaceable value.

We therefore consider both unwarranted and unwise the broad generalizations in *Opinions* 33, 50 and 185 to

the effect that a lawyer may never properly accept employment where his partner is likely to be a witness and that he must withdraw from a case when such probability develops.

The question frequently arises in connection with cases like that here propounded. In such cases the lawyer for the decedent has prepared all the papers, knew the decedent, and knew exactly why he did what he did. His firm, however, naturally represents the decedent's estate, which properly relies on them to sustain the gift. By reason of their knowledge of the decedent's affairs they are peculiarly qualified to do so, and unless they can do so the estate will be deprived of their valuable services.

In such cases there does not appear to be any impropriety in the lawyer who drew the papers and knew the testator testifying to the facts surrounding the execution of the deed of gift, and in his partner representing the estate to sustain it. The possibility of the witness moulding his testimony in order to secure a higher fee for his firm is more than balanced by the injustice to the client of depriving the latter either of a necessary witness or of a specially qualified lawyer. The possible interest of the witness would merely affect his credibility. While it is true that such a situation might require the lawyer for the estate to argue the veracity of his partner, this would be equally the case where the witness was his friend or his near relation. Actually, if the partner of the witness withdrew from the case and asked one of his colleagues at the bar to take his place, the latter would be not less assiduous in standing up for the witness' reputation as would the latter's partner.

We do not construe the words "other counsel" in *Canon* 19 as necessarily excluding a partner of the lawyer who must become a witness.

In our opinion, therefore, it cannot properly be said in every case that a lawyer may not properly appear in

a case where his partner could not; but that each case should depend on its own facts.

Like many other problems arising in the course of professional employment, this involves questions of good taste as well as of ethics, its solution depending largely on the surrounding circumstances, in the light of which each case must be resolved, within the limits above outlined, by the lawyer, with, of course, full disclosure to opposing counsel and to the tribunal.

MR. HOUGHTON, dissenting:

From certain statements and conclusions in the opinion of the majority of the committee, I respectfully dissent.

I do not agree that the criticized statements contained in *Opinions* 33, 50, and 185 relating to the conducting of litigation by a lawyer in which one of his partners has been or may be a material witness, are wrong or should be departed from. Neither do I agree that it is proper for one partner to be a witness and another the advocate in a trial even in cases where the lawyer acting as a witness has long and detailed familiarity with the details of the matter in litigation, so that his withdrawal may necessarily deprive his client of knowledge and experience of irreplaceable value.

I am firmly of the opinion that no lawyer should be both witness and advocate, excepting under those circumstances recognized or permitted by existing Canons, and I am further of the opinion that the existing Canons should not be amended to justify the conclusion reached by the majority opinion.

If we start with the premise that it is improper for a lawyer to be both a witness and an advocate in a contested case, then it is my firm opinion that his law partner should likewise be barred from so doing. The functions of a witness and an advocate should not be carried

out by the same person. The function of a witness is to tell the facts as he recalls them in answer to questions. The function of an advocate is that of a partisan.

Canon 19 provides in effect that, except as to formal matters, when a lawyer is a witness for his client, he should leave the trial of the case for other counsel. This Canon has been construed in committee *Opinions* 33, 50, and 185, to prohibit one partner from acting as a witness and another partner as an advocate in a contested case. The Canon itself is merely a crystallization of recognized views of the bar prevailing for many years.

In the case of *Roys* v. *First National Bank*, 183 Wis. 10, where the court had under consideration the matter of the propriety of an attorney in a case appearing as a witness to contested facts, the court called attention to *Canon* 19 and stated:

> This rule is not to be allowed simply because the American Bar Association has adopted it, but with better reason because it states ethical considerations that must appeal to every lawyer as sound. A lawyer has a retainer—as a witness he is not entitled to such. He will find it hard to disassociate his relation to his client as a lawyer and his relation to the party as a witness. This case bears witness of that fact.

The soundness of the Canon is evidenced by many opinions of various courts. Lord Campbell, in his Lives of the Chancellors, in relating the fact that the solicitor general who was conducting the prosecution against Sir Thomas More, offered himself as a witness for the Crown, said that he did it to his eternal disgrace, and to the eternal disgrace of the court which permitted such an outrage on decency. *Stones* v. *Byron,* 4 Dowl. & L. 393, Note.

In the case of *Alger* v. *Merritt,* 16 Iowa 121, the Iowa court held that no attorney having a just concep-

tion of his true and proper position will willingly unite the character of counsel and witness in the same case, stating in effect that experience has shown that those who, on repeated occasions, allow themselves to be thus used, are certain to feel most keenly the consequences of their indiscretion, and that such testimony might even be excluded, not because the source of proof is regarded as unreliable, but because public policy and the integrity and welfare of the profession dictate that no one should be at the same time both advocate and witness for his client.

In the case of *Grindle* v. *Grindle*, 240 Ill. 143, 88 N. E. 473, the court condemned the conduct of an attorney who had assumed the double burden of acting as solicitor in a case and furnishing the evidence necessary to success.

In an early Pennsylvania case, *Frear* v. *Drinker*, 8 Pa. 520, the court said it was a highly indecent practice for an attorney to examine witnesses, address a jury and give evidence to contradict the witnesses.

Many courts have held that it is the duty of an attorney to withdraw from the case as soon as he learns that there is a necessity for him to be a witness therein.

I believe that it is the unanimous opinion of the Bar and courts passing on this question that it is improper for an attorney to be both witness and counsel in a contested case.

Is the practice to be condemned any less because a partner of the attorney witness is the advocate in the case?

In *Opinion* 33, rendered March 2, 1931, it is stated:

> . . . The relations of partners in a law firm are so close that the firm, and all the members thereof, are barred from accepting any employment, that

> any one member of the firm is prohibited from taking.

The reason for the ruling was because of the close relationships of the partners in a law firm.

In *Opinion* 50, rendered December 14, 1931, it is stated:

> . . . As the lawyer cannot properly accept employment in any matter in which he knows he will be a material witness for the party seeking to employ him, his partner cannot properly accept employment from that party. Likewise, anything which requires a lawyer to withdraw from a case requires that his partners withdraw.

It is my opinion that the functions of a witness and an advocate should not be carried out by the same party, nor by different members of the same firm. A law partnership is in reality an entity. The members are bound by a partnership agreement. Any act of the one binds the partnership. I believe that the same reasons that bar one member of a firm from acting as a witness and counsel in the same case apply to all the partners as well. The witness, being a member of the firm, shares in the monetary rewards of his partners who are the advocates, and he, being a member of the firm, is lawyer and advocate. On the other hand, if one of the partners is a witness, the same firm is acting in dual capacity of witness and advocate.

The majority opinion attempts to justify such conduct in case a judge permits it.

This to my mind does not in any way affect the propriety of the act of counsel.

I do not believe the practice is made proper by consent or permission of the trial judge. The function of the judge should be limited to passing on whether the

circumstances of the particular case bring it within the exceptions of the Canons.

It may be, as pointed out in the majority opinion, that it might be desirable from a standpoint of the successful conduct of the case that one member of the firm act as witness and another as the advocate in cases where the partners have represented the client from the outset and have knowledge and experience gained from the relationship of attorney and client. These facts, in my opinion, do not alter or affect in any degree the reasons for the prohibitions of the Canon. The partners must elect whether they are to be in the case as witnesses or as advocates. Election really should be reserved for the client. If he elects to have his attorney act as his witness, he gets the full benefit of the attorney's knowledge of the facts. I do not believe that the client would suffer any hardship in most cases, because he is required to obtain a new advocate. In any event, the proper administration of justice should not be affected by the zeal of an advocate or his partner who insists on having the members of one firm act in the repugnant capacity of witness and advocate.

For the foregoing reasons, I respectfully dissent.

MR. BRAND, dissenting:

The sole question involved is whether a partner of a lawyer-witness is included in the words "other counsel" appearing in *Canon* 19.

It is clearly the intent of the Canon that the lawyer who must become a material witness for a client should not conduct the trial. The justification for this important rule of professional conduct applies with equal force to a partner of the lawyer-witness.

The statement in *Opinion* 33 that

> The relations of partners in a law firm are so close that the firm, and all the members thereof, are

> barred from accepting any employment, that any one member of the firm is prohibited from taking.

is sound.

CITY OF LITTLE ROCK ET AL *v.* SUNRAY DX OIL COMPANY

5-4238 425 S. W. 2d 722

Opinion delivered April 1, 1968

Perry V. Whitmore, A. F. House, Lester & Shults, and *Rose, Meek, House, Barron, Nash & Williamson,* for appellant.

Darrell Dover and *House, Holmes & Jewell,* for appellee.

G. DAVID WALKER, Special Justice. The issue in this case is the correct zoning classification of property situated at the Northeast Corner of the intersection of

Kavanaugh and Oak Streets in Little Rock which was formerly the homestead of two prominent Little Rock citizens, the late Mr. & Mrs. J. F. Loughborough. Appellants contend that the property is properly classified as "D", Apartment, and appellee contends that the proper designation is "F", Commercial.

At the outset it should be pointed out that this is not a rezoning case. All parties acknowledge that the original zoning of the property in question has not been legally changed. The question for determination is how the property was originally zoned.

The difficulty arises out of the manner in which the various classifications were depicted upon the "District Map" which was adopted in the original Zoning Ordinance of the City of Little Rock in 1937. The respective classifications were established only by being shown on this map in different colors, which were apparently placed on the map with an ordinary crayon. It would appear that the best judgment was not used in choosing the contrasting colors because, to some eyes at least, there appears to be a minimum of difference between the shadings of the different classifications. The passage of time has rendered this difference more difficult to distinguish.

On June 19, 1937, the original Zoning Ordinance of the City of Little Rock was published in the Arkansas Gazette together with a reproduction of the District Map. Since the colors could not be reproduced in the newspaper print, the zoning classifications were shown by cross hatching or different slantings of lines on the published map. On this published map the zoning of the property in question was shown as "D", Apartment District.

In 1950 the City of Little Rock adopted Ordinance 8489 which recited:

"Whereas, the original Zoning Map of the City of Little Rock has become worn and unusable, and

"Whereas, the City has purchased three copies of the Bagley map of the City of Little Rock upon which the zoning of all property has been designated, which zoning has been verified by the Planning Commission,

* * * "The three copies of the Bagley map now owned by the City of Little Rock and upon which has been transcribed the present zoning of all property and land within the City of Little Rock are hereby approved and adopted as the official Zoning Map of the City."

The Bagley map so adopted consists of two books in which various tracts or portions of the City are shown as separate sheets which can be removed or redrawn as zoning changes take place. The Bagley map showed the property in question as "F", Commercial District.

In 1964 this property was placed upon the market and the appellee, Sunray DX Oil Company, became interested in purchasing it as a filling station site. It inquired of Mr. Henry M. DeNoble, Director of the Department of Community Development of the City of Little Rock, which is the department in charge of zoning matters, as to the correct classification of the property and on August 24, 1964, Mr. DeNoble wrote a letter to appellee advising that the property was zoned "F", Commercial District. After receipt of this letter appellee immediately consummated purchase of the property.

Shortly thereafter appellee applied for a building permit to commence construction of the proposed filling station. This application was denied on the sole ground that the property was zoned "D", Apartment District, and use for filling station was prohibited. It is stipulated that the application for building permit was

otherwise proper and the permit should have been issued if the property was classified "F", Commercial District, being a proper use under that classification.

It appears that after his letter of August 24, 1964, Mr. DeNoble made some investigation of the matter and decided that the Bagley map was incorrect and thereupon undertook to revise the map to set forth his determination. This was done after appellee's purchase and apparently without any knowledge of or notice to appellee. In oral argument it was admitted that Mr. DeNoble had authority to make such changes only in the event of action by the zoning authority and that his attempted revision of the map was unauthorized.

When the building permit was refused, appellee instituted the present suit praying a mandatory injunction directing the City and its agents to issue the building permit and restraining the City and its agents from interfering with appellee's use for the property for the construction and maintenance of a filling station. Numerous property owners with residences in the vicinity of the property intervened in opposition to appellee's petition. The Chancellor ruled in favor of appellee and issued the injunction as prayed. This appeal followed.

The Bagley map was never filed with the recorder of Pulaski County nor was there ever any notice or hearing of any change in the original classification of the property. These matters are immaterial, however, because appellee does not contend that the Ordinance of 1950 adopting the Bagley map was a change in the original zoning of the property. It is appellee's contention that the property was always zoned "F", Commercial and that the Bagley map and the Ordinance adopting it are merely a verification of that fact.

It is fundamental that the Chancellor's findings will not be set aside on appeal unless against the preponderance of the evidence, and it is incumbent upon ap-

pellants to establish that the findings of the lower Court were erroneous. *High* v. *Bailey,* 203 Ark. 461, 157 S. W. 2d 203; *Woods* v. *Spann,* 190 Ark. 1085, 82 S. W. 2d 850 and cases there cited. We are not convinced that the Chancellor's findings were erroneous.

Appellants first argue that an inspection of the original District Map will reveal that the color designation of the Loughborough property corresponds with that of "D", Apartment District. It may be observed that acuity of color vision is not one of the constitutional or statutory qualifications for a Supreme Court Justice. However, even among those members of the Court who profess accurate color perception there is a difference of opinion as to the interpretation of the faded colors of the original District Map. It might well be argued that in such a case we should not substitute our color vision for that of the Chancellor.

Moreover, even if the colors presently are apparently those designated for "D", Apartment, it does not follow that they were always such. A witness, Arthur Mills, a real estate man who was an Alderman in the City of Little Rock at the time of the passage of the Ordinance adopting the Bagley map as the official zoning map and who had served on the Planning Commission, testified that at the time the Bagley maps were adopted in 1950 he was familiar with the property in question and knew that it was designated "F", Commercial, both on the original District Map and on the Bagley map. He had a business interest in the vicinity which impressed the matter on him. He was not contradicted or impeached.

The Bagley map, adopted by an Ordinance which recites that the zoning therein reflected had been verified by the Planning Commission, is most persuasive that this was the classification set forth in the original Ordinance. In the view which we take of this case, it is not necessary to pass upon the argument advanced by

appellee on this point to the effect that the findings so made are conclusive upon the Court but, to say the least, such findings are presumptively correct and highly persuasive on the Court. See 37 Am. Jur., *Municipal Corporations,* Section 177, p. 812. The Ordinance of 1950 contained a finding that the original Ordinance, then thirteen years old, "has become worn and unusable" and further that the Bagley map "zoning has been verified by the Planning Commission". It would not seem that the original map has become any more reliable in the seventeen years which have passed since it was found to be worn and unusable. Fortunately the Bagley map was prepared in such manner that the classification would not fade.

Appellants argue the map published in the Arkansas Gazette at the time of the adoption of the original Ordinance as evidence that the original map showed this to be "D", Apartment property. In the first place the published map was not the original map but a copy of it and there is no showing by whom or by what authority the copy was made. Obviously there was an error either in this published copy or in the Bagley map. Three copies of the Bagley map were prepared and verified. It should be noted that the Loughborough property involved in this suit is a corner tract and was the only part of the block which was alleged to have been zoned as "F", Commercial, the rest of the block being unquestionably "D", Apartment. It would appear logical that it would be more likely that an error would be made in the preparation of the published map by failing to note the small tract which was classified "F" than in the three Bagley maps, which would have required a conscious addition of a small tract to a block otherwise entirely in the "D" class. To have made such a change on the Bagley maps required a deliberate act, whereas in the preparation of the published map it would have been quite easy to have overlooked the small tract differently classified, particularly in view of the slight differentiation in coloring; hence, we believe it more likely

that the Bagley map was the correct interpretation of the original map.

These views make it unnecessary to consider other points argued in able briefs of counsel.

The Decree of the Court below is correct and is affirmed.

HARRIS, C. J. and JONES, J., dissent.

GEORGE ROSE SMITH, WARD and FOGLEMAN, JJ., not participating.

Special Justices LOUIS RAMSAY and J. S. BROOKS join in this opinion.

BANK OF DARDANELLE, DARDANELLE, ARKANSAS *v.* BIBLER BROTHERS ET AL

5-4537 426 S. W. 2d 152

Opinion delivered April 8, 1968

James K. Young, for appellant.

Laws & Schulze, for appellee.

CARLETON HARRIS, Chief Justice. In May, 1955, Charles Joe Elliott purchased a 32-foot Lufkin semi-trailer in Springfield, Missouri, from Fruehauf. From September 20, 1956, through February 3, 1960, Elliott borrowed money from appellant, Bank of Dardanelle, and executed several chattel mortgages, including, along with other personal property, this trailer as collateral. Elliott died in May, 1960, at which time he was still indebted to the bank. Appellant learned that Bibler Brothers, appellee herein, had possession of the trailer, and made demand for same. However, appellee claimed ownership of the trailer and appellant instituted suit. On trial, the court dismissed the bank's complaint for want of equity and, from the decree so entered, comes this appeal.

The evidence reflects that Elliott had been employed by appellee for a long number of years, and that, at the time the trailer was purchased, Bibler Brothers furnished the money in the amount of $420.00 to enable Elliott to make the down payment. Title remained in Fruehauf until August 5, 1957, at which time, title was transferred to Bibler Brothers by Elliott. Testimony on behalf of appellee was to the effect that the title transfer was made to secure debts owed appellee by Elliott, monies having been paid to him, or on his behalf, over a period of several years. According to the evidence, Elliott was still, at the time of his death, indebted to Bibler Brothers in excess of $3,000.00 (and the Chancellor so found). Further testimony was offered that appellee had no knowledge of the bank's claim until after Elliott's death.

As earlier stated, Elliott gave a chattel mortgage to the bank (including this trailer) on September 20, 1956, and five subsequent chattel mortgages likewise included the trailer. Mr. Robert Holland, cashier of the bank, testified that Elliott was indebted to the institu-

tion in the amount of $2,920.00 at the time of his death, and Holland stated that he specifically remembered that part of the money lent to Elliott was to enable the latter to pay off the indebtedness on the trailer. Holland said that the mortgages were filed in the office of the Pope County Circuit Clerk, but no copies were filed with the Motor Vehicle Division of the State Revenue Department. He also stated that he was aware of the fact that Bibler Brothers held title to the trailer, this information being shown on the pink slip submitted by Elliott (in order that the bank might obtain the serial number of the trailer). Holland testified that the reason given by Elliott for the title being in Bibler Brothers was that this was necessary in order to comply with I.C.C. regulations. The witness said that he "checked with another lumber man who hauls to various states," to verify the procedure. Holland did not seek to ascertain from Bibler Brothers the reason for the trailer being in the name of appellee.

The failure to comply with Ark. Stat. Ann. § 75-160 (Supp. 1967) and § 75-161 (Repl. 1957) is controlling in this litigation. Provisions are as follows:

"(a) No conditional sale contract, conditional lease, chattel mortgage, or other lien or encumbrance or title retention instrument upon a registered vehicle, other than a lien dependent upon possession, is valid as against the creditors of an owner acquiring a lien by levy or attachment or subsequent purchasers or encumbrances with or without notice until the requirements of this article [§§ 75-160, 75-161] have been complied with.

"(b) There shall be deposited with the department [Revenue Department] a copy of the instrument creating and evidencing such lien or encumbrance, which instrument is executed in the manner required by the laws of this State with an attached or indorsed certificate of a notary public stating that the same is a true

and correct copy of the original and accompanied by the certificate of title last issued for such vehicle."

* * *

"(a) Such filing and the issuance of a new certificate of title as provided in this article [§§ 75-160, 75-161] shall constitute constructive notice of all liens and encumbrances against the vehicle described therein to creditors of the owners, to subsequent purchasers and encumbrancers except such liens as may be authorized by law dependent upon possession. * * *

"(b) The method provided in this article [§§ 75-160, 75-161] of giving constructive notice of a lien or encumbrance upon a registered vehicle shall be exclusive except as to liens dependent upon possession and any said lien or encumbrance or title retention instrument filed as herein provided and any documents evidencing the same are hereby exempted from the provisions of law which otherwise require or relate to the recording or filing of instruments creating or evidencing title retention or other liens or encumbrances upon vehicles of a type subject to registration hereunder."

In *West, Sheriff* v. *General Contract Purchase Corporation,* 221 Ark. 33, 252 S. W. 2d 405, we pointed out that this statutory method of giving notice is exclusive, and we mentioned that there was no longer any necessity for the documents to be recorded. This holding was reiterated in *Francis* v. *Thomas,* 232 Ark. 547, 338 S. W. 2d 933.

While the mortgage was good, as between the parties (Elliott and the bank), *Anderson* v. *First Jacksonville Bank,* 243 Ark. 977, 423 S. W. 2d 273, there was no notice of the encumbrance to third parties. The fact that appellant filed these mortgages with the Circuit Clerk is of no benefit whatsoever to the bank. Under the statutes, and our cases, herein cited, no notice was given to Bibler that appellant had any sort of claim on the trailer.

Appellant argues that the evidence was insufficient to sustain the Chancellor's holding that Elliott was indebted to Bibler Brothers. While the proof, in many instances, is not bolstered by documentary evidence, we think it entirely sufficient to justify the Chancellor in reaching his conclusions.

It is several times mentioned by appellant that the title to the Lufkin trailer was placed in Bibler Brothers simply because of I.C.C. regulations. However, we are never advised as to the regulations allegedly involved, nor is there any evidence that this was the reason, other than Mr. Holland's statement that Elliott so told him.

Other matters are argued, but we do not consider them pertinent to a decision in this case.

Affirmed.

W. R. TALLEY *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC.

5-4544 426 S. W. 2d 164

Opinion delivered April 8, 1968

Spears & Sloan, for appellant.

Harper, Young, Durden & Smith, for appellee.

GEORGE ROSE SMITH, Justice. This is an action brought by the appellant, W. R. Talley, for personal injuries and property damage sustained in a highway collision involving four vehicles, all headed north. At the close of Talley's proof the court directed a verdict in favor of the appellee, Arkansas-Best Freight System, Inc. For reversal Talley contends that his proof raised questions of fact for the jury.

Talley has brought up only his own testimony and that of a State police officer who reached the scene about ten minutes after the accident happened. As the officer's testimony added nothing of significance to Talley's own account, our statement of the facts is taken from Talley's version of the occurrence.

The accident happened at about 11:30 p.m. on a two-lane one-way overpass that is part of Interstate Highway 55 in Crittenden county. Basically, the accident was caused by the negligence of Charlie Sims, who had stopped his car in the righthand lane of traffic on the overpass, with his lights turned off.

The Arkansas-Best Freight truck, with Talley behind it, was approaching the overpass from the south, in the righthand lane, at about 50 or 55 miles an hour. The speed limit was 70. Talley, preparing to pass, pulled over into the lefthand lane and was trailing the truck in that position when the two vehicles entered the overpass.

After the truck passed the crest of the rise its headlights came downward and revealed the stationary Sims car. The truckdriver swerved to his left and succeeded in merely scraping the left rear part of the Sims car as he went past it. The truckdriver at once started to return to the righthand lane, but when he came to a stop his truck was still angling across the center line of the overpass, leaving the lefthand lane partly blocked.

Talley, too, had seen the Sims car when it appeared in the truck's headlights. He at once hit his brakes and succeeded in bringing his car to a stop about ten feet behind the ABF truck, without there having been any contact between the two. A few seconds later a fourth vehicle, also coming from the south, skidded into the rear end of Talley's car and knocked it against the ABF truck and the lefthand side of the overpass, causing the injuries to Talley and his car.

Talley charges the ABF driver with negligence in three particulars, but each charge may be answered in a few words.

First, Talley asserts that the truckdriver was traveling at an excessive speed. There are two flaws in this contention. One, there is no proof that the truckdriver's speed was excessive. Two, there was no causal connection between the speed of the vehicles and the ensuing collision between Talley's car and the fourth vehicle involved in the accident.

Secondly, Tally asserts that the ABF driver changed lanes without signaling his intention to do so. Even so, that omission was not the proximate cause of Talley's injuries. In fact, Talley testified that if the driver had given a lane-changing signal, "I would still have hit my brakes just as I did." He went on to say that in his opinion the truckdriver did all he could to avoid the accident.

Thirdly, Talley asserts that the truckdriver was negligent in stopping his truck in such a manner as to obstruct the highway. The trouble is that Talley's complaint contained no such allegation of negligence, nor was there any request that the pleadings be amended to conform to the proof. Thus that issue was not before the

court when it granted ABF's motion for a directed verdict.

Affirmed.

FOGLEMAN, J., disqualified.

BYRD, J., concurs.

J. ERNIE GASKIN *v.* STATE OF ARKANSAS

5301 426 S. W. 2d 407

Opinion delivered April 8, 1968

Harold Hall, for appellant.

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

GEORGE ROSE SMITH, Justice. Fourteen separate in-

formations were filed against the appellant, J. Ernie Gaskin, charging that he had violated § 7 of the Arkansas Securities Act, Ark. Stat. Ann. § 67-1241 (Repl. 1966), by selling Americana Motor Inns corporate stock to certain residents of Lee county with knowledge that the securities had not been registered as required by the Act. Upon trial the jury found Gaskin guilty of every offense charged and fixed his punishment for each offense at a fine of $1,000 and imprisonment for one year. This appeal is from a judgment entered on the verdict.

We need not detail the State's proof. Gaskin was the president of a company that was a registered dealer in securities. He did not deny that his salesmen had made the asserted sales of Americana stock to the purchasers who testified for the State. His defense was that the stock did not have to be registered, because he had obtained an exemption under § 14 (b) (9) of the Act, which exempts (upon certain conditions) "any transaction pursuant to an offer directed by the offeror to not more than twenty-five (25) persons." Ark. Stat. Ann. § 67-1248 (b) (9). That subsection goes on to provide that the Securities Commissioner may by rule or order further condition the exemption.

The State, in presenting its case in chief, attempted to anticipate and rebut Gaskin's expected defense by proving that he had not complied with the Commissioner's rules governing what we may call the 25-offerees exemption. The Commissioner, called as a witness for the State, testified that his department had adopted a rule requiring an applicant for that particular exemption to file a list of the names of the 25 proposed offerees "so we will know who they are." It was then shown that the names of the fourteen purchasers referred to in the informations against Gaskin were not included in the list of 25 names that Gaskin had filed in obtaining the exemption for Americana corporate stock.

Upon that proof the State contended below, and contends here, that Gaskin was guilty as charged.

We cannot sustain that argument. Section 21 (a) of the Act (§ 67-1255 [a]) provides that a violation of the *statute* is a felony punishable by a fine of not more than $5,000 or by imprisonment for not more than three years, or by both. By contrast, § 21 (b) (§ 67-1255 [b]) provides that a violation of any authorized *rule or order* of the Commissioner is a misdemeanor punishable by a fine of not more than $500 or by imprisonment for not more than six months, or by both.

Gaskin was charged and convicted under the felony provisions of the Act, but the proof does not support the conviction. The statute, being penal, must be construed strictly. It simply provides an exemption with respect to an offer of securities directed to not more than 25 persons (with other conditions not now relevant). It is plain enough that the statute, when read without reference to the Commissioner's implementing rule, was not violated by the sale of Americana stock to only fourteen persons.

Under our practice, when the evidence does not support the jury's verdict of guilty with respect to the offense charged, but does support a finding of guilty with respect to a lesser included offense, we may reduce the judgment accordingly unless the Attorney General elects to take a new trial. *Green* v. *State*, 91 Ark. 562, 121 S. W. 949 (1909). Here, however, even if it can be said that the proof establishes Gaskin's commission of a misdemeanor (or fourteen misdemeanors), that offense is not included within the felony with which he was charged. "To be an included offense, all the elements of the lesser offense must be contained in the greater offense—the greater containing certain elements not contained in the lesser." *Beck* v. *State, Ind.,* 149 N. E. 2d 695 (1958). See also Wharton's Criminal Law, § 33 (12th Ed. 1932); *Moreland* v. *State,* 125 Ark. 24, 188

S. W. 1, L.R.A. 1917A, 140 (1916); *State* v. *Nichols,* 38 Ark. 550 (1882).

The statutory definition of the 25-offerees exemption contains no requirement whatever that a list of names be filed with the Commissioner. That substantive step may well have been a proper implementation of the statute under the Commissioner's rule-making power, but the evidence to establish a violation of the Commissioner's rule must unquestionably encompass an element (the offer of the securities to a person not named on the list) not included within the felony denounced by the statute. Hence we cannot properly reduce the felony convictions to misdemeanors.

The judgment is reversed, and, since the State may be able to prove that the securities were actually offered to more than 25 persons, the cause is remanded for a new trial.

BROWN, J., not participating.

HERSHEL ABBOTT *v.* C. H. LEAVELL & CO. ET AL

5-4493 426 S. W. 2d 166

Opinion delivered April 8, 1968

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

Bridges, Young, Matthews & Davis, for appellees.

PAUL WARD, Justice. This is a Workmen's Compensation case. The Commission adjudged Hershel Abbott (appellant) to have received a 30% permanent disability to his body as a whole. On appeal to circuit court the award was reduced to 20%, hence this appeal. The case arose out of the facts presently mentioned.

On November 4, 1964 appellant suffered a compensable injury while in the employment of C. H. Leavell & Company (appellee). While working with a piece of construction machinery it came in contact with a power line, causing injury to his back and left foot. Appellee paid medical and disability benefits until a hearing was held.

Seeking a reversal of the circuit court, appellant makes only one contention, viz:

> "There is substantial evidence to support the award of the Workmen's Compensation Commission."

It is conceded of course that the word "evidence", as used above, means evidence or testimony which the Commission had a right to consider.

It must also be conceded that, if appellant is correct, the trial court erred in reducing the percentage of disability. In *Arkansas Workmen's Compensation* v. *Sandy,* 217 Ark. 821 (p. 826), 233 S. W. 2d 382, there appears this statement:

> "On the whole case, there is substantial evidence to support the Commission's finding of fact, and the Circuit Court erred in setting aside the order of the Commission."

In the recent case of *Bradley County et al* v. *Samuel Adams*, 243 Ark. 487, 420 S. W. 2d 900, the rule was emphasized in these words:

> "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."

Therefore we now proceed to examine the testimony relative to appellant's disability.

Appellant was employed by appellee for one year and three days before he was injured. His principal duties were to drive a motor crane, grease it, and look after an air compressor. His pay was $2.675 per hour. After being hospitalized and treated he returned to work for two months before the job was finished, and his employment was terminated. Shortly thereafter he found a similar job with the Continental Engineering Co., and is now receiving $2.80 per hour. It is not disputed that appellant received an injury to his back and to the lower part of his left leg and particularly to his left foot, necessitating the amputation of the big toe and the toe next to it. He is now wearing a special shoe on the injured foot.

Five doctors examined appellant, and their testimony was presented to the Commission. Since there is no contention here that appellant is not entitled to an award of 20% and since the sole issue here is whether there is substantial evidence to support the Commis-

sion's award of 30%, we set out only the results of the doctors' findings. One doctor fixed appellant's permanent partial disability at 5%, one at 35% and the others ranged from 10% to 17%.

We first point out that appellee correctly (at page 5 of its brief) agrees that the above percentages fixed by the doctors "were made on the basis of physical impairments only and did not purport to consider claimant's wage loss disability", although they made it clear he should be able to return to gainful employment in his former occupation.

After all the testimony had been presented the Commission made the following findings:

> "The preponderance of the medical evidence is that the claimant's *anatomical* impairment is in the neighborhood of 15 to 18 percent to the body as a whole." (Emphasis supplied.)
>
> "Based upon the entire record, the Commission concludes that claimant's wage earning capacity has, nevertheless, been diminished and that by combining claimant's *anatomical* impairment and his probable loss in *wage earning capacity,* his permanent partial disability to the body as a whole is 30 percent." (Emphasis supplied.)

It is our conclusion that the record contains testimony which the Commission had a right to consider and which constitutes substantial evidence to support its finding of a 30% disability. Portions of that testimony are mentioned and discussed below.

(a) Attention is called to the fact that one doctor evaluated appellant's disability at 35%. Certainly it must be conceded that medical evaluation is not an exact science, with no chance for error. This case demonstrates the verity of that conclusion, since no two doctors agreed

on the percentage. It is also verified by nearly every case of this kind which reaches this Court. Who then, other than the Commission, has the duty of evaluating such testimony, who is in a better position to do so, and on whom do the statutes impose that responsibility? The answer is too obvious for comment. True, the appellate courts have the last say, as a matter of law, what constitutes "substantial" evidence.

(b) This Court has many times held that certain testimony, other than medical, can be considered in this kind of case. See: *Glass* v. *Edens*, 233 Ark. 786, 346 S. W. 2d 685; *Wilson & Co., Inc.* v. *Christman,* 244 Ark. 132, 424 S. W. 2d 863; *Ark. Best Freight* v. *Brooks,* 244 Ark. 191, 424 S. W. 2d 377, and; *Jones Furniture Mfg. Co.* v. *Evans,* 244 Ark. 242, 424 S. W. 2d 880. In the *Glass* case, in construing Ark. Stats. Ann. § 81-1313 (d), (Repl. 1960), we said it ". . . does not mean merely functional disability but includes, in varying degrees in each instance, loss of use of the body to earn substantial wages". In that case we also said it was error to consider only medical evidence, but that the Commission should also consider the claimant's "age, experience, education, and other matters affecting wage loss". The *Wilson* case approved the *Glass* decision, and; there, we also said that the Commission has never been limited to medical evidence only in arriving at permanent partial disability of a claimant, but that it should consider all competent evidence relating to his incapacity to earn the same wages he was receiving at the time of his injury.

Appellee's contentions for an affirmance of the circuit court, as we understand them, are: one, the Commission could consider only the medical testimony; two, the undisputed proof shows appellant was, at the time of the hearing, receiving 12½ cents per hour more than he was receiving before the injury. For reasons previously stated, we find no merit in the first contention, and, for reasons presently stated, we find no merit in the other contention.

Appellee's contention here is largely, if not entirely, based on Ark. Stat. Ann. § 81-1302 (e) (Repl. 1960) which reads:

> " 'Disability' means *incapacity* because of injury to *earn,* in the same or any other employment, the wages which the employee was receiving at the time of the injury." (Emphasis supplied.)

We do not, for two reasons, agree with appellee's interpretation of the above section, as applied to the facts in this case.

(1) Construing the above statute in the light most favorable to appellant, as we must, it is emphasized: because appellant is making as much money now as he did before does not necessarily mean he has the "capacity" to earn that much. There is undisputed evidence from which the Commission could well have found, as it did, that appellant did not have such "capacity". One, before the injury appellant was a "driver" and an "oiler", whereas now he can no longer function as a "driver". Two, his present job is that of an "oiler" but he cannot do that job without assistance from his fellow workers.

There is another feature of this case which appellee apparently would exclude but which we think the Commission had a right to consider. It is the position of appellee that the requirement of the statute is met if appellant is *now* making as much money as he did before without any regard for how long he will be able to do so. We think this is a too narrow construction, and would place a great handicap on a claimant. The testimony shows that he has become exceedingly emotional and is in continuous fear of losing his job. Whereas he was a strong, healthy man before and never showed any emotionality, now he cries almost every day when he reaches home, and, at the least provocation, he often cries on the job.

We think the Commission had a right to consider all this evidence, and that it constitutes substantial evidence.

Reversed.

HARRIS, C. J., disqualified.

BROWN & FOGLEMAN, JJ., concur.

LYLE BROWN, Justice, concurring. I concur with the result of the majority; however, I think important facts were omitted that are vital to an understanding of the case. The claimant suffered a compensable injury on November 4, 1964. The injury occurred when the construction crane the appellant was operating came in contact with a power line and he sustained electrical shock and burns. The claimant worked as an oiler and operator for a year and three days. His duties included driving a crane, greasing, and looking after an air compressor, although most of his experience was as an oiler, rather than as an oiler and operator, the latter being a higher paying job.

Oiling consists of operating a grease gun, checking the oil, keeping the machinery clean, and keeping fuel in it. The testimony as to claimant's incapacity is derived from the claimant and two co-workers. In substance it established the following. As a result of the loss of the big toe and the toe next to it, claimant could no longer walk properly. He sustained a fracture of the back that further impaired his mobility. Finally, his nerves no longer can handle the pressures of more demanding jobs such as operator, thereby reducing his ability to move up to a higher paying position.

As far as the physical work involved in oiling is concerned, it is generally not considered strenuous. However, it requires a great amount of climbing and contortions in order to reach all parts of the machine. Since

the injury the claimant has been unable to perform his tasks without the aid of his fellow workers. The grease used comes in five-gallon cans which he is unable to carry. The operators bring it and set it on the machine for him. He has to keep treads cleared of mud. Most oilers have to shovel it, but because of his back injury he cannot. He uses a hoe and must go down the tracks and push the mud off. When the tracks get real muddy some of his co-workers help clean. Before the accident claimant could climb up the boom, and would grease all the jibs and gantries. The company does not permit him to do that now. The operator does the climbing although it is an oiler's responsibility. The claimant concluded, "And if I didn't have help, I couldn't make it there. Because I couldn't do what they ask the man."

On claimant's first job, after recovering from the injury, he went back to work; "he [foreman] found out that I couldn't do the work and I stayed there two months or something near two months and he laid me off. Because I couldn't keep the track rig clean and go up on the gantry and grease it. I happened to catch . . . an operator out of El Dorado, Kansas, and he didn't want to help do anything but his job and, therefore, I didn't make it." The claimant testified he gets a job by going over to the union hall and the business agent sends him out to a job. "Whether I get the job depends on whether or not I can handle it."

Under Ark. Stat. Ann. § 81-1302(e) (Repl. 1960), " 'Disability' means *incapacity* because of injury to *earn*, in the same or any other employment, the wages which the employee was receiving at the time of the injury." (Emphasis supplied.)

It is admitted that the claimant is earning more than he was when he was injured. Whether that prevents recovery for wage-loss, as distinguished from the medical disability, must be decided.

Three terms used in the statute must be understood.

Those terms are incapacity, earn, and wages. *Wages* is defined by statute. Ark. Stat. Ann. § 81-1302(h) (Repl. 1960). Webster's Second Unabridged Dictionary defines *incapacity* as "Quality or state of being incapable; lack of physical or intellectual power . . ."; it defines *earn* as "To merit or deserve, as by labor or service. . ."

Compensation is paid to those suffering a compensable disability. In order to give the term disability substance and meaning it is keyed to the capacity to earn wages. Larson, *Workmen's Compensation Law,* §§ 57.22 and 57.34 discusses the problem similar to the case at bar. "If the employee, as often happens, returns to his former work for the same employer after his injury, or is offered it, at a wage at least as high as before, there is a strong presumption against loss of earning capacity. . . . Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and, for purposes of determining permanent disability are to be discounted accordingly. The same is true if the injured man's friends help him to hold his job by doing much of his work for him, or if he manages to continue only by delegating his more onerous tasks to a helper."

The testimony of the medical and lay witnesses substantiates the fact that he is partially incapacitated. That alone does not necessarily affect his ability to earn; however, the additional testimony to the effect that the claimant can only hold his current position if his fellow employees do some of his more onerous tasks indicates that he is not earning his wages within the meaning of the statute.

"The ultimate objective of the disability test is, by discounting these variables, to determine the wage that would have been paid in the open labor market under normal employment conditions to claimant as injured, taking wage levels, hours of work, and claimant's age

and state of training as of exactly the same period used for calculating actual wages earned before the injury. Only by the elimination of all variables except the injury itself can a reasonably accurate estimate be made of the impairment of earning capacity to be attributed to that injury." Larson, *Workmen's Compensation Law,* § 57.21.

The Commission here found that the *anatomical* loss was from 15 to 18 per cent "and that by combining claimant's anatomical impairment and his probable loss in *wage earning capacity,* his permanent partial disability to the body as a whole is 30 per cent." (Emphasis supplied.) In construing the statute liberally in favor of the claimant it is reasonable to assume that the legislature intended the word "earn" in its usual sense otherwise the word "receive" could have been used and would have removed any ambiguity.

I also agree that the claimant is entitled to recover now for future loss of probable earnings based on the incapacity suffered. The reason is that a period of employment representative of future capacity to earn is generally unascertainable. Conversely, the claimant cannot wait out the remainder of his life to see what his wage loss ultimately may be. "The only possible solution is to make the best possible estimate of future impairment of earnings, on the strength not only of actual post-injury earnings but of any other available clues." Larson, *Workmen's Compensation Law,* § 57.21. This I think is exactly what the Commission has done.

FOGLEMAN, J., joins in the concurrence.

YELLOW CAB COMPANY ET AL *v.* BETTY DOSSETT
5-4491 426 S. W. 2d 792

Opinion delivered April 8, 1968
[Rehearing denied May 13, 1968.]

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

McMath, Leatherman, Woods & Youngdahl, for appellee.

LYLE BROWN, Justice. Plaintiff-appellee was injured when she alighted from appellant Yellow Cab's vehicle and was struck by an oncoming car. From a judgment against it, Yellow Cab appeals. The North Little Rock Transportation Co., Inc., joins in the appeal because of the possibility that it might, in a subsequent proceeding, be held liable. Appellants insist there was no substantial evidence of causative negligence on the part of any cab driver; that the court erred in its instructions; that liability insurance was injected into the trial; and that appellants' motion for a trial on the grounds of newly discovered evidence should have been granted.

Betty Dossett, twenty-two years of age and a working girl, lived a short distance from the apartment of her friend, Bonnie Pockrus, a telephone operator. Both were unmarried. On the night of the accident in December, the girls had planned to meet at Bonnie's apartment at 111 West Thirteenth Street in Little Rock. Bonnie's workday ended at around 9:00 p.m., and the television show which they were to watch started at 10:15 p.m. Here is a summary of the pertinent incidents as related by appellee:

She lived only four and a half blocks from Bon-

nie's apartment but because of the lateness of the hour and a misting rain she called Yellow Cab; when she entered the cab she gave the driver the address of her destination; when the driver arrived at 111 West Thirteenth he stopped the cab in front of the address but on the opposite side of the street; (the cab entered West Thirteenth headed west and his right side of the street was opposite the apartment); as they turned into Thirteenth Street she handed him a one dollar bill; he was due to give her twenty-five cents in change and she reminded him of it; when he stopped the cab, Betty pointed to the apartment and said, "I want out at the house across the street over there in the U shape . . ."; he was mad about the change and "he just sat there"; she finally concluded that he was not going to move until she alighted; cars were parked on the side of the street where the cab stopped; the cab was in the left half of his driving lane next to the white center line; she got out of the cab in a misting rain and bareheaded; she walked out from behind the Yellow Cab and was struck by an automobile operated by one Gary Elder, who was headed in the opposite direction; her vision of Elder's car was somewhat obstructed by the Yellow Cab and an advertising sign on the back of it. (Elder was joined as a defendant and the jury returned a verdict in his favor.)

Appellants' Point I: *There was no substantial evidence of negligence on the part of any cab company which was a proximate cause of plaintiff's injury.* Appellants' argument is devoted to the theory that the cab driver's responsibility had ended because Miss Dossett had alighted at a safe place, thereby assuming the status of a pedestrian.

Whether a particular point is a safe place for a passenger to alight is a relative matter which must be viewed in light of the particular circumstances. It is generally a jury question. *Capitol Transit Co.* v. *Burris,* 224 Ark. 755, 276 S. W. 2d 56 (1955). Plaintiff's evidence

must have convinced the jury that the cab driver discharged Miss Dossett at a place which was likely to subject her to risk of injury and coerced her into alighting at that point. In addition to our previous summary of Miss Dossett's testimony there was this evidence: The driver could easily have taken a route which would have placed him on the proper side of the street when the destination was reached; there was a vacant space next to the curb and immediately in front of the apartment; the driver could have turned into an alley which ran alongside the apartment and discharged Miss Dossett on the sidewalk; and the driver witnessed the striking of Miss Dossett and drove away, evidencing complete disregard for her welfare. Appellee testified that she took the cab such a short distance because she did not want to be out on the streets at night.

The cab driver had an unescorted girl as a passenger; the hour was late; she engaged a cab for a relatively short distance to take her to a specific address; there was evidence of misting rain; trees and shrubs are abundant in the apartment block; several old buildings are evident; at one end of the block is a liquor store; and no street lights are shown in the center of the block, the situs of the apartment. Under those circumstances, and in view of her expressions of concern to the cab driver, it should have been evident that the girl might attempt the shortest route rather than walk a half block to one of the corners, cross the street, and walk another half block to her destination.

The cab driver owed the highest degree of care, consistent with practical operation, to afford appellee a safe place to alight. *Arkansas Power & Light Co.* v. *Hughes,* 189 Ark. 1015, 76 S. W. 2d 53 (1934); *Checker Cab & Baggage Co.* v. *Harrison,* 191 Ark. 564, 87 S. W. 2d 32 (1935). In the face of that duty it is not unreasonable to say that he created a situation which stimulated appellee to attempt to cross the street. If that be true, then the initial proximate causation continues. *Hill* v. *Wil-*

son, 216 Ark. 179, 224 S. W. 2d 797 (1949); 2 *Restatement of Torts* 2d § 443. Any negligence on her part would, under our comparative negligence law (and under which this case was submitted), diminish or bar her recovery, depending on her degree of negligence. See *Restatement, supra,* § 443 c.

Appellants' Point II. *The Instructions of the Court were erroneous.* Yellow Cab offered this modification of AMI 1701:

> "At the time of the occurrence in question, Yellow Cab Company was a common carrier. A common carrier is not an insurer of the passenger's safety, but it has a duty to its passengers to use the highest degree of care consistent with the type of conveyance used and the practical operation of its business. *While this duty on the part of a carrier requires it to furnish to its passengers a safe place to alight, no further duty is owed by the carrier after a passenger has alighted at a safe place or after a reasonable time and opportunity to reach a position of safety. Thereafter, the passenger assumes the status of a pedestrian, and is subject to all of the duties and obligations imposed upon pedestrians.*" (Emphasis added.)

AMI 1701 was given but without the modification shown in italics. The refusal to give the instruction as modified was not error. The modified instruction contained the same error as the cab company's proffered instruction in *Checker Cab & Baggage Co.* v. *Harrison, supra.* Checker Cab's proffered instruction 11 (which was refused) would have told the jury that if Checker "transported the plaintiff with safety to the gate in front of his home and discharged him upon the highway in safety, its duty to him was performed, and thenceforth the plaintiff, Harrison, was a mere traveler upon the highway. . ."

The amended portion of AMI 1701, in essence, would tell the jury the same thing as quoted from *Checker Cab*. Of the proffered instruction 11 this court said:

> "It will be noted that appellant's request number 11 absolved it from all liability when the passengers were discharged from the cab, irrespective of the place of discharge or the conditions surrounding it. We do not understand this to be the law."

The safety requirements surrounding the discharge of a cab passenger in a public street are to be found in *Checker Cab*. Exercising the highest degree of care consistent with practical operation, the driver should not discharge the passenger at a point where reasonable foresight would dictate the passenger might be injured. All circumstances at the moment which would be evaluated by a competent driver should be considered. The phrase in the amended instruction, "no further duty is owed by the carrier after a passenger has alighted at a safe place," certainly does not embody the recited requirements.

Within the format of AMI 601 the trial court inserted a city ordinance which requires cab drivers, when possible, to discharge passengers at the sidewalk or at the extreme right side of the street. The jury was told that a violation of the recited ordinance would not necessarily be negligence, only evidence of negligence. Contrary to appellants' contention, we perceive no error in giving that instruction. Whether it was possible to discharge Miss Dossett near the sidewalk crossing the alley, or in a vacant place near the curb on the apartment side of the street, and whether the driver's failure to so act constituted a proximate cause, were questions for the jury.

Appellants' Point III. *The Court erred in refusing to grant a mistrial when counsel for Gary Elder delib-*

erately injected the existence of liability insurance for the taxicab as an issue in the case although he knew that no such liability insurance existed. Mr. Fred Andres, president of Yellow Cab Company, testified. The main purpose of his testimony was to establish Yellow Cab's contention that none of its vehicles was transporting Miss Dossett on the night of the accident. Counsel for co-defendant Gary Elder cross-examined Andres. In that examination counsel produced a deposition given by Andres. There Andres had stated that on the morning after the accident he received knowledge of the incident from the night manager's report. Shortly thereafter he sent a report to the insurance company. Counsel for Yellow Cab moved for a mistrial because of the reference to insurance. The motion was overruled and Gary Elder's counsel continued to read from the deposition which contained additional reference to correspondence with a liability carrier. The court admonished the jury that the only purposes for which those references could be considered would be in relation to credibility of the witness and the identity of the cab involved in the accident.

We find no error. Insurance was not injected into the case by appellee. It was mentioned by co-defendant's counsel and in good faith in an effort to show that the identity of the driver and of the particular cab involved was known to Yellow Cab the day after the accident. On direct examination, Andres indicated the contrary to be true. We cannot say the court abused its discretion. A latter portion of the deposition, in which Andres asserted the non-existence of liability insurance, was not read by Elder's counsel. Counsel for Yellow Cab asserts that failure as error. Yellow Cab's counsel did not offer to read that portion of the deposition. He asked the court to instruct the jury as to the absence of liability insurance, and the court properly refused.

Appellants' Point IV: *The court erred in denying appellants' motion for new trial based on newly discov-*

ered evidence. In a matter of days after the trial, Yellow Cab and North Little Rock Transportation Co. (the latter operated Dixie cabs) moved for a new trial. The reason here pertinent was as follows:

> "The movants have discovered new evidence which they could not, with reasonable diligence, have discovered and produced at the trial. Subsequent to the trial, one Dewey Worthey, a taxicab driver, reported that he had read the newspaper report of the jury verdict and that he remembered the incident and that the taxicab out of which Miss Dossett alighted had been driven by one Richard John Laske who was driving Dixie cab No. 24 . . ."

Most of the essential rules for the consideration of a motion for new trial are succinctly stated in *Halbrook* v. *Halbrook,* 232 Ark. 850, 341 S. W. 2d 29 (1960). Summarizing, the trial court has broad discretion; these motions are not favored by the courts; the court should be convinced that injustice has been done; the new evidence is not cumulative; the proof was not discoverable through due diligence; and the additional testimony would probably change the result.

We have carefully weighed the evidence on Point IV in light of *Halbrook* and conclude the trial court's ruling should not be disturbed. We are particularly persuaded by the testimony of Mr. Andres, president of both companies, and his own employees. Andres conceded that on the morning after the accident he knew the identity of the driver; Dewey Worthey, a cab driver employed by Andres, testified he learned the driver's identity, having talked with the driver on the night following the accident; and that the incident was discussed by the driver at a cafe table in the presence of some five cab drivers, all employed by Andres. A radio dispatcher testified the driver of Betty Dossett's cab called in when the accident happened and asked for instructions. The dispatcher said he reported to the night manager, who

made up a report on the accident. That report was made available to Andres, who in turn made a report to an insurance carrier.

Suit was filed July 6, 1965. From that time until the date of the trial, appellants had twenty months in which to ferret out the "missing" evidence. It is not unreasonable to conclude that due diligence would have revealed the evidence in ample time for the trial.

Affirmed.

JIMMY DALE WILSON *v.* STATE OF ARKANSAS

5330 426 S. W. 2d 375

Opinion delivered April 8, 1968
[Rehearing denied May 6, 1968.]

Jack Yates and *Theron Agee,* for appellant.

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

JOHN A. FOGLEMAN, Justice. Jimmy Dale Wilson has appealed from his conviction of the crime of robbery, alleged to have been committed in the Ozark District of Franklin County, Arkansas, on August 26, 1967. The evidence was sufficient to support the verdict of the jury finding appellant guilty of the accusation of having, along with one Loyd Miller, robbed one Joe Bartlett. For reversal appellant contends that the trial judge permitted the prosecuting attorney to exhibit, read questions from, and comment on a purported written, but unsigned, in-custody confession made by appellant in the presence of the prosecuting attorney, deputy prosecuting attorney, the sheriff, a deputy sheriff, the jailer and the secretary to the deputy prosecuting attorney.

Appellant was arrested by the Criminal Investigation Division of the State Police Department at the recruiting station in Little Rock on Tuesday following the Saturday on which the robbery was committed. While in custody in Little Rock he was identified by Dorothy Bartlett, the wife of the victim.

Sheriff W. Dee Gober was called as a witness by the State. After testifying that appellant was taken into custody in Little Rock, he stated that appellant made a statement after he was returned to Ozark. When the prosecuting attorney asked the sheriff to state the circumstances surrounding the making of the statement, the trial judge properly recessed the trial and conducted a hearing in chambers to determine the admissibility of

any statement made by appellant. During this hearing, it was shown that the Criminal Investigation Division officers, in the presence of Sheriff Gober, advised appellant of his right to remain silent, his right to counsel and his right to stop answering questions at any time, and of the fact that anything he said might be used against him in court. Appellant was not questioned while in Little Rock and did not make any statement there. On the day following his arrest, appellant was brought back to Ozark. According to the sheriff, appellant asked, on the morning of September 1st, if the prosecuting attorney could come down so appellant could make a statement. The sheriff stated that Deputy Prosecuting Attorney Cravens came to a living room in the jail at 1 p.m. and again advised appellant of his constitutional rights and that appellant signed a statement in the presence of W. Dee Gober and M. F. McClellan relating to the giving of this advice. Sheriff Gober testified that a statement was then voluntarily given by appellant and that during the questioning appellant was repeatedly advised that he should not make the statement if he did not want to do so.

On cross-examination the sheriff stated that Wilson never did sign this statement. Appellant's counsel then objected to the introduction of the oral statement, but the trial judge ruled that it was voluntary. Appellant's attorney's objection to the introduction of the unsigned written confession was sustained by the trial judge who ruled that the officer might not read the statement from the witness stand. No exceptions were taken by appellant to either ruling of the trial judge. At the conclusion of the hearing, the deputy prosecuting attorney stated that the written statement would be put in the file.

The first action to which appellant directs our attention was an examination of the witness Gober about a statement signed by appellant with reference to his constitutional rights. Upon objection by appellant's

counsel, the trial judge advised the prosecuting attorney that this statement was for the record on the hearing to determine the admissibility of statements made by appellant, but not to be introduced in the trial. No exceptions were taken to the trial judge's ruling. No request was made for any further action by the trial judge. The prosecuting attorney did not pursue the matter further. Thus, reversal could not be predicated on this action, even if it had been erroneous. *Bivens* v. *State,* 242 Ark. 362, 413 S. W. 2d 653.

Sheriff Gober was examined and testified at length about oral statements made by appellant on the occasion he had described, without objection by appellant whose attorney cross-examined the witness about circumstances preceding and subsequent to the making of these statements. In the absence of any objection by appellant, the admissibility of these oral statements is not for our consideration on this appeal. *Bivens* v. *State, supra.* On the testimony presented to the trial judge, it seems that he was justified in finding that the statements were voluntary and that there was a conscious, intelligent waiver of constitutional rights by appellant.

Appellant's principal argument is directed toward an incident which occurred during the cross-examination of appellant by the prosecuting attorney about the statements. The entire record on this matter is as follows:

> "THE COURT: I think it best that you put that paper back on the table, Mr. Rogers.
>
> MR. YATES: If the Court please, we object to the use of the statement in the presence of the jury.
>
> THE COURT: Both of you approach the bench.
>
> MR. YATES: (Out of the hearing of the Jury) Comes the defendant and moves for a mistrial on the grounds that the Prosecuting Attorney is using

an unsigned statement, not once but several times, and waving it before the Jury during cross-examination in strict violation of the instructions.

THE COURT: He has not been waving it before the Jury, and that motion is overruled.

MR. YATES: Save our exceptions."

There is nothing in the record to indicate that the prosecuting attorney exhibited the unsigned statement, if indeed that is what the "paper" was, to the jury or that any of the jurors was able to see or identify the paper. The trial judge was in an excellent position to observe exactly what took place. Obviously he was alert, for he admonished the prosecuting attorney to put the paper on the table before any objection was made on behalf of appellant. Counsel suggests that the cross-examination of appellant was conducted by the prosecuting attorney by referring to the unsigned statement. Whether this is true or not, we cannot say that the denial of a motion for mistrial by the trial court was an abuse of its discretion in that regard.

Appellant relies on cases such as: *Kasinger* v. *State,* 234 Ark. 788, 354 S. W. 2d 718; *Davis* v. *State,* 243 Ark. 157, 419 S. W. 2d 125; *Cabbiness* v. *State,* 241 Ark. 898, 410 S. W. 2d 867; *Anderson* v. *City of El Dorado,* 243 Ark. 137, 418 S. W. 2d 801; *Escobedo* v. *State of Illinois,* 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977; *Binns* v. *State,* 233 Ark. 259, 344 S. W. 2d 841; *Turner* v. *Pennsylvania,* 338 U. S. 62, 69 S. Ct. 1352, 93 L. Ed. 1810; *Watts* v. *Indiana,* 338 U. S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801; *Miranda* v. *State of Arizona,* 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694. None of them, except the *Miranda* case, is applicable here.

In the *Kasinger* case there was rather convincing evidence that a confession admitted into evidence was involuntary. No evidence was offered in the hearing on

the admissibility of appellant's statements to indicate that the confession was involuntary. In *Davis* v. *State, supra,* the State's evidence clearly showed that the oral confession constituting the principal evidence against Davis was elicited by interrogation after he had stated that he did not want to tell what had happened. No such evidence was offered in this case. In *Cabbiness,* the record clearly showed that the prosecuting attorney pursued a line of inquiry with reference to a weapon which the court had clearly held inadmissible. The record here does not disclose any like conduct on the part of the prosecuting attorney. As a matter of fact, the court's ruling on appellant's objection states facts contrary to appellant's contention. In the *Anderson* case, the trial court held that the State had failed to meet the burden of proving that the defendant's statement was made after he had been advised of his right to counsel. In this case the only evidence shows that appellant was advised of his right to counsel prior to his making any statement. In *Escobedo,* the accused was denied a positive request for advice of counsel during interrogation. There is no evidence of any request for counsel by appellant. In *Binns* v. *State,* the reversal was based on undisputed evidence that the defendant there was subjected to almost continuous interrogation for 52 hours before he made a confession. In the *Watts* and *Turner* cases there were similar periods of interrogation. Here, the evidence indicates that there was no prolonged interrogation, but that appellant himself indicated, without any questioning, that he wanted to make a statement.

The only evidence which the trial court had to consider on the question of appellant's statements shows full compliance with the requirements of the *Miranda* decision.

Finding no error, we affirm the judgment.

IRA BOND *v.* PAUL E. DUDLEY AND ROY MOORE, D/B/A DUDLEY & MOORE AUTO SALES, A PARTNERSHIP

5-4506 426 S. W. 2d 780

Opinion delivered April 8, 1968
[Rehearing denied May 6, 1968.]

Douglas Bradley, for appellant.

H. L. Methvin and *Frank Lady*, for appellees.

JOHN A. FOGLEMAN, Justice. This appeal questions the priority of a security interest for purchase money of an automobile over a lien of a repairman. The judgment appealed from was entered in favor of appellees in their suit to replevy the motor vehicle from appellant. The evidence showed that appellees, used automobile dealers, sold the car to Randall and Deena (Dinky) Bishop on April 12, 1965 for $1,237.53, payable at $12.50 per week. A title retaining contract signed by the Bishops was filed with the Motor Vehicle Division of the Arkansas Revenue Department, and the certificate of title dated June 17, 1965, reflected a lien in favor of appellees. Subsequently, on January 8, 1966, without the knowledge or consent of appellees, the purchasers had repair work done by appellant. The total cost of the parts and labor was $140.97, of which the Bishops paid only $20. Appellant kept the vehicle in his possession until February 14, 1966, when it was taken on the writ issued on the complaint of appellees. Appellant asserted his lien and prayed for the return of the vehicle or its value.

As his first ground for reversal, appellant asserts that the Uniform Commercial Code gives priority to his lien over the claim of appellees. In order to determine the question thus posed, it becomes necessary that we examine pertinent sections from the Secured Transactions Chapter of the Uniform Commercial Code. Ark. Stat. Ann. § 85-9-310 (Add. 1961) reads as follows:

> "When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon

goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise."

Section 85-9-102(2) provides:

"This Article [chapter] applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Article [chapter] does not apply to statutory liens except as provided in Section 9-310 [§ 85-9-310]."

The lien asserted by appellant is based upon Ark. Stat. Ann. § 51-412 (1947) which reads:

"Priority of lien.—The lien herein provided for shall take precedence over and be superior to any mortgage or other obligation attaching against said property in all cases where the holder of such mortgage or other obligation shall permit such property to remain in the possession and be used by the person owing and bound for the amount thereof; provided, that the lien herein provided for shall be subject to the lien of a vendor of automobiles, trucks, tractors and all other motor propelling conveyances retaining title therein, for any claim for balance of purchase money due thereon; provided, further, that said lien shall not take precedent [precedence] over a bona fide purchaser for value of any such automobile, truck, tractor and other motor propelled conveyances without notice either actual or constructive. [Acts 1919, No. 140, § 9, p. 123; * * *.]"

Appellant asserts the priority of his lien upon the

contention that it is a common law lien not dependent on statute, citing *Gardner* v. *First National Bank,* 122 Ark. 464, 184 S. W. 51. On the other hand, appellees say that the right to the lien is entirely statutory, citing *Commercial Credit Company* v. *Hayes-Lamb Motor Co.,* 174 Ark. 945, 298 S. W. 217.

In the absence of any statute on the subject, a common law lien in favor of mechanics repairing automobiles was recognized in Arkansas. It has been held, however, that the lien which arose under the common law was superseded by the statutory lien created by Act 147 of 1903 (Kirby's Digest 5013—5016). *J. M. Lowe Auto Co.* v. *Winkler,* 127 Ark. 433, 191 S. W. 927. That act was, in turn, superseded by Act 140 of 1919 [Ark. Stat. Ann. § 51-402—51-412]. Consequently, the lien of appellant is a statutory lien in the sense of Ark. Stat. Ann. § 85-9-310.

Appellant contends, however, that the security interest of a seller under the Uniform Commercial Code does not constitute the lien of a vendor of automobiles retaining title for his claim for a balance of the purchase money under § 51-412. We do not agree. To so hold would put form above substance. The mere fact that the lien of a conditional sale contract is now called a security interest does not so destroy its identity or character as to render nugatory the otherwise applicable proviso in the artisan's lien statute. Our position is substantiated by the comment on § 85-9-310 in which the Code draftsmen say, "Some of the statutes creating such liens expressly make the lien subordinate to a prior security interest. This section does not repeal such statutory provisions." At the time this comment was written it is unlikely that any state statute classified the lien of a vendor under a title retaining contract as a "security interest." This name for the various classes of liens now included within its scope probably came into existence through the drafting of the Code.

A similar result has been reached by the Supreme

Court of Alaska under a statute making the artisan's lien on a motor vehicle subordinate to conditional sales contracts properly filed before the vehicle comes into possession of the lien claimant. *Decker* v. *Aurora Motors, Inc.,* 409 P. 2d 603 (Alaska 1966). The Superior Court of New Jersey, appellate division, has also reached the same result. *National State Bank of Newark* v. *Rapp,* 90 N. J., Super 300, 217 A. 2d 325.

Neither *Corbin Deposit Bank* v. *King,* 384 S. W. 2d 302 (Ky. 1964), *Schleimer* v. *Arrowhead Garage, Inc.,* 46 Misc. 2d 607, 260 NYS 2d 271 (1965), nor *Westlake Finance Co.* v. *Spearmon,* 64 Ill. App. 2d 342, 213 N. E. 2d 80 (1965), cited by appellant, are persuasive because of differences in the applicable repairman's lien statutes. The Kentucky court said that its statute contained no provision subordinating its lien to an earlier security interest. Reference to the statute discloses no provision making the lien subject to any other lien by any name or designation. The garageman's lien statute involved in the New York case specifically makes the lien superior to a security interest. The Illinois statute made the lien subject only to the lien of a bona fide chattel mortgage previously recorded. While Illinois case law had extended the chattel mortgage priority to the holder in due course of a conditional sales contract, the Illinois court held that its statute did not *expressly* make the lien subordinate to a conditional sale contract, as required by the Uniform Commercial Code.

Appellant also contends that appellees failed to prove that they had a lien or other interest in the automobile to support their possessory action. This argument is based largely on his contention that the title certificate and note were not properly introduced as evidence. Appellee Moore identified a photostatic copy of the title certificate. After appellant objected to the introduction of the copy, the witness explained that appellees had again sold the vehicle and had endorsed the original certificate to show this sale and that the cer-

tificate had then been sent to the "State of Arkansas." The witness also testified from and identified a photostatic copy of the title retaining note. The record recites that these instruments were handed to the court without any objection being made by appellant. Both the witness and his counsel referred to the instruments, and the witness read from the note. While the instruments were not marked as exhibits, it is obvious that the court and all of the parties considered that they were in evidence and so treated them. While the judgment does not specifically state that the court considered these instruments as exhibits, its specific findings that the automobile was sold on April 12, 1965, to Bishop under a title retaining sales contract signed by the Bishops and filed with the Motor Vehicle Division of the Arkansas Revenue Department, that the title issued by that division showed a lien for $1,237.53, and that the balance due appellees was $900, clearly show that these instruments were considered by the court.

In a trial before the court without a jury, this procedure was sufficient to constitute an introduction of the documents in evidence in absence of any objection by appellant to excerpts therefrom being read by the witness or to their being handed to the trial judge. In *Austin Western Road Machinery Co.* v. *Blair,* 190 Ark. 996, 82 S. W. 2d 528, it was contended on appeal that a pertinent county court order was not introduced in evidence. We said:

> "* * * It is insisted that the order last mentioned was not introduced by appellee. This contention is based on the fact that the testimony fails to show that the order was read in open court. The evidence is to the effect that the clerk was requested to turn to a certain page of a particular record of the court and to read the order. He answered, 'This order is dated June 16, 1930, calling in all county warrants,' and, when asked whether or not the warrant involved (No. 91) was shown to have been filed, re-

issued, and classified, he answered in the negative. The appellant was present by attorney who had the opportunity to examine the record and might have had the order read if he so desired. We are of the opinion that this was a sufficient introduction of the order."

It is apparent that the parties understood that the validity of appellees' lien was not an issue in the case. The real issue was the priority of the liens. This is clearly shown by this colloquy among the trial judge and the attorneys at the conclusion of the hearing:

"COURT: I believe the only issue before the court is which lien has the priority?

MR. METHVIN: Yes, sir.

COURT: I believe the burden of proof is upon the defendant, isn't it?

MR. METHVIN: Yes, sir.

MR. BRADLEY: Why the defendant?

COURT: Because in your answer you claim a lien in preference of the lien claimed by the plaintiff.

MR. BRADLEY: He alleged the lien in the first place.

COURT: That is true, but you don't deny he had a lien for the purchase price. You just state your lien comes before the lien for the purchase price.

MR. BRADLEY: I don't think it makes much difference.

MR. METHVIN: This is a rather vital question and if your honor would like us to submit short written briefs on it, I wouldn't mind doing that. This

thing involves not only this sale, but many other sales.

COURT: Do you want to submit the question on written briefs or argue it?

MR. BRADLEY: I would rather argue it and get it over with.

COURT: All right. You may proceed."

Appellees' attorney had made an opening statement reciting the execution and filing of the title retaining note and the issuance of the title certificate showing the lien of appellees. He also stated that his clients contended that the purchase price lien shown in the certificate was prior and superior to the lien claimed by appellant, but that appellant contended that his lien had priority. Appellant's counsel responded that he did not see any point in making a statement.

While appellant's attorney did not specifically agree that the question of priority was the only issue, he certainly had a duty to advise the trial judge if he disagreed. His silence constituted at least a tacit acquiescence in the judge's statements relative to the issues and burden. A party, by his conduct during the trial, may effectively abandon an issue made by the pleadings, so that he cannot rely on it in this court. *Arkansas Real Estate Company, Inc.* v. *Keaton*, 215 Ark. 179, 220 S. W. 2d 129.

Cases from other jurisdictions making an application of the rules stated in the *Keaton* case are appropriate and particularly applicable to this situation. Where a party causes a court to understand that certain facts are admitted, he cannot object to a hearing being conducted on the basis of that understanding. *Sundgren* v. *Sundgren*, 363 P. 2d 853 (Okla. 1961). Even though an issue is made by the pleadings, a failure of

the party appealing to mention it on oral argument or to discuss it in briefs in the trial court prevents his raising the question on appeal. *Shockley* v. *Abbott Supply Company,* 50 Del. 510, 135 A. 2d 607 (1957). Where a case arising from a motor vehicle collision was tried on the assumption that there was no issue as to the death of a driver of the defendant's vehicle, and there was no contention that proof thereof could not have been readily afforded had anyone considered it necessary, appellant could not raise the argument on appeal that there was no direct proof of death. *Neilsen* v. *Uyechi,* 172 Cal. App. 2d 508, 342 P. 2d 329 (1959).

The failure of appellant to question the court's statement as to the only issue before the court would certainly have led the trial court to understand that no issue was being made as to the proof of appellees' security interest.

We think that the evidence was sufficient to support the judgment, but even if it were not, appellant's conduct justified the court in proceeding upon the theory that the only issue to be determined was that pertaining to priority of liens.

The judgment is affirmed.

Byrd, J., concurs.

R. T. PHILLIPS *v.* ARKANSAS REAL ESTATE COMMISSION

5-4437 426 S. W. 2d 412

Opinion delivered April 15, 1968

Thomas D. Ledbetter, for appellant.

Griffin Smith, for appellee.

CARLETON HARRIS, Chief Justice. This action was instituted by appellee in the Pulaski Chancery Court by complaint against appellant, R. T. Phillips, a resident of Jasper, Newton County, wherein appellee, Arkansas Real Estate Commission, asserted that appellant had been guilty of violating the statutes generally known as

the Arkansas Real Estate Brokers Act.[1] The complaint, in effect, alleges that Phillips acted as a real estate agent, without being licensed, in handling a real estate transaction between Keith J. Smith of Houston, Texas, and Don and Darlene Gronwaldt, residents of Newton County. More specifically, it was asserted that on October 24, 1966, Phillips prepared and forwarded to Smith an option to purchase the property from Phillips for the sum of $34,000.00. Consideration for the option was $3,000.00, which Smith forwarded on November 4, when returning the executed instrument. On November 5, 1966, Phillips secured an option to purchase the Gronwaldt land, in his own name, the consideration being $2,000.00, and the price of the property being set at $24,000.00. Summons was issued and served on Phillips, and appellant filed a demurrer. The Chancellor overruled this pleading, and Phillips then filed an answer, in which he admitted that he held no license to act as a broker or agent; admitted that he was a party to the two executed contracts, but it was denied that appellant had acted as a real estate agent, and it was asserted that his acts were not in violation of any law. The deposition of Smith was taken in Texas, and the case was set for trial. Phillips moved for a continuance, alleging that he was unable to attend court because of illness; however, he did not present the motion to the court, nor appear with any evidence to support it. The court held that no adequate grounds for continuance had been shown, and overruled the motion. Some time subsequent thereto, the case proceeded to trial, Phillips not being present. Appellee offered the deposition of Keith Smith, and the testimony of Don Hadfield, secretary of the real estate board, and Don Gronwaldt, and copies of the option agreements between the Gronwaldts and Phillips, and Smith and Phillips were offered in evidence. The court found that Phillips had:

"* * * violated the Arkansas Real Estate Brokers

[1]This action was brought under the provisions of Ark. Stat. Ann. § 27-603 (Repl. 1962).

Act, Ark. Stats. S. 71-1302, by entering an agreement with Mr. and Mrs. Gronwaldt to sell their land, known as Buffalo Basin Guest Ranch, to Mr. and Mrs. Keith Smith, for compensation, and in so doing acted as a real estate broker, without being licensed."

Appellant was enjoined from acting as a real estate broker until he was issued a valid license by the Arkansas Real Estate Commission, the decree enjoining him from committing the acts set out in the first paragraph of Ark. Stat. Ann. § 71-1302 (Repl. 1957), and further:

"* * * from taking options on real estate for the purpose of effectuating a sale by the owner to a third party, or arranging for options taken in another's name in order to effectuate sale."

He was also specifically enjoined from attempting to enforce any rights out of the transaction in which he participated concerning the sale of Buffalo Basin Guest Ranch.

This decree was entered on June 13, 1967, and on June 30, appellant moved the court to alter its decree, again asserting that he had not violated the Arkansas Real Estate Brokers Act, and contending that the provisions of the decree went beyond the scope of the relief sought by appellee in its complaint. This motion was denied. Thereupon appellant gave notice of appeal. On August 17, appellee moved the trial court to cite appellant to show cause why he should not be punished for contempt, it being alleged that Phillips was seeking to enforce contract rights under his option from the Gronwaldts to purchase their property. The matter of contempt is being held in abeyance until this court passes on the validity of the court's original decree.

Phillips relies upon several points for reversal, which we proceed to discuss. It is first asserted that appellant was entitled to all constitutional guarantees of

criminal proceedings, because the Arkansas Real Estate Brokers Act is criminal in nature. This assertion is based on the fact that Ark. Stat. Ann. § 71-1301 (Repl. 1957) provides that one who acts as a real estate broker or salesman in Arkansas without first having obtained a license is guilty of a misdemeanor, and subject to fine and imprisonment. Appellant argues that the present action is a criminal action, and he is entitled to a jury trial in the county in which the alleged crime was committed (Newton County), and that his rights have been violated. We do not agree, and this point has been decided contrary to appellant's contention. In *Hudkins* v. *Arkansas State Board of Optometry,* 208 Ark. 577, 187 S. W. 2d 538, a similar argument was presented, and this court disagreed, saying:

"* * * the relief sought by those complaining was not to enjoin the commission of a crime, as such. The purpose, primarily, was to prevent illegal practice of optometry. Cessation of the practice—not punishment for past acts—was the end.

"The Board has nothing to do with prevention of crime; nor is it concerned with punishment. But under § 15 of Act 94 it is authorized to invoke injunctive aid as a means of protection."

Here, also, the real estate commission is not concerned with punishment, but is rather invoking injunctive aid, which is authorized by Ark. Stat. Ann. § 71-1311, as follows:

"Upon petition of any member of the Commission [real estate], its secretary, or any holder of a license thereunder, the chancery court shall enjoin a violation of this Act if and when it shall appear that such action is necessary to protect the interest of those who have complied with the terms of this Act and who are operating legitimately."

Appellant next makes an attack on the constitution-

ality of the act, asserting that, "The rights to contract and to hold property are more fundamental than the laws of the land." We need not discuss this contention, since the act, now under attack, was held constitutional in the case of *State* v. *Hurlock,* 185 Ark. 807, 49 S. W. 2d 611.

The deposition of Keith Smith relates that Smith, while riding through Jasper, saw a sign in a store occupied by Phillips, "Land for Sale." He met with Phillips and was shown 200 acres of land, which was owned by appellant, and Smith purchased it from him. Later, they again met, and discussed the possibilities of building a home on that tract. According to the witness, Phillips then stated that he could show a piece of land to Smith that already had a home on it, and the two went to the lodge known as the Buffalo Basin Guest Ranch, owned by the Gronwaldts, and obtained their permission to look over the premises. Smith was interested in purchasing the property, and Phillips told him that it could be bought for $24,000.00, plus the 200 acres purchased, or $34,000.00 cash. After Smith returned to Texas, several telephone conversations were engaged in between Smith and Phillips. Smith said that Phillips was not quite sure that he would be able to trade in the 200 acres, "and he suggested then that he would send an option agreement, and by the time he sent the option agreement he said it could not longer be bought for a $2,000.00 payment on the option, that it had to be $3,000.00." Appellant requested that Smith send him the money to buy the option, and the witness mailed Phillips a check in the amount of $3,000.00. Smith's evidence is the only evidence that appears of record, though Gronwaldt, owner of the property involved, also testified, along with Don Hadfield; the testimony of these two witnesses was not reported.

Appellant contends that the court's original decree went much farther than permitted by the pleadings, stating:

"In the instant case the only prayer for relief was that appellant 'be enjoined from *further* [our emphasis] violation of the Arkansas Real Estate Brokers Act.' Under the decree and permanent injunction appellant is not only prohibited from acting as real estate broker, but he also is 'enjoined from attempting to enforce any rights out of the transaction in which he participated concerning the sale of Buffalo Basin Guest Ranch.' It is this final portion of the decree which appellant asserts is not within the scope of relief sought and should not have been granted in a judgment taken by default, at which appellant was not present."

Appellant apparently takes the position that the court's injunction was only properly applicable to all transactions which might commence subsequent to the date of such injunction, and he argues that, in prohibiting him from proceeding further with the Smith-Gronwaldt transaction, the court granted relief which was not sought in the complaint. We do not agree. The complaint very definitely is based on appellant's dealings with Smith and Gronwaldt, and if that relationship was in violation of the Arkansas Real Estate Brokers Act, certainly the court had a right to enjoin Phillips from endeavoring to enforce any alleged rights concerning the sale of the Buffalo Basin Guest Ranch.[1a] The law does not permit a man to violate the law, even once, and an injunction from "further violation of the Arkansas Real Estate Brokers Act" applies just as much to further acts in connection with enforcing the agreement in question (if it is unlawful), as to future transactions, which have never yet commenced. Of course, appellant's argument is based on the premise that no violation was committed, *i. e.,* Phillips was only contracting to buy property for himself (from Gronwaldt) and then intend-

[1A]The record reflects that Phillips has instituted a suit in the Newton County Chancery Court, wherein it is asserted that the Gronwaldts are "currently in the process" of transferring the ranch to Smith (by-passing appellant), and he asks for specific performance of his own contract, or damages against the defendants.

ed selling that same property to Smith. In other words, Smith was buying the property—not from Gronwaldt—but from Phillips.

The record does not bear out appellant's contention. In the first place, he escorted Smith to see, and encouraged him to buy, a piece of property which did not belong to appellant, but belonged to the Gronwaldts. It is true that Phillips, in preparing his option with Smith, presented himself as the owner, but it is noticeable that he did not acquire the option from Gronwaldt until after he received Smith's check (November 5, 1966)—and it might be added that there is no evidence in the record that he was borrowing money from Smith in order to buy the property. On October 24, 1966, the date of the option from Phillips to Smith, appellant had no interest in the Gronwaldt property at all. Other pertinent language appears in the Phillips to Smith option. After setting out (on a printed option form) that Phillips and his wife would convey the property to Smith, the following words are typed into the instrument, "or cause to be done." This, of course, can only mean that Phillips will either deed the property himself or get the Gronwaldts to do it. In handling both ends of this transaction, Phillips stood to make $1,000.00 on the option (obtaining option from Gronwaldt for $2,000.00, and giving option to Smith for $3,000.00), and on the entire transaction, he stood to make a profit of $10,000.00 (agreeing to buy the property from Gronwaldt for $24,000.00, and agreeing to sell it to Smith for $34,000.00). Of course, the amount of profit made would have no bearing on this litigation if a bona fide sale of appellant's own property were involved. But we cannot agree that this was that sort of transaction.

We think the instruments offered into evidence, and Smith's testimony, make it clear that the proposed "purchase" by Phillips was only a means used to evade the statute in question, and it must also be remembered that Mr. Gronwaldt testified. The testimony of Gron-

waldt and Hadfield apparently was not taken for the record, and we have no idea what the former testified to, but certainly it dealt with his transaction with Phillips. We have said many times that where there is a failure to bring into the record the testimony presented to the trial court, it must be presumed that the testimony was sufficient to support the findings of the court.[2] In *Watson* v. *Jones,* 233 Ark. 203, 343 S. W. 2d 415 (1961), this court stated:

"* * * We have held in many instances that where there is a failure to bring into the record the testimony presented to the trial court, it must be *conclusively presumed* [our emphasis] that the testimony supported the trial court's findings. [Citing cases]"

In the case before us, this simply means that there is a conclusive presumption that the testimony of Mr. Gronwaldt, and that of Don Hadfield, supported the finding of the trial court that appellant had violated the Arkansas Real Estate Brokers Act.

We agree with appellant that the prayer for relief in appellee's complaint cannot be amended, or broadened, since appellant did not appear for trial. But we do not agree that that happened in this instance. The complaint alleges that Phillips had no license (which is admitted by appellant), and sets out the transactions between Phillips, Gronwaldt, and Smith; it is asserted that these acts are violative of the Arkansas Brokers Act, and the prayer is that Phillips be enjoined from further violation. We think the evidence in the record, and also under our holdings, that which is not in the record, supports the findings of the Chancellor and justifies the relief which was sought.

Affirmed.

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[2]This is not an instance where the record was abbreviated by agreement, or without objection, as provided in Section 12 of Act 555 of 1953.

MARGARET G. SANDERS *v.* ROBERT KEENAN AND DELMA MERRITT

5-4538 426 S. W. 2d 399

Opinion delivered April 15, 1968

Laws & Schulze, for appellant.

Williams & Gardner, for appellees.

GEORGE ROSE SMITH, Justice. This is an action in unlawful detainer brought by the appellant, Margaret

G. Sanders, in March, 1966, to recover possession of a farm in Yell county. The two defendants—Robert Keenan, who was Mrs. Sanders's tenant under a written one-year lease which expired on December 31, 1965, and Delma Merritt, who was Keenan's subtenant—retained possession of the land during the year 1966 by executing a bond for retention of the property. Ark. Stat. Ann. § 34-1510 (Repl. 1962). In the court below Mrs. Sanders obtained a $5,000 verdict and judgment against Merritt only. Her principal contentions for reversal are that the trial court erred (*a*) in directing a verdict for Keenan, and (*b*) in refusing to submit to the jury her claim for triple damages under the statute.

Over a period of about forty years the farm in question was the subject of an annual Sanders-Keenan lease. At first the lessor was the plaintiff's husband; after his death it was Mrs. Sanders herself. At first the lessee was Dan Keenan; after his death it was his son, the defendant Robert Keenan. The 1965 lease, which adhered to a form used by the parties for several years, specified a rental of $5,000, payable in installments of $2,000 on October 15, 1965, $1,500 on November 15, and $1,500 on December 15. It is conceded that Keenan paid the 1965 rental and that the parties—apparently for the first time in some forty years—did not agree upon a lease for 1966.

We consider first the court's action in directing a verdict in favor of Keenan. Merritt had been Keenan's subtenant for several years. Merritt testified that Keenan did not finance Merritt's farming operations in 1966, as he had done in prior years. Merritt went on to say, in response to a question by the court, that Keenan had no interest at all in the 1966 farming operations. Keenan did not elect to testify. Upon that state of the record, as far as the defendants' testimony was concerned, the trial court concluded, with some expressed doubt, that Keenan was entitled to a directed verdict.

The court was in error. It is settled by decisions far

too numerous for citation that a verdict ought not to be directed against the plaintiff if there is any substantial evidence to support a finding in favor of the plaintiff. Here there are no fewer than three considerations that might have induced the jury to find that Keenan was actually a participant, as a tenant, in the detention of the land in 1966. First, during the year 1966 Keenan sent Mrs. Sanders a $5,000 check for the annual rent (which was not accepted). That same check was again tendered to the plaintiff at the beginning of the trial. Secondly, Keenan and Merritt, as joint *principals,* executed the bond to retain possession of the farm during 1966, after the suit had been filed. Thirdly, the answer filed in the case by the two defendants, Keenan and Merritt, admitted that "the Defendants have remained in possession of said lands since the first day of January, 1966." Despite the possibility that the pleadings may be amended before the case is tried anew, *Stucker* v. *Hartford Acc. & Ind. Co.,* 222 Ark. 268, 258 S. W. 2d 544 (1953), we must determine the present appeal upon the record presented. Any one of those three considerations might well be a basis for denying Keenan's motion for a directed verdict. The combined thrust of all three is irresistible.

The remaining issue is that of the appellees' possible liability for multiple damages. At the trial the plaintiff requested an instruction under the triple damage statute, Ark. Stat. Ann. § 34-1516, but the court refused that request and submitted only the issue of Merritt's liability for single damages (Keenan having already received a directed verdict, as we have said).

The court was right in excluding the issue of triple damages. Under the statute such damages are recoverable only for the unlawful detention of property that is used either for commercial or for mixed residential and commercial purposes. Section 34-1516. Multiple damage statutes, being penal, must be strictly construed. *Missouri Pac. R. R.* v. *Lester,* 219 Ark. 413, 242 S. W. 2d

714, 27 A. L. R. 2d 1182 (1951). "Commercial" means pertaining to commerce, which is ordinarily defined as the exchange or buying and selling of commodities. Webster's Second New International Dictionary; Random House Dictionary of the English Language. Under that definition statutes relating to commercial purposes, even when not strictly construed, are not considered to be applicable to agricultural pursuits. *Terrace* v. *Thompson,* 263 U. S. 197 (1923); *Jones* v. *Johnson,* 80 Ga. App. 340, 55 S. E. 2d 904 (1949); *Armand* v. *Bordelon,* La. App., 53 So. 2d 168 (1951); *Partridge* v. *Blackbird,* Minn., 6 N. W. 2d 250 (1942). In the case at bar our statute, *a fortiori,* must be narrowly interpreted.

The appellant's brief, more or less in passing, also suggests alternatively that she would in any event be entitled to an instruction under the double damage statute. Ark. Stat. Ann. § 50-509 (1947). The theory of a recovery under that statute was not in issue at the first trial, under either the pleadings or the requested instructions. We do not feel called upon to speculate about its possible relevance when the case is tried anew. The appellant also complains of the trial court's refusal to give her Instruction No. 1. Part of that instruction—a reference to the tenants' belief that they owned the land—was abstract; so it should not be given, in the form requested, upon a new trial.

As to Keenan, the judgment is reversed and the cause remanded for a new trial. As to Merritt, the judgment is affirmed, no error prejudicial to the appellant having been shown with respect to Merritt.

ARKANSAS STATE HOSPITAL *v.* ESTATE OF GRACE BROOKS CULVER, AN INCOMPETENT

5-4543 426 S. W. 2d 374

Opinion delivered April 15, 1968

Douglas Bradley, for appellant.

George H. Steimel, for appellee.

GEORGE ROSE SMITH, Justice. Since 1947 Grace Brooks Culver, a mentally incompetent woman, has been almost continuously confined to the State Hospital. In 1966 Mrs. Culver inherited $12,388.03, which was paid to her guardian. The State Hospital then filed a claim in the probate court against Mrs. Culver's estate for $16,268.74, which is shown to be the sum due the State Hospital for her maintenance and treatment during the years of her confinement, nothing having ever been paid upon the account. This appeal is from a probate court order allowing the claim for three years only, in the amount of $5,280.

Counsel for the guardian concede, with candor, that there is no applicable statute of limitations with respect to the State Hospital's assertion of a claim of this kind. *Cruce* v. *Ark. State Hospital,* 241 Ark. 680, 409 S. W. 2d 342 (1966); *Alcorn* v. *Ark. State Hospital,* 236 Ark. 665, 367 S. W. 2d 737 (1963). In fact, counsel's only argument against a reversal is the forlorn suggestion

that the court's order is not a final judgment, for the reason that the allowance of part of the State Hospital's claim was not accompanied by an express disallowance of the rest of it. Such a contention does not deserve serious discussion.

Reversed and remanded for the entry of an order allowing the claim.

LUCY LEE ROBBINS *v.* MILES GUY AND ETHEL FORD GUY

5-4513 426 S. W. 2d 393

Opinion delivered April 15, 1968

Wilton E. Steed, for appellant.

Joe Holmes, for appellees.

PAUL WARD, Justice. This appeal comes from a

Chancery Court order setting aside the Commissioner's sale of land in a foreclosure suit.

Miles Guy and his wife (appellees) executed a note for $550 to Lucie Lee Robbins (appellant), and to secure payment they also executed a deed of trust on Lot 4 in Block 6 in Waters' Addition to the City of Pine Bluff. Upon default, appellant filed suit against appellees, securing a judgment for $537.14 (including costs) and also an order to sell the security. At the Commissioner's sale, appellant bought the property for the amount of the judgment. The trial court confirmed the sale, and ordered the property turned over to appellant who later sold it to a third party.

At the same term of the Chancery Court appellees filed a Motion to set aside the sale on the ground that the price paid by appellant was inadequate. After hearing testimony on behalf of both parties the court granted appellees' Motion, holding "that the property herein sold for an inadequate price". The court then canceled the sale to appellant and ordered a resale of the property by the Commissioner after giving proper notice, hence this appeal.

Appellant now seeks a reversal on the ground of insufficient evidence to sustain the action of the trial court in setting aside the sale, and we agree.

There is no contention by appellees that there was any irregularity, any mistake, or any fraudulent conduct in the entire proceedings. That being the state of the record before us, the trial court erred in setting the sale aside.

In *Free* v. *Harris,* 181 Ark. 644, 27 S. W. 2d 510, the Court, on facts similar to those in this case, said:

> "Mere inadequacy of consideration, however gross, unaccompanied by fraud, unfairness or other in-

> equitable conduct in connection with the sale, is of itself insufficient to justify the court in setting the sale aside and refusing confirmation."
>
> * * *
>
> "It is of the greatest importance to encourage bidding by giving to every bidder the benefit of bids made in good faith and without collusion or misconduct, and at least when the price offered is not unconscionably below the market value of the property."

In *Union & Planters' Bank & Trust Company* v. *Pope,* 176 Ark. 1023, 5 S. W. 2d 330, there appears this language:

> "While this court has held that mere inadequacy of price will not justify a chancery court in refusing to approve a sale and deprive a purchaser of the benefits of his purchase, yet, if a purchaser has been guilty of any unfairness or has taken any undue advantage, the sale will be regarded as fraudulent, and the party injured will be permitted to set aside the sale."

The above cited cases have never been overruled.

Our attention has been called to the case of *The Security Bank of Branson, Missouri* v. *Speer,* 203 Ark. 562, 157 S. W. 2d 775, where this Court held that during the same term, at which a judgment or order is rendered, it remains subject to the plenary control of the court, and may be vacated, set aside, modified or annulled. However, in the case of *Summars* v. *Wilson,* 205 Ark. 923, 171 S. W. 2d 944 where the *Speer* case was cited, this Court either interpreted the *Speer* decision to hold or reversed it to hold that while the trial court had the *power* to set aside its judgments or orders (in term time) it could do so only by *exercising sound discretion.* There we said:

> "Judicial sales are not to be treated lightly. The courts should not reject a sale and refuse a confirmation for captious reasons, but only in the exercise of sound discretion. The trial court is vested with sound judicial discretion in these matters; and the appellate court, in reviewing the action of a trial court to see if there has been an abuse of discretion, does not substitute its own decision for that of the trial court, but merely reviews the case to see whether the decision was within the latitude of decisions which a judge or court could make in a case like the one being reviewed. Just as the law's standard of conduct is the ordinary, reasonable, prudent man, so in reviewing the exercise of discretion, the test is whether the ordinary, reasonable, prudent judge, under all the facts and circumstances before him would have reached the conclusion that was reached."

In any event, we now choose to follow the rule announced in the *Summars* case.

We cannot agree with appellees' contention that the low price paid for the property ($537.14) was unconscionable and therefore justified the court in setting the sale aside. This is on the basis that the property was worth $1,000, but the testimony does not justify that figure. It is true that appellees' attorney testified (over strenuous objections) that he believed the property was worth $1,000. Another witness, who was contacted by appellees to secure a loan and who examined the property, stated that he would advance $1,000 provided it would be used to pay off the judgment and the balance used to improve the house. Another witness, who had recently inspected the property, valued the property at not more than $575.

Appellees say the trial court should be affirmed because appellant failed to comply with Rule 9 (d) of this Court. We do not find this to be the case. Appellant's

brief contains an abstract of all material parts of the pleadings, the testimony and the decree. The Rule requires only such matters that "are necessary to an understanding of all questions presented to the court for decision". This requirement has been met by appellant.

It is our opinion that the trial court erred in setting aside the sale and in ordering a resale.

The decree of the trial court is therefore reversed.

SMITH, J., concurs.

FOGLEMAN, J., dissents.

GEORGE ROSE SMITH, Justice, concurring. I should like to discuss two cases, not mentioned by the majority, which seems to answer the argument made in the dissenting opinion.

In *George* v. *Norwood,* 77 Ark. 216, 91 S. W. 557 (1905), the property was sold at a public sale for $4,000. One of the parties objected to confirmation, on the ground that the price was grossly inadequate. The objector offered to bid $5,000 at a resale. The chancellor offered to permit the successful bidder to increase his bid to $5,000, but the bidder refused to do so. The chancellor then set the sale aside and accepted the party's higher bid of $5,000. We first observed that a judicial sale should not be set aside for mere inadequacy of price unless the inadequacy "be so great as to shock the conscience or raise a presumption of fraud or unfairness." We then went on to point out that a court does not have an arbitrary right to refuse to confirm a judicial sale, saying:

> "Courts have adopted as a wise public policy, the rule that confidence in the stability of judicial sales should be maintained, so that competitive bidding may be encouraged by the assurance that, in the

absence of fraud or misconduct, the highest bidder will be accepted as the purchaser of the property offered for sale. And, while it is often said that the accepted bidder at such a sale acquires no independent rights until the sale be confirmed by the court, and that the court may exercise a discretion in either confirming or rejecting the sale, yet this discretion must be exercised according to fixed rules, and not arbitrarily, and the bidder has the right to insist upon its exercise in this manner only. He can insist that his purchase be not set aside by the court upon reasons which are condemned."

In reversing the chancellor's decree we closed our opinion with these words:

"If the chancellor had, under the proof, approved this sale, our duty to affirm his decision would be plain, for it is undisputed that the sale was regularly made in accordance with the order of the court, and was free from any fraud or misconduct, and the evidence shows that the price bid was not inadequate.

"That being true, the purchaser had the right to insist upon a confirmation of the sale, and it is equally our duty to protect that right and to reverse a decision of the chancellor denying it. In other words, the decision refusing to confirm the sale under the proof presented by the record can not be said to be proper exercise of the discretion of the court, and must be reversed.

"The decree is therefore reversed, and the cause remanded, with directions to confirm the sale to appellant upon compliance by him with the terms of his bid."

Thus the *George* case unmistakably holds that mere inadequacy of price (which is all that is shown in the

case at bar) is not a sufficient basis for the chancellor's refusal to confirm a judicial sale and, further, that we will reverse such a decree and direct that the sale be confirmed.

The same principle was applied in *Federal Land Bank* v. *Floyd,* 187 Ark. 616, 61 S. W. 2d 449 (1933), which I cite because there as here the highest bidder was the judgment creditor, who merely credited his bid upon the judgment, leaving a deficiency. Upon testimony that the property had brought only half its value the chancellor refused confirmation and ordered a resale. We held that the highest bidder had a vested right to confirmation, saying: "Therefore, it seems that this court is committed to the doctrine that a purchaser at a commissioner's sale takes a vested interest by reason of the purchase, *and confirmation follows as a matter of right* [my italics], unless it be found that fraud entered into the transaction or else the price bid and offered was so grossly inadequate as to shock one's sense of justice." Upon that reasoning we reversed the decree and remanded the cause with a direction that the sale be confirmed.

The foregoing cases rebut the novel suggestion that a chancellor may arbitrarily set aside a judicial sale, for no announced reason, just because the term of court has not expired. If that were so, the purchaser's vested right to confirmation would often be meaningless, since more often than not judicial sales are submitted for confirmation at the same term of court as that in which the order of sale was made.

Indeed, to accept this same-term-of-court notion would lead to an untenable result: If the chancellor refused to confirm the sale, for inadequacy of price, and the successful bidder took an appeal from that refusal, we would reverse the decree and direct that the sale be confirmed—exactly as we did in the *George* and *Floyd,* cases, *supra.* But if, as here, the chancellor *first con-*

firmed the sale, then he could within the term exercise his unlimited discretion to set aside the decree of confirmation and order a resale, with no possibility of a reversal by this court. To state such a proposition is of course to answer it.

JOHN A. FOGLEMAN, Justice dissenting. I dissent because I feel that the majority has not given due consideration to (1) the fact that the action of the trial court was taken during the term of court at which the order of confirmation of the commissioner's sale was entered and (2) that the sale was made to the plaintiff-mortgagee in the foreclosure suit. I would agree with the result reached if either one of these facts were not involved. There can be no doubt that the trial court had the power to set aside its order confirming the commissioner's sale during the term at which it was rendered. *Wofford* v. *Young,* 173 Ark. 802, 293 S. W. 725; *Union & Planters' Bank & Trust Co.* v. *Pope,* 176 Ark. 1023, 5 S. W. 2d 330. The extent of this control by the court of its judgments has been stated in *Stinson* v. *Stinson,* 203 Ark. 888, 159 S. W. 2d 446, as follows:

> "* * * Courts in this state, having absolute control of their judgments and decrees during the term at which rendered might change, modify or set them aside on their own motion and without requiring the formality of a motion to do so and without any notice whatever to the parties in the case."

It has been held that a court may set aside a judgment during the term at which it was rendered without even hearing any evidence. In *Union Sawmill Co.* v. *Langley,* 188 Ark. 316, 66 S. W. 2d 300, it was said:

> "We have repeatedly held that, during the term of court at which a judgment is rendered, the court has the inherent power to set aside the judgment, and it may do so without stating any cause. Appellant refers to the statute and numerous authori-

ties, but they all refer to setting aside judgment after the term of court in which they were rendered. We know of no case, and our attention has been called to none, that prohibits a court from controlling its orders and judgments during the term in which they were entered. It therefore becomes unnecessary to set out the evidence taken on the motion to set aside the judgment. It was proper, of course, for the court to hear evidence, if he wished to do so, in order to determine whether the judgment should be set aside."

A trial court may also set aside a judgment during the term without stating or assigning any reason. *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797; *Whaley* v. *Whaley,* 224 Ark. 632, 275 S. W. 2d 634. In *Karoley* v. *A. R. & T. Electronics, Inc.,* 235 Ark. 609, 363 S. W. 2d 120, it was said that a chancery court has the power to set aside its judgment rendered within the same term, on its own motion and without notice. It has further been held that a probate court has full power to set aside any order it had made at the same term, on its own initiative. *Ozment* v. *Mann,* 235 Ark. 901, 363 S. W. 2d 129.

In *Browning* v. *Berg,* 196 Ark. 595, 118 S. W. 2d 1017, this court rejected the arguments that the rule is subject to the limitation that a chancery court may not set aside a judgment or decree without good cause being shown therefor and that the trial court may be reversed for abuse of its discretion in so doing. There it was said:

"It may be urged that the language in the Langley Case, 'it may do so without stating any cause,' impliedly holds there must be cause, but that such cause need not be stated by the court. In the instant case the chancellor, at the term from which this appeal comes, explained what his purpose was. Yet, regardless of the apparent sufficiency or insufficiency of the reason, the fact remains that it was

> the court's intention to set the decree aside, and this right is not to be denied. A sufficient purpose was stated: 'to enable the defendants to present the matter at the coming term of court.' "

Moss Tie Company v. *Miller,* 169 Ark. 657, 276 S. W. 586, is the only case I have been able to find where this court has reversed a trial court's action setting aside a judgment during the term at which it was rendered. There, the court set aside its judgment of dismissal which had been granted on motion of the plaintiff, who then moved to have the judgment set aside. This opinion states that a court can only set aside a judgment for good cause shown. The effect of this decision as authority is eliminated by the opinion in *Browning* v. *Berg, supra.*

Application of the rule in cases involving foreclosure sales is no novelty. In *Security Bank of Branson, Missouri* v. *Speer,* 203 Ark. 562, 157 S. W. 2d 775, this court affirmed an order of a chancery court cancelling an order of sale and report of sale and divesting all rights of the mortgagor who purchased at the commissioner's sale, and permitting mortgagees to redeem. The order was made at the same term of court and without notice to the plaintiff-purchaser. This court, in answering its own question as to the power of the court in this regard, said:

> "There appears to be no rule of law better settled than that courts have the inherent power to control, or to set aside, their judgments or decrees, without assigning cause, at the same term at which they were rendered."

No cause whatever for the setting aside of the decree was mentioned in that case.

It is well established that the setting aside of foreclosure sales may be improper when the purchaser is a

stranger to the case but proper when the purchaser is a party to the case. *Griffin* v. *Solomon,* 237 Ark. 653, 375 S. W. 2d 232.

The majority relies principally on the case of *Free* v. *Harris,* 181 Ark. 644, 27 S. W. 2d 510. The quotations from that opinion are probably dicta. They are of little value as precedent because the court found that the preponderance of the evidence in that case showed that the price received for the lands was fair and reasonable. The appeal from the order denying confirmation was taken by the purchaser at the commissioner's sale. He had not theretofore been a party to the action.

The quotation from *Union & Planters' Bank & Trust Co.* v. *Pope,* 176 Ark. 1023, 5 S. W. 2d 330, if not dictum, is also of little value as precedent here. This court affirmed an order setting aside the sale made without any notice having been given to the appellant, who was the plaintiff and the purchaser at the commissioner's sale. The sale included an interest of one of the mortgagors in lands which had been excepted from the provisions of the mortgage.

I fail to see the application of *Summars* v. *Wilson,* 205 Ark. 923, 171 S. W. 2d 944, to the facts in this case. The "proof-text" quoted therefrom in the majority opinion relates to the *denial* of confirmation to a *third-party purchaser.* The sale was made in a partition suit. The order of sale, the sale, an order disapproving it, the application of the purchaser to set aside the order of *disapproval,* an order setting aside the disapproval and approving the sale, and an order vacating the approval of the sale and reinstating the order of disapproval were all made during the same term of court. The third-party purchaser, one Summars, had not paid the purchase money and he did not have the purchase money on the day of the final order reinstating the disapproval of the sale to him. In the interval between the original disapproval of the sale and the motion of the purchaser

to set aside the order of disapproval, the parties to the partition suit had resolved their differences and sold the lands to one McCollum who was not a party to any of the proceedings. McCollum then went into possession of the lands and made a contract with one Wilson relating thereto. On the date the court made its order approving the sale to Summars, the attorney for McCollum and Wilson was not present in court. Prior to this action, the judge had announced in open court that no order would be made in any case in which this attorney was interested. This court said that the order setting aside the original order disapproving the sale to Summars and approving the sale was properly made to remedy the trial judge's inadvertence in entering the order during his momentary forgetfulness of his announcement. Summars appealed from this order and the refusal of confirmation of his purchase. The portion of the court's opinion quoted in the majority opinion has nothing whatever to do with the setting aside of the order relating to the sale. It relates only to the confirmation of the judicial sale. I do not agree that the *Speer* case was construed in this case as the majority state, nor do I agree that the *Speer* case was overruled. Six years later it was cited as authority for a trial court's setting aside of a judgment during the term at which rendered, without assigning any cause. *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797.

I recognize the importance of the stability and integrity of judicial sales. If the purchaser at the foreclosure sale were a third-party bona fide purchaser for value and this litigation were between him and the mortgagor, I would view the matter differently.

I do not think that the court is justified in treating this case as one where the rights of a third party have intervened. In the first place, a third party has not asserted any rights. It is still a suit between mortgagor and mortgagee. In the second place, appellant makes no assertion in pleading, proof, or brief that the property

has been sold to a bona fide purchaser for value. Thus, this cannot be a ground for reversal. In the third place, there is no evidence before the court that such is the case. Appellant successfully objected to evidence offered by appellees which might have shown that a third party had purchased the property.

On rebuttal, one of appellees, Ethel Ford Guy, was called as a witness. When she was asked by her attorney whether this property had been sold, appellant's objection that this was improper as rebuttal was sustained. Then an offer of proof was tendered for the record. In this offer she stated that one Margie Smith had the property and paid $1,150 for it. Cross-examination on this offer revealed that this witness based her testimony on information she received from her daughter. The daughter, Gloria Guy, then testified that Margie Smith was supposed to own the place now. The court sustained an objection by appellant on the basis that the testimony was not proper rebuttal, but again permitted an offer of proof for the record. In this offer she stated that "a lady that answered the phone" advised her that the property was sold and that Margie Smith told her the amount for which it was sold was $1,150. After this offer the court properly sustained a further objection to this testimony on the basis that it was hearsay. Even this offered evidence fails to show a sale of the property by appellant Lucy Lee Robbins.

A concurring opinion calls attention to *Federal Land Bank* v. *Floyd,* 187 Ark. 616, 61 S. W. 2d 449. Emphasis is placed upon the statement in that case that a purchaser at a commissioner's sale takes a vested interest by reason of his purchase and confirmation follows as a matter of right, except where fraud is involved or the price was so grossly inadequate as to shock the sense of justice. This language was not used with reference to the court's setting aside the confirmation of the sale. The court there actually held that the purchaser's right to confirmation was a vested right in the sense

that an act of the legislature passed subsequently to the sale could not impair his right to confirmation and that this right must be measured by the law in force prior to the passage of the act. At any rate, this case was decided nearly ten years before the decision in *Security Bank of Branson, Missouri* v. *Speer, supra.* Certainly the rights of the Federal Land Bank in the *Floyd* case were no more vested than the rights of the Security Bank in the *Speer* case. If the *Floyd* case requires the treatment suggested in the concurring opinion, it was overruled by the *Speer* case which seems to me to be in irreconcilable conflict with that suggestion.

I would affirm the order of the chancery court.

BOBBY JONES ET AL *v.* EDWARD TURNER

5-4540 426 S. W. 2d 401

Opinion delivered April 15, 1968

W. F. Denman Jr. and *C. E. Tilmon,* for appellants.

Tompkins, McKenzie, McRae & Harrell, for appellee.

PAUL WARD, Justice. In this litigation Edward Turn-

er, appellee, sought to collect damages to his truck allegedly caused by the negligence of an employee while servicing it at a filling station. The managers of the station were Bobby Jones and Larry Stafford, and Webster Henton was the employee—all appellants here.

In his complaint appellee alleged that he took his truck to the station to be serviced; that it was necessary for Henton to remove the plug from the oil pan, and that he negligently failed to properly replace the same; that a few days later, while driving the truck, the plug fell out, and allowed the oil to drain, and; that, consequently, the truck was damaged in the amount of $750. In their answer appellants denied the allegations of negligence and the extent of the damages.

The case was tried before the judge, sitting as a jury. At the close of appellee's testimony appellants moved for a dismissal of the plaintiff's case for the reason that any judgment would be based on speculation. The motion was denied, and then each of the appellants took the stand and testified. At the close of all the testimony the judge (as a jury) found in favor of appellee, and fixed the damages at $651.55.

On appeal appellants contend the judge erred in three respects. *One,* in refusing to grant the motion to dismiss; *Two,* in admitting expert testimony from a non-expert witness, and; *Three,* in failing to require appellee to meet the burden of proof.

One. The trial court was correct in refusing to dismiss at the close of appellee's testimony. When appellants' Motion was denied, they all took the stand and testified. By doing so they waived any alleged error. In *Grooms* v. *Neff Harness Company,* 79 Ark. 401, 96 S. W. 135, this Court said:

> "The defendant may, however, at the close of the plaintiff's evidence, test its legal sufficiency by a

> request for a peremptory instruction in his favor. If, after a denial of the request, he introduces evidence which, together with that introduced by the plaintiff, is legally sufficient to sustain the verdict, he waives the error of the court in refusing to give the instruction."

The *Grooms* case was cited with approval in *Fort Smith Cotton Oil Co.* v. *Swift & Co.,* 197 Ark. 594 (p. 598), 124 S. W. 2d 1.

Two. It is here contended by appellants that the trial court erred in considering the testimony of B. F. Willingham, a witness for appellee who had approximately 39 years experience as an auto mechanic, and who was familiar with this particular truck. He was familiar with the oil pans and the plugs on similar trucks. It was his opinion that the plug came out of the oil pan in this instance because it "just wasn't properly tightened". Q. "Do you have an opinion that one can come out under any circumstances"? A. "I have. Let me say that if the plug was properly tightened at the time he changed oil, it would have stayed there forever."

It is our conclusion that the court had a right to consider this testimony. In *Lee* v. *Crittenden County,* 216 Ark. 480 (p. 485) 226 S. W. 2d 79, this question arose out of what caused a temporary structure to fall. There, this Court said:

> "From the above, we hold that the court did not abuse its sound discretion in permitting witness Goodwin to testify and express his opinion or expert judgment, in the circumstances, for the reason that he had shown himself to possess sufficient qualifications and information to qualify him to state an inference or give his expert judgment."

To the same effect see *Arkansas Power & Light Co.* v. *Morris,* 221 Ark. 576, 254 S. W. 2d 684 and *Ratton* v.

Busby, 230 Ark. 667, 326 S. W. 2d 889.

Three. In our opinion the record contains substantial evidence to support the judgment of the trial court, sitting as a jury. Except for the testimony of Willingham referred to above, appellants do not challenge other testimony on behalf of appellee. This "other" testimony was to the effect that no one touched the "plug" after it was inserted by Henton.

Cross-Appeal. We find no merit in appellee's contention that the trial court erred in fixing the damages at $651.55 instead of $750—the amount asked for in his complaint. Willingham who was appellee's own witness, upon recall, stated to the court that the damages amounted to $651.55. This testimony was not denied and we think it constitutes substantial evidence to support the finding of the judge—sitting as a jury.

Therefore, the case is affirmed on direct and cross-appeal.

BYRD, J., concurs.

LUCILLE DUKE ROCHELLE ET AL *v.* BETTYE PILES

5-4468 427 S. W. 2d 10

Opinion delivered April 15, 1968
[Rehearing denied May 21, 1968.]

Bethell, Stocks, Callaway & King, for appellants.

Donald Poe, for appellee.

LYLE BROWN, Justice. Mrs. Bettye Piles, appellee, filed this suit to establish her right to the use of a driveway between her home and the home of appellants, Mrs. Lucille Duke Rochelle and Mrs. Clyde Duke. The trial court held that Mrs. Piles had acquired an easement by right of prescription. Mrs. Rochelle, the fee owner of the disputed strip, challenges the sufficiency of the evidence. Mrs. Duke, mother of Mrs. Rochelle, was apparently made a party because of her having occupied the property since 1884.

The parties reside in Waldron on Old Danville and Waldron Road which runs east and west. Mrs. Piles and Mrs. Duke, both widows, have been neighbors since 1924. Running north and south, and near the western edge of the Rochelle property, is a driveway which provides access to both homes. The chancellor found, and we think correctly so, that prior to the turn of the century a public way existed, running from Danville Road north and between the litigants' properties. Farmers used the lane to haul their cotton to a cotton yard located north of the present location of the two homes. The cotton yard was abandoned, apparently around 1912, and a fence was placed across the north end of the lane. The location of the driveway in dispute is identical with the south end

of the cotton yard road.

Mrs. Duke's father built a home on the Duke property around 1884 and Mrs. Duke has lived there for the past 82 years. For many years the lane was fenced on both sides and down to Danville Road. As far back as she can remember, the lane was used by her family and by the Piles family and their predecessors in title. That was true until 1966 when Mrs. Duke caused the lane, or driveway, to be enclosed within the bounds of the Duke-Rochelle property. That action precipitated this lawsuit.

Mr. and Mrs. Piles obtained title to their property in 1924. Their predecessors in title had lived on the property since at least 1907. The only access to their home has been the disputed driveway. Mrs. Piles testified their vendor represented that the driveway was included in their purchase. (A survey was introduced to sustain that contention but we think the court was correct in holding the true survey line to be just west of the driveway.) Mrs. Piles testified that she had no knowledge of any claim by Mrs. Duke or Mrs. Rochelle to the driveway until the present dispute arose. Over the years the Pileses made substantial improvements to their property. A patio, garage apartment, and a tenant house—all serviced by this driveway—were constructed. At their expense the Pileses replaced a wooden culvert, asphalted the driveway in about 1952, and in 1960 they had it seal-coated.

On the other hand, Mrs. Duke testified positively that to her personal knowledge every owner of the Piles property—including Mr. and Mrs. Piles—sought and obtained permission to use the driveway. She was corroborated by her daughter, Mrs. Rochelle, as to these occupants of whom she had recollection. They recited a number of instances in which both Mr. and Mrs. Piles tried to prevail on them to sell them the driveway property. Mrs. Piles denied knowledge of any such conversations.

In the transcript are two depositions which, if admissible, would support appellants' theory of permissive use. We are convinced that the trial court never saw those depositions. Counsel for appellant thinks we should consider them and counsel for appellee made no objection. Here are the chronological facts pertinent to the depositions:

1. At the close of the testimony on June 17 it was stated that the evidence was concluded "except for two depositions to be taken by agreement."

2. On June 22 the trial court entered his findings which contain this statement:

> "On the 13th day of June, this cause came on and was presented for hearing, and after hearing of the evidence and proof submitted on June 13, 1967, the cause was continued to June 17, 1967, for further proof and hearing, and was then continued, after June 17, 1967, until June 22, 1967, for the filing of depositions of the defendant; and on this 22nd day of June, 1967, the matter is finally submitted to the court. . ."

3. Subsequent to the entry of final judgment on June 22, two depositions were filed, one on June 23 and the other on June 28. One was taken in Texas on June 21, and the other in California on June 26.

4. The depositions were inserted by the clerk in the transcript and abstracted.

In the first place, we look to the wording of the final judgment and point up the phrase "and was then continued until June 22 for the filing of depositions." The only logical interpretation of the phrase is that the trial court allowed five days—from June 17 to June 22—to file the interrogatories which were being taken by agreement. Nine months had elapsed since the first

hearing in the case and June 22, so ample time had been available for the taking of depositions. Counsel knew, or should have known, that the trial court had not considered the depositions. Upon ascertaining that fact a motion should have been filed to set aside the judgment and reconsider the case in light of the depositions filed subsequent to the decree. There is nothing in the record to show why that was not done and we cannot consider any reasons advanced which are extraneous to the record. That is particularly true in light of the trial court's statement that the cause was continued until June 22 "for the filing of depositions."

We conclude that counsel acted in utmost good faith; in fact, the discrepancy between the dates of the decree and the filing of the depositions probably was not called to their attention. However, we are concerned here with a precedent that may well come back to haunt us, that is, *the evaluation by this court of testimony that was never presented to the trial court.* This court has held that an agreed statement of facts merely filed with the clerk cannot be considered here. *Evans* v. *Davidson,* 207 Ark. 865, 180 S. W. 2d 127 (1944). In *Morrison* v. *Heller,* 183 F. 2d 38 (1950), appellants placed additional documents in the record which were not considered by the trial judge. On appeal, the documents were ordered stricken on the ground that their acceptance would make a complete new trial. "Litigation would otherwise be interminable," said the court. The case of *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653 (1925), was by this court reversed and dismissed. On rehearing appellee filed an affidavit of one of appellant's material witnesses, in which the witness repudiated his testimony. This court said the affidavit could not be considered to determine the correctness of the chancery court's decision—"the record made in the court below must furnish the sole test." By analogy, the two depositions were never considered by the trial court in making its decision; therefore we should not consider them in passing on the merits of the case.

We revert briefly to the testimony in the case. A host of witnesses were called. Surveyors testified about the land lines but that testimony need not be summarized. A number of witnesses testified about the long and continued use by both families, their tenants, service men, visitors, deliverymen, and friends. In fact appellants concede that "both of the parties, their friends and tenants have used the driveway without interruption for forty years until just prior to the commencement of this action." However, appellants contend that a public easement was not shown and "it is therefore incumbent upon the plaintiff to show an adverse and hostile use by herself or predecessor in title. This we submit she has not done." The chancellor discounted the theory of mere permissive use and held that Mrs. Piles and her predecessors in title had become vested with an easement by right of prescription. This brings us to the legal requirements for the establishment of a prescriptive easement by Mrs. Piles over the driveway.

This court has many times dealt with the acquisition of passageways over land. The general rule is that a passageway over unenclosed lands is presumed to be permissive. On the other hand, as said in *Fullenwider* v. *Kitchens,* 223 Ark. 442, 266 S. W. 2d 281 (1954: "This court, however, in dealing many times with acquisition of passageways over land, has recognized what might be deemed a variation or exception to the rule before mentioned." One exception, which we consider here applicable, was stated in *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932 (1926):

> "It is true that the use originated as a permissive right and not upon any consideration, but the length of time which it was used without objection is sufficient to show that use was made of the alley by the owners of adjoining property as a matter of right and not as a matter of permission. In other words, the length of time and the circumstances under which the alley was opened were sufficient to

establish an adverse use so as to ripen into title by limitation. *Clay* v. *Penzel,* 79 Ark. 5, 94 S. W. 705; *Scott* v. *Dishough, supra; Medlock* v. *Owens,* 105 Ark. 460, 151 S. W. 995."

In the *Fullenwider* case, the Kitchens farm was located off the public road. For 35 years the occupants of the Kitchens lands traversed a passageway across the Fullenwider lands to get to the highway. That use started as a permissive one but the continuous use of the passageway for so long a period by all who had business at the Kitchens farm created a presumption that the usage was adverse. That usage was held to have ripened into a vested right.

In *McGill* v. *Miller, supra,* the parties lived on different lots in the same block in Little Rock. The only convenient means of access to their respective homes was an alley. The alley was not dedicated; it consisted of a strip back of the properties which the owner originally kept free of obstructions. This court held that since the neighbors had used the alley for some nineteen years as their only means of ingress and egress, the original owner had no right to close the strip and prevent its use.

Some of the other cases in which the factual situations and the court's conclusions comport with the chancellor's ruling in this instance are *Salzer* v. *Balkman,* 234 Ark. 209, 351 S. W. 2d 422 (1961); *Scaife* v. *Coleman,* 239 Ark. 427, 389 S. W. 2d 884 (1965); and *Barbee* v. *Carpenter,* 223 Ark. 660, 267 S. W. 2d 768 (1954).

On the question of permissive use, the facts are concededly close. The testimony on each side was as opposite as the poles. When viewed numerically it may be meritoriously argued that it favored appellants. On the other hand, an experienced chancellor saw and heard the witnesses in an extended proceeding. In view of his

advantageous position, and when considered in light of all the circumstances, we cannot say his findings were against the greater weight of the evidence.

We find no merit in appellee's argument that the true dividing line on the east is near the center of the driveway. We also agree with the chancellor that the portion of the old lane north of that area which had been maintained and blacktopped has long been abandoned.

The decree of the chancellor is in all respects affirmed.

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

GEORGE ROSE SMITH, Justice, dissenting. I would reverse the decree on the basis of the two depositions that the majority have not seen fit to consider.

Those depositions were taken by agreement. They are properly certified by the clerk of the trial court as part of the record. They have been abstracted by the appellants, along with the other testimony submitted for our consideration. The appellee has made no objection to the two depositions. Yet the majority, on their own initiative, raise a technical objection to that part of the record and go on to reach a conclusion that would seem to be unwarranted if all the proof before us were taken into account.

The situation, which was explained during the oral argument, is not apt to arise again. The chancellor, Judge Paul X. Williams, was nominated to a federal judgeship before he had reached a final decision in this case. In the course of clearing his docket he filed his findings of fact and conclusions of law on June 22 and directed counsel for the prevailing party to prepare a precedent for a final decree, which was also signed on June 22. On the next day, June 23, Judge Williams was

sworn in as a United States district judge. See 266 F. Supp. p. xv, footnote 11. The parties went ahead with the taking of the depositions and eventually filed them, without objection, for inclusion in the record.

It will be seen that Judge Williams faced something of a dilemma: Either he could leave to his successor an undecided case in which Judge Williams himself had heard the oral testimony, or he could decide the case himself without having seen the depositions that were being taken. He chose the second course, no doubt in all good conscience and with the realization that the missing depositions might ultimately tip the weight of the evidence against his decision.

I should emphasize that for us to consider the two depositions would *not* set a precedent requiring us to consider in every case proof that had not been seen by the trial judge. The precedent would be controlling only in a case similar to the one at bar. Should that unlikely situation ever confront us again, I would be perfectly willing to adhere to the rule of taking into account all the proof that counsel have seen fit to include in the record. That course merely puts the merits of the case above a technical point of no importance.

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

CHARLENE MOORE *v.* J. W. WILLIS
D/B/A THE FRIENDLY BUTCHER

5-4541 426 S. W. 2d 372

Opinion delivered April 15, 1968

Kenneth Coffelt, for appellant.

Hardin & Richard, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant asserts error on the part of the trial court in directing a verdict against her in her suit against appellee for damages for personal injuries allegedly sustained by reason of her fall inside the front entrance of appellee's store. Evidence on behalf of appellant showed: Rain started falling a little before 2 p.m. on the day of her fall. While the rain was continuous, it was not raining very hard when she left a PTA meeting about 3:30 p.m. or when she entered appellee's store about 4 p.m. She walked to her car which was parked directly in front of the building where the PTA meeting was held and from her car parked directly in front of appellee's store into the store. She was not wearing a raincoat. The rain had been harder earlier. She stated that she slipped and fell at a point about four to six feet inside the front double-swinging doors. She realized that her feet had hit something wet and slick as she was falling. As she arose, she could feel that her clothing was wet and her left hand wet and dirty. After arising, she observed the floor

looked wet and was not perfectly clean, as if people had been "tracking in all afternoon." She had some substance on her hand and on the seat of her dress. She described the spot where she fell as pretty dirty and wet. It looked as if water and dirt had been tracked in from the outside.

No presumption of negligence arises from the mere fact that a customer sustains a fall while in a store. *Miller* v. *F. W. Woolworth Co.,* 238 Ark. 709, 384 S. W. 2d 947. A storekeeper is not an insurer of his patrons against any and all hazards which may be encountered on his premises. *Kroger Grocery & Baking Co.* v. *Dempsey,* 201 Ark. 71, 143 S. W. 2d 564. He is liable to a patron who is injured as a result of slipping on some foreign substance or object on the floor where it is shown by the evidence, or is reasonably inferable therefrom, that the foreign matter was negligently placed or left on the floor by the storekeeper or one for whose acts he is responsible, or that the matter had remained on the floor a sufficient length of time that the storekeeper knew, or, in the exercise of ordinary care, should have known of its presence. *Kroger Grocery & Baking Co.* v. *Dempsey, supra; Deason* v. *Boston Store Dry Goods Company,* 226 Ark. 667, 292 S. W. 2d 261, 61 ALR 2d 170.

Obviously, it is impossible for a store owner to prevent some water and mud from being brought through an entranceway on the shoes and clothing of persons entering on a rainy day. Here, there was no evidence of the length of time the floor had been wet or dirty nor was any circumstance shown that indicated that appellee or his employees either knew or should have known that this condition existed. The strongest inference that can be drawn from appellee's testimony is that during the period of the rainfall, customers entering the store had tracked water and dirt into the store and that some of this had accumulated at the spot at which she fell. The burden was on appellant to show that the interval

between the time this accumulation took place and the time of her fall was substantial. *Owen* v. *Kroger Grocery Co.*, 238 Ark. 413, 382 S. W. 2d 192. There is no evidence from which a jury might determine, without speculation or conjecture, that the accumulation of water and dirt tracked in by, or dropped from the clothing and umbrellas of, persons entering the store became sufficiently great or dangerous that it should have been observed by appellee or his employees in time to give opportunity for its removal prior to the entry and fall of appellant.

Appellant does not point out clearly the exact facts upon which she relies to establish negligence on the part of appellee, or from which an inference of negligence might be drawn. She urges that we reverse the trial court upon the authority of *Menser* v. *Goodyear Tire & Rubber Co.*, 220 Ark. 315, 247 S. W. 2d 1019. The case at bar is clearly distinguishable. In *Menser* there was testimony that the substance on the floor appeared to be floor wax that had not been spread smoothly. According to the testimony, the substance was in thick and thin strips over a spot two to three feet in diameter. This court held that a jury question was presented because the customer fell in the middle of the day, and, if the spot was the result of waxing the floors, sufficient time had elapsed for properly finishing the job. Furthermore, it was said that the character of the place of business and the extent and nature of the spot were such that it would not be reasonable to assume that some customer had recently inadvertently dropped the wax-like substance on the floor. Appellant contends here that the moisture and dirt were tracked in by customers. As previously pointed out, there is no indication of the time any accumulation should have come to the attention of appellee.

In a case where a passenger claimed injury from slipping upon pieces of ice and snow in the vestibule of a street car from which she was debarking, we held that

it must have been shown that the carrier permitted the accumulation of ice and snow or that it had been in the vestibule of the car such a length of time as to afford an opportunity for removal before negligence could be inferred. *Turner* v. *Hot Springs Street Ry. Co.,* 189 Ark. 894, 75 S. W. 2d 675.

The evidence was not sufficient to justify any inference of negligence on the part of appellee.

The judgment is affirmed.

HARDING GLASS COMPANY *v.* WILLIAM B. CRUTCHER ET AL AND BILL LANEY, COMM'R. OF LABOR

5-4507 426 S. W. 2d 403

Opinion delivered April 15, 1968

Shaw, Jones & Shaw, for appellant.

McMath, Leatherman, Woods & Youngdahl and *John P. Sizemore* and *Luke Arnett*, for appellees.

J. Fred Jones, Justice. This appeal from the Sebastian County Circuit Court involves an unemployment compensation case in which the employer is resisting the claims of a number of employees on the grounds that the employees are ineligible for benefits because their unemployment was brought about by a labor dispute within the meaning of Ark. Stat. Ann. § 81-1105 (f) (Repl. 1960), which is as follows:

> "If so found by the Commissioner, no individual may serve a waiting period or be paid benefits for the duration of any period of unemployment if he lost his employment or has left his employment by reason of a labor dispute other than a lockout at the factory, establishment, or other premises at which he was employed (regardless of whether or not such labor dispute causes any reduction or cessation of operations at such factory establishment or other premises of the employer), as long as such labor dispute continues, and thereafter for such reasonable period of time (if any) as may be necessary for such factory, establishment, or other premises to resume normal operation. Provided, however, that this subsection shall not apply if it is shown that he is not participating in or directly interested in the labor dispute; and he does not belong to a grade or class of workers of which, immediately before the commencement of the labor dispute there were members employed at the factory, establishment or other premises at which the labor dispute occurs, any of whom are participating in or directly interested in the labor dispute. Provided, that if in any case, separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate depart-

ments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment or other premises."

The facts are not seriously in dispute and may be briefly stated as follows: Appellant manufactures glass at its plant in Fort Smith and appellees are members of Local No. 4, United Glass and Ceramic Workers Union and regularly employed at appellant's plant. A separate class of employees at the plant were members of Local No. 7, Window Glass Cutters League of America. The collective bargaining agreement between appellant and Local No. 7 expired in June of 1966, and thereafter Local No. 7 periodically picketed appellant's plant. When the dispute arose with Local No. 7, about 285 of the appellee members of Local No. 4 were placed on a lay-off status and started drawing unemployment compensation benefits without question. Twenty-five members of Local No. 4 were not placed on a lay-off status and these employees crossed the picket line established by Local No. 7 and continued to work until October 10, 1966.

The collective bargaining agreement between appellant and Local No. 4 was to have expired on August 1, 1966, but was verbally extended from time to time. On October 10, 1966, the president of Local No. 4 advised appellant that Local No. 4 employees did not have a contract and were not going to continue to work. The 25 employees who had continued to work until October 10 failed to return to work on that date and the other 285 employee members of Local No. 4 remained on a lay-off status. A number of Local No. 4 employees (appellees) were requested to return to work at various times between October 10 and November 16, 1966, and refused to do so. On November 16, 1966, a new contract was signed by appellant and Local No. 4 and the appellees returned to work as requested after that date. The claims involve a period of time from October 10,

1966, until the claimant employees were requested to return to work after October 10, 1966.

The decision of the Board of Review, which was affirmed by the trial court, is as follows:

> "The determination denying benefits to the claimants who left their work on October 10 due to the labor dispute was correct and is affirmed. The determination denying the other claimants benefits from the date they were directed to report to work and failed to do so was correct and is affirmed as they became a part of the dispute or participated in the dispute by their refusal to report to work as directed. The determination of the Agency denying the claimants benefits subsequent to November 19, the end of the week the dispute was settled, is reversed because the lack of production was not caused by this labor dispute."

On appeal to this court the appellant employer designates one point relied on for reversal, as follows:

> "The circuit court erred in affirming the findings of the Arkansas Employment Security Division wherein the Employment Security Division allowed unemployment compensation benefits to certain of the appellees during the period of October 10, 1966, to November 16, 1966."

The appellees had no interest in the labor dispute in which members of Local No. 7 were involved. In fact they crossed the picket line established by Local No. 7 and were unaffected by the dispute with Local No. 7 except that a slowdown in production was probably caused by the dispute with Local No. 7 and resulted in the layoff of appellees prior to October 10, 1966. So, the fact situation presented on this appeal is one in which all regular employees, with the exception of 25, were laid

off for lack of work and were entitled to, and were receiving, unemployment compensation benefits. While these employees were still on lay-off status for lack of work and were still drawing benefits, the collective bargaining contract of their union expired and the employer was advised that none of appellee members of Local No. 4 (including the 25 who had not ceased work) would continue to work without a contract. The 25 who had worked all along failed to report for work as usual following the notice to the employer, and the remaining employees who were on lay-off status and drawing unemployment benefits, were not notified that work was available nor were they requested to return to work until sometime after notice had been given to the employer that they would not return without a contract.

The question then, boils down to whether the employees who were laid off for lack of work and who were drawing unemployment benefits, were still entitled to draw unemployment benefits until they were notified to return to work and refused to do so. In other words, does notice to the employer by the union president that employees do not intend to work without a contract, suspend the right to continued compensation payments to those employees who are on a lay-off status and already out of work when the notice is given and a labor dispute arises, or is it necessary that such employees be notified to return to work and refuse to do so before their unemployment benefits are suspended?

We are of the opinion that such employees should be notified to return to work and refuse to do so before the payment of their unemployment compensation benefits should be suspended.

As we understand the record, the appellant contends that there is only one labor dispute involved in this case; that the only labor dispute involved is between appellant and appellees and arose on October 10, 1966, when the president of Local No. 4 advised the ap-

pellant that appellees would not continue to work without a contract and would no longer cross the picket line established by Local No. 7, and that because of this dispute the appellees who were on lay-off status when the dispute arose, forfeited their rights to unemployment compensation benefits when it was shown that the 25 employees who had worked on October 9, 1966, participated in the dispute by failure to report for work on October 10, and since appellees belonged to the same grade or class of workers as the 25 who immediately before the commencement of the labor dispute were employed in appellant's plant and participated in the dispute by failure to report for work available to them.

Subsection (f), supra, provides that "no individual . . . may be paid benefits . . . if he lost his employment or has left his employment by reason of a labor dispute. . . . " It further provides that "this subsection [f] shall not apply if it is shown that he [the employee] is not participating in or directly interested in the labor dispute; and he does not belong to a grade or class of workers of which, immediately before the commencement of the labor dispute there were members employed at the factory . . . at which the labor dispute occurs, any of whom are participating in or directly interested in the labor dispute."

Now, assuming that subsection (f), supra, *does apply* to the appellees who were not working immediately before the commencement of the labor dispute, because it was *not shown* that they *did not belong* to the same grade or class as the 25 workers who *were working* immediately before the commencement of the dispute and who *did participate* in the dispute, still the question remains; did these employees lose or leave their employment "*by reason of a labor dispute?*" To us the record seems clear that they did not. We conclude that the appellees did not lose or leave their employment by reason of the labor dispute which arose on October 10, 1966; but that they remained on a lay-off status and did not par-

ticipate in the labor dispute until they were notified to return to work and they failed to do so. For it was then, and only then, that they lost or left their employment *by reason of the labor dispute.*

Our decision in the case of *Fort Smith Chair Co.* v. *Laney, Commissioner,* 238 Ark. 636, 383 S. W. 2d 666, relied on by both the appellant and the appellees, does not quite reach the situation presented in the case at bar. In the *Chair Co.* case a labor dispute arose on May 21, 1961, while Ballard, Wilson and Rhodes were on layoff because of lack of business. They lost or left their employment *by reason of a labor dispute,* however, when they were notified to return to work on June 13 and they refused to cross a picket line and return to work. In the *Chair Co.* case the employees' rights to benefits between May 31, 1961, when the dispute arose, and June 13, when they were notified to return to work and refused to do so, were not in issue. This corresponding period is the only one that is in issue in the case at bar.

In the *Chair Co.* case, the claim was for benefits covering a period after the employees were notified to return to work and they refused. In the case at bar, the claims are for the period of time after the labor dispute arose, but before and until appellees were notified to return to work and they refused to do so. In the *Chair Co.* case, after the employees were notified to return to work they refused to do so because of the labor dispute, thereby participating in and becoming a part of that dispute. In the case at bar, until such time as appellees were notified to return to work, they had no opportunity or obligation to return or refuse, so it can hardly be said that they were participating in the dispute until they were afforded an opportunity to do so.

In 28 A.L.R. 307 § 9, is found the following:

"While it seems clear that if a strike occurs during a layoff imposed by the employer for its own rea-

sons, the statutory disqualification for benefits where work is stopped because of a labor or industrial dispute will come into operation during the period following the strike, the cases also indicate that disqualification will not occur unless the employer notifies the striking employees that work is available for them.

"If unemployment is originally caused by a lack of work, and a labor dispute develops during the continuance of the unavailability of work, such labor dispute does not disqualify the employee until work becomes available and he refuses the work because of the labor dispute. *Muncie Foundry Div. of Borg-Warner Corp.* v. *Review Board* (1944) Ind. App. 475, 51 NE 2d 891.

"In *Employees of Lion Coal Corp.* v. *Industrial Commission* (1941) 100 Utah 207, 111 P 2d 797, where a coal operator voluntarily caused work to cease sometime prior to the calling of a general strike, it was held that there must be some evidence given and something shown by such operator to indicate when it desired work to begin again, from which it might be found that the stoppage of work was no longer due to the operator's act but was due to a strike within the meaning of the statute."

The Employment Security Act was intended to withhold benefits from those who bring about their own unemployment by bringing about or participating in a labor dispute. *Knox Consol. Coal Corp.* v. *Review Board,* (1942 Ind. App.), 43 NE 2d 1019 reversed on another point in 221 Ind. 16, 46 NE 2d 477.

We conclude that the appellees in the case at bar did not bring about their own unemployment by bringing about, or participating in, a labor dispute until they were notified to return to work following their layoff and they joined in the labor dispute by failing to return to work.

The judgment of the trial court is affirmed.

CARL W. WIDMER *v.* FORT SMITH VEHICLE AND MACHINERY CORPORATION

5-4511 427 S. W. 2d 186

Opinion delivered April 15, 1968

Carl W. Widmer, pro se.

Hardin, Barton, Hardin & Jesson, for appellee.

J. FRED JONES, Justice. This is another appeal by Carl Widmer from an adverse decision of the Sebastian County Circuit Court wherein Widmer sought judgment for more than $6,000.00 against Fort Smith Vehicle and Machinery Corporation without the necessity of offer-

ing proof of the allegations in his complaint, and without the necessity of a trial of the issues on their merits.

On June 12, 1962, Widmer purchased a used Case grain combine from the appellee, Fort Smith Vehicle and Machinery Corporation, under a conditional sales contract for a total cash purchase price of $1,050.00 of which amount $250.00 was paid in cash. The contract provided for the balance to be paid in semi-annual installments of $269.25 on December 15, 1962, $218.45 on June 15, 1963, $227.70 on December 15, 1963, and $236.90 on June 15, 1964. The purchase agreement was drawn up on a printed form designated "Purchase Order," and the form was designed for use in the sale of John Deere equipment. Under the terms of the contract title was retained by the seller until the combine was fully paid for. A section designated "Warranty and Agreement" appears in bold type in the face of the form and this section of the contract provides as follows:

> "Seller warrants each new John Deere machine to be free from defects in materials or workmanship. The obligation of Seller under this warranty is limited to replacing parts which prove defective with normal and proper use within a period of 6 months from date of delivery to Purchaser. *In no event shall Seller be liable for incidental or consequential damages or injuries including loss of crops or inconvenience or loss in performing contracts.*
>
> "The above warranty is in lieu of all other warranties, statutory or otherwise, expressed or implied, all other representations to Purchaser, and all other obligations or liabilities with respect to such machines including implied warranties of merchantability and fitness. No warranty or representation whatsoever, expressed or implied, has been made by the manufacturer or wholesale distributor of John Deere machines and relied on by Purchaser, and Seller has no authority to make any such warranty

or representation on behalf of such manufacturer or wholesale distributor.

"*Seller makes no warranty (including the implied warranty of merchantability and fitness) or representation, expressed or implied, and disclaims all obligations and liabilities whatsoever, as to*: (a) batteries and rubber tires; (b) *any second hand goods;* (c) *tractor engines not manufactured by John Deere* except that this warranty includes Detroit Diesel 2 cylinder engines on light industrial and light agricultural tractors; and (d) *any other goods not specifically named in the first paragraph of this warranty* (whether or not sold on or with John Deere machines). *As to any such goods Purchaser agrees to look solely to the written warranty, if any, undertaken by the manufacturer thereof.* However, in the case of certain such goods Seller may elect to give a written warranty in the form of a certificate or other written statement specifically designated 'Warranty' in which case the provisions of such Warranty shall govern.

"*No assistance given to Purchaser by Seller or anyone acting with him in the repair or operation of the goods shall constitute a waiver on the part of Seller* of the conditions of this Warranty and Agreement." (Emphasis supplied.)

According to the complaint the combine was repossessed by the appellee in the latter part of December 1963, and according to the answer the combine was repossessed because Widmer had paid nothing on the purchase price except the down payment and had defaulted in the payment of all of the first three semi-annual installments at the time the combine was repossessed by the appellee.

On March 2, 1967, Widmer filed suit against the appellee alleging the purchase of the combine under an

express verbal agreement by Bill Woody, salesman and agent of the appellee, that the combine "as is" would harvest all of Widmer's grain without difficulty, and that the machine was so warranted; that the actual sale price of the combine was $950.00, but that Widmer agreed to give the appellee an additional hundred dollars to replace and repair any worn or damaged parts and to generally check and completely service the machine, etc.; that the combine was not delivered when agreed and that all the agreed work had not been done on the combine when it was finally delivered; that numerous breakdowns occurred after its delivery, and that one such breakdown lasted for more than a week before the machine was put back into service by the appellee's employees.

Widmer alleged that because the combine failed to perform as warranted, he was late in harvesting his grain crop, and because of this delay he was late in getting his bean crop planted, and because of the delay in planting the fall soy bean crop, a large part of that crop did not mature and that as a result of loss in grain and the soy bean crop, he was damaged in the amount of $6,500.00.

Under a second count in the complaint, Widmer alleged ownership of the combine and damage to the extent of its value, as well as punitive damages in unlawful trespass committed by appellee in repossessing the combine. On March 10, the appellee filed a "Motion to Elect" praying an order requiring the plaintiff, Widmer, to pursue his cause of action in either contract or tort. On March 14, Widmer filed "Request for Admission of Facts" requesting the appellee to admit as true eighteen paragraphs of statement including the alleged delay in harvest due to breakdowns and repairs, the consequential delay in planting 150 acres of soy beans resulting in failure of the soy bean crop to mature, and that the net fair market value of the soy bean crop that did not mature would have been $3,600.00.

On March 17, defendant filed a motion to quash the request for admissions, and on March 17, Widmer filed his response to defendant's motion to elect, concluding the response as follows:

> "[A]ll rights and defenses as to both parties to the action and as to both Counts arise out of and come into being as a result of a purchase order dated June 12, 1962; the purchase order in question being the contract in this action; thus, it is apparent that plaintiff's action is based on contract, and defendant's motion for plaintiff to elect is superfluous."

On April 12, the trial court granted defendant's motion to quash the request for admissions; granted defendant's motion to elect and set the case for trial on May 2, 1967. Under date of April 20, 1967, Widmer filed a motion to vacate the order granting defendant's motion to quash request for admission of facts. He subsequently complied with the order to elect and elected to proceed under the first count of his complaint, and on April 21 he filed motion for summary judgment on the theory that since the defendant had not responded to the request for admission of facts which the court had quashed, the facts set out in the request would be taken as true and would entitle Widmer to a judgment on his complaint as a matter of law.

Appellee filed a demurrer to the complaint combined with its answer and also filed a motion for a summary judgment. On May 29, the cause was heard by the court sitting as a jury and the motions for summary judgment were denied. Widmer stood on his demand for a summary judgment and refused to go forward with evidence in support of his complaint. The complaint was dismissed by the trial court, and on his appeal to this court Widmer designates two points he relies on as follows:

"That the trial court erred in not deeming all requested admissions contained in request for admission of facts dated March 14, 1967, as being deemed admitted.

"That the trial court erred in not granting appellant's motion for summary judgment."

In support of the points appellant relies on, he argues in his brief, as follows:

"The plain, cold, and obvious facts are that appellee just has not complied with the plain and simple provisions of sub-part (2) of subsection (a) of Statute 28-358 concerning written objections and the explicit requirement for 'Notice of Hearing.' "

We consider the plain, cold and obvious facts to be, that appellant purchased a used Case combine and almost five years after he purchased it and some three years after it was repossessed for nonpayment, he filed suit on breach of warranties in his contract of purchase and alleged prospective damages measured in acres of grain he did not harvest and soy beans he did not produce.

The record reveals that appellant previously filed this identical law suit in the Sebastian County Circuit Court and followed exactly the same procedure in filing the identical requests for admissions of identical facts and when appellee complied with the requests in that case, appellant refused to go forward with his proof in the trial of the law suit but took a voluntary nonsuit. Appellant refiled the present suit and again filed identical requests for identical admissions, all of which he had a perfect right to do, but under the risk of becoming vexatious to the point of necessary intervention of the trial judge in protecting the rights of other parties to the law suit and the orderly conduct of the business of the court. We are of the opinion that the trial court did not abuse its discretion in quashing the appellant's

request for admissions and in requiring the appellant to proceed with his burden of proof in the orderly trial of this law suit on its merits.

Appellant has apparently overlooked two recent decisions of this court in which the argument he now advances in support of the points he relies on was rejected. In the case of *Widmer* v. *Wood,* 243 Ark. 457, 420 S. W. 2d 828, and again in *Carl Widmer* v. *R. G. Wood,* 243 Ark. 32, 421 S. W. 2d 872, we held that where objections to a request for admissions fail to include a notice for hearing thereon, such omission does not constitute a defect so fatal as to result in the defendant's admission of the truth of the requests. We so hold again in the case at bar.

It should not be necessary to point out that the discovery statutes were intended to assist in clarifying the issues in a law suit and help eliminate the elements of surprise and resulting delay in reaching a fair and impartial result at the trial of a law suit on its merits.

The purpose of discovery procedure is to simplify the issues at the actual trial and is not intended to take the place of the actual trial, nor is it intended to relieve the plaintiff of the burden of proving the allegations of his complaint in a civil case. The request for admissions within our discovery procedure is intended to eliminate the effort, expense and time involved in proving such facts as are admitted and is not intended as some new or modern legal method of winning law suits without trial. The object of the civil court trial still remains to attain justice between the parties as nearly as possible, and the rules of civil procedure, including discovery, are intended to aid in that object.

We know of no unique procedure under our code of practice whereby a plaintiff may completely abandon his burden of proof and safely rely on requests for admissions to which his adversary may finally grow weary

and fail to respond and thereby automatically entitle the plaintiff to a judgment on any kind of complaint without any kind of proof or any kind of trial. The business of the circuit court of this state is serious business and although a party litigant has a right to represent himself and to devote his full time to the job if he desires to do so, he does not have the unlimited right to convert the rules of civil procedure into a game of legal wits and unduly burden his adversary with expense of counsel in responding to unnecessary and frivolous pleadings simply because they are permitted by statute. The trial court has a duty and inherent power to quash such pleadings and its actions in doing so will not be disturbed on appeal unless that discretion is abused.

Appellant seems to recognize, and we agree, that his entire law suit is predicated on a breach of warranty by appellee in the contractual sale of the combine. At page 35 of appellant's brief he states:

> "It must be kept in mind that the 12 SP Case Combine that is the subject of this action was sold with a warranty and guarantee on the part of appellee."

Appellee, in its verified answer to the complaint, specifically denied that any warranties of any kind were ever made in connection with the purchase of the combine as alleged by the appellant. Even if appellee had admitted all the other facts requested by appellant, there would have been no substantial evidence upon which the court could have rendered judgment for the appellant for breach of warranty.

Appellant cites *Hambrick* v. *Peoples Mercantile & Implement Co.*, 228 Ark. 1021, 311 S. W. 2d 785, in support of the warranties he alleged. The *Hambrick* case is very much in point with the case at bar but sustains appellee's contention that there were no warranties, rather than appellant's contention that there were war-

ranties. The *Hambrick* case involved the sale of a used cotton picker. The contract contained express warranties on new machines and merely stated that the warranties on the new machines did not apply to used machines. Thus, since the express warranty in the *Hambrick* contract did not apply to used machines, the used cotton picker was left subject only to such warranties as the law implies as to fitness for the purpose it was sold. The last paragraph of the *Hambrick* decision clearly distinguishes it from the case at bar. In referring to the seller who prepared the *Hambrick* contract, in the last paragraph of that decision we said:

> "It [the seller] failed to insert a declaration that there should be no warranty of second-hand goods and instead contented itself with the statement that such goods should not carry the warranty applicable to new machines. We therefore conclude that the implied warranty which the appellants sought to prove was not excluded by the agreement."

The exact wording of the contract in the *Hambrick* case is as follows: "*This warranty does not apply* to used or secondhand goods," (emphasis supplied) whereas in the case at bar the language of the contract states affirmatively: "*Seller makes no warranty* (including the implied warranty of merchantability and fitness) or representation, expressed or implied, *and disclaims all obligations and liabilities whatsoever, as to: . . . any second hand goods.*" (Emphasis supplied). The other warranty provisions of the contract in the case at bar, quoted supra, are so clear and unambiguous nothing would be accomplished by restating them here.

The appellant alleged warranties and their breach by the appellee. The appellee, by verified answer, denied the existence of warranties and affirmatively disclaimed all obligations and liabilities whatsoever as to this second-hand Case combine. The burden was on the appellant to prove the existence of the warranties he alleged,

as well as their breach by the appellee, and this the appellant failed to do. As a matter of fact in order for appellant to have proved warranties in this case, it would have been necessary for him to have disproved the written terms of the contract he relied on. Appellant not only failed to prove the warranties and their breach by the appellee, as alleged in his complaint, he refused to even attempt to do so.

The judgment of the trial court is affirmed.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result. When appellant elected to stand on his motion for summary judgment, his request for admissions had been quashed. Although he had filed a motion to vacate the order quashing his request, no action was taken thereon. By his election to stand on his motion for summary judgment, he waived the motion to vacate. Appellant could not have been entitled to a summary judgment unless the trial court was required to consider his request as admitted.

Appellee had filed a pleading called "Motion to Quash" in response to the request. While this is not a proper pleading on a request for admissions under the statute, we are committed to the rule that a pleading is to be treated according to its substance rather than its title. *Parker* v. *Bowlan,* 242 Ark. 192, 412 S. W. 2d 597. Appellee's motion stated that the request for these admissions in this case, after the same requests had been answered in a previous action on the same cause between the same parties, showed that it was made for the purpose of annoyance, expense, embarrassment and oppression contrary to the spirit and purposes of the discovery procedures. Appellee further stated that the requests were irrelevant and argumentative and that the requests were otherwise improper. The trial court granted the motion. This motion actually constituted a written objection to the requests, which, in effect, was sustained by the trial court.

Examination of the requests indicates that the motion may well have been granted upon the basis that some were irrelevant and some argumentative. Although the answer contains a general denial, it also contains certain specific statements which might be deemed to have sufficiently answered some of appellant's requests. Each request should have been phrased so that it could be admitted or denied without explanation. 2A Federal Practice & Procedure, Barron & Holtzhoff (Wright), Rules Edition, p. 503, Chapter 9, § 832. Some of the requests might well have been found to be argumentative because they would have been difficult, if not impossible, to answer without explanation.

Appellant elected to stand on his motion for summary judgment. The premise of that motion is that the court was required to take the requests to be admitted, because no notice of hearing of appellee's motion to quash was given. Appellant does not question here the propriety of the granting of the motion to quash by the court, except because of appellee's failure to give the notice.

Appellant cited only one case to support his contention, namely, *United States* v. *Kellert,* 101 F. Supp. 698. Since this case was decided before Arkansas adopted Rule 36 of FRCP, he urged that we adopted the construction of the rule in this case. While this rule of statutory interpretation is sound, it is doubtful that the decision of a district court would be as binding on us as that of an appellate court. Furthermore, there is a factor in the case upon which appellant relies that prevents the decision from constituting authority for the rule he urges. In the *Kellert* case, the court relied upon the failure of the defendant to attempt to obtain a hearing on his motion to dismiss the request for admissions at any time within the year intervening between the filing thereof and the granting of the summary judgment. No such period of time elapsed here and this motion was heard by the court. If there was undue delay about

the disposition of the motion, there was nothing to keep appellant from having asked for a hearing. We have previously held against appellant on this point and I think the holdings are proper. See *Widmer* v. *Wood,* 243 Ark. 457, 420 S. W. 2d 828; *Widmer* v. *Wood,* 243 Ark. 32, 421 S. W. 2d 872. I am not aware of any case that follows the rules suggested by appellant here which was decided before our adoption of Rule No. 36. It is interesting to note that at least two district courts have held that failure to accompany objections to a request for admissions with a notice of hearing does not render the objections ineffective where local practice and procedure has eliminated oral hearings on motions. *J. R. Prewitt & Sons, Inc.* v. *Willimon,* 20 FRD 149 (D. C. Mo. 1957); *Eastman Kodak Co.* v. *U. S. F. & G. Co.,* 34 FRD 490 (D. C. Md. 1964).

The majority opinion suggests that requesting the same admissions as were sought in a prior non-suited action may be considered as vexatious. I do not agree that this is the case. The statute clearly states that an admission made pursuant to request is for the purpose of the pending action only and may not be used in any other proceeding. If this is the intended effect of the holding by the majority, I consider it an ill-advised limitation of a very salutary provision of our procedural statutes. The scope and purpose of this provision is broader than simply clarifying the issues. It is also for the purpose of eliminating issues as to which there can be no controversy in good faith. Like the motion for summary judgment, the request for admissions is designed to remove the shielding cloak of formal allegations in a pleading. *Mid-South Ins. Company* v. *First National Bank of Fort Smith,* 241 Ark. 935, 410 S. W. 2d 873. Its use for that purpose should not be discouraged, particularly where that most evasive of all pleadings, the simple general denial, has been utilized.

I am authorized to state that Brown, J., joins in this concurring opinion.

PENNSALT CHEMICAL CORP. ET AL *v.*
CROWN CORK & SEAL CO., INC. ET AL

5-4341 426 S. W. 2d 417

Opinion delivered April 15, 1968

Hale & Fogleman and *Rose, Meek, House, Barron, Nash & Williamson* and *McMath, Leatherman, Woods & Youngdahl* and *Nance, Nance & Fleming,* for appellants.

Frierson, Walker & Snellgrove and *Wright, Lindsey & Jennings* and *McDonald, Kuhn, McDonald, Crenshaw & Smith* and *Rieves & Rieves,* for appellees.

CONLEY BYRD, Justice. Personal jurisdiction over nonresident appellees Crown Cork & Seal Company, Inc., a New York corporation with its principal place of business in Philadelphia, Pennsylvania; Superior Valve & Fittings Company, a Pennsylvania corporation; and

Chase Products Company, an Illinois corporation, under Ark. Stat. Ann. § 27-2502 C. 1(d) (Supp. 1967) (being § 103 [a] [4] of the Uniform Interstate and International Procedure Act), is the issue on this appeal by appellants W. C. Hull and Lillie Hull, his wife, and Pennsalt Chemical Corporation, a Pennsylvania corporation, which has filed a third party complaint against appellees. The statute provides:

> "C. Personal jurisdiction based upon conduct.
>
> 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;
>
> * * *
>
> (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;
>
> * * *
>
> 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."

This case originated in the trial court as a tort action and a breach of warranty action, which were consolidated for trial purposes, against Pennsalt Chemical Corporation, a Pennsylvania corporation; Crown Cork and Seal Company, a New York corporation; Chase Products Company, an Illinois corporation; Superior Valve & Fittings Company, a Pennsylvania corpora-

tion; and in the warranty action against Budlock Refrigeration Supply Company, Inc., a Tennessee corporation.

The action arises out of an explosion on May 16, 1962, of a can of refrigerant manufactured by Pennsalt Chemical Corporation and labeled "PENNSALT HANDI-CAN REFRIGERANT 12." The can and top for the refrigerant were manufactured by defendant Crown Cork & Seal Company. The refrigerant was packaged in the can by Chase Products Corporation. The valve used by Hull in attempting to put the refrigerant into the air conditioner of an automobile was manufactured by Superior Valve & Fittings Company. The allegation in the complaint is that Hull's employer, the McCaa Chevrolet Company, purchased the Pennsalt Handi-can Refrigerant 12 from Budlock Refrigeration Supply Company, Inc.

The trial court restricted all interrogatories about appellees' solicitation of business and the revenues derived therefrom to matters arising before May 16, 1962, and upon the record made held that the court had no personal jurisdiction over appellees Crown Cork & Seal Company, hereinafter referred to as Crown Cork; Chase Products Company, hereinafter referred to as Chase; and Superior Valve & Fittings Company, hereinafter referred to as Superior Valve.

For reversal appellants contend that the trial court erred in holding that appellees' activities were not embraced within § 27-2502 C. 1(d), and in limiting or restricting interrogatories on the subject to the period before accrual of plaintiff's cause of action.

For affirmance appellees contend (1) that the cause of action involved herein did not arise from actions enumerated in § 27-2502 C. 1(d) as the same is restricted by subsection C. 2 of the statute; (2) that to submit them to the jurisdiction of the Crittenden Circuit Court would violate due process of law; (3) that appellees were not

regularly doing or conducting business or engaged in any other persistent course of conduct in Arkansas or deriving substantial revenue from goods consumed or services used in Arkansas; (4) that § 27-2502 C. 1(d) does not apply to a warranty case and (5) that appellants did not preserve their right on appeal to argue the limitation of interrogatories in the trial court.

It is admitted that appellees are not authorized to engage in business in the state of Arkansas, have no offices or places of business in the state and have no agents or servants resident in the state. It is further admitted that up to May 16, 1962, appellees had no warehouses and stored no merchandise in the state of Arkansas for delivery to customers.

The facts show that Chase does not sell directly to persons, firms or corporations in the state of Arkansas but does sell through independent brokers and manufacturers' agents. During the three years immediately before the accident it sold through such agents and shipped by common carrier to Little Rock Wholesale, Little Rock, Arkansas, an item known as "Super Spraysno." The amount shipped in 1960 was $1,987.78; in 1961 was $546.48; and in 1962 (up to May 16) was $123.60. Its annual sales volume is over $5,000,000. It had processed $22,000 worth of units for Pennsalt in connection with "Pennsalt Handi-can Refrigerant 12" for the period involved. This processing consisted of 63,955 units in 1960, no units in 1961, and 49,779 units in 1962 up to May 16. The units processed were, upon orders of Pennsalt, shipped by common carrier to all of the states bordering Arkansas.

Notwithstanding its shipments to the bordering states and the fact that it knew the intended use of the refrigerant, Chase denies that it had knowledge or reason to believe that the cans would be sold or used in Arkansas.

Superior Valve makes valves for high and low pressure gas industries; fire extinguishers and refrigeration; and allied assemblies such as manifolds, heat exchangers, liquid indicators and charging hoses for refrigeration and air conditioning. Valves and fittings for air conditioning and refrigeration use and valves for use with gases such as chlorine and oxygen are shipped to customers in Little Rock, Conway, Fort Smith and El Dorado, Arkansas. Annual sales made to such customers through manufacturers' agents amounted to $670 in 1959, $2,025 in 1960, $3,423 in 1961, and $2,743 in 1962. Superior Valve admits that it manufactured the FITZ-ALL valve described in the complaint, but states that from January 1, 1960 to October 15, 1965, it had shipped only twelve such valves to the state of Arkansas for a total revenue of $11.60.[1] The manufacturers' agents for Superior Valve left its advertising brochures with customers from time to time, and Superior Valve would mail them to a customer upon request. The only advertising of its products through news media was in national trade papers and magazines, none of which are published in Arkansas.

The interrogatories and affidavits of Crown Cork show that it manufactures containers and crowns. It admitted making cans of the type used by Pennsalt which it delivered to Chase in the state of Pennsylvania. In 1960, $332 worth of cans of this same type were sold to Southwest Aerosol of Little Rock, Arkansas, and $2,621 worth in 1961 to Reasor Hill Company, Jacksonville, Arkansas. It had one salesman who called on customers in Arkansas not more than eight times a year. Its Arkansas sales in 1960 totaled $719, in 1961 $3,191 and in 1962 $379. In an affidavit Crown Cork stated that its annual sales were $141,000,000 and that its Arkansas sales amounted to .24% of the total. Appellants interpret the total annual sales allocable to Arkansas as .24% of $141,000,000, or $338,400.

[1]It is not contended that the valve here involved is one of the twelve shipped to Arkansas.

The right of a state court to exercise personal jurisdiction over a nonresident for acts committed outside the state but affecting a resident of the state has been recognized in *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957), where Justice Black in speaking for the court stated:

> "Since *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned "consent," "doing business," and "presence" as the standard for measuring the extent of state judicial power over such corporations. See Henderson, The Position of Foreign Corporations in American Constitutional Law, c.V. More recently in *International Shoe Co.* v. *State of Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, the Court decided 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." Id., 326 U. S. at page 316, 66 S. Ct. at page 158.
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> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full con-

tinent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

The only restriction in *International Shoe Co.* v. *State of Wash.*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057 (1945), and *McGee* v. *International Life Ins. Co., supra,* is that before a state can exercise such jurisdiction it is essential that there be a showing that the defendant purposefully availed itself of the privilege of conducting activities within the forum state. It is recognized that such activities may be carried on by mail, *Travelers Health Ass'n.* v. *Commonwealth of Va.*, 339 U. S. 643, 70 S. Ct. 927, 94 L. Ed. 1154 (1950), and by an independent agent or manufacturer's representative, *Jackson* v. *National Linen Serv. Corp.,* 248 F. Supp. 962 (W. D. Va. 1965); *Gray* v. *American Radiator & Sanitary Corp.,* 22 Ill. 2d 432, 176 N. E. 2d 761 (1961); *Johnson* v. *Equitable Life Assur. Soc.,* 22 App. Div. 2d 138, 254 N.Y.S. 2d 258 (1964); and *Coreil* v. *Pearson,* 242 F. Supp. 802 (W. D. La. 1965).

We think the facts here show enough of a persistent course of conduct within the state of Arkansas by each of the nonresident corporations, either through its own agent or an independent manufacturer's agent, to constitute the minimum contacts necessary to give a state jurisdiction without offending the traditional notions of fair play and substantial justice. As pointed out in *Gordon Armstrong Co.* v. *Superior Court,* 325 P. 2d 21, 160 Cal. App. 2d 211 (1958), in determining this issue much consideration must be given to the forum which is more convenient and to the facilities of modern transportation and communication. Under today's mode of travel, the city of Little Rock is closer and more easily accessible to Dallas than it was to Pine Bluff, a mere

distance of 45 miles, a generation ago. Consequently, we hold that the exercise of personal jurisdiction does not violate the due process of law provisions of the United States Constitution.

Appellees' arguments (1) and (3), above, are based on the premise that subsection C. 2 makes it mandatory that the conduct that gave rise to the injury must have some relation to the activities upon which service is founded. Thus appellees argue that subsection C. 1(d), as modified by subsection C. 2, requires that the tortious injury must arise out of the business regularly solicited or engaged in by appellees. This argument is contrary to the comment of the commissioners in adopting the act, which specifically points out as follows:

> "It should be noted that the regular solicitation of business or the persistent course of conduct required by section 1.03 (a) (4) need have no relationship to the act or failure to act that caused the injury. No distinctions are drawn between types of tort actions."

Furthermore, to adopt appellees' construction would limit the jurisdictional reach of subsection C. 1(d) to that of subsection C. 1(a) ("transacting any business in this State;"), thus making subsection C. 1(d) surplusage. We think the better construction is that an action brought under subsection C. 1(d) must be limited to a tortious injury in this state arising out of an action or omission outside of this state, thus preventing a citizen injured in Missouri from bringing a cause of action in Arkansas. But we do not interpret subsection C. 2 as applying to the qualifying portion of subsection C. 1(d) —*i. e.*, ". . . 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; . . ." This interpretation places beyond jurisdictional reach of the statute those isolated transactions where the nonresident

has no other contact with the state, *Hill* v. *Morgan Power Apparatus Corp.,* 259 F. Supp. 609 (E. D. Ark. 1966), but on the other hand recognizes that one who pursues a persistent course of conduct or otherwise derives substantial revenue from activities in this state will be liable for acts committed outside this state resulting in injuries in this state. Therefore, we hold that the trial court erred in quashing service of summons upon the nonresident appellees.

Furthermore, we find that subsection C. 1(d) applies both to actions for breach of warranty and to actions in tort. Appellees' contention in this respect would unduly restrict the interpretation of the word "tortious." Most authorities treat personal injuries arising from an implied warranty as tortious in nature. See Prosser, Torts, Ch. 19 (3d ed. 1964); and Harper & James, The Law of Torts, Ch. XXVIII (1956). Also, in *Evans Laboratories* v. *Roberts, Judge,* 243 Ark. 987, 423 S. W. 2d 271 (1968), we recognized that a personal injury action for implied breach of warranty fell within our venue statute for personal injuries rather than being an action upon a contract.

It follows that the argument over whether appellants properly objected to the trial court's action has become moot. Since the issue may arise in the future, we point out that the testimony relative to the persistent course of the nonresident's conduct and to whether it derived substantial revenues subsequent to the date of the accident is ordinarily within the permissible scope of inquiry under subsection C. 1 (d).

Reversed and remanded.

FOGLEMAN, J., disqualified and not participating.

DON HALE ET AL *v.* SOUTHWEST ARKANSAS WATER DISTRICT

5-4441 427 S. W. 2d 14

Opinion delivered April 15, 1968
[Rehearing denied May 21, 1968.]

[redacted]

Eugene B. Hale Jr. and *Fred Pickett,* for appellants.

Hayes McClerkin, for appellee.

CONLEY BYRD, Justice. Appellee Southwest Arkansas Water District, a public non-profit regional water distribution district formed under Act 114 of 1957, Ark. Stat. Ann. §§ 21-1401—1415 (Supp. 1967), for the counties of Hempstead, Little River, Miller, Lafayette and Columbia, instituted this action to condemn a right-of-way some six miles long for pipe lines and a canal to transport water from the Millwood Dam Reservoir on Little River to a point east of Highway 71 south of Ashdown. The canal was to commence at the Millwood

Dam Reservoir and end at the plant of Nekoosa-Edwards Paper Company, and since Nekoosa-Edwards Paper Company was the only consumer of the water district at that time, appellants Don E. Hale et al, Robert L. Black et al, and Wayne L. Carver et al contended that the taking was for private rather than public use, which is prohibited by article 2, section 22 of the Constitution of Arkansas.

The act under which the water district was incorporated, Ark. Stat. Ann. § 21-1408 (Supp. 1967), requires it to transport, distribute, sell, furnish and dispose of such water to any person at any place. Section 21-1409 gives to any person aggrieved by the water district's service or rates the right to petition the Circuit Court to issue such orders as may be necessary and proper to protect his rights therein.

After its organization the water district obtained from the United States government a contract for the acquisition of 265,000,000 gallons of water daily from the Millwood Dam Reservoir. The purpose of the contract with the Corps of Engineers was the contemplated distribution of water for municipal, industrial and agricultural purposes to the surrounding area. The evidence shows that the water district as such had no funds with which to construct or make any distribution and that it depended wholly upon revenue bonds for the construction of improvements. Consequently, before any improvements could be undertaken the district needed a contract with sufficient guaranteed revenues to float a bond issue. In this case, in addition to floating a bond issue upon the revenues derived from the Nekoosa-Edwards Paper Company contract, the district applied to the Economic Development Administration, an agency of the federal government, and obtained a grant of $1,870,000 to aid in the construction of the canal. Furthermore, the over-all planning by Brown & Root, Inc., the project engineers, covered all of the multi-county area included in the water distribution district south and west

of Little River. However, the construction plans covered only the canal here involved. The present design capacity of the canal is adequate to serve all expected needs south and west of Little River, including the cities of Ashdown, Foreman, Texarkana and a hoped-for paper company near McNab.

In *Railway Co.* v. *Petty,* 57 Ark. 359, 21 S. W. 884 (1893), we had before us somewhat the same issue as the one here. There the railroad had instituted eminent domain proceedings for the purpose of constructing an additional side track across Petty's land to that of an adjacent and competing coal miner. In upholding the right of the railroad to exercise eminent domain, we said:

> "To be public the user must concern the public. If it is an aid in facilitating the business for which the public agency is authorized to exercise the power to condemn, or if the public may enjoy the use of it not by permission but of right, its character is public. When once the character of the use is found to be public, the court's enquiry ends, and the legislative policy is left supreme, although it appears that private ends will be advanced by the public user. It is common for the interest of some individuals to be advanced, while that of others is prejudiced, by the location of railway stations and switches when there is no motive on the part of the railway officials to discriminate between them. That result is seen in the original location of every line of railway. But the courts do not assume to interfere with the right of the company to locate its line, stations or switches. In this case, the railway located its sidetracks contiguous to the mine of the coal company, rather than to that of the appellee who is a rival miner. The evidence is abundant that side tracks were necessary to facilitate and hasten the business offered to the company at that point. That, of itself, is sufficient to give public character

> to the use to which the land was to be devoted. Moreover, at that point upon this very land, as the proof shows, there is established a shipping station for coal. The railway's franchise empowers it to establish none but public stations. It can place no unreasonable restraint on the right of the public to use it. If the railway maintains a coal shipping station at that point, and unreasonably refuses to accord to the appellee, or others who have occasion to ship coal therefrom, facilities for doing so, the courts can afford a remedy for the wrong; and if the railway abuses the privilege of condemning private property for a public use by turning the property acquired by condemnation to a private use, doubtless the easement it acquired by condemnation may be revoked, and the possession restored to the owner of the fee."

Thus the water district here stands in much the same position as the railroad. By law it is obligated to serve any member of the public desiring its services, and while the statute does not specifically set it forth, it would appear that this would be upon the same terms and conditions applied to Nekoosa-Edwards Paper Company—*i. e.,* the cost of such services to any prospective customer would be that only which was necessary to pay for the water plus the amortization of the investment in the canals necessary for distribution of the water. Our position would be otherwise if Nekoosa-Edwards Paper Company were the only customer who had a right to use the water. It is true that at present the canal would serve only Nekoosa-Edwards Paper Company; but we feel that we would be unduly restrictive in our interpretation of the right of eminent domain if we required a utility to have a going business before it laid its first trunk line for the distribution of its product. The testimony here showed without doubt that the canal was to serve as a trunk line not only for Nekoosa-Edwards but for all other customers who might demand service south and west of the river. Under these circum-

stances we hold that a preponderance of the evidence shows that the proposed use of the canal by the water distribution district is for a public purpose. Nor can we find anything to the contrary in *City of Little Rock* v. *Raines,* 241 Ark. 1071, 411 S. W. 2d 486 (1967).

It is also argued that the trial court erred in finding that the landowners had the burden of proving that the taking was for private use. Since in our opinion a preponderance of the evidence when construed in connection with the statute shows that the taking was for a public use, this issue is moot.

Appellants Don Hale et al urge other points for reversal, such as that the trial court erred in finding that the pleadings should be amended to conform to the proof; in not granting appellants' motion for continuance; in not granting resubmission of the case and transferring the cause to equity; and in permitting entry until just compensation was determined and paid.

On these allegations we find no error. Appellant Hale failed to show in what different manner he would have prepared his case had a continuance been granted, and certainly the mere recording of mortgages on the condemned land by the water district would not call for a resubmission of the case and a transfer to equity. The alleged error with respect to the entry until a just compensation was determined and paid is argued here for the first time.

Since the statutory authority for the exercise of eminent domain refers to "rights-of-way," we hold that the trial court erred in taking the fee title of appellants' properties rather than an easement for right-of-way. The term "right-of-way" ordinarily refers to an easement only. *Graham* v. *St. Louis I. M. & S. R. Co.,* 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344 (1901). By limiting the eminent domain to an easement, appellants have the security pointed out in *Railway Co.* v. *Petty, supra,* should

the water district abuse its privilege of condemning private property for public use by turning the property acquired into a private use.

Affirmed as modified.

BROWN, J., not participating.

LEGAL SECURITY LIFE INSURANCE CO. *v.* MRS. JESSIE BROOKS ET AL

5-4479 426 S. W. 2d 784

Opinion delivered April 15, 1968

[Rehearing denied May 13, 1968.]

Perry V. Whitmore, for appellant.

Jack Young and *Jack Sims,* for appellees.

CONLEY BYRD, Justice. Appellant, Legal Security Life Insurance Company, was sued on two counts by Mrs. Jessie Brooks for transactions she had had with American Teachers Life Insurance Association, a fraternal life insurance association, and for transactions with Kelly-Barrett Company, Inc., which held a management contract with American Teachers Life Insurance Association. The record shows that the policies of American Teachers were assumed by Southern United Life Insurance Company; that Southern United was consolidated into American Commerce Life Insurance Company; and that American Commerce Life Insurance Company was merged into appellant Legal Security Life Insurance Company of Dallas, Texas.

The first count in Mrs. Brooks' complaint was on a $5,000 note executed on May 10, 1963. The second count was an equitable garnishment, it being alleged that Kelly-Barrett Company was indebted to Mrs. Brooks in the amount of $11,866.50, for which judgment had been obtained; and it further being alleged that as of October 17, 1963, American Teachers was indebted to Kelly-Barrett in the sum of $12,941.61, which is still due. The allegation then followed that the liabilities of American Teachers were assumed by Southern United, for which appellant Legal Security now stands obligated.

Appellant denies that the contract of Southern United assumed the responsibilities of American Teachers; denies that the $5,000 note is an obligation of American Teachers; and in the alternative pleads fraud in the procurement of the contract between American Teachers and Southern United, and that the obligation of Amer-

ican Teachers to Kelly-Barrett Company was extinguished by an accord and satisfaction. Appellant filed a third-party complaint against J. C. Kelly, J. G. Barrett and Kelly-Barrett Company, Inc., based on an indemnification clause in the contract between Southern United and American Teachers.

From a decree holding appellant liable on both counts and dismissing its third-party complaint against J. C. Kelly (J. G. Barrett and Kelly-Barrett Company, Inc., not having been served), appellant appeals, raising the same issues.

The agreement between Southern United and American Teachers, insofar as applicable, provides:

> "(2) Southern United Life Insurance Company further agrees to assume all of the legal liabilities of American Teachers Life Insurance Association including all liabilities under and by virtue of all outstanding policies of insurance issued by said Association. . ."
>
> * * *
>
> "(6) It is agreed and understood that this assumption of all liabilities and all insurance in force by Southern United Life Insurance Company of American Teachers Life Insurance Association is based upon certain warranties and covenants made by the officers of American Teachers Life Insurance Association, and said officers whose names are affixed to this agreement do hereby indemnify the said Southern United Life Insurance Company from any and all claims over and above those herein listed. Specifically, it is agreed that the purported claims of Jo Ann Abel in the amount of $1,000.00, Kate C. Nunn in the amount of $1,250.00, Cities Service in the amount of $474.31, Golden Galaries in the amount of $649.18, and Tom Blackwell of Austin, Texas in the amount of $69.53, are actually

individual liabilities and are not liabilities of the company for which the company would in any way become liable."

Obviously the above contract provisions placed Southern United in the position of assuming the liabilities of American Teachers if any were owed, despite the fact that they were not listed on the contract. Therefore we find without merit appellant's contention to the contrary.

In urging that it was not liable on the contract between Southern United and American Teachers, appellant contends that the contract was procured by fraud of American Teachers' officers. They also argue that the trial court erred in excluding certain evidence tending to show fraud. The latter we need not consider, for the record is clear that American Teachers' books showed the obligations of Mrs. Brooks and Kelly-Barrett Company as those of American Teachers. In fact, the Insurance Commissioner had audited the books as of July 31, 1963, and his audit included the obligations as liabilities of American Teachers. The record further reflects that the contract between American Teachers and Southern United was initiated by the Insurance Commissioner, and that agents of Southern United actually examined American Teachers' books and records before entering into the contract. While Southern United's president, Mr. Mendenall, denied any personal knowledge of such obligations, the agents who examined the books were not called to testify. Since Mr. Mendenall stated that he did not rely on the representations made by American Teachers but on examination of the books by Southern United's agents, we hold that appellant failed to show that there was any fraud on the part of American Teachers in the procurement of the contract. *Fausett & Co., Inc.* v. *Bullard,* 217 Ark. 176, 229 S. W. 2d 490 (1950).

The record shows that Mrs. Brooks advanced to

J. C. Kelly $5,000 at the time the preliminary certificate of American Teachers was issued early in 1963. This $5,000 was placed in a bank under the joint control of J. C. Kelly and the insurance commissioner and served as the bond required by Ark. Stat. Ann. § 66-4704(2) (Repl. 1966) for the issuance of the preliminary certificate. American Teachers' permanent certificate to do business was issued on April 30, 1963. Subsequent to the issuance of the permanent certificate the money was withdrawn from the bank and concededly went into the assets of American Teachers. On May 10, 1963, the $5,000 note here involved was executed. The note was on a form designed for use by individuals. On the signature lines first appeared the name of J. G. Barrett and then that of J. C. Kelly. To the right of their signatures appeared "American Teacher Ins Assn—P O 3095, Little Rock, Ark". Both Mrs. Brooks and J. C. Kelly testified that the note was an obligation of American Teachers. There is no testimony to the contrary, except for the appearance of the note, and we hold that under the record this was sufficient to establish the note as an obligation of American Teachers—particularly since the Insurance Commissioner's audit so listed it as of July 31.

As a further defense to liability on the note, appellant contends that American Teachers, being a fraternal benefit society, had no authority to borrow money and thus its conduct in making the obligation was ultra vires. In view of Ark. Stat. Ann. § 66-4704(6) Repl. 1966), we find this contention to be without merit. That section specifically provides that such corporations would have such powers "as are necessary and incidental to carrying into effect the objects and purposes of the society," and it would be unduly restrictive of such a society to hold that it could not borrow money. To hold otherwise would prevent such a society from building its own office building.

The issue on equitable garnishment resolves itself

into one of accord and satisfaction. It is conceded that if American Teachers is not presently obligated to Kelly-Barrett, Mrs. Brooks' equitable garnishment must fail. Mr. Kelly testified without equivocation that at the time of the contract and the assumption of liabilities by Southern United on October 17, 1963, American Teachers was not personally indebted either to him or to J. G. Barrett. He stated that the obligation was owed to Kelly-Barrett Company, Inc. Mr. Mendenall testified, without contradiction, that Southern United's check No. 1654 for $250, dated October 16, 1963, and its check No. 1655 for $902, dated October 17, 1963, were given in complete satisfaction of all obligations owed by American Teachers to Kelly-Barrett Company, Inc.

The record also shows that Kelly-Barrett was incorporated for the sole purpose of managing American Teachers; that it ceased to do business about August 31, 1963, when negotiations were started for the reinsurance with Southern United; and that, except for the obligation owed by American Teachers to Kelly-Barrett, it had no assets as of October 17, 1963.

Kelly was president of American Teachers and Barrett was vice president at the time the October 17, 1963, contract with Southern United was executed. The record is not clear as to what Barrett's status was with Kelly-Barrett Company, (it appearing that he had resigned from its board of directors), but it does show that Kelly was the principal officer of Kelly-Barrett Company at that time.

Under the circumstances the payments by Southern United to J. C. Kelly and to J. C. Kelly and J. G. Barrett were obviously sufficient to constitute an accord and satisfaction. *Pettigrew Machine Co.* v. *Harmon,* 45 Ark. 290 (1885).

To refute the accord and satisfaction argument, Mrs. Brooks points to the fact that on check No. 1655,

made payable to Glen Barrett and J. C. Kelly in the amount of $902, there was this notation:

> "Full and final settlement for any claims on American Farm Life Insurance Association and American Teachers Life Insurance Association."

From this notation Mrs. Brooks argues that parol evidence such as Mr. Mendenall's was insufficient to contradict the notation on the check. *Tillar* v. *Wilson,* 79 Ark. 266, 96 S. W. 381 (1906). We hold Mrs. Brooks' contention to be without merit, for the clear and uncontradicted proof shows that no obligation was personally owed to J. C. Kelly and Glen Barrett; and under the holding in *Tillar* v. *Wilson, supra,* it is specifically recognized that clear, cogent and convincing evidence can be introduced to contradict a written instrument when properly pleaded. We find that the pleadings in this case were sufficient to raise the issue. Furthermore, Mrs. Brooks' argument overlooks check No. 1654 for $250, made payable to J. C. Kelly, without any notation.

The $5,000 note above was not on the itemized list of obligations attached to the contract between American Teachers and Southern United. Under the facts here, paragraph 6 above clearly shows that J. C. Kelly and J. G. Barrett agreed to indemnify Southern United for any such obligations not appearing on the list. Therefore we hold that the trial court was in error in not awarding judgment against J. C. Kelly for the $5,000 obligation for which Mrs. Brooks is entitled to judgment against appellant Legal Security Life Insurance Company. Appellee Kelly argues that appellant has waived this argument by not arguing it in this court. We disagree, and hold that appellant is entitled to judgment against Kelly for $5,000.

Therefore, the trial court's judgment against appellant Legal Security Life Insurance Company upon the equitable garnishment is reversed and dismissed; its

judgment against appellant and in favor of Mrs. Brooks for the $5,000 is affirmed; and its dismissal of appellant's claim of indemnity against appellee J. C. Kelly is reversed with directions that judgment be entered for $5,000.

Ross DOPSON *v.* METROPOLITAN LIFE INSURANCE COMPANY

5-4535 426 S. W. 2d 410

Opinion delivered April 15, 1968

Ben D. Lindsey, for appellant.

Mahony & Yocum, for appellee.

CONLEY BYRD, Justice. Appellant Ross Dopson instituted this action in chancery court for specific performance of a rider giving coverage to his wife, Aurelle Dopson, under a group hospitalization policy issued by appellee Metropolitan Life Insurance Company. From a

decree denying relief to appellant and awarding relief upon a cross-complaint to appellee, appellant relies upon the following points for reversal:

I. THE FINDING OF THE COURT THAT APPELLANT HAD FAILED TO DISCLOSE THE HISTORY OF HIS WIFE'S PRIOR BACK TROUBLE IN THE APPLICATION IS NOT SUPPORTED BY A PREPONDERANCE OF THE COMPETENT EVIDENCE.

II. THE FINDING OF THE COURT THAT APPELLANT'S FAILURE TO DISCLOSE HIS WIFE'S PRIOR BACK TROUBLE IN THE APPLICATION WAS MATERIAL TO THE RISK IS NOT SUPPORTED BY A PREPONDERANCE OF THE COMPETENT EVIDENCE.

The record shows that Ross Dopson had known his present wife for approximately six months before their marriage in December 1964. He and his children by his first wife already had coverage under the group policy and previous riders. The application for the rider to cover his wife, Aurelle, and her three children was made on June 8, 1965, at Dopson's home. Appellee's agent, Burton R. Mullins, Jr., prepared the application signed by Dopson. In obtaining the information necessary for the preparation, Mr. Mullins directed his questions to Mrs. Dopson rather than to Mr. Dopson.

There is a dispute between the Dopsons' testimony and that of Mullins about whether Mrs. Dopson told Mullins about her back trouble in May 1964. Mr. and Mrs. Dopson testified that she did. Mullins testified that she did not. It is uncontradicted that she entered the hospital with a back problem in May 1964, at which time her doctor ran a myelogram. The chancellor found the issues in favor of appellee and we can not say that his finding is contrary to a preponderance of the evidence.

Appellant argues, however, that Dopson himself made no representation because the undisputed proof shows that he had no knowledge of Mrs. Dopson's back trouble. While it is true that Dopson is the only party to the lawsuit and that he was honest insofar as his personal knowledge was concerned, we hold that his lack of knowledge does not prevent appellee's defense under Ark. Stat. Ann. § 66-3208 (Repl. 1966), which provides in part:

> "*Representations in applications.*—(1) All statements in any application for a life or disability insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, *omissions,* concealment of facts, and *incorrect statements* shall not prevent a recovery under the policy or contract unless either:
>
> (a) Fraudulent; or
>
> (b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> (c) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract in as large an amount or at the same premium or rate, or *would not have provided coverage with respect to the hazard resulting in the loss,* if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise. . . [Acts 1959, No. 148, § 275, p. 418.]" (Emphasis supplied.)

Upon the second issue appellant relies on *Inter-Ocean Casualty Co.* v. *Huddleston,* 184 Ark. 1129, 45 S. W. 2d 24 (1932). There we held that a misrepresentation would not void liability under a policy unless the failure to disclose was material to the risk involved. Un-

der § 66-3208, *supra,* our holding in the *Huddleston* case has been modified to the extent that a recovery will be denied where the "omissions" or "incorrect statements" are such that the company would not have provided coverage with respect to the hazard resulting in the loss had it known the true facts.

As part of the foregoing, appellant argues that there is no competent evidence to prove a connection between the back trouble of 1964 and the injury of 1965. Appellee points out that in an affidavit one E. R. Ryan referred to Mrs. Dopson's past medical history and definitely stated that, had the May 1964 back trouble information been available to the Metropolitan Life Insurance Company, it would not have issued the rider without an exclusion relative to Mrs. Dopson's back. E. R. Ryan's affidavit was put in the record under the following stipulation:

> "MR. YOCUM: May it please the Court, I have an affidavit here by Mr. E. R. Ryan, who is the Assistant Supervisor of the Underwriting Section of Metropolitan Life Insurance Company and it's my understanding that with Mr. Lindsey, that we will stipulate that Mr. Ryan would testify as to the contents of this affidavit if he were here.
>
> MR. LINDSEY: I will agree to that, Your Honor.
>
> THE COURT: Let this be marked."

Under the stipulation we hold that the affidavit was competent evidence to show that Metropolitan Life Insurance Company would not have provided coverage of Mrs. Dopson's back had it been advised of the 1964 back trouble.

Affirmed.

ALTA RISOR, ADM'X *v.* GORDON BROWN

5-4498 426 S. W. 2d 810

Opinion delivered April 22, 1968

Smith, Williams, Friday & Bowen, for appellant.

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

Lyle Williams, for amicus curiae, Commissioner of Revenues B. Bryan Larey.

CARLETON HARRIS, Chief Justice. The question at issue on this appeal is whether a part of the federal and state estate tax paid by Alta Risor, Administratrix of the estate of Oddie M. Anderson, deceased, is to be apportioned against the inter vivos donee of stock, Gordon Brown, appellee, such stock being included in the gross taxable estate, or whether the tax is entirely payable from the residuary estate. Brown received an inter vivos gift of stock from Mrs. Anderson on March 4, 1964, in the amount of $22,000.00. At the time the gift was made, Oddie M. Anderson was 86 years of age, had been bed-

ridden for over 2 years, and was paralyzed on her entire left side as a result of strokes suffered in December, 1962, and September, 1963. She died testate 7½ months after making the gift, leaving a specific bequest to appellee in the amount of $350.00. Both the federal and state estate tax returns were filed in January, 1966, by the decedent's personal representative, and all taxes due were paid from assets in the probate estate. Soon thereafter, the Internal Revenue Service examined the return, and determined that the $22,000.00 gift to Brown, made within 3 years of Mrs. Anderson's death, was a transfer in contemplation of death within the provisions of Section 2035 of the Internal Revenue Code (26 U. S. C.), and was subject to the federal estate tax. Assessment was made in accordance with this determination, and $3,022.04 in taxes, plus $176.56 in interest, was paid to the United States and the state of Arkansas by the personal representative. Mrs. Risor instituted an action in the Pulaski County Probate Court, seeking an order decreeing that Brown was a distributee and beneficiary of the estate of Mrs. Anderson within the meaning of the Arkansas apportionment statute, Ark. Stat. Ann. § 63-150 (Supp. 1967); that he was liable for his proportionate share of the federal and state estate taxes paid by the personal representative, and it was prayed that appellee be required to pay to Mrs. Risor, the administratrix, his proportionate share of the taxes, plus his proportionate share of all interest paid to the Internal Revenue Service on account of the gift made to him by the decedent. On trial, the court dismissed the action, holding that Brown was only liable for his pro rata part of the state and federal estate taxes due on the $350.00, which he received as a legatee under the will of Mrs. Anderson, thus in effect holding that Brown was neither a distributee nor beneficiary of the decedent's estate within the meaning of Section 63-150. From the judgment so entered, the administratrix brings this appeal.

It is regrettable that we cannot decide this case on its merits, since the question involved has not been here-

tofore passed upon, and is of some importance. However, the Probate Court had no authority to determine the issue before us, *i. e.,* it had no jurisdiction of the subject-matter. In *Shane* v. *Dickson,* 111 Ark. 353, 163 S. W. 1140, we said:

"This contention involves a misconception as to the nature of this action. It is not a matter 'relative to the probate of wills, the estate of deceased persons, executors, administrators,' etc., but is a suit by the executor to recover a debt due the estate. The probate court has no jurisdiction of contests between an executor or administrator and third parties over property rights or the collection of debts due the estate. Its jurisdiction is confined to the administration of assets which come under its control, and, incidentally, to compel discovery of assets. [Citing cases.]"

This court has been very strict where the matter of the jurisdiction of the trial court is involved. We have held that the question of jurisdiction of the subject matter cannot be waived, but is always open, and may be raised for the first time on appeal. See *Magnet Cove Barium* v. *Watt,* 215 Ark. 170, 219 S. W. 2d 761, and cases cited therein. As recently as April, 1967, in *Catlett* v. *Republican Party of Arkansas,* 242 Ark. 283, 413 S. W. 2d 651, we held that it is immaterial that the parties have not raised the issue of jurisdiction, and, though both sides ask this court to pass on the question at issue, we cannot do so where the trial court had no jurisdiction.

In the present litigation, the question of jurisdiction is raised, albeit the record is not in very good shape. The question was presented to the trial court, but an abbreviated record was sent to this court, which did not include that portion of the record wherein appellee raised the question of jurisdiction, nor is the order of the court, wherein it held that the Probate Court had jurisdiction, included in the transcript. Appellee does

argue that the Probate Court had no jurisdiction, and in her reply brief appellant includes a copy of the court's order, wherein it overruled appellee's motion relative to jurisdiction, and held the court had jurisdiction over the cause of action. At any rate, we held in *Price* v. *Madison County Bank,* 90 Ark. 195, 118 S. W. 706, that, even though the question of jurisdiction is not raised, "yet the question of jurisdiction of the subject-matter always presents itself, for it is well settled that consent cannot give jurisdiction of the subject-matter where none exists. [Citing cases]" In *McCain, Commissioner of Labor v. Crossett Lumber Company,* 206 Ark. 51, 174 S. W. 2d 114, this court stated that the question of jurisdiction "presents itself, and must be determined by the court."

In the present case, the suit is not a matter "relative to the probate of wills, the estate of deceased persons, executors, administrators, etc.," but is actually a suit by the administratrix seeking contribution from one she alleges to be a distributee and beneficiary (under the provisions of Section 63-150). As pointed out in *Shane,* the Probate Court's jurisdiction was "confined to the administration of assets which come under its control," *i. e.,* assets which were a part of the estate devised or bequeathed by Mrs. Anderson in her will.

In accordance with what has been said, the judgment of the Pulaski County Probate Court is reversed, and, matters of contribution[1] being cognizable in courts of equity, the cause is remanded with directions to transfer same to the Pulaski County Chancery Court.

It is so ordered.

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[1]According to 37 A.L.R. 2d 172, "The doctrine had its origin in courts of equity upon the principle that equality among those in aequali jure is deemed to be equity. 13 Am Jur 6, 7, Contribution §§ 3, 4."

ANCIL DOUTHIT ET AL *v.* THOMAS L. ALLEN

5-4549 426 S. W. 2d 812

Opinion delivered April 22, 1968

Joe C. Kemp, City Attorney; *Perry V. Whitmore,* Asst. City Attorney, for appellants.

Chowning, Mitchell, Hamilton & Burrow and *Cockrill, Laser, McGehee, Sharp & Boswell,* for appellee.

PAUL WARD, Justice. This is an appeal from a decree, issued by the Chancery Court (3rd Div.) of Pulaski County, which enjoined and restrained the City of Little Rock from awarding a contract to purchase a "crawler tractor".

Facts. The City, acting through its manager, Ancil Douthit, and other officials (hereafter referred to as

appellants) published an "Invitation to Bid" in proceeding to purchase the tractor. All prospective bidders were furnished a description of the tractor and minute details of pertinent terms and conditions. When the bids were opened on June 22, 1967 the only response was that made by J. A. Riggs Tractor Company. Previously this litigation had been instituted.

Thomas L. Allen (appellee), a citizen and taxpayer of the City, filed a complaint against appellants, alleging that the Invitation to Bid (with specifications) is illegal and in excess of the authority delegated to said defendants for the following reasons:

(a) The Invitation violates the City Code and certain statutes;

(b) Appellee has no remedy at law.

The prayer was for an order permanently enjoining appellants from awarding a contract under the Invitation to Bid. Attached to the complaint, as Exhibit A, are the Invitation, the bond, and detailed specifications—constituting nineteen pages in the record.

After a temporary restraining order was issued, appellants answered, denying all material allegations in the complaint.

On July 17, 1967 the trial court, after hearing testimony, entered a decree, holding, in substance:

(a) The Invitation to Bid together with Exhibit A is in violation of the City Ordinances and the State statutes relating to competitive bidding;

(b) The threatened acts of the City in awarding a contract are illegal and in excess of its authority under said ordinances and statutes;

(c) The City is permanently enjoined from awarding a contract pursuant to the "Invitation to Bid set out in Exhibit A."

It is the contention of appellants, in seeking a reversal, that; (1) The bid procedures employed do not violate Amendment 10 of the State Constitution; (2) "The construction placed upon the contract offered for bids was erroneous."

For reasons presently mentioned we have concluded that the decree of the trial court must be affirmed. First, however, it is pointed out that appellee makes no contention here that the City has violated, or will violate, Amendment 10 to the State Constitution.

We find it necessary to consider only two phases of the proposed purchase contract. *One* relates to repairs on the tractor, and *Two* relates to a resale of the tractor to the successful bidder.

One. Under the City's proposal the successful bidder must guarantee that the maximum cost of repairs on the tractor for a period of five years would not exceed $20,000. Item 2 E. provides, in effect, that regardless of the amount involved on any repair job, the City and the bidder could agree on the costs. Obviously this procedure violates City Ordinance § 2-43 and § 2-44 which requires competitive bidding "Where the amount of expenditure for any purchase or contract authorized . . . exceeds the sum of one thousand dollars . . ."

Two. Item 3B. of the specifications provides, in effect, as follows: Any time within five years after delivery of the tractor or at the end of 15,000 operating hours the successful bidder is bound, at the option of the City, to repurchase the tractor for the sum fixed in the specifications. Thus, again, this places the City in a position to dispose of an expensive piece of property without the safeguard of competitive bidding, and is in

violation of Ordinances § 2-42 and § 2-44.

In addition to what we have said above, we think there is another aspect which also calls for an affirmance.

Robert J. Wilson, vice-president of a local machinery company, gave several reasons why his company could not submit a bid in this instance. His reasons are set forth in a letter to the City as follows:

(a) There are six indefinite items which a bidder would have to consider in connection with cost of repairs. 1—price increase on repair parts over a period of five years; 2—cost of labor; 3—competency of City service personnel; 4—competency of operating personnel; 5—how tractor would be used, and; 6—major repairs.

(b) Requirement of bidder to repurchase tractor —for a fixed amount after five years imposed questionable and indefinite factors; 1—mechanical condition of machine; 2—economic conditions; 3—local market conditions; 4—technical improvements in machinery, and; 5—his company's inventory of machinery.

We think the trial court could have properly found that these uncertainties, inherent in the specifications, would tend to stifle competitive bidding and would not, therefore, be in the public interest. In the early case of *Fones Hardware Co.* v. *Erb,* 54 Ark. 645, 17 S. W. 7 this Court said that "Any arrangement which excludes competition prevents a letting to the lowest bidder. . ." In 43 Am. Jur., Public Works and Contracts, § 23, *et seq.,* in a discussion of this same matter there appears this statement:

"Experience has shown, however, that the interests of the public are best conserved by offering con-

tracts for public work to the competition of all persons able and willing to perform it, and in most, if not all, jurisdictions there are mandatory and peremptory constitutional and statutory provisions, as well as provisions of municipal charters and ordinances, which prescribe competitive bidding by all persons who wish to obtain such contracts, and the letting by public authorities of the contracts to the lowest bidders. . ."

It is our conclusion therefore that the decree of the trial court should be, and it is hereby, affirmed.

FOGLEMAN, J., not participating.

CLAUDE WILLIAMS ET AL *v.* RUSSELL ELROD ET AL

5-4620 426 S. W. 2d 797

Opinion delivered April 22, 1968

Odell Pollard and *Darrell Hickman,* for appellants.

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

LYLE BROWN, Justice. The plaintiff-appellants are taxpayers, residents, and electors of twenty-five of the State's senatorial districts. The defendant-appellees constitute all State Senators. Plaintiffs below sought a writ of mandamus to require the thirty-five senators to draw lots to fix their terms of office at two or four years in accordance with Sec. 6 of Art. 23 of our Constitution. The case was submitted on the pleadings, requests for admissions and responses, stipulations, and motion for summary judgment. Plaintiffs' motion for summary judgment was denied and the complaint dismissed.

In *Block* v. *Allen,* 241 Ark. 970, 411 S. W. 2d 21 (1967) we explained the history of the senatorial apportionment provisions of our Constitution and the pertinent decisions of this court. That explanation need not here be detailed; reference is made for the benefit of interested parties. However, for clarity we should reiterate that Amendment 23 requires senatorial drawing by lot following reapportionment after each federal census. At the drawing eighteen senators would draw terms of two years and the remainder would draw terms of four years.

The taxpayers contend there is no conflict between the cited provisions of Amendments 23 and 45 (which fixes senatorial terms at four years); there being no conflict, they assert that since there was a reapportion-

ment as directed by *Yancey* v. *Faubus,* 238 F. Supp. 290 (E. D. Ark. 1965), there should be an immediate drawing by the twenty-six senators not affected by the decision in *Catlett* v. *Jones,* 240 Ark. 101, 398 S. W. 2d 229 (1966). The nine senators in *Catlett* were elected to four-year terms in 1964. Their districts were not altered by the court-ordered reapportionment resulting from *Yancey* v. *Faubus.* We therefore held they could serve the remainder of their terms. *Contra,* the senators assert that Amendment 45 gives them an unqualified right to serve four years, superseding the required lot-drawing provisions of Amendment 23. Alternatively, the senators contend that lot-drawing is not required as a consequence of a court-ordered apportionment, and specifically that any drawing is restricted to every ten years following the regular federal census.

First, we dispose of the contention that Sec. 6 of Amendment 45 nullifies the lot-drawing provisions of Amendment 23. The involved portion of Amendment 45 reads as follows:

> "At the next general election for the State and County officers ensuing after any such apportionment, Representatives shall be elected in accordance therewith, Senators shall be elected henceforth according to the apportionment now existing, and their respective terms of office shall begin on January 1 next following. *Senators shall be elected for a term of four years* at the expiration of their present terms of office." (Emphasis supplied.)

Four-year terms for senators, reapportionment, and drawing by lots are thoroughly embedded in our law. Those principles are found in every Arkansas Constitution, four in all, since 1836. Having been harmonized for 131 years, it is not reasonable to believe that the electorate intended to sever those provisions merely by approving the customary four-year term for senators. Repeal by implication is not favored.

The contention that Amendment 45 eliminates drawing by lot would in effect defeat redistricting. That is true because without Amendment 23 there would never be a time when all senate terms expired simultaneously. In effect the senatorial districts would be frozen, a result which was declared unconstitutional in *Yancey* v. *Faubus.*

We encounter no difficulty in harmonizing the two provisions, that is, the four-year term in Amendment 45 and the lot-drawing provision in Amendment 23. We agree with the statement in the concurring opinion in *Block* v. *Allen,* that the decision in *Yancey* v. *Faubus* did not affect Sec. 6 of Amendment 23.

It is next contended by the taxpayer-appellants that Sec. 6 of Amendment 23 is applicable to the 1965 reapportionment made pursuant to the decision in *Yancey* v. *Faubus.* If that contention is correct, an immediate drawing would be required, rather than wait until the 1970 federal census.

The only administrative procedure in our constitution requiring members of the Senate to be "divided into two classes by lot" is Sec. 6 of Amendment 23, which provides:

> ". . . At the first regular session succeeding any apportionment so made, the Senate shall be divided into two classes by lot, eighteen of whom shall serve for a period of two years and the remaining seventeen for four years, after which all shall be elected for four years until the next reapportionment hereunder."

The apportionment referred to in Sec. 6 is defined in Sec. 4 as being the apportionment immediately following each federal census:

"The Board [of Apportionment] shall make the

first apportionment hereunder within ninety days from January 1, 1937; thereafter, on or before February 1 immediately following each Federal census, said Board shall reapportion the State for both Representatives and Senators . . ."

It must be conceded that those provisions amount to a restriction upon the length of the terms of office for which some of the senators are elected. However, that provision, being in the Constitution, is well known to all senatorial candidates and they cannot complain if they become affected by it. But we do not think an additional restriction should be placed on their tenure in the absence of constitutional sanction.

In *Butler* v. *Democratic State Committee,* 204 Ark. 14, 160 S. W. 2d 494 (1942), this court held that the election of an entirely new senate should be conducted after the federal census and then only when the Board of Apportionment altered the boundaries of any of the senatorial districts. In *Catlett* v. *Jones, supra,* we declined to shorten the elected terms of office of the involved nine senators. They were found to have been elected "in accordance with the Board's plan" of reapportionment after *Yancey* v. *Faubus, supra.* Our holding today is in conformity with those two cases; to hold to the contrary would actually be inconsistent with *Butler* and *Catlett.* Furthermore, the problem now before us was fully explored when *Block* v. *Allen, supra,* was under consideration. There, as here, we had the benefit of exhaustive briefing, and the *Block* case was orally argued. In *Block* v. *Allen* we concluded there was "logic and apparent merit" in the theory of appellees that an immediate drawing was not then required. Additional consideration of the question has served only to strengthen that conclusion. Quoting from the concurring opinion in that case, it is our holding that "there is no occasion for a drawing until at least after the 1970 Federal census has been taken."

We would also point out that appellants seek a man-

datory drawing for twenty-six senators, whereas the Constitution requires that thirty-five senators participate.

If any change is made by the Board of Apportionment (or by this court on appeal) in the boundaries of the senatorial districts as a result of the 1970 census, it will necessitate the election of an entirely new senate. The newly-elected senators would then draw for tenure as required by Sec. 6. *Butler* v. *Democratic State Committee, supra.*

We express no opinion upon the right of a group of taxpayers to here litigate an action against the Senate. That question was not raised, in fact all parties here seek a full determination of the case on its merits.

For the recited reasons we hold that the taxpayer-appellants' motion for summary judgment should have been denied and their complaint dismissed.

Affirmed.

BILL STOUT *v.* STATE OF ARKANSAS

5329 426 S. W. 2d 800

Opinion delivered April 22, 1968

Sam Sexton, for appellant.

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

LYLE BROWN, Justice. Bill Stout was tried on a first degree murder charge for the fatal shooting of Winfred Lee Jones. From a conviction of manslaughter he appeals. Eight procedural errors are urged for reversal.

Stout and Jones, both in their thirties, were friends. Both were family men and they visited in each other's homes. On the day of the shooting, Jones went to the Stout home in Fort Smith and the two men drank some beer. Stout said he consumed two beers. Stout was working on a cabinet and Jones helped with the task. Stout went to work on a 4:00 p.m. shift and when he left home about thirty minutes earlier, Jones remained at the Stout home. Shortly after six o'clock Stout received a call from a member of his family, informing him that Jones was still at the home, and was belligerent and insulting. Stout obtained a short leave and went home. He asked Jones to leave and the latter refused. Stout went to a nearby telephone and called the police. Officer Hamlet declined to answer the call unless Stout would come in and swear out a warrant. It was Stout's testimony that he returned to his home; that he sent word in to Jones to come outside; that Jones refused; whereupon Stout walked inside the door. Jones arose from a couch and "went to his left-hand pocket again." It was at that point that Stout fired his pistol, fatally wounding Jones. The defendant testified he knew Jones had a knife and thought he might have a pistol.

Stout testified that he had no intention of shooting Jones. He stated that his only purpose in firing the shot was to shoot over Jones' head and frighten him into leaving the house. The single shot entered the front part of the left chest and lodged in the rear of the right chest. It tore the left pulmonary artery and transgressed the upper aspect of the left lung. Death followed within a matter of minutes.

The case was submitted to the jury on first and second degree murder and manslaughter. The manslaugh-

ter conviction carried a sentence of two years. We reverse on Point I, but because of a possible retrial we will enumerate and discuss seven of the points raised.

Point I. *The trial court erred in refusing to require the prosecuting attorney to produce the written statements of the defendant and Witness Tommy Ray Thomas.* When Stout was taken to the sheriff's office he made an oral statement to Sheriff Vickery, explaining his version of the incident in detail. Shortly thereafter the prosecuting attorney arrived and took a written statement. When Sheriff Vickery was testifying as to the oral statement made to him, counsel for appellant inquired if the written statement was the same as the oral statement. To that question the prosecutor replied that they were generally similar. At that point appellant's counsel asked that the written statement be introduced through the sheriff. The request was denied on the ground that its introduction was a matter for the prosecuting attorney to decide.

Later the same matter arose. Appellant was being cross-examined by the prosecuting attorney. He challenged the truth of appellant's contention that appellant received a report by telephone that Jones was still at the house, drunk and belligerent. The prosecutor asked: "How does it happen in your [written] statement that there is no mention of it?" At that point appellant's counsel objected to the prosecutor picking out parts of a statement and withholding the rest; he suggested that the proper procedure would be to introduce the statement. The court overruled the objection. The prosecutor continued to ask the witness questions concerning the contents of the written statement, the clear insinuation being that accused told the truth when he gave the statement but not so when he was testifying.

The prosecutor used the written statement as a tool to impress upon the jury his contention that inconsistencies existed between that statement and the testimony

of the accused. With the credibility of the witness being so placed in jeopardy, we think the request by the accused that the jury be permitted to evaluate the contents of the statement should have been granted. The prosecutor accused Stout of denying portions of his written statement. How could the jury determine the accuracy of that accusation unless they were permitted to examine the statement? By introducing the statement on appellant's motion the State would not necessarily be bound by its contents. It could also be introduced for the limited purpose of determining if any inconsistencies existed between its contents and Stout's testimony. Stout had in fact testified that the two were the same except for details. The prosecuting attorney's attempt to establish inconsistencies was in effect an effort to impress *portions* of the written statement in the minds of the jurors. In *Adkins* v. *Hershy,* 14 Ark. 442 (1854), the court said:

> "The admission must be taken as a whole, and if the plaintiff proves only a part, the defendant may call for the entire conversation on cross-examination. The rule is, not that the plaintiff is concluded by the entire admission, but that it is competent evidence for the defendant to go to the jury, who are the proper judges of its credibility, and may reject such portions if any, as appear to be inconsistent, improbable or rebutted by other circumstances in evidence."

It is true the State did not formally introduce parts of the written statement but the effect was the same. We therefore hold that the same rule should apply, namely, that the defendant should be permitted to prove other relevant portions. *Whitten* v. *State,* 222 Ark. 426, 261 S. W. 2d 1 (1953).

It was not error to permit the sheriff to testify as to the oral statements made to him by the accused. The written statement was taken by the prosecuting attorney

and not by the sheriff. Those were two different statements. *Finn* v. *State,* 127 Ark. 204, 191 S. W. 899 (1917).

Point II. *The court erred in refusing to suppress oral statements made by the defendant at his home and before he was advised of his constitutional rights.* Officer Hamlet, with whom Stout had previously conferred on the telephone, was the first officer to arrive after the shooting. He could see the deceased lying on the floor. He inquired of appellant as to the whereabouts of the weapon. Appellant's wife located it and brought it to the officer. Hamlet then inquired of the accused if that gun was used in the shooting; to which the latter replied in the affirmative. That was the sum total of their conversation.

Shortly thereafter the sheriff arrived. The only conversation between the sheriff and the accused was summarized by appellant: "He asked me what was going on and a few simple questions." At that point the sheriff told Stout he would have to go to town with him.

Appellant relies on *Miranda* v. *Arizona,* 384 U. S. 436 (1966), contending he was not given the required warnings prior to the two recited interviews. *Miranda* does not apply here. The police were responding to a call from the defendant and found a dead body. The officers' investigation had not reached an accusatory stage. *Miranda* warnings are required when the investigation reaches custodial interrogation of a suspect. The officers testified that immediately on reaching headquarters, and prior to that interrogation, defendant was fully advised of his rights.

Points III and VI. *It was error to refuse appellant's requested Instructions* 1 *and* 2. Both instructions embodied the theory of justifiable homicide by killing in self-defense. Stout's version of the cause for the killing was that he went in the house with the gun with the intention of scaring Jones from the home. Stout testified

that he meant simply to shoot over Jones "and kind of bluff him and shoo him on out of the house." He said he didn't intend to shoot Jones; he only wanted to frighten him. Stout asserted he never intentionally hurt anyone in his life.

Justifiable homicide embodies an *intent* to kill but under circumstances which render the act proper. ". . . excusable homicide is that which takes place under such circumstances that the party can not strictly be said to have committed the act willfully and intentionally, and whereby he is relieved from the penalty annexed to the commission of a felonious homicide." Warren on Homicide, V. 1, p. 616 (1938). Killing in necessary self-defense is our statutory definition of justifiable homicide. Ark. Stat. Ann. § 41-2231 (Repl. 1964).

Since Stout's defense was not based on a willful and intentional killing in self-defense, he was not entitled to the proffered stock instructions on self-defense. His assertion that the killing was unintentional is inconsistent with the concept of self-defense. *State* v. *Hale,* 371 S. W. 2d 249 (Mo. 1963). The *law* of self-defense is not involved, only the *right* of self-defense. *Curry* v. *State,* 97 S. E. 529 (Ga. 1918). Consonant with his right of self-defense, he would have been entitled to an instruction covering excusable homicide. A suggested instruction under very similar circumstances is summarized in *Curry, supra.* It involves the law of excusable homicide as applied to the evidence in the particular case, which narrows down to accidental homicide.

This court recognized the rule in the Curry case in *Jordan* v. *State,* 238 Ark. 398, 382 S. W. 2d 185 (1964). However, in that case the rule was held not applicable because it was Jordan's intention, according to his testimony, to shoot his assailant to save himself from being shot. Jordan was therefore entitled to an instruction on self-defense.

Point IV. *The court erred in permitting the widow*

of the deceased to testify because she was permitted to remain in the courtroom, notwithstanding the Rule had been invoked, and because her name had not been furnished as a witness for the prosecution. In chambers, and before the beginning of the trial, appellant's counsel reminded the court that Mrs. Jones had been called as a witness and he asked that she be excluded from the courtroom. His motion was overruled. When the trial shortly began, Mrs. Jones was called as the first witness. At that point, the only motion made by appellant's counsel was that Mrs. Jones not be permitted to testify because her name was not on the list of witnesses. Specifically, he did not renew his objection to her testifying on the ground that she should have been placed under the Rule. The failure to so object constituted waiver. Mrs. Jones was the first witness called and she was never recalled to the stand, so she heard no testimony from other witnesses. If the court committed error, it was clearly not prejudicial. *Williams* v. *State,* 237 Ark. 569, 375 S. W. 2d 375 (1964). Furthermore, she testified only to the age, height, and weight of the deceased, the number of children in the family, and the fact that the Joneses often visited in the Stout home. In other words, she testified to no facts really material to the case.

As to the second objection, the requirement of endorsing the witnesses has long been held merely directory, assuming it applies to prosecution by the filing of an information. It should also be said that the prosecutor advised appellant's counsel on the morning of the trial that he intended to call Mrs. Jones to testify to matters which were not material.

Point V. *The court erred in instructing the jury on first degree murder.* A discussion of this point is unnecessary because Stout cannot again be tried for a crime greater than manslaughter.

Point VII. *The prosecuting attorney was permitted to improperly cross-examine the defendant and*

his witness, Ed Baker. The prosecutor inquired of Stout concerning several alleged misdemeanors. On more than one occasion Stout denied having been convicted. Since those were collateral matters, each denial should have concluded that inquiry; however, the prosecutor would not accept the denial but would proceed to press the matter further. That practice should be avoided on retrial; nor should such questions be propounded in argumentative and accusatory form.

Point VIII. *The court erred in refusing to permit Witness Ed Baker to testify as to the past actions of Winfred Lee Jones when the latter was drinking.* Ed Baker was foreman at a plant where Jones was at one time employed. If permitted, he would have testified that Jones was discharged by Baker because he was intoxicated on the job, was "loud and belligerent, rude and very disrespectful." There was evidence to the effect that decedent was intoxicated when he was shot and that he was belligerent. Appellant contends that Jones' acts of belligerency at the time he was discharged would tend to show that drunkenness always brought on belligerency on the part of Jones. To establish such a pattern of conduct by a single prior act is too illogical to require comment.

Reversed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I would affirm the judgment of the lower court. I have a consuming curiosity about the content of appellant's written statement, but this is not a proper basis for reversal. In considering whether reversible error was committed we should consider the entire record in the case and the actions of appellant and his attorney in regard to this particular statement. Appellant first filed a motion to suppress, stating that it was a mere written summary of what he had told the police officers, without having

been advised of his constitutional rights. This motion was denied, but appellant's motion for new trial assigns this denial as error. When the sheriff took the witness stand, appellant objected to his relating an oral statement, contending that if the statement was taken down in writing, the writing would be the best evidence. It was then established that the oral statement to the sheriff had not been reduced to writing. The prosecuting attorney stated that, in general, the oral and written statements were the same. Appellant's abstract does not reveal any request for inspection of the written statement. On cross-examination appellant's attorney determined that the sheriff had possession of a copy of the written statement. He moved its introduction after the sheriff testified that only the first part of the written statement was made in his presence. This motion was denied. Appellant's attorney did not ask for permission to inspect the statement at that time and did not make any proffer for the record. The defendant, in testifying, stated that he was willing for the statement to be introduced. He also said that it was substantially the same as his testimony, except that his testimony was in more detail. On cross-examination, defendant stated that only the prosecuting attorney and his secretary were present when the written statement was made. Although the prosecuting attorney asked defendant how it happened that there was no mention of his wife's call to him to come home in his written statement, the defendant never answered the question and never was called upon to answer. After an objection by appellant's attorney, this question was never repeated. The statement was not offered by the prosecution to contradict defendant's testimony.

The sheriff was called by the state in rebuttal to contradict testimony of defendant's witness Thomas. On cross-examination he stated that he had in his possession the written statement of Tommy Ray Thomas and appellant. Appellant's counsel then specifically asked to see the statement of Thomas and asked its in-

troduction. No objection was offered to inspection of this statement by appellant's attorney. When an objection was made to introduction of the Thomas statement, appellant's counsel proceeded without a ruling by the court and inquired of the sheriff about the absence of a part of Thomas' testimony from this statement. He did not ask to be permitted to see the statement of appellant nor did he ask that it be introduced at this time. There is no reason to believe that any objection would have been raised to examination of the statement by appellant's attorney.

If the statement was favorable to appellant, it was not admissible as it would have been a self-serving declaration and not contemporaneous with the statement made to the sheriff. *Butler* v. *State,* 34 Ark. 480. Self-serving statements cannot be offered in rebuttal of proof of incriminating statements. *Patterson* v. *State,* 179 Ark. 309, 15 S. W. 2d 389. Such statements are not rendered competent merely because they differ from statements testified to by other witnesses. *Reece* v. *State,* 125 Ark. 597, 189 S. W. 60.

If it were admissible to impeach the testimony of the officers as to the content of appellant's oral statement, then it could not be introduced through one who was not present when it was made. Appellant never at any time called either the prosecuting attorney or his secretary to testify as to this statement, as he might have done. Neither did he indicate that he desired to offer the written statement to impeach the testimony of the officers or lay the foundation to do so.

But the most fatal defect of all is that the statement was never proffered for the record. This being the case, we are not at liberty to consider its admissibility or possible prejudice in the refusal to admit. *Misenheimer* v. *State,* 73 Ark. 407, 84 S. W. 494; *Latourette* v. *State,* 91 Ark. 65, 120 S. W. 411; *Jones* v. *State,* 101 Ark. 439, 142 S. W. 838; *Baldwin* v. *State,* 119 Ark.

518, 178 S. W. 409; *Simmons* v. *State,* 124 Ark. 566, 187 S. W. 646; *Fowler* v. *State,* 130 Ark. 365, 197 S. W. 568; *Powell* v. *State,* 133 Ark. 477, 203 S. W. 25; *Lassiter* v. *State,* 137 Ark. 273, 208 S. W. 21.

I do not agree with the trial judge that the matter of introduction of the written statement lay wholly within the province of the prosecuting attorney. I agree that it is reversible error for the prosecuting attorney to withhold evidence favorable to a defendant. I do not agree that this rule requires him to introduce a defendant's self-serving statements, nor do I agree that we should act on the admissibility of evidence without knowing what that evidence is. We can only speculate as to the content of the statement. There simply is no evidence that anything favorable to the defendant was withheld. It is a novel idea to suggest that an attorney is required to offer his entire conversation with a witness in evidence because he asks the witness why some fact revealed in the witness' testimony was not disclosed in the conversation. The majority's holding that this statement was admissible regardless of its content is unique to say the least.

AUBREY VANGILDER *v.* PAUL FAULK

5-4550 426 S. W. 2d 821

Opinion delivered April 22, 1968

Kirsch, Cathey & Brown, for appellant.

Barrett, Wheatley, Smith & Deason, for appellee.

JOHN A. FOGLEMAN, Justice. This appeal is from a judgment based upon a jury verdict denying appellant a recovery from appellee for the death of a Hereford bull owned by appellant. The parties are adjoining landowners whose pastures are separated by a partnership fence. Evidence on behalf of appellant tended to show that his bull suffered injuries on November 14th from an encounter with appellee's Angus bull in appellant's pasture. Appellee was notified of the occurrence by appellant's wife. He caused his employee to remove his bull from appellant's pasture and to return it to appellee's premises where it was in a holding corral for less than half a day. Thereafter, the bull was returned to appellee's pasture. Appellee took no action designed to prevent another trespass by his bull into appellant's pasture, where appellant kept not only his bull but 20 to 25 cows. Appellee did cause an employee to walk and inspect the division fence, which was found to be intact. Appellee stated that he knew that a bull which escaped his enclosure once had a tendency to make other escape attempts; that when strange bulls meet they can be expected to fight, particularly in the presence of the female of the species; and that when bulls fight there is danger that injury will occur.

Appellee's bull escaped into appellant's pasture again on November 17th. Evidence indicates that another fight took place on that occasion. Appellant's bull died on November 25th as a result of injuries which appellant contends were inflicted in the second fight.

The first point relied on for reversal is that there was error in the court's instructions in that the basis

of appellee's liability was limited to negligence in permitting his bull to run at large. The point is properly preserved in appellant's objection to the instruction given and by the rejection of his offer of instructions which would have submitted the case to the jury on the alternate bases of (1) strict liability for damage done by a trespassing animal and (2) liability based on appellee's knowledge of the dangerous propensities of his bull.

Appellant first argues that our cases, such as *L. R. & F. S. Ry.* v. *Finley,* 37 Ark. 562, and *St. Louis I. M. & S. Ry.* v. *Newman,* 94 Ark. 458, 127 S. W. 735, rejecting the rule of strict liability of an owner for the acts of his trespassing animals should have no application here. This argument is based upon the contention that the properties of these parties were located in a stock law district created under the provisions of Act 156 of 1915. The trial court took judicial notice of the existence of this district. We agree that the rule stated in the above cases is confined to situations where the owner permits his animals to run at large on unenclosed lands of another, and that the rule may well be changed by laws requiring an owner to keep his animals within his own enclosure.

We do not agree with appellee's contention that the 1915 stock law has no application to this case by reason of its repeal by Act 368 of 1947. We have already recognized that stock law districts created under Act 156 remain in existence in spite of the specific language of Act 368 which states that it repeals sections relating to the creation of such districts and to the legal effect of adoption of the district by the electorate. In *Goggin* v. *Ratchford,* 217 Ark. 180, 229 S. W. 2d 130, it was held that annexation of a single township to a stock law district to which Act 368 was applicable could only be made to districts already in existence when this act was passed. This holding recognized, without stating, the rule that where both the prior and subsequent acts legislate upon

the same subject and the subsequent act re-enacts substantial portions of the original act but either adds, eliminates or modifies provisions of the original act, the subsequent act shall be treated as amendatory only in spite of language expressly repealing the prior act. *Bear Lake & River Waterworks & Irrigation Co.* v. *Garland,* 164 U. S. 1, 17 S. Ct. 7, 41 L. Ed. 327 (1896); *Lamb* v. *Powder River Live Stock Co.,* 132 F. 434, 67 LRA 558 (8th Cir. 1904).

A very closely parallel application of the rule is found in *Petition of Orange County Water District,* 292 P. 2d 927 (CA Cal. 1956). There the contention was made that the district created by a 1933 act was superseded by a completely new district of the same name created by a 1953 act. The basis for this contention was the repeal of § 1 of the 1933 Act by the 1953 Act. It was held that this contention was unsound because the re-enacted portion of the repealed act continued in force without interruption even though the new act provided for different boundaries, different directors and different purposes. Here the re-enactment of substantial portions of the 1915 Act neutralized the repeal, and the 1947 Act should be considered as amendatory of the 1915 Act. The stock law remains in effect as amended by the later act. This appears to be the majority rule. Crawford, Statutory Construction, § 322, p. 657. See 77 ALR 2d 357. It is consistent with the holding of this court on the effect of the repeal of our first general comparative negligence statute. *Chism* v. *Phelps,* 228 Ark. 936, 311 S. W. 2d 297, 77 ALR 2d 329.

The doctrine of absolute liability was applied in *Pool* v. *Clark,* 207 Ark. 635, 182 S. W. 2d 217. That case is not authority requiring the application of the doctrine here, however, because the stock law involved there absolutely prohibited the running at large of certain animals. Absolute liability of the owner was there predicated upon the statute's making the running at large of stock unlawful. See Act 103 of 1907, as amended by Act

273 of 1909. The statute applicable here does not contain such an absolute prohibition. It provides that it shall be unlawful for an owner to permit his animals to run at large outside the owner's enclosure. See Act 156 of 1915 and Act 368 of 1947. We have held that the owner is subject to the consequences of such a statute only when he intentionally or negligently permits his animals to run at large. *Favre* v. *Medlock,* 212 Ark. 911, 208 S. W. 2d 439. Therefore, the doctrine of strict liability cannot be applied for the reason urged.

Appellant's next argument is that the case should have been submitted to the jury only on the questions of proximate cause and measure of damages because appellee was apprised of the occurrence of November 14, 1966. The evidence was sufficient to raise an issue of fact as to appellee's liability for keeping and failing to restrain an animal known by him to be possessed of vicious and dangerous qualities. *Holt* v. *Leslie,* 116 Ark. 433, 173 S. W. 191; *Field* v. *Viraldo,* 141 Ark. 32, 216 S. W. 8; *McIntyre* v. *Prater,* 189 Ark. 596, 74 S. W. 2d 639. Appellant offered his requested instruction no. 1 that would have submitted these issues, but the instruction was defective in that it would have permitted a verdict for appellant if appellant's bull died as a result of either fight. There is no evidence upon which scienter could have been held to exist as a matter of law on the occasion of the first fight, in spite of appellee's admissions. Testimony of a veterinarian called as a witness by appellant might be construed to mean that the death might have resulted from the first fight. This instruction would have also found appellee to have had sufficient knowledge of the bull's propensities after the first encounter to invoke strict liability. The testimony here is not sufficiently clear to eliminate a question of fact on this point.

The trial court's refusal to give an instruction which is not accurate, correct and free from criticism is not reversible error. *Henry Wrape Company* v. *Barrentine,*

138 Ark. 267, 211 S. W. 366; *Bovay* v. *McGahhey,* 143 Ark. 135, 219 S W. 1026. It would have been error for the court to have given the offered instruction since it would have allowed the jury to find a verdict for appellant without considering the issue of whether the second fight was the proximate cause of the loss of the bull. *Miller* v. *Ballentine,* 242 Ark. 34, 411 S. W. 2d 655.

Appellant offered his requested instructions, numbered two and three, relating to this issue. These were not subject to the proximate cause defect to the same extent as was the first request, although they should have made it clear that liability based on scienter required *previous* knowledge by the owner. There are other reasons, however, why the refusal of these instructions did not constitute reversible error. Instruction No. 2 would have virtually amounted to the direction of a verdict for appellant. He was not entitled to this. As previously pointed out, there was a jury question as to scienter of appellee under all the surrounding circumstances. While appellant's requested Instruction No. 3 was a correct statement of the law, AMI 1602 is applicable in this case and should have been given with appropriate modifications fitting it to a situation where the injury is to an animal rather than a person.[1] The AMI form would have given the jury an objective statement of the law. The instruction requested is somewhat slanted toward appellant's contentions. One of the primary purposes of adoption of Arkansas Model Jury Instructions was to make jury instructions objective, rather than partisan, statements. Introduction, Arkansas Model Jury Instructions, p. X.

The per curiam order of this court (entered April 19, 1965) clearly directs that when an AMI instruction is applicable in a case, it shall be used unless the trial judge finds it does not accurately state the law. In the

[1]It is recognized that modifications of these instructions may be necessary. See Arkansas Model Jury Instructions, "How To Use This Book" pp. XXIV, XXV.

event an applicable AMI is not used, the judge is required to state his reasons for refusal. It is implicit in this order that parties request instructions in the language of an applicable AMI, modified if necessary. If a judge is required to state reasons for not using an AMI, it is only logical to require a party offering an instruction when he thinks that an AMI does not adequately or accurately state the law to state his reasons into the record. For this reason, there was no reversible error in the refusal of appellant's requested Instruction No. 3.

Appellant's second point for reversal is the giving of the court's Instruction No. 5 over his objection. This instruction told the jury that in determining whether or not appellee was negligent, it was not to consider the inadequacy of the division fence to restrain appellee's bull, because the responsibility for its maintenance and upkeep was borne by each of the parties. Appellant objected to the giving of this instruction on the basis that there was no allegation or proof with respect to maintenance and upkeep of the fence and that the instruction prejudicially singled out the fact that the inadequacy of the fence to restrain appellee's bull should not be considered when there was no question at issue about the adequacy of the fence. We find appellant's position as to the lack of an issue on maintenance and upkeep to be well taken. The only statement in the pleadings remotely related to such an issue is the vague and general statement in appellee's amendment to his answer alleging that appellant was guilty of contributory negligence by failing to use ordinary care to prevent appellee's animals from entering his pasture. No evidence was ever offered by either party to show any deficiency in the maintenance or upkeep of the fence. On the contrary, an employee of appellee checked the fence after each expedition of the bull and found it to be in good order. It was a 39-inch woven wire fence above which there was one strand of wire making the fence 44 inches high. On appellee's side of the fence there was a ditch about 30 feet wide and 6 feet deep. The ditch was not more than

3 feet from the fence at any point and in places was immediately adjacent to the fence. After the second visit of appellee's bull to appellant's pasture, appellee's employee found black hair caught on the fence. Consequently, insofar as the inadequacy of the fence from the standpoint of maintenance and upkeep is concerned, the instruction was abstract, even if it could be said to be academically correct. The court's Instruction No. 4 had told the jury that a violation of the applicable stock law prohibiting an owner from permitting his cattle to run at large was evidence of negligence. When the two instructions are read together, the giving of this instruction is calculated to be misleading and confusing. Under these conditions the giving of such an instruction is prejudicial and reversible error when it cannot be determined that the jury did not base its verdict on the abstract instruction. *Ayer & Lord Tie Co.* v. *Young,* 90 Ark. 104, 117 S. W. 1080; *District Grand Lodge No.* 11 v. *Pratt,* 96 Ark. 614, 132 S. W. 998; *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226.

Since the appellant, in making his objection to the giving of court's Instruction No. 5, stated that there was no question in the case about the adequacy of the fence, we cannot consider the correctness of that instruction in that respect as a ground for reversal. We foresee that there is a possibility on a retrial that the adequacy of the division fence might be a circumstance to be considered by the jury in determining whether appellee was negligent in failing to take some additional step to prevent his bull's second foray into the Vangilder pasture. We see no reason why the joint responsibility of the parties for the maintenance and upkeep of the fence or the fact that it was a partnership fence should prevent this circumstance from being considered with all the other facts and circumstances of the case on the question of negligence.

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

CARL WIDMER *v.* MODERN FORD TRACTOR SALES, A CORPORATION; AND W. A. "JAKE" DAVIS

5-4512 426 S. W. 2d 806

Opinion delivered April 22, 1968

Carl Widmer, pro se.

William Powell Thompson, for appellees.

J. FRED JONES, Justice. On January 2, 1962, the appellant, Carl Widmer, purchased from the appellees, Modern Ford Tractor Sales and its agent, W. A. "Jake" Davis, a Landmaster tiller under a conditional sales contract for a total purchase price of $1,195.14. When appellant defaulted in the final payment due on January 2, 1963, the tiller was repossessed by appellees.

On December 3, 1965, appellant filed suit in the Sebastian County Circuit Court alleging damages in the amount of $3,250.00 because of breach of warranties in the sale of the tiller and alleging that the tiller with the attachments was worth $1,250.00 when appellees wrongfully trespassed and took the equipment from appellant. Appellant prayed judgment for compensatory and punitive damages in the total amount of $7,556.25.

The issues were joined by answer and counterclaim on a welding and repair bill allegedly owed to appellees by the appellant. After the answer and counterclaim was filed, appellant, on April 12, 1966, filed a request for admission of the truth of 27 separate statements covering all of the detailed allegations in the complaint. Each of the facts stated by appellant, which he requested appellees to admit, were all separately denied, or admitted, by the appellees on April 22, 1966, and copy was mailed to Widmer on April 23. Appellant then on July 5 filed "Interrogatories to Defendant" which in effect required that the answers to the original requests for admission be made more definite and certain. Example: "Please state the facts on which you base your denial of request for admission of fact No. 5." On July 8, 1966, appellant filed additional requests for admissions. Example: "That the Landmaster Mark 650 Tiller literature from which the photo-copies of statement No. 1 were obtained, was obtained in the showroom of Modern Ford Tractor Sales located at 1320 Towson Ave. in Fort Smith, Arkansas." On July 15 appellant propounded additional interrogatories to appellees.

On July 15 appellees filed a motion to quash the interrogatories filed on July 5 and the request for admission of facts filed on July 8. On July 22 appellees filed a motion to quash the additional interrogatories filed by appellant. On July 22 appellant filed a motion to stay proceedings on appellees' motions pending appellant's full opportunity to exercise his rights under discovery procedure. By agreement of the parties, on

August 3, 1966, an order of the court was entered requiring that all discovery procedures be completed by September 1, 1966, and setting the case for trial on September 27, 1966. On August 29, 1966, appellees' motion to quash the interrogatories filed on July 4, was granted and the motion to quash the requests for admissions of fact filed on July 8 and the interrogatories filed on July 15, were granted in part and denied in part. Appellees filed answers to the interrogatories and requests for admission on which their motion to quash was denied.

The case was not tried on September 27, 1966, as originally set, and on March 17, 1967, appellant filed additional requests for admission. Example:

> "That the net fair market value of the crop losses suffered by plaintiff because of the delays in planting and subsequent reduction in yields of the crops, as set out in statement 6, after harvesting costs, would be $900.00 for the 60 acres of Spring Barley; $1,275.00 for the 85 acres of Spring Oats; and $1,075.00 for the 170 acres of Fall Soybeans; and that the total net fair market value after harvesting costs, of the crop losses suffered by plaintiff because of delays in planting and subsequent reduction in yields of crops resulting therefrom during the 1962 crop year would be $3,250.00."

On March 22 appellees filed motion to quash the requests for admissions alleging in their motion as follows:

> "That since the 3rd day of December, 1965, plaintiff has pursued this matter against the defendants and others in this court and in other courts of this county, and the plaintiff has from time to time since said date filed an untold number of interrogatories and requests for admission of facts which have been answered; that now the continued propounding of

same is simply for the purpose of annoyance, expense, embarrassment and oppression, all of which is contrary to the spirit and purposes of the discovery procedures of this state; that the same are irrelevant and argumentative and that the Request is otherwise improper in whole or in part, and for said reasons same should be quashed.

"It is further pointed out that all discovery procedures were closed in this matter as of September 1, 1966, by court order of August 3, 1966."

This motion was granted on March 22, and on April 21, 1967, appellant filed motion for summary judgment.

A jury was waived and on May 29, 1967, this case proceeded to trial before the court sitting as a jury, at which time the court made the following comments of record:

"Upon examination of the file, I find that the request for the admissions of fact dated April 12, 1966, were all answered and denied by the defendant on April 22, 1966. So, contrary to the assertion here, they are not deemed admitted in their entirety for failure to respond."

The court then continued, as revealed by the record, as follows:

"Now, Mr. Widmer, gentlemen, the requests for admissions of fact dated March 17th were ruled out by the Court. We said that defendant was not required to answer them, and that was done in the Court's order of March 22, 1967. Now, that is what the defendant [sic] relies upon except that he says he has a verified complaint and that what admissions of fact he has, and I don't know what he is referring to really—in the interrogatories I haven't found anything of significance—basically it seems

he's resting on his verified complaint. Here is the plaintiff representing himself and he, in effect, as I understand it, has submitted his verified complaint as an affidavit in support of his motion for summary judgment. Is that correct, Mr. Widmer?

MR. WIDMER: Yes, but, Your Honor, there are answers to two interrogatories—you know, where they set out the amount of funds they received for the sale of this tiller, that they did answer. Other words, the court order and the order to these where they state who they sold it to and the amount they received.

THE COURT: Right, and that would go to the counterclaim. That's going as a defense to the counterclaim?

MR. WIDMER: Yes, that's right.

THE COURT: But for the reasons I've said—and, Mr. Widmer, I've been, if anything, overly meticulous about this, to try to get you to understand why the Court feels that it cannot render your motion for summary judgment. I hope you understand the basis for my ruling.

MR. WIDMER: Yes, sir.

THE COURT: Now, we're talking about the motion for summary judgment on the complaint. Both counts I and II. So let me ask you now—do I understand you correctly that it's your wish to simply stand on your motion?

MR. WIDMER: That is right, your Honor.

THE COURT: Without any proof in connection with it?

MR. WIDMER: Yes, sir."

Appellant refused to go forward with any proof at all. Appellees did offer proof in contradiction to appellant's complaint, but before doing so the record reveals the following inquiry by the attorney for the appellees and response by the court and the appellant:

> "MR. THOMPSON: Do I understand that the plaintiff is not going to go forward with his case?
>
> THE COURT: He is resting. Your answer?
>
> MR. WIDMER: Motion for summary judgment? You mean on this other counterclaim, this counterclaim?
>
> THE COURT: No, on the complaint.
>
> MR. WIDMER: Yes, we are resting on our motion for summary judgment."

None of the evidence was abstracted by appellant in his brief, but on May 29, 1967, the trial court entered judgment for appellees as to appellant's complaint, and the complaint was dismissed with prejudice.

A cursory check of our reported cases over the past two years reveal that this is the fourteenth appeal by Mr. Widmer to this court from adverse judgments and decisions of the Sebastian County Circuit Court wherein Mr. Widmer attempted to act as his own attorney. *Widmer* v. *Wood,* 243 Ark. 32 (9-18-67); *Widmer* v. *J. I. Case Credit Corp.,* 243 Ark. 149, 419 S. W. 2d 617 (10-1-67); *Widmer* v. *Wood,* 243 Ark. 457, 420 S. W. 2d 828 (11-13-67); *Widmer* v. *Kennedy, Albers & Phillips,* 243 Ark. 527, 421 S. W. 2d 609 (11-20-67); *Widmer* v. *Wood,* 243 Ark. 617, 421 S. W. 2d 872 (12-4-67): *Widmer* v. *State,* 243 Ark. 952 (1-22-68); *Widmer* v. *Tole,* 243 Ark. 990 (1-19 & 31-68); *Widmer* v. *Apco Oil Co.,* 243 Ark. 773, 421 S. W. 2d 888 (12-18-67); *Widmer* v. *Gibble Oil Co.,* 243 Ark. 735, 421 S. W. 2d 886 (12-18-67); *Widmer*

v. *Wood,* 244 Ark. 307 (3-11-68); *Widmer* v. *Price Oil Co.*. 243 Ark. 756, 421 S. W. 2d 885 (12-18-67); *Widmer* v. *J. I. Case Credit Corp.,* 239 Ark. 12, 386 S. W. 2d 702; *Widmer* v. *Ft. Smith Vehicle & Machine Corp.,* (still pending in this court). All of these cases are of a similar nature in that Mr. Widmer relied on motions and requests for admissions, and he offered no evidence, in support of his contentions, in any of them.

We take judicial notice of the expense involved in perfecting an appeal to this court, and in a number of Mr. Widmer's cases the foreseeable cost of appeal amounted to more than the amount involved in the litigation. (*Widmer* v. *Apco Oil Co.; Widmer* v. *Gibble Oil Co.; Widmer* v. *Price Oil Co., supra*). Knowledge of *how* to prepare and file the various instruments permissible under our civil code is, of course, an elementary necessity in the practice of law, but a thorough knowledge of the office of the instrument, and *when* and *why* it should be used, is indispensable in the proper preparation and trial of a lawsuit. A knowledge of how to proceed in the trial of a lawsuit after a motion has been granted or denied, or after requests for admissions have been complied with, refused, or ignored, is more important in resolving differences by a fair and impartial trial in a court of law than is the knowledge of how to prepare and file such motions or requests. We recognize a litigant's right to attempt his own representation in the courts of this state under our code of practice, but regardless of the amount in controversy or the merits of a litigant's cause, we know of no way to protect a litigant against the incompetency of his attorney when he insists on representing himself in a court of law.

We have held that upon a motion for summary judgment the burden is on the movant to show that no justiciable issues exist. *Widmer* v. *J. I. Case Credit Corp., supra.* We have also held that a motion to quash requests for admissions may constitute written objection thereto and that a failure to answer the re-

quests in such case does not necessarily mean that the requests stand admitted. *Widmer* v. *Wood,* 243 Ark. 617, 421 S. W. 2d 872.

All of appellant's requests for admissions filed on April 12, 1966, were admitted or denied by appellees in the case at bar. The trial court did not abuse its discretion in quashing appellant's interrogatories of July 5, 1966, and in quashing appellant's request for additional admission of facts filed on March 17, 1967.

Although appellant designated the entire record in this case and failed to abstract the evidence offered by the appellees, we have examined the transcript of the testimony of the witnesses produced by appellees and there is substantial evidence in the record to sustain the judgment of the trial court.

The judgment is affirmed.

E. M. OTT, AND J. W. RAY, D/B/A CRAWFORDSVILLE DEHYDRATOR COMPANY, A PARTNERSHIP *v.* WONDER STATE MANUFACTURING COMPANY

5-4551 427 S. W. 2d 20

Opinion delivered April 22, 1968

[redacted]

Rieves & Rieves, for appellants.

Branch & Adair, for appellee.

J. Fred Jones, Justice. E. M. Ott and J. W. Ray, as partners, doing business as Crawfordsville Dehydrator Company, brought suit in the Greene County Circuit Court against Wonder State Manufacturing Company for damages sustained by Ott and Ray because of the collapse of a grain bin they purchased from Wonder State. This appeal by Ott and Ray, is from a judgment entered on a jury verdict in favor of Wonder State.

The appellants, Ott and Ray, were engaged in the business of manufacturing alfalfa pellets, and the appellee, Wonder State Manufacturing Company, was engaged in manufacturing and selling metal seed houses or bins. In early 1965, the appellants purchased from the appellee two 46½ ton bins to be used for the purpose of storing the processed alfalfa pellets. These bins, when erected in single units, were ten by twelve feet in dimension with ten foot vertical side and end walls. The bottom of each bin or unit was of hopper like design in the form of an inverted pyramid and the entire unit was elevated on steel posts in such manner that trucks could be driven underneath for loading from the hopper. The two bins purchased by the appellants were put together in such manner that they actually constituted a single building or bin 12 feet wide and 20 feet long with two loading hoppers, one at each end. One bin was first erected without its north wall and the second bin, without a south wall, was added to the first bin on the north side of the first bin, thus constituting the single bin without a partition between the two units. This single bin with the two hoppers was supported on six steel posts set in concrete. The manufactured pellets were introduced into the bin by a pneumatic process through a

tube or pipe inserted through a hole that had been cut near the top or eave in the side of the second unit, or north portion of the bin. The pellets were then allowed to flow by gravity to the south and other portions of the bin. Appellants advised the appellee of the purpose for which the bins were being purchased and the appellee assured appellants that the bins were suitable for the intended use.

In June 1965, the northwest corner of the bin buckled, and the north hopper of the bin collapsed, under the weight of the pellet content and in appellants' suit for damages they allege the collapse was caused by the defendant in improperly designing the building for its intended use, and that such failure constituted a breach of warranty made by appellee to the appellants. Appellee answered by general and specific denials and alleged, among other things, that the collapse of the bin and hopper was caused by the appellants overloading it. There is no question that the collapse occurred because of the weight of the contents of the bin, so the actual question at the trial was whether the fault lay with the appellee in design, construction, or warranty, or whether the fault lay with the appellants in the use of the bin. On appeal to this court, the main question involves the sufficiency of the evidence, and about the only law involved in this case is the law of gravity.

Appellants designate two points upon which they rely for reversal, as follows:

> "The court erred in permitting witness to testify, over appellant's objection, as to improper loading of bin.
>
> The court erred in permitting the introduction of the testimony and the graphic illustration by appellee's expert witness, Tom Bailey, with reference to the maximum pile of alfalfa pellets which could be introduced into the seed house; and in failing to

strike the testimony of Tom Bailey at appellant's request."

We find no merit in either of the points designated by appellants. From appellants' own evidence it is clear that three holes had been cut through the wall of the double unit bin for the purpose of introducing pellets into it. The first hole was approximately 44 inches from the bottom of the bin and from the top of the hopper portion of the bin. This hole was approximately 29 inches south of the center line of the bin and was over the north portion of the hopper constituting the bottom of the south unit of the bin. The second hole was of no significance, but the third hole, and the one being used for the introduction of pellets, was some 104 inches from the bottom of the bin and from the top of the hopper portion of the bin. This hole was approximately 44 inches north of the center line of the bin and was over the south portion of the hopper constituting the bottom of the north unit of the bin. At least 89.41 tons of the pellets had been blown into the north end of the bin through this third hole and these pellets were still in the bin when the north side of the bin and the north hopper collapsed. As to the weight of the pellets in the bin at the time of the collapse, appellant Ray testified as follows:

"Q. How much of it [alfalfa pellets] were you able to salvage?

A. I have got some tickets. We weighed it all. I believe, looks like 168,820 pounds.

* * *

A. We estimated there was an additional five tons we couldn't recover."

On cross-examination Mr. Ray testified:

"Q. Do you recall, offhand, the weight of the pellets that remained in the hopper that stayed up?

A. No, I do not. I recall, I was a little bit, amazed me, there were—I don't recall, exactly, I remember, more in there than I thought there would be.

* * *

Q. Do you have anything here you could look at to determine the weight of the pellets that remained in the hopper?

A. No, sir. I don't believe so.

Q. Do you recall, it was something between 19 and 20 ton?

A. No, sir. I don't recall, but it is possible that is right.

Q. The amount left in the hopper and that recovered from the ground together weighed 168,820 pounds, figure you testified to earlier?

A. Yes, sir. That is correct.

Q. And you and someone from Wonder State estimated there was about six tons that remained on the ground, could not be, be recovered?

A. I think we said five, five or six."

According to appellant's own testimony, when his lowest estimate of five tons of pellets that could not be salvaged is added to the amount that was salvaged and weighed, there was 89.41 tons of pellets in the entire bin when it collapsed. This was only 3.59 tons short of the weight both bins were designed to hold had they been erected as single and separate units. From appellant's own testimony, and that of his own witnesses, the entire bin would have reached its pellet weight content capacity of 93 tons when the pellets had reached a uni-

form depth throughout the bin up to the first hole that had been cut 44 inches from the bottom of the bin. There is no question that all the pellets in the bin had been blown into it through the hole near the top of the side of the north unit or end of the bin and allowed to simply flow by gravity to the other areas of the bin. Appellant testified that at the time the north end collapsed, the bin had not been filled to the first hole on the south side. So we conclude, that from appellant's own evidence and the undisputed physical facts deductible therefrom, the jury, by the application of its common sense to the laws of gravity, could have reasonably found that considerably more than 46½ tons of pellets was in the north end or unit of the bin when it collapsed, and that it was the excessive weight of these pellets that caused the north hopper and north end of the bin to collapse.

Appellee's witness, Tom Bailey, not only testified as a qualified expert in the construction and erection of the type of bins involved here, he testified that he went into the collapsed bin and observed the pellets that remained in the south end of the bin and in the south hopper. He testified that the southeast corner of this south hopper had not filled up. Bailey also testified that the angle of repose for alfalfa pellets was 25 degrees and from the angle of repose of the pellets he observed in the south and undisturbed end of the bin and hopper, he estimated the distribution of the contents between the north and south halves of the bin to be 40% in the south end and 60% in the north end at the time of the collapse.

The only evidence offered as to statements made in the nature of express warranties, pertained to statements that a single bin would hold 46½ tons of feathers and that the bins would be suitable for storing alfalfa pellets. It is obvious that the statement as to feathers simply meant that the bin could be completely filled with any substance so long as the total weight did not exceed 46½ tons. There is no evidence in the record that

the bins would not hold 46½ tons of feathers or anything else, including 46½ tons of alfalfa pellets. There is no evidence in the record that the bin was not suitable for storing alfalfa pellets, but there is substantial evidence in the record that appellants overloaded the north end of the bin with more than 46½ tons of alfalfa pellets and that the north end of the bin collapsed under this weight. Many automobiles are designed as eight passenger automobiles and are sold as being suitable for safely transporting people, but certainly there is no warranty in the sale of such automobile that eight people can ride safely in the front seat. There is substantial evidence in the record to sustain the verdict of the jury, and finding no error in the admission of the evidence, we affirm the judgment of the trial court.

Affirmed.

FOGLEMAN, J., not participating.

OLD AMERICAN LIFE INSURANCE COMPANY *v.* DORCAS TAYLOR

5-4552 427 S. W. 2d 23

Opinion delivered April 22, 1968

Jack L. Lessenberry, for appellant.

Wright, Lindsey & Jennings, for appellee.

J. Fred Jones, Justice. This is an appeal by Old American Life Insurance Company from an adverse judgment of the Pulaski County Circuit Court in favor of Mrs. Dorcas Taylor, who was the plaintiff in the trial court.

On June 12, 1964, Southern Union Life Insurance Company issued a family group hospital and surgical benefit policy to the appellee, Mrs. Dorcas Taylor, and among other benefits the policy provided for payment for accidental injury resulting in death of any of the named insureds. Old American Life Insurance Company assumed all the obligations of Southern Union to the holders of policies issued by Southern Union. James Taylor, one of the named insureds in the policy issued to his mother, Mrs. Taylor, sustained an accidental injury resulting in his death, and Mrs. Taylor filed claim for $2,000 under the policy. Old American paid $1,000 as the full amount due under the policy, and Mrs. Taylor filed suit for $1,000, together with interest, penalty, costs, and attorney's fee. A trial before the judge, sitting as a jury, resulted in total judgment of $1,557 in favor of Mrs. Taylor and on appeal to this court Old American relies upon the following points for reversal:

> "The evidence was insufficient to sustain the judgment of the court.
>
> "The trial judge should not have considered opinion testimony."

Only a fact question is actually presented in this case and that question concerns the validity of an addi-

tional provision added, in red type, to the face of the policy, as follows:

> "All the benefits of this policy, with the exception of the daily room benefits shall be payable at the rate of 200% of the stated amounts."

The appellant contends that this provision was a forgery, so the question boils down to whether this provision was in the policy when it was issued or whether it was added to the policy after the policy was issued.

The appellee, Mrs. Taylor, testified that her husband purchased the policy through an agent by the name of Delbert Standridge; that the policy was received through the mail and that the provision typed in red was on the policy when it was received. Mr. Taylor testified that he purchased the policy from Mr. Standridge who was part owner of a general insurance agency; that the policy was delivered through the mail; that it is now in exactly the same condition as it was when received, and that it has not been changed.

The evidence submitted by the appellee was heard by the court on June 2, 1967, and it was agreed that the remainder of the evidence would be heard on June 17. On June 17 appellant presented its evidence, and Mr. Kelly, former vice president and part owner of Southern Union Insurance Company testified that the policy was sold by Delbert E. Standridge as a writing agent and who is now in California; that T. G. Tubb of Beebe was president of Southern Union, that he saw Tubb a couple of weeks ago down town but has no personal knowledge of whether Tubb is in the state. Mr. Kelly testified that the portion of the policy typed in red is not a normal provision of policies issued by Southern Union and stated: "We don't issue policies like this. We didn't put this on there." Mr. Kelly testified that Mr. Standridge was a general agent; that Miss Dutchy Wilson, the receptionist and secretary in the home office

of Southern Union, ordinarily did the necessary typing on insurance policies, and that he is not sure where she is now unless she is at home. At page 35 of the transcript, Mr. Kelly testified as follows:

"A. Of course we keep a copy of the policy.

Q. Where is that?

A. Where is a copy of the policy?

Q. Yes, sir.

A. In the file.

Q. Whose file?

A. Old American."

Appellant did not offer the testimony of agent Standridge who sold the policy, nor the testimony of Miss Wilson who ordinarily did the typing on the policies. Neither did appellant offer in evidence the office file copy of the original policy or attempt to explain its failure to do so. We conclude that there was substantial evidence to sustain the judgment of the trial court.

Some attempt was made on direct examination of the appellee as a witness at the trial, to qualify her as an expert on *typing;* on cross-examination she was questioned concerning her qualifications as an expert on *typewriters,* but the testimony elicited from her was not such testimony that would be confined to the knowledge of an expert in either field. On direct examination appellee testified that when a piece of paper has been typed on and removed from a typewriter, it is difficult to return the paper to the machine and obtain proper alignment of margins and spacing between the lines; that the typing in question on the policy involved, seemed to her to have the proper margin alignment and the proper spacing between the lines. On cross-examination

the appellee testified that the typewriter used had pica rather than elite type.

The knowledge revealed by the testimony of appellee as to the marginal alignment, spacing of lines, and pica rather than elite type on the typewriter used in preparing the policy, was knowledge common and well known to anyone who has ever used a typewriter and there is nothing in the record to indicate that the trial court gave any more weight to appellee's opinion as to the alignment of margins and spacing of the lines than he did to his own observation from examination of the policy, so we conclude that the trial court did not err in overruling appellant's motion to strike this testimony.

After the appellant had rested in the trial of this case, the appellee offered evidence in rebuttal that has given us considerable concern, especially in the light of our recent decision of *Rushton* v. *First National Bank of Magnolia,* 244 Arkansas Reports (Advance Sheets), opinion delivered April 1, 1968.

As rebuttal testimony, the attorney, who had conducted the trial for the plaintiff throughout the case, took the witness stand and under examination by another member of his firm, testified as a witness for their client. The testimony will not be set out in detail since no argument has been directed to it on this appeal, but the substance of this rebuttal testimony was to the effect that the attorney had taken the insurance policy to the office of the appellant and that the officers of the appellant company had admitted owing the full amount of the $2,000.00 claimed by the appellee; and that they and their office employees were more or less apologetic for their error in not having already paid it. No objection was made by appellant to the offer of this testimony, and unlike the *Rushton* case, supra, the witnesses were not under the rule in the case at bar, nevertheless, we reiterate the admonition laid down in the *Rushton* case against an attorney testifying for his client in a case he is trying.

We conclude that there was substantial competent evidence to sustain the judgment of the trial court and that the judgment should be affirmed.

Affirmed.

POTLATCH FORESTS, INC. ET AL v. CARL BURKS

5-4554 426 S. W. 2d 819

Opinion delivered April 22, 1968

Williamson, Williamson & Ball, for appellants.

Paul K. Roberts, for appellee.

CONLEY BYRD, Justice. Appellants, Potlatch Forests, Inc., and Hartford Accident & Indemnity Company, appeal from a circuit court order that set aside an order of the Workmen's Compensation Commission denying Carl Burks compensation benefits for a hernia he experienced, because he failed to meet the five requirements laid down in Ark. Stat. Ann. § 81-1313(e) (Repl. 1960). That section provides:

"(e) *Hernia*: In all cases of claims for hernia it shall be shown to the satisfaction of the Commission:

(1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;

(2) That there was severe pain in the hernial region;

(3) That such pain caused the employee to cease work immediately;

(4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter;

(5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within forty-eight (48) hours after such occurrence; . . ."

The facts giving rise to the claim are that on December 22, 1966, while appellee was operating a cut-off saw at appellant Potlatch Forests' plant, a board struck appellee in the stomach just above the belt line. Appellee was knocked backwards a step or two and suffered severe pain in his abdominal region. After resting for a few minutes, he then continued to work until quitting time. Appellee slept very well that night but was still bothered by pain the next morning, Friday, December 23, and although suffering he worked all day.

Appellant's plant closed down Friday, December 23, for the Christmas holidays. On Saturday, December 24, appellee was still suffering and attempted to contact his physician, but was unable to do so. Appellee spent most of this day lying down, as he had found that alleviated the pain.

On Sunday, December 25, appellee still had pain and spent most of the day reclining, which gave him some relief from the pain. He again tried to reach his physi-

cian, but without success. At no time did appellee call any of the other physicians in Warren.

On Monday, December 26, appellee still felt pain and had to lie down most of the day. He was again unable to contact his physician.

On Tuesday, December 27, appellee went back to work, but the pain became so severe that by 9:30 a.m. he was forced to stop working. He then sat down and elevated his feet and by this means got some relief. Appellee also notified his foreman, Mr. Greenwood, that he had injured himself and would have to discontinue work and see a physician. On Tuesday afternoon appellee attempted to reach his physician but was unable to do so.

On Wednesday, December 28, Dr. James W. Marsh, who had been out of town since December 23, returned to Warren. Dr. Marsh examined appellee and diagnosed the trouble as an inguinal hernia.

The evidence also shows that appellee had a hernia on his right side when he went to work for Potlatch in 1936; that subsequently he had a hernia on his left side in 1960, which was repaired; and that the present hernia was just above the one he had in 1960.

When the testimony is viewed in the strongest light in favor of the Commission's finding, as we must do, *Fagan Electric Co.* v. *Green,* 228 Ark. 477, 308 S. W. 2d 810 (1958), we find that there was substantial evidence to support the Commission's denial of relief to appellee.

Appellee, to support the circuit court's decision overruling the Commission, relies upon *The Crossett Co.* v. *Childers,* 234 Ark. 320, 351 S. W. 2d 841 (1961); *Prince Poultry Co.* v. *Stevens,* 235 Ark. 1034, 363 S. W. 2d 929 (1963); and *Williams Mfg. Co.* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380 (1943).

In the *Crossett* case, testimony showed that on February 9 a heavy wrench came in contact with Childers' stomach; that although he observed a small lump in the hernia area that night, it did not occur to him he might have a hernia; and that subsequently on February 12 there was a leakage of chlorine gas at the plant which caused Childers to cough steadily for twenty minutes or more. It was at that time that a big swelling came out and Childers was forced to cease working. We there held that the occurrence on February 12 was sufficient evidence to support the Commission's conclusion that the hernia occurred as a result of the working conditions on that date.

Nor do we find anything in the *Williams* or *Prince* cases to sustain appellee's position. An estoppel was involved in both of those cases. In the *Williams* case the employee suffered an injury causing a cessation of his work which was promptly reported to the employer and which the employer's doctor was unable to diagnose as a hernia within the 48-hour period. In the *Prince* case, claimant promptly reported his injuries to the employer, but because of the employer's heavy work schedule he continued to work, at the employer's specific request and with the aid of others furnished by the employer, beyond the 48-hour deadline for attendance by a physician. The estoppel present in those two cases is not present here.

Reversed and remanded.

A. F. HOUSE, TRUSTEE *v.* JAMES R. LONG ET AL

5-4258 426 S. W. 2d 814

Opinion delivered April 22, 1968

Wright, Lindsey & Jennings, for appellant.

Robinson, Thornton, McCloy & Young, for appellee and cross-appellant, Arkansas Louisiana Gas Co.

Catlett & Henderson, for appellee, Monarch Mill & Lumber Co.

W. B. PUTMAN, Special Justice. This litigation involves the priority of liens among a purchase-money mortgage, a construction money mortgage, various mechanics' and materialmen's liens and a security agreement involving certain fixtures in thirteen different dwellings.

The defendant Long, a builder, had arranged for financing with Modern American Mortgage Company for approximately forty residences to be constructed primarily in Beverly Hills Addition to the City of Little Rock, Arkansas. On each lot purchased by Long, purchase-money mortgages were given in amounts varying from $2,750.00 to $3,200.00, and in addition, separate construction money mortgages in the amount of $10,000.00 were given on each lot. Both the purchase and construction money mortgages and the notes which they secured were subsequently assigned in trust to the appellant, A. F. House. Construction was not begun until these mortgages were placed of record.

On ten of the thirteen residences in question, arrangements were made to disburse the proceeds of the construction money loans through Beach Abstract and Guaranty Company. Disbursements on the other three were through Standard Title Company. The procedure established required Long to submit to the disbursing agent each week a list of the laborers, mechanics and

materialmen who were entitled to payment and the amounts thereof on each house. An officer of Modern American would then inspect the premises to determine whether construction had progressed sufficiently to justify the requested disbursement. If so, funds would be sent to the disbursing agent, and Long would execute a separate note for each disbursement. Individual checks would be issued to each laborer, mechanic or materialman in the amount shown on the list and delivered to them by Long.

Cross-appellant, Arkansas Louisiana Gas Company, had entered into a separate contract with Long to sell a heating and air-conditioning unit, a cooling tower, a kitchen range and oven and to install the duct work in each house. A blanket security agreement was executed on November 30, 1964, but was never recorded. Security agreements on individual lots were also executed as the goods were delivered, but these also were not recorded. It was not until December 27, 1965, approximately two months after construction had ceased and Long's insolvency was generally known, that additional security agreements were executed and recorded.

The chancellor held that the language of the construction money mortgages did not unqualifiedly commit the mortgagee to make the advances so as to afford it priority over the mechanics' and materialmen's liens. He further held that the transaction between Arkansas Louisiana Gas Company and Long created a purchase-money security interest in collateral other than inventory which was not perfected within ten days after the debtor received possession as required by Ark. Stats. 85-9-312 (4) (Repl. 1961) in order to give it priority over conflicting security interests.

Accordingly, the chancellor established the priorities in the following order: (1) Purchase-money mortgage; (2) mechanics' and materialmen's liens; (3) construction money mortgage; (4) the security interest of

Arkansas Louisiana Gas Company. From this decree, A. F. House, Trustee, and Arkansas Louisiana Gas Company have appealed.

The pertinent language in each of the thirteen construction money mortgages in question is as follows:

> "Grantee agrees that the acceptance and recordation of this mortgage binds grantee, its successors and assigns absolutely and unconditionally to make said loans and advances. Such advances will be made as requested by grantor as such work progresses."

It was the view of the trial court that this language was insufficient under our decisions requiring such a recitation to leave the mortgagee no option in the matter of making advances. See *Lyman Lamb Co.* v. *Union Bank of Benton*, 237 Ark. 629, 374 S. W. 2d 820, and that the conduct of the parties left it to the discretion of the lender whether to make such advances. We are unable to agree with this conclusion.

The provision plainly recites that upon acceptance and recordation of the mortgage, the grantee (mortgagee) is "absolutely" and "unconditionally" bound to make the advances. Had the recitation stopped at the end of the first sentence, we presume there would have been no quarrel with it. If, therefore, there is any deficiency in the provision, it must be created by the last sentence which provides that "such advances will be made as requested by the grantor as such work progresses." We do not believe that this language grants the mortgagee any option in the matter. On the contrary, whatever options there are rest with the mortgagor. If he causes the work to progress and requests the advances, the mortgagee has no choice other than to make them.

There is no necessary vice in a disbursement procedure keyed to the progress of construction. In *Ash-*

down Hardware Co. v. *Hughes,* 223 Ark. 541, 267 S. W. 2d 294, the construction money mortgage provided for advances to be made upon completion of each of a series of tourist cabins. The unconditional nature of the commitment was sustained when attacked by a materialmen's lien holder seeking priority.

The precise language in question here was approved in *Planters Lumber Co.* v. *Wilson,* 241 Ark. 1005, 413 S. W. 2d 55, a case decided after the entry of the decree from which this appeal was taken. Although in that case the principal question was the priority of a construction money mortgage to the extent that funds secured by it were withheld as payment for the lot and for interest, this Court stated that the language of the mortgage absolutely and unconditionally bound the mortgagee to make advances as the work progressed.

We hold that the language in the construction money mortgages unconditionally required Modern American to make advances to Long and that they should take priority over the mechanics' and materialmen's liens.

Arkansas Louisiana Gas Company has filed a cross-appeal asserting that the chancellor did not accord it the priority to which it is entitled. We believe this point is well taken. The trial court held that Ark. Stats. 85-9-312 (Repl. 1961), dealing with priorities among conflicting security interests in the same collateral, was determinative of the rights of Arkansas Louisiana Gas Company. It was, however, stipulated that the kitchen range and oven were fixtures, and the chancellor held that the heating-air-conditioning units and cooling towers became fixtures when installed. We are of the opinion that under these circumstances, the applicable statute is 85-9-313 which is the provision of the Uniform Commercial Code designed to establish priority of security interests in fixtures. The appropriate provisions of that statute are as follows:

"(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

"(4) The security interests described in subsections (2) and (3) do not take priority over

"(c) a creditor with a prior encumbrance of record on the real estate to the extent that he made subsequent advances if . . . the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected."

Under this statute if Arkansas Louisiana's security interest in the goods, although not yet perfected, *attached* to the goods before they became fixtures, it would take priority, as to the goods only, over the prior recorded mortgages to the extent that advances were made under these mortgages before the goods were affixed to the realty.

Ark. Stat. 85-9-204 (1) provides that a security interest attaches when there is an agreement that it attach and value is given and the debtor has rights in the collateral. The chancellor found that as between Arkansas Louisiana and Long, the security interest attached before the goods became fixtures.

All of the purchase money had been advanced before the goods became fixtures, and it is apparent from the record that some construction funds were advanced before and some were advanced afterward. In order to establish the extent to which Arkansas Louisiana is entitled to priority as to its goods which became fixtures, it will be necessary to determine in each case how much money had been advanced under the construction money mortgages before the goods became fixtures and how much was advanced thereafter.

It is likewise our holding that the materialmen's liens will take priority over Arkansas Louisiana's attached but unperfected security interest in the goods only to the extent that labor or material was supplied after the goods became fixtures.

It is argued that this permits a "secret lien" and results in inequities to the other lien holders. The answer to this is that there is no inequity in prohibiting a secured creditor from looking to security other than that upon which he relied when he decided to advance the money. Arkansas Louisiana's priority of security interests affects only the goods which became fixtures and not the remaining realty and improvements. Ark. Stat. 85-9-313 (5) provides for the removal of the fixtures from the real estate in circumstances of this kind upon the posting of adequate security for the payment of damages resulting from the removal.

Appellant House argues, however, first: That Arkansas Louisiana's security interest attached at the time of the execution of the blanket security agreement on November 30, 1964, and that all the mortgage funds were advanced after that date; and, second: That this issue was raised by Arkansas Louisiana for the first time on appeal. We consider both of these arguments to be without merit. A security interest cannot attach under Ark. Stat. 85-9-204 (1) until value is given and the debtor has rights in the collateral, and, in any event, it is important only to determine whether the security interest attached *before* the goods became fixtures. The significant time in determining the extent of priority is the time the goods were affixed to the real property, for it is only after this has been done that a prior mortgagee may be induced to make further advancements by seeing the fixtures in place.

Arkansas Louisiana Gas Company pleaded that its lien was superior to that of appellants and prayed that the Court determine the nature and extent of its rights

in the property. We consider this to be sufficient to raise the issue at the trial level.

Appellee Monarch Mill & Lumber Company, a materialmen's lien holder, argues that the appeal should be dismissed because appellant A. F. House had no beneficial interest in any of the notes and mortgages assigned to him, and cites Ark. Stat. 27-801 which requires every action to be prosecuted in the name of the real party in interest.

It is true that House held only the bare legal title to these instruments, that he gave no consideration for them and that they were assigned to him merely for reasons of convenience. We do not agree, however, that this deprives him of standing to prosecute this action. House held these instruments as an assignee in trust. Ark. Stat. 27-804 provides that the trustee of an express trust may bring an action without joining with him the person for whose benefit it is prosecuted.

One of the primary purposes of "real party in interest" statutes is to prevent defendants from being harassed by different suits arising from the same cause. See *Pitts* v. *Crane,* 114 Ore. 593, 236 P. 475. The real party in interest, therefore, is generally considered to be that person who can discharge the claim on which suit is brought and not necessarily the person ultimately entitled to the benefit of the recovery. There can be little doubt that an adjudication of the rights of A. F. House as trustee of these notes and mortgages will be equally binding on his assignor, Modern American Mortgage Company.

The cases cited by Monarch, holding that in a suit to foreclose a deed of trust both the trustee and the owner of the indebtedness are necessary parties, are distinguishable. When a deed of trust is used as a security device, the trustee holds the security and the beneficiary holds the indebtedness. Clearly they must both be par-

ties to an action to foreclose the security and satisfy the indebtedness. Such a split ownership does not exist in this case, however. Appellant House owned legal title to both the notes and the mortgages.

This case must be reversed and remanded for determination of the amounts advanced under each construction money mortgage prior to and after the goods were affixed to the realty in question, for similar determinations in connection with the mechanics' and materialmen's liens, and for establishment of priorities of liens on the fixtures and on the remaining real property in accordance with this opinion.

FOGLEMAN and BYRD, JJ., disqualified.

LEROY AUTREY, Special Justice, joins in the opinion.

FRED BRYSON ET UX *v.* DELMAR DILLON ET UX

5-4523 427 S. W. 2d 3

Opinion delivered April 29, 1968

Rhine & Rhine, for appellants.

Branch & Adair, for appellees.

CARLETON HARRIS, Chief Justice. This is a boundary line case involving Lots 29 and 30 of Block "H-G" of Castleberry's Addition to Paragould, Arkansas. Appellants, Fred Bryson and wife, are the owners of Lot 30, and appellees, Delmar Dillon and wife, are the owners of Lot 29. The dispute which has arisen relates to the boundary line running east and west between the two lots. Both appellants and appellees derived their title either directly, or indirectly through mesne conveyances, from a common grantor, Kermit Mellberg. On April 7, 1949, Mellberg conveyed Lot 29 to W. W. Duncan and wife.[1] On January 14, 1956, Duncan and wife conveyed to Marion H. Wineland and wife. The Winelands conveyed the property to John D. Osburn on September 17, 1959, and the Osburns conveyed to appellees Dillon on September 27, 1965. The original deed from Mellberg to Duncan described the land conveyed as follows:

"The South Half of Lot 28 and all of Lot 29 in Block 'H-G' of Castleberry's Addition to Paragould, Arkansas, being a resurvey of Block 'H and G' of Castleberry's Addition to Paragould, Arkansas, as recorded in Plat Book 1, at page 45, said re-survey being of record in Plat Book 1, page 94."

In all of the other conveyances this same identical description was used. Appellant purchased Lots 30 and 31 in Block H-G from Mellberg and wife by warranty deed on December 3, 1962.

On May 31, 1967, appellees instituted suit against

[1]Actually, this conveyance was from Hilltop Lumber Company, Mellberg being a partner.

the Brysons alleging that in 1956 Wineland and Mellberg orally agreed that the boundary line between Lot 29 and Lot 30 "should be a line running East and West and located at a point five (5) feet South of the Southern most part of the house located on Lot 29, then owned by Marion H. Wineland, et ux, and now owned by the plaintiffs." It was then asserted that the subsequent grantees of Wineland had made improvements treating the aforesaid line as the true boundary and had exercised acts of ownership up to said line. It was then alleged that the Brysons were encroaching over the agreed line, and it was prayed that appellants be enjoined from interfering with the use of the property, and that appellants be required to remove rose bushes and other obstructions from the land allegedly belonging to appellees. The Brysons answered, denying that any oral agreement had ever been entered into concerning the boundary, asserting the title to the property in question, and asking that the complaint be dismissed. On trial, the court held that Wineland and Mellberg "had made a tacit agreement during 1956 as to the location of the boundary line" between the two lots, and that the Brysons and their predecessor in title had "acquiesced in the location of the boundary and are now estopped from asserting any other line as the boundary line" between Lots 29 and 30. Thereupon, the court declared the following line to be the boundary:

"The place of beginning shall be a point four feet South of the Southeast corner of the Southernmost wall of the plaintiffs' house. From the place of beginning run thence in an Easterly direction to the center of a drain pipe exit place (said drain pipe being the one running in a Southerly direction from the Southeast corner of the plaintiffs' house, approximately five feet; thence in an Easterly direction to its exit place); thence from said center of the exit place of the aforedescribed drain pipe and continuing in the same direction on the same course, to the East boundary line of Block 'H-G' of Castleberry's Addition to the City of Paragould, Arkansas.

"Then, again beginning at the place of beginning and running in a Westerly direction to a point twelve inches South of the South edge of the plaintiffs' water meter; thence continuing in the same direction and on the same course to the East line of Hilltop Street in Castleberry's Addition to the City of Paragould, Arkansas."

From the decree so entered, the Brysons bring this appeal.

First, let it be said that the evidence is undisputed that the record title to the property in question is in appellants.

Mr. Mellberg did not testify, and the court's finding was apparently largely based upon the testimony of Wineland. This witness testified that he and Mellberg lived next to each other, and that he (Wineland) performed drain work on the property while he lived at that location. He said that he hooked up a sewer line from his kitchen sink and from the automatic washer. "It run outside the kitchen window and then down to an open ditch at the back. It went out to the south and then east. About 4 or 5 feet outside the house." This "4 or 5 feet" was on the property presently owned by the Brysons, and Wineland said that he built a fence on the south side of the drain.[2] The witness said that

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[2]From the testimony:

"Q. This fence that you said you installed on the south line, where did it run from?

A. From the back corner of the house, from the southeast corner of the house out to the line and then back to the east side.

Q. Was it right next to the house or was it offset some way?

A. I had a gate where I could go through beside the house and then it went to the south and then back.

Q. Approximately how far was this from the edge of the house to the gate? How wide was your gate?

A. Oh, it was I would say four or five feet. I just made a gate all the way out.

Q. So from the corner of your house the gate came out ap-

Mellberg did not object to either of these acts, though he lived on Lot 30 at the time, and knew about them, and Wineland stated that he never had any dispute relative to the property line with Mellberg. He said that he mowed his lawn over to this fence.

"Q. And from the fence and gate to the front, to Hilltop Street, where did you mow?

A. Well, I mowed out in line with it."

Wineland testified that the fence had been taken down when he left the property, but part of the posts were still there. He said that he did not obtain permission from Mellberg to run the drain down to the east side of his house, nor did he obtain permission from Mellberg to build the fence—he simply performed these acts, and Mellberg never did say anything about it. He stated he never had any survey made in an effort to locate the true line between the two lots as reflected by the recorded plats. On re-direct examination the following testimony was given:

"Q. You said there wasn't any verbal agreement, Mr. Wineland. Do you actually remember whether you had any verbal agreement or do you just not know whether you made one or not?

A. Well, I don't know of any. I don't recall any agreement that we made.

Q. But you don't definitely say that there wasn't one, do you?

A. Well, I don't recall any agreement that we made."

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proximately four or five feet south and then the fence ran out to the south side of the drain, is that correct?

A. Yes, sir."

Osburn, who purchased from Wineland, testified that he did not know where the property lines were located. "Well, there never was anything said about no line no more than they just said approximately out there somewhere." The witness stated that there was no fence of any kind on the south side of the house, and on being asked if, when he moved into the property, he could see where a fence had been, answered, "I don't believe you could no more than it was in a low place. A slope from each house sloped toward it and you could still tell where there was a low place and see where it joined on." Osburn said that he mowed out four or five feet from his house, and that Mellberg never made any objection; nothing was ever said about where the line was located, "I don't know where it was but that was just the understanding between me and him." He also used the drain that Wineland had constructed, but he could not state exactly where the drain was located. The witness testified that Mellberg moved while he (Osburn) was still living on the premises; that Bryson moved into the Mellberg house, but did not object to his manner of mowing. Osburn testified that Bryson had the line surveyed, that the surveyer "put it over there somewhere in my way and I picked it up and throwed it out of the way." He said he told one of the Bryson "kids" that there was no need of "stakes between me and him." Osburn lived on the premises approximately six years before conveying to Dillon. The latter testified that he was claiming over to the drain, approximately five feet. This was admittedly a guess, and at other times, the witness would state, "4 or 5 feet." He said that Bryson started to build a fence about six inches from his house, but never did construct it; however, appellant put out rose bushes on the strip Dillon was claiming. Dillon admitted that at the time he purchased the property, and was looking it over, Bryson asked him if he "found out where the property line was," and he further said that appellant told him that the line was about two and one-half inches from his house.

Bryson testified that when he first moved to the premises he did not know just where the line was located, and he subsequently obtained a surveyor to ascertain that fact. He stated that both he and Osburn mowed the same strip, but they never discussed the matter. Appellant said that he met Dillon when the latter came to look over the Osburn property, and he told this appellee that, according to the survey, the house extended on his (Bryson's) property, but "I'll not cause you any trouble over it." Dillon made no response. Appellant said that he set rose bushes out on the disputed strip, and Dillon complained, stating that he intended to have it surveyed. However, from the record, this was not done. Two surveys were made at the instance of Bryson, one by George Wadley, and the other by Clay Kenward, registered engineer. The Wadley survey caught the southeast corner of the Dillon house, and the Kenward survey came out about one foot to the south, leaving the line about eight inches from the corner of the house. Bryson stated his willingness to accept the second line.

It will be seen from this review of the evidence that there was never any agreed boundary line, *i. e.*, none of the prior owners had ever agreed, or for that matter, even discussed, where the property line was located. In fact, it doesn't even appear that anyone gave thought to the true location of the line until Bryson had the first survey made. The trial court recognized this fact, and held only that a "tacit" agreement had been reached. This holding was based on acquiescence. The complaint does not allege, nor did the court find, that title had been established by adverse possession. In a long line of cases, we have held that, to establish an agreed boundary line, there must be an uncertainty or dispute as to the boundary line, there must be an uncertainty or dispute as to the boundary; that the agreement must be made by adjoining landowners; the boundary line fixed by the agreement must be definite and certain, and finally, the agreement must be followed by possession. *Payne* v. *McBride,* 96 Ark. 168, 131 S. W. 463; *Taylor* v. *Rudy,*

99 Ark. 128, 137 S. W. 574; *Malone* v. *Mobbs,* 102 Ark. 542. 145 S. W. 193, (*on rehearing*) 102 Ark. 545, 146 S. W. 143; *Sherrin* v. *Coffman,* 143 Ark. 8, 219 S. W. 348; *Moeller* v. *Graves,* 236 Ark. 583, 367 S. W. 2d 426. As occasionally happens, cases are found, which, without careful scrutiny, may indicate a departure from this rule. Appellant mainly relies on our case of *Deidrech* v. *Simmons,* 75 Ark. 400, 87 S. W. 649, where these requirements are not specifically mentioned, and it is said that an agreement may be inferred from long continued acquiescence and occupation, thus binding the parties. However, the facts there are not at all in accord with the present facts. In *Deidrech,* Melinda E. Kilpatrick was deeded Lot 4 in Block 74 of Tennehill and Owen's Addition in Pine Bluff by James M. Hudson, who also conveyed Lot 1 to Silas Reynolds. These two parties later conveyed to others, and eventually Deidrech became the owner of Lot 1 and Simmons became the owner of Lot 4. Simmons caused Lot 4 to be surveyed, and his survey reflected that this lot included some of the Deidrech property (which had earlier been owned by Reynolds). Mrs. Kilpatrick, who had originally purchased Lot 4 from Hudson, testified that she built a fence marking the boundary line between the two lots, and never at any time claimed any land north of the fence. Reynolds subsequently built a fence adjoining her fence, and she stated that she never, either before, or after, claimed any part of the land on the Reynolds side of the fence. This line was also observed by the subsequent owners of Lot 4 until the property was conveyed to Simmons. This court held that Mrs. Kilpatrick and Reynolds and subsequent purchasers had tacitly agreed upon the division line.

The opinion reflects, however, that there was uncertainty as to the line, caused by differences in two maps, both being generally accepted as correct, though they differed as to a 12-foot strip between the properties, so it is very evident that there was uncertainty as to the true line. In the next place, the original fence

was constructed by the owner of Lot 4, the result being that she gave up a strip of her property, but she emphatically stated that she never claimed beyond the fence she had herself built.

Here, there is really no uncertainty as to the boundary line (except for the difference of less than a foot in the two Bryson surveys); rather, the owners of the properties apparently never bothered to find out where the line was located. Also, to conform to *Deidrech,* the fence constructed in the present litigation would have had to have been built by Mellberg, who would have been giving up some of his property, rather than by Wineland, who was taking additional footage. Not only that, but in *Deidrech* the fence stood for many years, and the Wineland fence only stood during the period of his particular ownership, which could not have been more than three years.

Appellee also relies on *Seidenstricker* v. *Holtzendorff,* 214 Ark. 644, 217 S. W. 2d 836. The opinion points out that there was uncertainty in the location of the true line, and it was also shown that for more than thirty years, a fence had been recognized as a division fence. The court held that:

"Acquiescence, by owners of adjoining lands, in a boundary line, as shown by a division fence, for more than seven years will ordinarily confirm the boundary line as thus located, even though the fence may not be placed on the true line between the tracts."

It is apparent that adverse possession was one of the factors in this case, and the same is also true of the third case relied upon by appellee, *Vaughn* v. *Chandler,* 237 Ark. 214, 372 S. W. 2d 213. There, too, the case was determined on the basis of adverse possession, the court stating:

"After a careful review of the evidence in this case

we have determined that the 1,295.7 foot strip of land was occupied adversely by the appellee for more than seven (7) years in the belief that the existing fence represented the true boundary."

In *Sherrin* v. *Coffman,* supra, we said:

"In the present case there is no testimony to show that the parties made any agreement about the boundary line, or that such agreement if made was executed. Mrs. Coffman's testimony only goes to the extent of showing that she had a survey made and that the adjoining proprietor afterwards recognized its correctness and asked permission to move a house situated on the disputed strip. This testimony falls short of showing that the parties made an oral agreement establishing a boundary line which had been in dispute and that the possession of the disputed tract was taken by Mrs. Coffman by virtue of such agreement."

Summarizing, the evidence in this case reflects that the same description was used in each conveyance all the way from Mellberg to Dillon, and, under this description, the disputed tract belonged to appellants. There was no agreement by any of the owners, nor was any definite line considered as the boundary. In fact, the strongest evidence offered by appellee was that the line was approximately "4 or 5 feet" from the southeast corner of the house. While there was testimony by Wineland that he built a fence (and it is not clear to where this fence extended), this mark of a purported boundary was only in existence for less than three years, and was no longer standing when the property was conveyed from Wineland to Osburn. Finally, it does not appear that there was any dispute about the location of the proper boundary until the appellant had the property surveyed.

It follows, from what has been said, that the complaint should have been dismissed, and the court erred

in establishing the line heretofore referred to; the decree is reversed, and the cause remanded to the Greene County Chancery Court, with directions to enter a decree in accordance with this opinion.

GREINER MOTOR COMPANY *v.* K. S. SUMPTER ET UX

5-4547 427 S. W. 2d 8

Opinion delivered April 29, 1968

Shaw & Bedwell, for appellant.

Sam Sexton, Jr. and *Bill B. Wiggins,* for appellees.

GEORGE ROSE SMITH, Justice. On September 1, 1966, K. S. Sumpter and his wife, the appellees, bought a supposedly new Pontiac Tempest car from the appellant. A number of repairs to the motor and transmission

soon became necessary. Eventually the Sumpters learned that the car had not been a brand-new vehicle when they bought it. They elected to keep the car and bring this action for damages resulting from the seller's misrepresentations. This appeal is from a verdict and judgment awarding the plaintiffs $1,497 in damages.

Greiner contends primarily that it was entitled to a directed verdict, because it insists that the car really was new at the time of the sale. That argument is based upon proof that the Sumpters received a new-car warranty and that title to the vehicle had not been transferred to any other buyer before the sale to the Sumpters. The seller argues that those facts show that the car was actually new, so that its salesmen's statements to that effect were true.

It may be that automobile dealers regard such a vehicle as new, but the jury were entitled to take a more realistic view. Greiner bought the car in December of 1965, more than eight months before the sale to the Sumpters. In that interval the car was used by Greiner both as a rental vehicle and as a demonstrator. Moreover, according to the undisputed proof, the car was stolen and kept by the thief for some six weeks, eventually being recovered in Arizona. The odometer then showed more than 7,000 miles of travel. The seller turned that reading back to about 150 miles, put new tires on the car, cleaned it up in other respects, and represented it to be a new vehicle. In view of that proof it was evidently for the jury to say whether there were fraudulent misrepresentations in the sale.

Secondly, Greiner, citing *Union Motor Co.* v. *Turbiville,* 223 Ark. 92, 264 S. W. 2d 592 (1954), insists that the court should have instructed the jury that the measure of the plaintiffs' damages was the difference between the recited contract price of $2,400 and the actual value of the car at the time of the sale. Instead the court submitted to the jury the measure of damages that

we approved in *Union Motors* v. *Phillips,* 241 Ark. 857, 410 S. W. 2d 747 (1967), being the difference between the market value of the car as warranted and its market value in its condition at the time of the sale.

The *Turbiville* measure of damages has the merit of simplicity, but the rule of the *Phillips* case often achieves complete justice by disregarding the contract price, thereby preserving to the purchaser the advantage he may have gained by driving what would have been a bargain if the car or other chattel had been all that the seller represented it to be. Both rules have been applied in Arkansas. See Casenote, 1 Ark. L. Rev. 308 (1947).

In the case at bar the court properly adopted the *Phillips* standard, because the recited contract price of $2,400 was not the real price paid by the Sumpters. The president of the appellant company testified that he paid $2,647.30 for the car and that the suggested list price was $3,267.63. That list price was noted by the salesman on the Sumpters' invoice, which also recited a cash price of $2,400. The witnesses accounted for the discrepancy by explaining that, as a means of reducing the sales tax due the State, both the recited price of the Pontiac Tempest and the recited credit allowed for the Sumpters' trade-in had been reduced by the seller in the preparation of the contract documents. Hence the court was right, in fairness to the purchasers, in disregarding what was a fictitious contract price and submitting instead a measure of damages based upon actual values.

What we have just said pretty well answers Greiner's third contention, that the verdict is excessive. According to Greiner's own witnesses the car should have been worth more than the $2,647.30 that Greiner paid for it. Mr. Greiner testified that he would have tried to get $2,950 for the car. An expert witness appearing for the buyers fixed the value of the car on the sale date at

between $1,250 and $1,300. Even though the appellant's brief refers to that testimony as "patently unbelievable," we see no reason why the jury were not justified in accepting it—the issue being one of opinion.

Finally, it is argued that the court erred in answering a juror's inquiry about whether it is a criminal offense "to roll back a speedometer." We find no error, not only because the court did not give a positive answer to the question, but also because there was no objection to the court's statement.

Affirmed.

RAYMOND HENRY ATWELL *v.* STATE OF ARKANSAS

5341 427 S. W. 2d 1

Opinion delivered April 29, 1968

Garner & Parker, for appellant.

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

George Rose Smith, Justice. The appellant was charged with the crime of sodomy, found guilty, and sentenced to ten years imprisonment. He argues five points for reversal.

I. On complaint of the prosecuting witness, Atwell was arrested within a few moments after the commission of the offense, taken to police headquarters, and interrogated in the presence of several officers. He insists that the court erred in allowing the State to introduce an admission of guilt that was assertedly made in the course of the questioning.

We find no error. The trial judge, in compliance with the rules announced in *Jackson* v. *Denno,* 378 U. S. 368 (1964), first heard the witnesses in chambers and made a finding that the confession was voluntary. There is ample evidence to support that conclusion. One of the police officers present during the interrogation was the accused's brother. That officer's failure to testify at the trial is a persuasive indication that the accused's constitutional rights were not infringed. Moreover, the de-

fendant admitted on cross-examination that he was informed of his rights and that thereafter he did make an admission of guilt.

II. There is no merit in the contention that the prosecuting witness should not have been permitted to testify that Atwell had served a term in the penitentiary upon a conviction for rape. Atwell's counsel had already told the jury during their voir dire examination that his client had been in the penitentiary. The testimony was competent, as it tended to show that the prosecuting witness participated in the crime from fear and therefore was not an accomplice. Finally, the correctness of the court's ruling is not in issue on appeal, because no exceptions were noted. *Stockton* v. *State,* 239 Ark. 228, 388 S. W. 2d 382 (1965).

III. We cannot sustain the contention that the ten-year sentence fixed by the jury is excessive. The statute provides a maximum penalty of twenty-one years. Ark. Stat. Ann. § 41-813 (Repl. 1964). With respect to the argument now being made we have said: "If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, we are not at liberty to reduce it even though we may think it to be unduly harsh." *Osborne* v. *State,* 237 Ark. 5, 170, 371 S. W. 2d 518 (1963).

IV. It is asserted that after the jury had returned its verdict the trial judge made remarks derogatory to the accused. Perhaps so, but whatever the court may have said was not made a part of the record on appeal and is therefore not before us. We have, however, examined the trial proceedings with care and find nothing to indicate any lack of fairness or impartiality on the part of the presiding judge.

V. In a motion for a new trial on the ground of newly discovered evidence counsel merely stated that four named witnesses "will be in a position to testify as

to the circumstances existing'' at the time and place of the offense. Since the motion does not state the substance of the witnesses' expected testimony it fails to meet the requirement that the newly discovered proof be of such a nature that it probably would change the result reached at the first trial. *Bixby* v. *State,* 15 Ark. 395 (1854). Hence the motion was properly denied.

Affirmed.

JIMMY CHERRY AND MOTORS INSURANCE CORPORATION *v.* DANNY VINSON

5-4590 427 S. W. 2d 17

Opinion delivered April 29, 1968

Shaver, Tackett & Jones and *Terral, Rawlings, Matthews & Purtle,* for appellants.

George E. Steel and *McMillan, Teague, Bramhall & Davis,* for appellee.

PAUL WARD, Justice. This litigation arises out of an automobile collision.

Jimmy Cherry, appellant, filed a complaint against Danny Vinson, appellee, alleging, in material parts: The collision occurred on Hospital Road in Nashville; that appellee was negligent in failing to keep a proper lookout; in stopping his car in such manner as to create a danger to motorists, and in refusing to abide by traffic laws. He alleged and asked for the following damages: $2,414 for damage to his car; $546 for medical and hospital expenses; and, $23,000 for loss of earnings. A few days later Motors Insurance Corporation also filed a complaint (in the same court) against appellee, alleging that it had issued its policy to appellant covering his damaged car, that it had already paid him $2,371.50 in full settlement, and that it was subrogated to the rights of appellant. Its prayer was for judgment in the said amount against appellee.

To the above complaints appellee alleged that the alleged injuries and damages were caused by the negligence of appellant.

A jury trial resulted in a verdict in favor of Cherry for $800 against appellee. The jury made no finding in favor of Motors Insurance. Both parties now prosecute this appeal, alleging two points for a reversal: One, the trial court erred in refusing to admit certain testimony. Two, the verdict of the jury was contrary to the court's instruction.

One. It is our conclusion that the case must be reversed on this point. One of the specific acts of negligence with which appellee was charged was that he improperly parked on the street in violation of traffic rules and regulations. After the collision a traffic officer made an investigation. Appellants offered to introduce testimony to show appellee pleaded guilty in the Nashville City Court to a charge of "improper parking", and it was refused by the trial court. We think the jury had a right to consider this testimony for what it was worth on the issue of comparative negligence as be-

tween appellee and appellant, Cherry. In *Harbor* v. *Campbell,* 235 Ark. 492, 360 S. W. 2d 758, the applicable rule was announced as follows:

> "A plea of guilty for traffic violation for the identical traffic mishap is certainly a declaration against interest; and such plea of guilty is as admissible as any other declaration against interest in any other case."

Two. Since the case must be reversed on point One the cause of action must be retried as to all parties. In view of that situation we merely point out [as was pointed out by the trial court] that if the jury finds against appellee for any amount in favor of Cherry it must also find against appellee in some amount in favor of Motors Insurance Corporation under the admitted facts in the record before us.

Reversed and remanded.

EDDIE JAMES BOOKER *v.* THE STATE OF ARKANSAS

5331 427 S. W. 2d 177

Opinion delivered April 29, 1968
[Rehearing denied May 27, 1968.]

George Howard Jr., for appellant.

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

LYLE BROWN, Justice. Appellant Eddie James Booker was convicted of robbery. He asserts error by the trial court (1) in denying his motion for severance, (2) failing to direct a verdict in his favor, and (3) refusing to grant a new trial on newly discovered evidence.

Three teenage boys, residents of Pine Bluff, were on their way to a basketball game. It was December and the hour was approximately 7:15 p.m. They were accosted on a street in Pine Bluff by two young men armed with a gun and a knife. (There was a third con-

federate but he was never identified.) Under threat of violence the teenagers were relieved of a watch, two coats, and one dollar. As each of the three victims left the scene, one by one, they heard shots coming in their direction. One of the victims, a recent high school graduate, testified he was able to see Booker's face and to note also that he wore a cap and a blue shirt. On the following morning the same boy also identified Booker at the jail. The other two victims could not identify Booker.

(1) *Denial of motion for severance.* The basis of the motion was that Booker was being tried jointly with a convicted felon who had been returned from the penitentiary for the trial. There is not an iota of evidence in the record that the jury had any knowledge of the co-defendant's status as a felon. They were charged jointly. Ark. Stat. Ann. § 43-1801 (Repl. 1964). There is no showing of abuse of the trial court's discretion and we do not disturb the ruling. *Nolan* v. *State*, 205 Ark. 103, 167 S. W. 2d 503 (1943).

(2) *Court's failure to direct a verdict.* The robbery was established and one of the three victims identified Booker. The latter testified he was not in the vicinity of the robbery. We hold the State's evidence was substantial and that it was for the jury to resolve the facts.

(3) *Court's refusal to grant a new trial on newly discovered evidence.* The motion was bottomed on the testimony of a witness who testified he was told by one Thomas Miller that Miller in fact committed the robbery with which Booker was charged. The testimony was conflicting; in fact, the State's evidence raised substantial doubt as to Miller's veracity. It would border on facetiousness to say that the trial court did not act in sound discretion.

To recount the testimony in detail would be of no

importance to the bench and bar; suffice it to say that the record has been carefully examined and we find no merit in appellant's contentions.

Affirmed.

RALPH BURK SHADDOX *v.* STATE OF ARKANSAS

5338 427 S. W. 2d 198

Opinion delivered April 29, 1968
[Rehearing denied May 27, 1968.]

Robert G. Brackman, Donald J. Adams, for appellant.

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

JOHN A. FOGLEMAN, Justice. This is the second appeal of this case. On the first appeal, the conviction of Shaddox of the offense of assault with intent to kill was reversed because of the refusal of the trial court to grant a mistrial for impropriety in the cross-examination of appellant by a special prosecutor. On the first trial, appellant's punishment was fixed by the jury at five years imprisonment. Upon retrial, appellant was again found guilty of assault with intent to kill, but the jury was unable to agree upon the punishment. The trial judge then sentenced appellant to three years in the State Penitentiary. Appellant asserts as reversible error: (1) the court's instruction and form of verdict stating the applicable sentence to be not less than 1 nor more than 21 years; (2) refusal of a mistrial because of a statement by a special prosecutor in closing argument; (3) denial of a directed verdict or, in the alternative, reduction of the charge to a misdemeanor. We will discuss these points in the order listed.

I

Appellant argues that the fixing of his punishment on the first trial amounted to an acquittal of any and all punishment over and above 5 years imprisonment and that subjecting him to the possibility of punishment in excess of that term amounts to double jeopardy. Since the length of the sentence imposed was actually 2 years less than that imposed by the jury on the first trial, appellant was not prejudiced, even if appellant should be right in his contention. Error in the giving of an instruction on a higher degree of an offense than is justified is rendered moot when the jury convicts a defendant of a lower degree. *Willis* v. *State,* 221 Ark. 162, 252 S. W. 2d 618. The analogy is so close that the same rule is properly applicable to both cases.

II

Not only did appellant elect not to testify in his own behalf on the new trial, but he offered no admissible evidence whatever. In the closing argument, the special

prosecutor made the following statement with reference to the intent of appellant:

> "* * * Now, how could even, how could these fine attorneys for the defense reasonably argue to you that he did not intend to inflict serious harm upon Younes, he said he did. He said 'Johnny, Blankety-blank I'll kill you.' And nobody has attempted to explain that away, in fact, I guess they couldn't."

Objection and motion for a mistrial were based on the contention that this amounted to a comment on the appellant's failure to take the witness stand.

This court has held many times that such remarks as were made here do not constitute a comment on the defendant's failure to testify. In *Davis* v. *State,* 96 Ark. 7, 130 S. W. 547, a prosecutor's remarks that the defendant had told two witnesses how he had administered medicine to produce an abortion, followed by the statement that, "* * * it is undisputed and undenied and he cannot deny it," were expressions of opinion as to the weight of the testimony of the witness which could not be construed as a reference to the fact that the defendant had not testified. In *Culbreath* v. *State,* 96 Ark. 177, 131 S. W. 676, a statement that a defendant had never seen fit to say where he was on the day of a murder and that he had not shown by anyone where he was at the time, was held not to be a comment on the defendant's failure to testify. A statement by a prosecuting attorney asserting that a conversation by a defendant was unexplained and undenied by anyone and calling on "them" to explain it, if untrue, was held to be an expression of opinion that the testimony, not being rebutted, should be accepted as true and not a comment on the failure of the defendant to testify. *Davidson* v. *State,* 108 Ark. 191, 158 S. W. 1103. When a prosecuting attorney referred to a coat of an alleged accomplice which had been found in a defendant's car and asked, "What explanation have they made of that?", this

court said that this argument was not a comment on the defendant's failure to testify. *Cascio* v. *State,* 213 Ark. 418, 210 S. W. 2d 897. In *Edens* v. *State,* 235 Ark. 996, 363 S. W. 2d 923, also a case where the defendant offered no proof, a statement by a prosecuting attorney in closing argument that the State's evidence was undenied was said to be a contention that the testimony should be believed because it was uncontradicted.

These remarks called to the jury's attention the impact of appellant's statement as evidence of intent and as contravention of the theory of self-defense raised by him. Clyde Loftin, who was present during the entire encounter, told of this statement by appellant. No witness, other than Younes and Loftin, testified relative to appellant's remarks. The argument in question relates to appellant's statement and the argument of his attorneys, which would have inevitably presented the facts and inferences which they thought would justify the theory of self-defense and indicate a lack of the element of intent on the part of appellant. We find no error on this point. *Perry* v. *State,* 188 Ark. 133, 64 S. W. 2d 328, *Bridgman* v. *State,* 170 Ark. 709, 280 S. W. 982, *Starnes* v. *State,* 128 Ark. 302, 194 S. W. 506, *Lee* v. *State,* 73 Ark. 148, 83 S. W. 916, and *Evans* v. *State,* 221 Ark. 793, 255 S. W. 2d 967, cited by appellant, are distinguishable. In some of these cases the attorney for the prosecution had stated that the defendant himself had failed to deny certain testimony. In others the prosecutor stated that the defendant had failed to give certain testimony. In others the prosecuting attorney, in argument, had addressed to the jury or to the defendant a rhetorical question as to why the defendant had not testified.

III

No useful purpose would be served by outlining the evidence in this case. It is substantially the same as we found sufficient to sustain a conviction on the previous appeal. We again find it sufficient. Appellant's alter-

nate request that the court reduce the charge to a misdemeanor was also properly refused. The trial judge instructed the jury thoroughly as to the elements necessary to constitute the crime of assault with intent to kill. He also defined and distinguished the crime of aggravated assault or assault with a deadly weapon. The determination of appellant's intent was a question of fact for the jury. The principal argument advanced by appellant on this point is that on this trial Younes admitted not only that he was willing to do whatever was necessary to take the money appellant owed him even if that included doing Shaddox bodily harm, but that he thought that Shaddox thought that he so intended. Of course, it was the province of the jury to determine under all the facts and circumstances of this case whether appellant intended to kill Younes, or only inflict bodily injury; whether any considerable provocation for his action appeared; whether appellant acted in a sudden heat of passion upon sufficient provocation; whether Shaddox was acting without fault or carelessness in defending himself from assault by Younes; whether it appeared to Shaddox that the degree of force used by him was reasonably necessary in repelling such an assault; whether he was justified in believing that the danger of bodily harm at the hands of Younes was imminent and impending; whether he acted under the influence of reasonable fears, or in a spirit of revenge; and whether appellant acted with due care and circumspection. All these matters were submitted to the jury under proper instructions and have been resolved against appellant.

Finding no prejudicial error, the judgment is affirmed.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. I disagree with the majority view because in my opinion Mr. Shouse, the special prosecutor, commented upon the defendant's failure to take the witness stand.

At the scene when the shooting occurred were only three people: the defendant Ralph Shaddox, the prosecuting witness Johnny Younes, and Clyde Loftin, owner of the service station. Witnesses Younes and Loftin were called and testified in behalf of the prosecution. Defendant Shaddox did not take the witness stand. In this setting Mr. Shouse, in his argument to the jury, stated:

> "And there is another thing, and to me it is very significant, most all that this Johnny Younes did was took hold of his shirt, of course, intending to pull him out of the car; Shaddox pulled back and his shirt was torn and that is all that was done, up to the time of the shooting; then, Shaddox comes up with a gun and shoots him and he shot him in a vital part, the lung, which shows intent to kill, of course, and what did he say, he says, 'God-damn,' I believe he used an oath, 'Johnny, I'll kill you' which shows that he had kill, kill in his mind. Now, how could even, how could these fine attorneys for the defense reasonably argue to you that he did not intend to inflict serious harm upon Younes, he said he did. He said 'Johnny, blankety-blank I'll kill you.' And nobody has attempted to explain that away, in fact, I guess they couldn't."

When the special prosecutor, Mr. Shouse, said, "AND NOBODY HAS ATTEMPTED TO EXPLAIN THAT AWAY, IN FACT I GUESS THEY COULDN'T," he could have been referring to "nobody" but the defendant Shaddox, who did not take the witness stand. Everybody else had already explained the shooting.

What the jury may infer on its own from the defendant's failure to take the witness stand is one thing, but what it may infer when the prosecutor argues his silence as evidence is quite another. The former is a necessary evil following from the accused's presence at the trial, but the latter is forbidden by the Fifth Amend-

ment to the United States Constitution. *Griffin* v. *California,* 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965).

Therefore I respectfully dissent.

STATE OF ARKANSAS v. EUGENE JARVIS AND NOBLE JARVIS

5318 427 S. W. 2d 531

Opinion delivered April 29, 1968
[Rehearing denied May 27, 1968.]

Joe Purcell, Attorney General; *David Hodges,* Asst. Atty. Gen., for appellant.

Pickens, Pickens & Boyce and *Kenneth H. Castleberry,* for appellees.

J. FRED JONES, Justice. Eugene and Noble Jarvis were separately found guilty in the Municipal Court of Newport in Jackson County, Arkansas, on two separate charges of selling or giving intoxicants to minors. They

each were fined $150.00 and costs in the Municipal Court and appealed to the Jackson County Circuit Court where the cases were consolidated by agreement. When the case came on for trial in the circuit court, the defendants filed a motion to dismiss because "there is no such crime 'as selling to minors.' " The trial court granted the motion and dismissed the charges. The state has appealed and relies on a single point for reversal:

> "Arkansas statute 48-903 did not repeal Arkansas statute 41-1117."

Arkansas Statutes Annotated § 41-1117 (Repl. 1964) is digested under chapter 11 having to do with criminal offenses pertaining to children. This section was enacted on March 8, 1879, amended in 1889, and having survived the 18th amendment to the Federal Constitution, it remains as follows:

> "Any person who shall sell or give away, either for himself or another, or be interested in the sale or giving away of any ardent, vinous, malt or fermented liquors, or any compound or preparation thereof called tonics, bitters or medicated whiskey, to any minor, without the written consent or order of the parent or guardian, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than fifty [$50.00] nor more than one hundred dollars [$100]."

In 1935 the Arkansas legislature enacted "The Arkansas Alcoholic Control Act" (Act 108 of 1935). Article VI of this act insofar as it relates to the question here presented, is as follows:

> "Section 1. It shall be unlawful to sell intoxicating alcoholic liquors at the places, on the day, during the hours, to the persons or under the circumstances set out below, and the penalties herein prescribed shall be in addition to any other penalty

prescribed by law on account of sale of intoxicating liquor:

"(a) Any person who shall sell, give away, or dispose of intoxicating liquor to a minor or habitual drunkard or an intoxicated person shall be guilty of a misdemeanor and for the first offense be punishable by a fine of not less than One Hundred ($100.00) Dollars nor more than Two Hundred and Fifty ($250.00) Dollars, and for the second and subsequent offenses, he shall be guilty of a misdemeanor and punishable by a fine of not less than Two Hundred and Fifty ($250.00) Dollars nor more than Five Hundred ($500.00) Dollars or by imprisonment in the county jail for not less than six (6) months nor more than (1) year, or both so fined and imprisoned in the discretion of the jury."

By Act 356 of the Acts of 1941, Act 108 of 1935 was amended as follows:

"Section 1. That Section 1 of Article 6 of Act 108 of the Acts of the General Assembly of the State of Arkansas for 1935 shall be amended to read as follows:

"It shall be unlawful to sell intoxicating alcoholic liquors at the places, on the day, during the hours, to the persons, or under the circumstances set out below, and the penalties herein prescribed shall be in addition to any other penalties prescribed by law on account of the sale of intoxicating liquors:

"(a) Any person who sell, give away, or dispose of intoxicating liquor to a minor, or habitual drunkard or an intoxicated person shall be guilty of a misdemeanor and for the first offense be punishable by a fine of not less than $500.00 nor more than $1,000.00 or confinement for not more than one year in the Arkansas State Penitentiary, or both."

Act 218 of the Acts of Arkansas for 1943 was entitled "An Act to Amend Act 356 of the Laws of 1941," and provides as follows:

> "Section 1. That Section 1 of Act 356 of the laws of 1941 is hereby expressly repealed and there is substituted in lieu thereof the following:
>
> "It shall be unlawful to sell intoxicating alcoholic liquors at the places, on the day, during the hours, to the persons or under the circumstances set out below, and the penalties herein prescribed shall be in addition to any other penalty prescribed by law on account of sale of intoxicating liquor:
>
> "(a) Any person who shall sell, give away, or dispose of intoxicating liquor to a minor or habitual drunkard or an intoxicated person shall be guilty of a misdemeanor and for the first offense be punishable by a fine of not less than One Hundred ($100.00) Dollars nor more than Two Hundred and Fifty ($250.00) Dollars, and for the second and subsequent offenses, he shall be guilty of a misdemeanor and punishable by a fine of not less than Two Hundred and Fifty ($250.00) Dollars nor more than Five Hundred ($500.00) Dollars, or by imprisonment in the county jail for not less than six (6) months nor more than one (1) year, or both so fined and imprisoned in the discretion of the court or jury."

At the same session of the legislature in 1943, Act 257 was also enacted by the General Assembly, and except for the enacting and emergency clauses, this entire act is as follows:

> "AN ACT to Make the Sale of Intoxicating Liquor to a Minor or on Sunday Misdemeanors, and Fixing the Punishment Therefor.

"Section 1. The sale, giving away or other disposition of intoxicating liquor to a minor is declared to be a misdemeanor, and any person who shall sell, give away, or otherwise dispose of intoxicating liquor to a minor shall be punished by a fine of not less than One Hundred ($100.00) Dollars nor more than Two Hundred and Fifty ($250.00) Dollars for the first offense; and for the second and subsequent offenses he shall be punished by a fine or [sic] not less than Two Hundred and Fifty ($250.00) Dollars nor more than Five Hundred ($500.00) Dollars or by imprisonment in the county jail for not more than one year, or both such fine and imprisonment in the discretion of the jury or court.

"Section 2. The sale of intoxicating liquor on Sunday is declared to be a misdemeanor, and any person who shall sell intoxicating liquor on Sunday shall be punished by a fine of not less than One Hundred ($100.00) Dollars nor more than Two Hundred and Fifty ($250.00) Dollars for the first offense; and for the second and subsequent offenses he shall be punished by a fine of not less than Two Hundred and Fifty ($250.00) Dollars nor more than Five Hundred ($500.00) Dollars or by imprisonment in the county jail for not more than one year, or both such fine and imprisonment in the discretion of the jury or court.

"Section 3. *This Act shall not be construed to repeal any law with respect to the sale of intoxicating liquors except to minors and on Sundays;* and all laws and parts of laws in conflict herewith are repealed.

"Section 4. The Legislature finds as a matter of fact that there are a great many violations of the law with respect to the sale of intoxicating liquor to minors and on Sundays, which, on account of present provisions of the law making such acts

felonies, cannot in many cases be enforced; that the practice of selling intoxicating liquor to minors and on Sundays should be stopped and can best be prevented by making such acts misdemeanors." (Emphasis supplied).

Act 218 of 1943 is digested as Ark. Stat. Ann. § 48-901 (a) (Repl. 1964), and the only difference in amendatory Act 218 of 1943 and Act 257 of 1943, insofar as the sale of intoxicating liquor is concerned, is that Act 218 (Ark. Stat. Ann. § 48-901 [a]) carries an optional minimum jail sentence of six months, whereas Act 257 merely limits the jail sentence to not more than one year, and Act 257 provides "this act shall not be construed to repeal any law with respect to the sale of intoxicating liquors *except to minors and on Sundays;* and all laws and parts of laws in conflict herewith, are repealed." (Emphasis added).

It would appear, therefore, that Act 257 of the Acts of 1943 is the last word from the legislature on the sale of intoxicating liquor to minors where knowledge of minority is not an element, and we are of the opinion, that the legislative intent in enacting this legislation is clearly apparent from sections 3 and 4, supra.

We therefore hold, that Act 257 did repeal so much of Ark. Stat. Ann. § 41-1117 as is in conflict with Act 257 pertaining to the sale of intoxicating liquors to minors. The written consent or order of the parent or guardian as provided in § 41-1117 is no longer available as a defense under Act 257, and the penalty provision under § 41-1117 has been increased as set out in Act 257, supra.

Apparently Act 257 of 1943, did not fully accomplish the purpose of its enactment, as expressed in § 4 of the act, so in 1961 the General Assembly saw fit to strengthen the laws against selling intoxicants to minors by the enactment of entirely new and separate legislation.

Act No. 180 of 1961 (Ark. Stat. Ann. § 48-903 [Repl. 1964]) with the exception of the enacting clause, is as follows:

> "AN ACT to Make It Unlawful for Any Person to *Knowingly* Sell, Give or Otherwise Furnish Any Alcoholic Beverage to Any Person Under the Age of Twenty-One Years; to Prescribe Penalties for the First and Subsequent Convictions for Violations of This Act; and for Other Purposes.
>
> "SECTION 1. It shall be unlawful for any person knowingly to sell, give, procure, or otherwise furnish any alcoholic beverage to any person under twenty-one (21) years of age.
>
> "SECTION 2. Any person violating this Act shall upon a first conviction therefor be deemed guilty of a misdemeanor and shall be fined One Hundred Dollars ($100.00); upon a second conviction within three (3) years, such person shall be deemed guilty of a felony and shall be imprisoned in the State penitentiary not less than one (1) year nor more than five (5) years and shall be fined Five Hundred Dollars ($500.00); upon a third or subsequent conviction within five (5) years, such person shall be deemed guilty of a felony and shall be imprisoned in the State Penitentiary not less than twenty-one (21) years nor more than fifty (50) years." (Emphasis supplied).

By Act 120 of the Acts of Arkansas for 1967, the General Assembly re-enacted the provisions of Act 180 of 1961 with the addition of an optional ten day jail sentence as additional penalty on first offense. This act became law without the signature of the Governor on June 30, 1967, and at the same session of the General Assembly, Act 277 of the Acts of 1967, was enacted which, with the exception of the enacting clause, is as follows:

"AN ACT to Make It Unlawful for Any Person to Knowingly Sell, Give or Otherwise Furnish Any Alcoholic Beverage to Any Person Under the Age of Twenty-One Years; to Prescribe Penalties for the First and Subsequent Convictions for Violations of This Act; and for Other Purposes.

"SECTION 1. It shall be unlawful for any person knowingly to sell, give, procure, or otherwise furnish any alcoholic beverage to any person under twenty-one (21) years of age. Provided, however, that this Act shall not apply to the serving of such to one's family or to the use of wine in any religious ceremony or rite in any established church or religion.

"SECTION 2. Any person violating this Act shall upon a first conviction wherefor be deemed guilty of a misdemeanor and shall be fined not more than Five Hundred Dollars ($500.00) or by imprisonment for not more than ten (10) days, or by both such fine and imprisonment; upon a second conviction within three (3) years, such person shall be deemed guilty of a felony and may be imprisoned in the State Penitentiary not less than one (1) year nor more than five (5) years and shall be fined not more than Five Hundred Dollars ($500.00) or both.

"SECTION 3. All laws and parts of laws in conflict with this Act are hereby repealed."

This Act was approved by the Governor on March 10, 1967.

It is clear to us that the General Assembly intended to enact, and did enact, two separate and nonconflicting statutes pertaining to the sale of intoxicants to minors. By Act 257 of 1943 the sale, giving away or other disposition of intoxicating liquor to a minor is made a misdemeanor with punishment for violation fixed at a fine

of not less than $100.00 nor more than $250.00 for the first offense, and not less than $250.00 nor more than $500.00 or imprisonment in the county jail for not more than one year or both such fine and imprisonment as provided in the act. This act repeals all laws in conflict with it and the consent of a parent or guardian is no defense to the enforcement of its provisions.

By Act 180 of 1961 (Ark. Stat. Ann. § 48-903 [Repl. 1964]) to *knowingly* sell, give, procure, or otherwise furnish any alcoholic beverage to any person under 21 years of age is made a misdemeanor for the first offense and a felony upon a second and subsequent conviction, with penalties as amended by Act 277 of the Acts of 1967.

We conclude, therefore, that the legislative intent is clearly spelled out in the acts, supra, and is supported by public policy. We conclude that to unknowingly sell, give away, or dispose of intoxicating liquor to minors is a misdemeanor with attending penalty for violation as provided in Ark. Stat. Ann. § 48-901 (except that the jail sentence may be imposed for any time up to one year), and to *knowingly* do so is a misdemeanor for the first offense and a felony for subsequent offenses with penalties as provided in Ark. Stat. Ann. § 48-903, as amended by Act 277 of 1967, supra.

Error declared.

BYRD, J., dissents.

JAMES ROBERT McCOLLUM *v.* JONES TRUCK LINES, INC., ET AL

5-4571 427 S. W. 2d 18

Opinion delivered April 29, 1968

Shelby R. Blackmon, for appellant.

Wright, Lindsey & Jennings and *Philip S. Anderson, Jr.,* for appellees.

CONLEY BYRD, Justice. Workmen's Compensation claimant James Robert McCollum appeals from a circuit court order upholding the Commission's finding against him.

Appellant had been employed by appellee Jones Truck Lines since 1962, first loading and unloading trucks, then driving bob trucks, and during the latter three years or more driving trailer trucks. About one in five of the trailer trucks was refrigerated and appellant averaged driving three refrigerator trucks a week. Appellant has a long medical history with various Little Rock orthopedists. His present orthopedist, Dr. Richard Logue, testified that appellant had been a patient since a toe injury in 1959. His medical history reflects

that in 1953 torn cartilage was removed from his left knee and in 1957 from his right knee. Dr. Logue had treated appellant's right knee "numerous times" for chronic swelling. This claim relates to appellant's left knee.

On September 2, 1966, appellant, suffering from a swelling knee, left work early. After rest didn't help, appellant went to St. Vincent's emergency room where he saw Dr. Logue early September 3. Dr. Logue was surprised to find appellant had a "hugely swollen hot left knee," and subsequently diagnosed it as a staphylococcus infection in the knee, apparently from staph within appellant's own body.

After hearing, the referee found that "the duties of claimant's employment aggravated a pre-existing condition. . . . which aggravation of a pre-existing condition is an accidental injury within the meaning of the Arkansas Workmen's Compensation Act." The majority of the full Commission found that there was no "convincing or substantial medical evidence that the staphylococcus infection in claimant's left knee resulted from his employment either as an accidental injury or as an occupational disease" and denied his claim, which denial was affirmed by the Circuit court.

The gist of appellant's argument is that working in and out of the cold in refrigerated trailer trucks had aggravated his knee; that he had complained about being assigned so many refrigerated trucks; and that the cold air hurt his knees and apparently caused the staph to lodge in that knee. The deposition of Dr. Logue introduced before the full Commission does not substantiate appellant's claim of aggravation of a pre-existing injury. Dr. Logue pretty well summarized his own testimony as follows:

> "I do not know whether the swelling was caused by the staph infection or whether the staph infection

lodged in his knee because there was a swelling that was there as a result of aggravation, work and lifting. I certainly do not know without equivocation."

Appellant's brief states the point concisely:

"The point here is whether that pre-existing condition of claimant's was aggravated by the employment. There is no issue here of occupational disease. . . . The real and only issue here is the 'aggravation of a pre-existing condition,' whatever the cause of the pre-existing condition."

On appeal from circuit court, the point here is whether the judgment of the Commission is supported by substantial evidence. During oral arguments, the parties admitted that the matter here is purely a fact question. It is apparent that the credibility of appellant's testimony about his complaints and the detrimental effects of working in and around refrigerated trucks during the preceding three years was undermined by his record of bidding each year to drive trailer trucks, when he could have bid for non-refrigerated bob trucks without loss of pay. (Appellee's employees bid each February for the shift and type of truck they will drive from March to March.)

". . . (I)t is not our province to decide contested issues of fact in compensation cases, . . . it is the responsibility of the Commission to draw inferences when the testimony is open to more than a single interpretation, and . . the Commission's findings have the force of a jury verdict. These principles demand that the Commission's decision in the case at hand be upheld." *Bradley County* v. *Adams,* 243 Ark. 487, 420 S. W. 2d 900 (1967).

Affirmed.

JONES, J., not participating.

EAGLE MORTGAGE CORP. ET AL *v.* J. L. JOHNSON ET AL

5-4533 427 S. W. 2d 550

Opinion delivered May 6, 1968

Hall & Tucker and *Fred E. Briner,* for appellants.

Butler & Dishongh, for appellees.

CARLETON HARRIS, Chief Justice. The appellees herein are all owners of property in Hollywood Heights Subdivision, Saline County, Arkansas. On November 13, 1962, one of the appellants, Land Development, Inc., being the sole owner of a 120-acre tract of land in Saline County, executed and recorded a plat and Bill of Assurance, carving the land into streets, a proposed park, and 248 lots. Various restrictions were listed in the bill of assurance on the use of, and improvements to, the property. The issue in this litigation arises because of the provisions of Paragraph 7 and Paragraph 12 of the bill.

Paragraph 7 provides:

"Temporary structure. No structure of a temporary character, trailer, basement, tent or shack, garage, barn, or other out building other than servant's quarters, shall be erected on a building site covered by these covenants for human habitation, temporarily or permanently, nor shall any temporary type residence be erected thereon for human habitation."

Paragraph 12 provides:

"The AMENDMENTS. Any and all of the covenants, provisions, or restrictions set forth in this Bill of Assurance may be amended, modified, extended, changed, or cancelled, in whole or in part by a written instrument signed and acknowledged by the owner or owners of at least 50% in the area of the land in this subdivision, and the provisions of such instrument so executed shall be binding from and after the date it is duly filed for record in Saline County, Arkansas, and these covenants, restrictions, and provisions of this instrument shall be deemed covenants running with the land and shall remain in full force and effect unless and until amended or cancelled as authorized hereinabove."

Land Development, Inc., sold these 33 appellees (16 couples and 1 individual) lots in the subdivision,[1] the contracts of sale containing the following provision:

"In addition to the foregoing restrictions and stipulations, no dwelling shall be constructed on any lot purchased under this contract, nor shall any dwelling of less than 1,000 sq. ft. of floor space, excepting porches and porticos. There shall be no shed roofs and all buildings will be finished and painted on the outside. No houses will be moved in (or house trailers) on said property.

"The foregoing stipulations, restrictions and condi-

[1]Five have built homes.

tions are imposed for the benefit of each and every other parcel of land in this addition, and shall constitute covenants running with the land; and the vendor, its successors and assigns, and any person owning property in said addition may prosecute proceedings at law or in equity to prevent or remedy the violation of such restrictions and covenants, and secure redress for damages on account of such violation."

Subsequently, Land Development, Inc., conveyed its interest in Hollywood Heights to Eagle Mortgage Corporation (hereafter called Eagle) and Western Realty, Inc. (hereafter called Western). At the time of trial Eagle owned approximately 75 lots, of which 59 were subject to contracts of sale, and Western owned 130 lots, of which 2 were subject to contracts of sale. All of the lots owned by Western are encumbered by a mortgage to Eagle.

Accordingly, on March 20, 1967, Western and Eagle were the owners of more than 50% of the area of land in this subdivision, and on that date, they executed an amended bill of assurance for Hollywood Heights Subdivision, which was filed for record on March 21, 1967. This amendment to the 1962 bill permitted mobile homes in an undeveloped portion, and very close to the center, inclusive of Lots 171 through 190, of the original subdivision; these lots were replatted into "Western Park Subdivision," mobile homes in this new subdivision being permitted. Appellants sold some of the lots in Western Park for this type home, and were in the process of selling other lots, when the appellees instituted suit to enjoin them from making these sales on the ground that Paragraph 7 of the original bill was being violated. After the filing of answers, appellants contending their action was authorized by Paragraph 12, and the taking of interrogatories, the case proceeded to trial; at the conclusion thereof, the court held that Paragraph 12 of the original bill of assurance "constitutes abuse of law and is ambiguous and against public policy. That said

Paragraph 12 should be interpreted to read that the bill of assurance could be changed at such time that fifty per cent (50%) of the homeowners physically living in the subdivision vote to change the provisions.'' Appellants were enjoined from selling property for the purpose of placing house trailers or mobile homes in the subdivision, and the court further directed that all trailers previously placed thereon should be removed; the amended bill of assurance was voided. From the decree so entered, appellants bring this appeal.

Junior L. Johnson, one of the appellees, testified that he had owned one of the lots since January, 1965, and had just completed building a house. He valued his house and lot at approximately $15,000.00. Johnson had purchased two lots from Land Development, Inc., and he testified that he was aware of the restrictions in the contract, though he did not read the bill of assurance. The witness said that, upon inquiring if the same restrictions held true to the other lots in Hollywood Heights, he was assured by Charlie Miller, President of Land Development, Inc., that this was correct. Johnson stated that he was familiar with the provision in his deed, heretofore set out, and because of that provision, and the assurance by Miller, purchased the property. The parties stipulated that the testimony of this witness would be representative of the other appellees, except as to the value of their respective properties.

George F. Fleischauer, salesman and property manager of Block Realty Company, testified that he had not been in Hollywood Heights Subdivision, but that he had had experience with trailers being placed on property. He was of the opinion that lots that had been set up as a residential subdivision would be depreciated by as much as 50% if the trailers were then put in the center (of the subdivision). This statement had reference to ground value, and the witness stated that if homes were placed on the property, such improvements would be depreciated by 25% if trailers were moved in.

Miller testified that, in addition to Hollywood Heights, he had developed about 7 other subdivisions, all with similar bills of assurance. The witness said that he and his salesmen, in selling lots, would give prospective purchasers a brief resume of the restrictions, and that these restrictions were placed in the contracts so that the individual who purchased his lot would know exactly what he could do. He testified that the provision for amending a bill of assurance (referring to Section 12) is customary, and that the power to amend is essential:

"* * * You want to protect everyone as near as possible. At the same time you have to leave an opening somewhere because nobody knows what the future holds and if the majority of the land owners so desire to change it for some other purpose, I believe it would be a standard practice. I have never seen any that wasn't. * * * Any man, owner or owners who own 50% of the land or more would have the right to change the Bill of Assurance."

The witness said that at the time the bill was amended, there were only about 13 houses in the entire area, and that about 96% of the subdivision was uninhabited. He stated that a 6-foot redwood fence was being built surrounding the mobile home area.

Maurice Mitchell, Chairman of the Board of Eagle Mortgage Corporation and Vice-President of Western Realty, testified that, after examining the bill of assurance, his company made a development loan to Miller in the amount of $60,000.00 and subsequently provided additional investment. The sale of lots came to a halt, and Miller, unable to meet his obligations to the mortgagee, executed a deed to the property. According to Mitchell, the subdivision contained 248 lots and only 7 had been improved (other than mobile homes). Under the provisions of Section 12, Eagle and Western, being the owners of more than 50% of the lots, replatted a portion of the

area to permit the location of mobile homes. The witness referred to a number of subdivisions which Eagle had developed, and he said that language similar to Paragraph 12 was contained in every modern bill of assurance that he had ever seen. Mitchell held the view that the development of the mobile home area would increase the market value of the other lots by encouraging activity in the area. He said that no permanent dwelling would be erected next door or across the street from any mobile home.

C. V. Barnes, a real estate counselor of Little Rock, testified that all of the developments, with which he had been associated, had included a provision similar to Section 12, and he was actually of the opinion that the sale of mobile homes would aid in stabilization of the neighborhood. James Larrison, a professional appraiser of Little Rock, agreed with Mr. Barnes.

The sole question presented to us is the meaning of Paragraph 12, or to be more specific, that portion of the language which provides that the bill of assurance may be amended by a written instrument "signed and acknowledged by the owner or owners of at least 50% in the area of the land in this subdivision." The court held that this language was ambiguous, and constituted an abuse of law; that it should be interpreted to read that the bill could be changed "at such time that fifty per cent (50%) of the homeowners physically living in the subdivision vote to change the provisions."

Appellants simply contend that the meaning is that the owners of 50% of the land in the subdivision can amend the bill.

We are of the opinion that a provision in a bill of assurance giving the power to subsequently amend or modify the provisions of the original bill, is valid. In *Matthews* v. *Kernewood,* 40 A. 2d 522, the Maryland Court of Appeals held that one who conveys part of a

tract of land by deed containing restrictive covenants may reserve to himself the power to modify those restrictions in future sales. The same conclusion was reached by the Supreme Court of Georgia in the case of *Davis* v. *Miller*, 96 S. E. 2d 498.

Here, Paragraph 12 gave notice that the restrictions set forth in the bill could be amended or cancelled in whole or in part.

Appellees' principal argument is that the paragraph under discussion is ambiguous, and that the provision in question should be construed most strongly against the one who created it. We agree with that declaration of the law, but we do not agree that Paragraph 12 is so ambiguous as to be susceptible to two meanings. To be sure, the pertinent phrase is not perfectly written, but we think the language obviously means that the bill may be changed by "the owner or owners of at least 50% *of* the area of the land in this subdivision," rather than "*in* the area of the land," etc. The contrary construction, as pointed out by appellants, is not very logical. Appellants say:

"A reverse construction, 'by 50% of the *owner* or owners in the area of the land in this subdivision' simply does not make sense. There is no such thing as 50% of an owner, in this context."

Of course, the interpretation rendered by the court, viz., the "Bill of Assurance could be changed at such time that fifty per cent (50%) *of the homeowners physically living in the subdivision* [our emphasis] vote to change the provisions," is not supported by any language in the bill; nor do we find any evidence that would imply such a construction. In fact, this version could well lead to a preposterous situation. The proof reflected that, at the most, thirteen people had built homes in the entire area.[2] It would appear that, under the finding of

[2]Other evidence indicated that only seven had built homes.

the Chancellor, seven homeowners could change the bill of assurance for the entire subdivision composed of 248 lots. To go a step further, let us suppose that only two people had built homes in the original subdivision; again, according to the holding of the trial court, one homeowner could likewise change the bill of assurance for the whole subdivision. We think it evident that the questioned provision simply means that the bill may be modified by a written instrument executed by the owner or owners of 50% of the land in the subdivision.

Certainly, we can understand the position of the appellees, and the desire of those who have built their homes, to maintain the original restrictions; however, Paragraph 12 was a part of the bill of assurance when the lots were purchased, and therefore, all lot purchasers were on notice that the restrictions could be modified, or cancelled, in whole or in part.

Reversed.

BYRD, J., disqualified.

SAMMY CLARK *v.* STATE OF ARKANSAS

5290 427 S. W. 2d 172

Opinion delivered May 6, 1968

E. V. Trimble and *Charles E. Scales,* for appellant.

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

CARLETON HARRIS, Chief Justice. Sammy Clark, appellant herein, was charged with the rape of a nine-year-old girl, and on trial, was found guilty, and his punishment fixed at imprisonment in the State Penitentiary for life. From the judgment so entered, Clark brings this appeal. For reversal, only one point is argued, *viz.,* the court erred in failing to grant a mistrial on the motion of appellant when the state offered to call appellant's wife to testify during the presentation of the state's evidence. However, the motion for new trial also asserts that error was committed by the court in failing to give three requested instructions by appellant, and it is also alleged that the verdict was contrary to the law and evidence. We proceed to a discussion of these contentions, but in reverse order.

The state's evidence reflected that Clark requested a friend to drive him to the home of Anna Marsenburg for the purpose of picking up his stepchildren. This was done, and Clark got his stepdaughter, a child then nine years of age, who lived with her grandmother, Anna Marsenburg, together with her sisters, and the friend drove them to the home where Clark lived with the children's mother, to whom he was married. On arriving

at the house, Clark told the sisters to go outside, but directed the little nine-year-old girl to stay inside. He then asked her to take her clothes off, but upon her refusal, appellant took them off. He then took his own clothes off, and, according to the witness, choked her, and raped her.[1] The little girl stated that she tried to push him off, and tried to get away, and that he hurt her; further, that she did not tell anybody, because she was afraid he would kill her.

The grandmother testified that she found her granddaughter's bloody panties on a Tuesday (the alleged rape having occurred on the previous Sunday); that she questioned and examined the little girl, and observed that she was swollen and bleeding. A subsequent examination was made by a physician, Dr. Bill Floyd.

Dr. Floyd testified that the hymen had been ruptured and torn; that the child's condition had originated probably from one to four days earlier, and that, in his opinion, a forceful penetration was the cause of the injury.

Clark admitted getting the children from the grandmother's house, and taking them to his house, but he denied that he bothered the girl in any way. The evidence obviously, if believed by the jury, was more than ample to sustain the conviction.

It is asserted that the court erred in refusing to give an instruction, at appellant's request, on assault with intent to rape. We do not agree. The evidence on the part of the state was that the act of intercourse was

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[1]The child testified that she was raped on the couch in the living room. From the record:

"Q. Was he hurting you all the time that you were on this couch?

A. Yes, sir.

Q. And all the time he was on this couch, was his private part in you?

A. Yes, sir."

forcibly committed, and the evidence on the part of the defendant was simply that he did not molest the little girl in any way. It was not error to refuse the instruction. *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937.

We think, however, that appellant's requested instruction No. 1 should have been given. This was an instruction defining the offense of carnal abuse, the instruction telling the jury that, if there was reasonable doubt that Clark was guilty of rape, he could still be found guilty of the crime of carnal abuse. The difference in the two offenses is that rape is the carnal knowledge of a female, forcibly and against her will (or without her consent), while carnal abuse is the carnal knowledge of a female under the age of sixteen years. It is immaterial in the latter case whether consent is given or not. While the little girl testified as to acts constituting rape, the jury could possibly have found, since she did not report it, that she consented. The offense of carnal abuse is included in a charge of rape where the female is under sixteen years of age. *Warford and Clift* v. *State,* 214 Ark. 423, 216 S. W. 2d 781. See also *Willis* v. *State,* 221 Ark. 162, 252 S. W. 2d 618.

Instruction No. 2, offered by appellant, was not proper; since counsel for Clark announced at the beginning of the trial that he was waiving his plea of not guilty by reason of insanity; nor was there any evidence offered that appellant was insane.

The principal point relied upon by Clark for reversal relates to the trial court's refusal to grant appellant's motion for a mistrial when the Prosecuting Attorney offered to call Clark's wife to testify during the presentation of the state's evidence. The record reflects the following:

"Mr. Howard:

If your Honor please, I would offer to call this little

girl's mother who is married to this defendant, if the defense counsel would allow her to testify.

Mr. Trimble:

I move for a mistrial, Your Honor. That's a prejudicial offer.

The Court:

Overruled. Save his exceptions. You can call her if you like, but I won't let her testify.

Mr. Howard:

I can't use her if you won't let her testify."

We think the motion for a mistrial should have been granted. Ark. Stat. Ann. § 43-2019 (Repl. 1964) provides:

"In any criminal action in the courts of this state a husband or wife may testify as a witness in behalf of the other when called as such witness by the other spouse, but cannot be called as a witness by the opposite party.[2]"

The state argues that Clark was not prejudiced by the act of the Prosecuting Attorney in attempting to call appellant's wife as a witness against the defendant, and mentions the case of *McDonald* v. *State,* 225 Ark. 38, 279 S. W. 2d 44. There, the defendant's wife was called by the state, was sworn, and seated in the witness chair. The record then reflects that the court asked defense counsel if he had a motion, but the record does not reflect what motion, if any, was made. The opinion recites:

[2]The exception is found in the following section, 43-2020, which reads: "In any criminal prosecution a husband and wife may testify against each other in all cases in which an injury has been done by either against the person or property of either."

"* * * (Discussion off the record.) By the Court: The Court will hold that Mrs. McDonald is incompetent to testify. By Mr. Lookadoo: I want to make an objection to this later. By the Court: Mrs. McDonald, you may stand aside and go back to the witness room. Gentlemen of the Jury, the witness who is leaving the stand is the wife of the defendant, and the Court has held that a wife cannot testify against her husband except where she has been personally injured; the Supreme Court has held that this does not include children. All right, call your next witness."

In holding that no prejudicial error occurred, we said:

"It appears that appellant made no objection to the court's action and he is, therefore, in no position to complain for the first time here."

It is thus clear that we did not hold that the action of the attorney for the state was not prejudicial, being unable to pass upon the point under the state of the record.

In the case before us, we think the act of the Prosecuting Attorney was prejudicial. It will be noted that our statute, heretofore quoted, goes a good bit farther than prohibiting a spouse from testifying against the other in a criminal action; it provides that the spouse "cannot be *called* [our emphasis] as a witness by the opposite party." Of course, when an effort is made by the state to call one spouse to testify against the other, it would immediately appear to the jury that the called spouse considered the defendant guilty, held no sympathy for the accused, and would like to see the one on trial convicted. This could be particularly damaging where the offense was allegedly committed by a present husband against the wife's child by a previous marriage. While the crime with which the appellant is charged is heinous and revolting, we think the offer to call the wife,

mother of the alleged victim, the prosecution knowing that the statute prohibited her testimony, exceeded the bounds of fairness, so essential to an unprejudiced trial.

Because of the errors herein set forth, the judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I agree that the conviction of appellant must be reversed for failure to give defendant's requested instruction No. 1 on carnal abuse. I do not agree with the majority that there was any prejudicial error in the trial court's refusal to grant a mistrial. I take the majority opinion to state that a wife cannot ever be used as a witness by the State when the offense charged is not against her or her property. If this is the position of the majority, I am certainly in disagreement. In the first place, I cannot agree that we did not hold such an action to be nonprejudicial in *McDonald* v. *State,* 225 Ark. 38, 279 S. W. 2d 44. It is true that the court bolstered its holding by stating that no objection was made by the appellant there to the court's action. The trial court's action there was to hold the wife called by the prosecuting attorney incompetent and to advise the jury of her incompetence. The really pertinent holding was that the offer was not prejudicial. In opening the discussion of this alleged error, this court said:

> "Appellant in Assignment 2 argues that the State erred in offering as a witness appellant's wife knowing that she could not be compelled to testify against her husband (by virtue of §§ 43-2019, 43-2020), and that this offer prejudiced the jury against him. We do not agree."

In the next place, I think that the courts' holding in the *McDonald* case was correct. It is true that our opinions almost universally refer to both the common

law and statutory rules pertaining to testimony of a wife either for or against a husband as going to the competency of the witness. *Inman* v. *State,* 65 Ark. 508, 47 S. W. 558; *Woodard* v. *State,* 84 Ark. 119, 104 S. W. 1109; *Padgett* v. *State,* 125 Ark. 471, 188 S. W. 1158; *Dean* v. *State,* 139 Ark. 433, 214 S. W. 38; *Satterwhite* v. *State,* 139 Ark. 605, 214 S. W. 44; *Witham* v. *State,* 149 Ark. 324, 232 S. W. 437; *Lighter* v. *State,* 157 Ark. 261, 247 S. W. 1065; *Conley* v. *State,* 176 Ark. 654, 3 S. W. 2d 980; *Robison* v. *State,* 191 Ark. 455, 86 S. W. 2d 927; *Reed* v. *State,* 222 Ark. 119, 257 S. W. 2d 362. Actually, however, the rule that one spouse may not testify against the other should be considered as a privilege. Matthews, Evidentiary Privileges & Incompetencies of Husband & Wife, 4 Ark. Law Rev. 426; 8 Wigmore, Evidence § 2227 *et seq.* (McNaughton rev. 1961). I find nothing in our cases which actually treats this rule other than as a privilege, even though the terms "incompetency" and "incompetent" are used. Our General Assembly has specifically referred to the rule as stated in Ark. Stat. Ann. § 43-2019 as the husband-wife privilege. It seems to me that the privilege is that of both the party and the witness, and that either could claim it. 8 Wigmore, Evidence § 2241, p. 254 (McNaughton rev. 1961). This court has recognized that one spouse has a right not to assist in the prosecution of the other when the offense is not against the former. *Taylor* v. *State,* 220 Ark. 953, 251 S. W. 2d 588.

Regardless of whether the rule is treated as creating an incompetency or a privilege, its application may be waived. An objection to the incompetency of a witness must be made as soon as it appears. *Thrash* v. *State,* 146 Ark. 547, 226 S. W. 130. A specific objection is necessary to raise the question of incompetency. *Mosley* v. *Mowhawk Lbr. Co.,* 122 Ark. 227, 183 S. W. 187; *Mahoney* v. *Roberts,* 86 Ark. 130, 110 S. W. 225. Failure to make timely objection constitutes waiver. *Sanders* v. *State,* 175 Ark. 61, 296 S. W. 70. This seems to be in keeping with the majority rule. See, *e. g.,* the following

cases where the husband and wife status is involved. *Olender* v. *United States,* 210 F. 2d 795, 42 ALR 2d 736 (1954); *People* v. *Wilkins,* 135 Cal. App. 2d 371, 287 P. 2d 555 (1955); *Hembree* v. *Commonwealth,* 210 Ky. 333, 275 S. W. 812 (1925); *Huff* v. *State,* 176 Miss. 443, 169 So. 839 (1936); *State* v. *Hill,* 76 S. W. 2d 1092 (Mo. 1934); *State* v. *Palen,* 119 Mont. 600, 178 P. 2d 862 (1947); *Parrish* v. *State,* 167 Tex. Crim. 404, 320 S. W. 2d 853 (1959); *State* v. *Bledsoe,* 325 S. W. 2d 762 (Mo. 1959). If the rule accords a privilege, it is certainly subject to waiver by one in whose favor it exists. *National Annuity Ass'n* v. *McCall,* 103 Ark. 201, 146 S. W. 125; *Wooten* v. *Wooten,* 176 Ark. 1174, 5 S. W. 2d 340; *Schirmer* v. *Baldwin,* 182 Ark. 581, 32 S. W. 2d 162; 8 Wigmore, Evidence (McNaughton rev. 1961) § 2242, p. 256. Either spouse may claim the privilege, so waiver would have to be by both.

The statute [Ark. Stat. Ann. § 43-2019 (Repl. 1964)] is in derogation of the common law and must be strictly construed. *Jenkins* v. *State,* 191 Ark. 625, 87 S. W. 2d 78. This construction is to be taken most strongly against change in the common law and the intent to change the common law must be clear. Crawford, Statutory Construction, § 228, p. 422. See *Thompson* v. *Treller,* 82 Ark. 247, 101 S. W. 174; *Hackney* v. *Southwest Hotels,* 210 Ark. 234, 195 S. W. 2d 55; *Raney* v. *Gunn,* 221 Ark. 10, 253 S. W. 2d 559; *Thompson* v. *Chadwick,* 221 Ark. 720, 255 S. W. 2d 687. It appears from an examination of § 43-2019 (Act 14 of 1943) that there was no intention to change the common law so as to make absolute the exclusion of one spouse as a witness on trial of the other in a criminal action. If there is doubt from reading the statute, resort to the title of the act will dispel it. The title reads: "An Act To Permit A Husband Or Wife To Testify For The Other In Criminal Actions." Obviously, this was the only change of the common law intended.

This court has already recognized that there may

be a waiver of the rule. In *Dillon* v. *State,* 222 Ark. 435, 261 S. W. 2d 269, a defendant's wife was called as a witness by him. On cross-examination most of the questions propounded were outside the scope of the direct examination, but no objection was made until the examination had been pursued rather extensively. The court said that this interrogation was improper but that the rule did not help the appellant there because his objection was tardy and not specific.

There is a very close analogy to the application of the husband-wife rule as declared by statute and the Dead Man's Statute set out in Schedule Sec. 2. Section 43-2019 says that in a criminal action a husband or wife cannot be called by the opposite party. Schedule 2 says that in actions by or against executors, administrators or guardians, neither party shall be allowed to testify as to transactions with or statements of the testator, intestate or ward, unless called by the opposite party. The language seems just as prohibitory in one statute as the other. The Dead Man's Statute has also been treated as relating to the incompetency of the witness. *Park* v. *Lock,* 48 Ark. 133, 2 S. W. 696; *Bush* v. *Prescott & Northwestern Ry. Co.,* 83 Ark. 210, 103 S. W. 176; *Bradford* v. *Reid,* 202 Ark. 108, 149 S. W. 2d 51; *Harris* v. *Whitworth,* 213 Ark. 480, 211 S. W. 2d 101; *Bush* v. *Evans,* 218 Ark. 470, 236 S. W. 2d 1013. On the other hand, it, too, has been considered to recognize or establish a privilege. *Lisko* v. *Hicks,* 195 Ark. 705, 114 S. W. 2d 9. But it is now clearly established that both the incompetency and the privilege may be waived. *Lisko* v. *Hicks, supra*; *Harris* v. *Harris,* 225 Ark. 958, 286 S. W. 2d 849; *Smith* v. *Clark,* 219 Ark. 751, 244 S. W. 2d 776. Failure to make timely objection constitutes waiver. *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; *Starbird* v. *Cheatham,* 243 Ark. 181, 419 S. W. 2d 114.

Since the State proposed to call the wife, in this

case, it seems obvious that she waived the privilege. Until a timely objection was made by appellant, he had not claimed any privilege or raised a question of competency of the witness. Here, as in the *McDonald* case, the trial judge promptly sustained the objection. While appellant made his objection in the form of a motion for mistrial, he did not request any admonition to the jury.

I agree that it would have been better to have taken the matter up out of the presence of the jury as suggested by the Supreme Court of South Dakota in holding that just such a procedure as was followed here did not constitute reversible error. *State* v. *Damm,* 62 S. D. 123, 252 N. W. 7 (1933). Certainly we should hesitate to call this action prejudicial error when eminent authority, 8 Wigmore, Evidence § 2243, p. 261 (McNaughton rev. 1961), states:

> ". . . Furthermore, in any event, upon the same principle as under the privilege against self-incrimination (§ 2272 *infra*), the party desiring to compel the spouse to testify should be able at least to call for the testimony and should not be deprived of it until the party spouse formally objects and claims the privilege."

Some courts have held this to be the proper procedure. See, *e. g., People* v. *Wilkins,* 135 Cal. App. 2d 371, 287 P. 2d 555.

While disagreement of the courts is acknowledged, it seems to me that the majority of courts to which the question has been presented have held that there is no prejudicial error. See *People* v. *Chand,* 116 Cal. App. 2d 242, 253 P. 2d 499 (1953); *People* v. *Ward,* 50 Cal. 2d 702, 328 P. 2d 777 (1958); *State* v. *Roby,* 128 Minn. 187, 150 N. W. 793 (1915); *State* v. *Dennis,* 177 Ore. 73, 159 P. 2d 838 (1945); *Commonwealth* v. *Weber,* 167 Pa. 153, 21 Atl. 481 (1895).

HOUSING AUTHORITY OF THE CITY OF CAMDEN
v. JOHN R. REEVES, JR. ET AL

5-4557 427 S. W. 2d 196

Opinion delivered May 6, 1968

Streett & Plunkett, for appellant.

Gaughan & Laney, for appellees.

GEORGE ROSE SMITH, Justice. This is an action brought by the Camden Housing Authority to condemn 6.236 acres of a 73-acre tract owned by the Reeves family, in Camden. The jury fixed the value of the property being taken at $38,000. The Authority's single point for reversal is the court's asserted error in allowing the

landowners to introduce an unrecorded plat showing the 73-acre tract as a residential subdivision consisting of public streets and blocks divided into lots.

In recent years we have had several cases involving the admissibility of similar plats, some of which depicted subdivisions that existed only on paper. The cases are not out of harmony with one another; the difficulty is that of applying the law to varying fact situations.

We have consistently held that such a lot-and-block plat is not admissible when the subdivision has really not yet come into existence. The reason for the exclusionary rule is that such an exhibit is apt to mislead the jury into valuing the property as consisting of so many lots, without adequately considering necessary development expenses such as the construction of streets and utility lines, which could not be properly explained to the jury without bringing a host of collateral issues into the case. *Arkansas State Highway Comm.* v. *Parks,* 240 Ark. 719, 401 S. W. 2d 732 (1966). In several of the cases relied upon by the Housing Authority, the subdivision portrayed by the plat was not beyond the planning stage, so that the admission of the plat was fairly sure to mislead the jury. That point was discussed in detail in *Arkansas State Highway Comm.* v. *Watkins,* 229 Ark. 27, 313 S. W. 2d 86 (1958), where it was admitted that the land had not been developed at all as a subdivision. Similar non-existent subdivisions were involved in *Arkansas Louisiana Gas Co.* v. *Howard,* 240 Ark. 511, 400 S. W. 2d 488 (1966), and *Arkansas Louisiana Gas Co.* v. *Lawrence,* 239 Ark. 365, 389 S. W. 2d 431 (1965). Such an exhibit is especially misleading when, as in the *Watkins* case, it is accompanied by testimony about the value of the fictitious lots.

On the other hand, an unrecorded plat may be admissible when the subdivision is not merely imaginary. In *Arkansas State Highway Comm.* v. *O. & B.,* 227

Ark. 739, 301 S. W. 2d 5 (1957), the land had not been dedicated as a subdivision, but it was surrounded by well developed sections of the city of Jacksonville. The testimony proved that its best use was for the development of residential lots. We upheld the admission of a plat showing the land divided into lots and blocks. There the court appropriately cautioned the jury against trying to determine how the land might best be divided into building lots or at what price the lots might be sold. In the case at bar a similar cautionary instruction would have been proper, but the Housing Authority made no clear-cut request for such an admonition to the jury.

The facts in *Arkansas State Highway Comm.* v. *Witkowski,* 236 Ark. 66, 364 S. W. 2d 309 (1963), were very much like those now before us. There the subdivision was not shown to have yet been dedicated, but its proprietors had succeeded in bringing in improvements such as a road and gas and water lines. In sustaining the admissibility of two exhibits that showed the tracts subdivided into lots and blocks we used language that seems to have been used as a guide by these appellees:

> "It is undisputed that the highest and best use of the property in question is for residential purposes. These exhibits were offered and admitted in evidence only for the limited purpose of showing the highest and best use of the property as being for residential purposes and for the further purpose of showing the improvements existing thereon [gas and water lines and gravel road] some several months before the taking by the appellant. This evidence could not result in conjecture or speculation by the jury as to market value to the prejudice of appellant. *Ark. State Highway Comm.* v. *O. & B. Inc.,* 227 Ark. 739, 301 S. W. 2d 5.
>
> "Appellant urges that the exhibits are inadmissible as evidence in view of our ruling in *Arkansas State*

Highway Comm. v. *Watkins,* 229 Ark. 27, 313 S. W. 2d 86. The facts in that case, on this point, are quite different. There testimony was admitted as to the number and value per lot of the property. It is true that witnesses in the case at bar testified they considered the value of other lots in the area; however, there was no testimony as to the value per lot of the subject property. The testimony, as to value, was on a raw acreage basis of the tract. Thus, we hold that the court was correct in admitting appellees' Exhibits A and B under the facts in this case."

In the case at bar the 73-acre tract has been owned by the Reeveses for more than fifty years. In 1952 or 1953 Bob Reeves, a graduate engineer, surveyed the land, laid it out in lots and blocks, and built a home on one lot. Later on two more homes were constructed on lots sold to others. The Reeveses, pursuant to a plan to develop the subdivision over a period of years, had paved, curbed, and guttered two streets and had laid about 1,900 feet of water lines, 1,500 feet of sewer mains, and almost 3,000 feet of gas lines before the Housing Authority brought this action. By that time about a third of the property had access to streets and utilities.

The plat that was introduced in evidence showed the improvements we have mentioned, the contours of the land, the streets not yet developed, and the proposed division of the tract into lots and blocks. It also showed how the whole tract was almost cut in two by the Housing Authority's condemnation of the 6.236 acres now in question. The landowners confined their proof to the value of the tract as a whole, carefully avoiding any reference to the value of individual lots. Thus it will be seen that the facts are so similar to those in the *Witkowski* case that it would be hard to draw a logically controlling distinction between the two.

The Housing Authority's principal argument is

that the paved streets, houses, and utility lines could have been shown without the inclusion of the lots and blocks. No doubt that statement is true, but it does not follow that the plat in dispute was therefore inadmissible. The same argument could certainly have been made in the *O. & B.* and *Witkowski* cases, *supra.* Here the Reeves subdivision had progressed beyond the planning stage and into the process of actual physical development on the land. The question is, Had that development progressed to such a point that a lot-and-block plat of the area could be shown to the jury without being misleading? When it is borne in mind that every pertinent fact could have been brought out on cross-examination of the landowners' witnesses and that the court might have been asked to give cautionary instructions like those in the *O. & B.* case, we are not willing to say that the court committed reversible error in allowing the introduction of an exhibit that was unquestionably of value both to counsel and to the jury in the interpretation of the testimony.

Affirmed.

MRS. FRANK THOMAS *v.* BILL D. STOBAUGH ET UX

5-4558 427 S. W. 2d 170

Opinion delivered May 6, 1968

Felver A. Rowell Jr., for appellant.

Gordon & Gordon, for appellees.

PAUL WARD, Justice. This litigation is over the ownership of a city lot. Appellant sued to quiet title on the ground of adverse possession. The trial court held in favor of appellees who held the record title. The background facts, set out below, are not in dispute.

On July 30, 1947 appellee, Bill D. Stobaugh, received a warranty deed to lots 94, 95, and 96 in Parkdale Addition to the City of Morrilton, Arkansas. On March 7, 1949 he sold lots 94 and 95 to I. E. Halbrook. On June 7, 1954 Halbrook sold lots 94 and 95 to Mr. and Mrs. Frank G. Thomas. There was a dwelling on lots 94 and 95 which abutted lot 96 to the south. While Halbrook lived on lots 94 and 95 he had permission from Stobaugh to make use of lot 96. Mr. Thomas died in 1956.

On May 1, 1967 Mrs. Thomas, appellant, filed a petition in chancery court to quiet title to lot 96, alleging: She acquired title to said lot by proper conveyance, and by adverse possession for more than ten years during which time she paid taxes on the lot. In answer to the petition appellee alleged he was the owner of lot 96, and that appellant was not in possession of said lot.

After presentation of testimony on the issues joined, the trial court found and held: The defendants (Stobaugh and wife) hold record title to lot 96; plaintiff

had permissive use of said lot but did not give appellees notice of adverse holding, and; plaintiff "did not have possession sufficient to constitute notice to defendants of adverse possession".

On appeal, for a reversal, appellant relies on one point: "The findings of the trial court are against the preponderance of the evidence." For reasons hereafter mentioned, we are unable to agree with appellant.

Both sides here have cited and discussed several decisions and authorities relating to acquisition of title to real estate by adverse possession, but, after careful consideration, we feel that the rules applicable to the facts in this case have been adequately announced in two decisions of this Court.

In *Gee* v. *Hatley,* 114 Ark. 376, 170 S. W. 72, where a fact situation similar to the one here was presented, the Court made the following statement:

> "And it is true that it having been shown that Brooks entered into the permissive possession of the land, the presumption is that his subsequent possession and that of those claiming under him was in subordination to the church's title and pursuant to this permission. But this presumption may be overthrown by the evidence, and the jury should find that it was overthrown, and that the possession was adverse, if they should find the fact to be that the trustees of the church had actual notice of this adverse possession, or that defendants' occupancy had been so inconsistent with the presumption of a permissive possession as to impute knowledge to the trustees of that hostility."

The above decision has been cited with approval by this Court many times. In *Dial* v. *Armstrong*, 195 Ark. 621, 113 S. W. 2d 503, where the *Gee* case was cited and approved, the Court also said:

> "The rule is that where the entry 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." (citing cases)

An application of the above rules here calls for an affirmance of the trial court unless the weight of the evidence shows: (a) appellees had actual knowledge that appellant was claiming title to lot 96, or; (b) appellant's acts of possession were sufficient to impute such knowledge to appellees. It is our conclusion that the case must be affirmed on both grounds.

(a) It is not even contended by appellant that she or anyone else ever actually told appellees (or either of them) that she was claiming title to lot 96. Mr. Stobaugh denies that he had such notice, and we find nothing in the record to the contrary.

(b) A much closer question is here presented. It is not questioned by appellees or anyone else that appellant and her husband exercised acts of control and possession over lot 96. They planted a garden each year; they tore down old buildings; they mowed the grass, and; they put a hedge across the front. However, there were other facts and circumstances which, we think, justified and support the trial court.

When Halbrook moved on lots 94 and 95 he was given permission to use lot 96, which, apparently, was unsightly because of old buildings and undergrowth. Consequently Stobaugh gave him permission to use it in any way he desired. When appellant (and her husband) moved in they used lot 96 as previously indicated. Mr. Stobaugh testified that all this was agreeable to him. The record shows that appellees had moved away from Morrilton in 1947 and did not return until 1959. Also, the trial court could have concluded that appellant was confused as to certain matters. She stated they were

supposed to get title to lot 96, but their warranty deed (Transcript p. 20) plainly shows otherwise. Appellant stated they had paid taxes on lot 96 from 1955 to 1959, but tax receipts attached to the record show otherwise. This discrepancy, however, is explained by the record so as not to reflect on the integrity of appellant.

The close question therefore is: Were the above acts of possession, when viewed together with all the attending circumstances, sufficient to constitute notice to appellees that appellant was claiming absolute title to Lot 96? The trial court found they were not sufficient, and we are unable to say such finding is against the weight of the evidence.

Affirmed.

BYRD, J., dissents.

ARKANSAS BEST FREIGHT SYSTEM ET AL
v. E. B. HILLIS

5-4522 427 S. W. 2d 167

Opinion delivered May 6, 1968

Felver Rowell Jr., for appellee.

LYLE BROWN, Justice. Arkansas Best Freight System, Inc., and Daniel L. Thompson, driver for ABF, appeal from a judgment awarded E. B. Hillis for injuries and damages resulting from a collision between trucks driven by Thompson and Hillis. Appellants' principal attack is on the sufficiency of the evidence. The amount of the verdict, the denial of their motion for a directed verdict, and the propriety of one instruction are also questioned.

Thompson was pulling a forty-foot trailer containing 42,000 pounds of explosives. It was January 21, 1967, at approximately 7:15 a.m. He was headed east on U. S. Highway 64 outside Morrilton. Visibility was good. He was on a straight stretch of highway about one and a half

miles in length. He faced a very slight upgrade. Proceeding in the same direction and a considerable distance ahead of Thompson was appellee Hillis, a carpenter. His destination was a job site about midway of the straight stretch. It was necessary for him to make a left turn and enter a private driveway to reach his destination. At a time when Hillis was either set to make his turn, or actually making a turning movement, his 1956 truck was struck from the rear. The point of impact was in Thompson's passing lane and some two feet across the center line. Hillis' truck was headed fairly straight down the highway, as shown by the fact that the pickup was sideswiped fairly evenly from left rear to left front. Hillis' truck was knocked to his right, cleared the highway, and came to rest in a ditch several feet away. The ABF truck proceeded down the highway in Thompson's passing lane, then back to his driving lane, and came to rest upright on his right shoulder of the highway. That point was 651 feet beyond the point of impact.

The facts just recited are undisputed. Other evidence offered by Hillis is in dispute. Hillis was the only eyewitness who testified in his behalf. He stated that he stopped his truck some twenty-one feet before reaching a point opposite the driveway; that he could see through his rear-view mirror a large truck approaching him a considerable distance away; that he stopped his truck to permit the passage of three vehicles approaching from the opposite direction; he was not certain of the length of time during which he gave a manual left turn signal by putting his left arm through the vent window; he was positive that the arm remained in that position during the time the three vehicles were passing; that during the passage of the vehicles he might have been slightly over the center line; that very shortly after the last vehicle passed, and before he had time to release his brake and get both hands on the steering wheel, he was struck by the ABF truck.

State Trooper Duvall arrived at the scene shortly af-

ter the accident and before either vehicle was moved. He testified, among other things, that there were no skid marks from the debris down to the ABF trailer; that the front bumper of ABF's truck was bent backward and against the right front tire, not enough to lock the wheel but sufficient to cut the tire. The right front fender and the saddle tanks of that truck were damaged.

Under the law, when applied to the evidence produced by Hillis, it would have been error for the court to grant an instructed verdict at the close of Hillis' evidence. Being the lead vehicle, he had the superior right to the use of the highway for the purpose of leaving it to enter an intersecting road or passageway. *Madison Smith Cadillac Co.* v. *Lloyd,* 184 Ark. 542, 43 S. W. 2d 729 (1931). Hillis asserted that he approached the intended turn by edging over the center line, coming to a complete stop, and extending his arm for the left turn signal, at a time when the ABF truck was a considerable distance behind him. That evidence, along with the assertion, substantiated by physical evidence, that Hillis did not make a sudden left turn, made a question for the jury.

Daniel Thompson, ABF's driver, was appellants' only eyewitness. He asserted that he pulled into the passing lane approximately 100 yards behind Hillis. At that time, so he contends, Hillis was moving slowly down the highway. It was Thompson's version that Hillis began a left turn at a point when the ABF truck was within ten feet of the Hillis truck. He denies having seen any other vehicles on the road, nor did he see any hand signal given by Hillis. On cross-examination it was developed that an early fog had cleared and there was good vision. In fact Thompson testified he could see for a mile and a half down the road. At a point when Thompson was some 400 yards behind Hillis, Thompson could perceive that he was rapidly gaining speed on Hillis and at a time when Thompson was driving at approximately 48 miles per hour. Thompson estimated Hillis' speed at

twenty miles per hour. As a result of Hillis' slow speed, Thompson began a passing movement 100 yards behind Hillis.

If Thompson's version of distance and speed is correct, his position would have been somewhat similar to the trailing car in the *Madison Smith Cadillac* case. There the trailing vehicle observed as far back as 100 yards that the forward car was making some fifteen miles per hour. Under those circumstances this court commented that the trailing vehicle could have taken precautions until it ascertained for what purpose the lead car was slowing down. Also the jury here could have given weight to the fact that Thompson, rather than reduce his speed and stop if necessary, deliberately elected to maintain his speed. If he so acted, then he assumed the hazard of turning to the left and passing the Hillis car.

We hold that the trial court properly denied appellants' motion for a directed verdict at the conclusion of all the evidence.

In light of Hillis' testimony, together with some of the testimony of Thompson which favored Hillis, we are unable to say the jury verdict is not sustained by substantial evidence.

Appellants rely on *Midwest Bus Lines* v. *Williams,* 243 Ark. 854, 422 S. W. 2d 869 (1968). There we held that there was but one conclusion to be reached and we reversed and dismissed as to two defendants. In *Midwest Bus Lines* there were physical facts which mathematically did not authorize the finding of negligence as to Tyler and Midwest. Such evidence is not here available. Concededly, Hillis' version of the occurrence is not flawless. On the other hand, the version given by Thompson is stoutly disputed. We have only the testimony of two eyewitnesses and because of substantial conflict in their testimony the problem fairly reduces itself to a ques-

tion of credibility. That is solely the prerogative of the jury. See *Southern Kansas Stage Lines* v. *Ruff,* 193 Ark. 684, 101 S. W. 2d 968 (1937).

The verdict is not excessive. It cannot be disputed that appellee received a terrific blow to his truck, an impact sufficient to force the heavy ABF truck bumper back into the right front tire. The course taken by Hillis' truck undoubtedly resulted in an experience that could have taken his life. That is because the truck went into a hole of such depth as to conceal a larger part of his truck. The right side of the truck was heavily damaged as a result of the impact with the ditch bank.

Dr. Logue found small chips of bone around the left hip, which was partially dislocated, and the capsule was apparently torn away at the time of the dislocation. He testified that Hillis had a restriction of motion in the left leg and because of his age of 67 years it would probably be permanent. That restriction of motion will, in the doctor's opinion, restrict the use of the leg by an estimated ten per cent. He further testified that an injury of this type is generally accepted to be painful. Appellee testified that the hip is still giving pain and he is forced to sit on the right side.

Hillis testified that he received cuts all about the forehead, which required forty stitches, several abrasions on the left hand and elbow, and a loss of teeth. He was hospitalized seven days and his medical totalled $628.64. At the time of the accident Hillis was earning $70 per week as an experienced carpenter. That was his usual weekly wage when he worked. He was regularly employed at the time of the accident, although he did not earn a sufficient amount in 1965 and 1966 to pay an income tax. The record is not clear, but it could have been due to loss of time from a back injury. Hillis testified he had not been physically able to perform any labor since the accident. The damage to his truck was fixed at $300. Considering the recited factors, Hillis' vocation,

and today's purchasing power of money, we are unable to say that the judgment for $20,000 should be disturbed.

Appellants contend the court's instruction on damages was in error in that it permitted the jury to consider scars, disfigurement, and visible results of the injury. They contend that the evidence did not justify the submission of those elements. We have referred to the testimony of Hillis concerning the taking of forty stitches about the forehead. The number of scars still apparent at the time of trial is not in the record. However, it is reflected that there were scars about the forehead and they were exhibited to the jury. For those reasons we think the objection is without merit.

Affirmed.

RUTH ESTES *v.* DON MASNER ET AL

5-4499 427 S. W. 2d 161

Opinion delivered May 6, 1968

Terral, Rawlings, Matthews & Purtle, for appellant.

Pickens, Pickens & Boyce and *Kenneth Castleberry,* for appellees.

JOHN A. FOGLEMAN, Justice. This appeal is from a decree of the Independence Chancery Court holding appellant in contempt of court and modifying an original custody award. For reversal, appellant contends that the trial court was without jurisdiction to hear the citation for contempt; that the notice of the contempt hearing was improper and invalid; and that the custody change is invalid due to lack of prior notice.

As to the facts necessary to decide this case, the record reflects that the parties were divorced in 1959. The divorce decree awarded custody of the children to their paternal grandparents. In 1966, appellant petitioned the court for temporary custody of the children and the court granted the relief, allowing appellant custody for a two-week period. Appellant immediately fled the country and proceeded to Puerto Rico. The former husband, who is an appellee in the custody proceeding, went to Puerto Rico with his father (who had been awarded custody of the children in the 1959 decree) to regain custody, and, having been enjoined from taking

the children out of Puerto Rico, he returned to this country and instituted criminal proceedings against appellant.[1] Upon her return to the United States to answer the charges, appellant was arrested for contempt. Habeas corpus proceedings were commenced in this court, and a continuance was granted to have the records brought up. During the continuance, appellees filed a petition for citation for contempt in the trial court, and had the clerk mail notice of a hearing thereon to appellant. Upon failure of appellant to appear, the trial court held her in contempt for violation of the court's temporary order and modified the 1959 decree so as to award the former husband custody of the children.

Appellant's first contention is that the trial court lacked jurisdiction to hear the citation for contempt. She cites the proceeding in Puerto Rico and the habeas corpus hearing in this court, both of which were pending at the time of the trial court's action, as grounds for her contention.

The nature of the proceeding[2] in the Puerto Rican courts is not clear from the record, but assuming arguendo that at the time of the trial court's disposition of this case there was pending a custody proceeding, such fact could have no effect on the jurisdiction of the trial court to punish, as for contempt, one who knowingly violated its order. This court has previously held that the mere pendency of a suit in another state did not preclude a suit in this state for the same cause. *Moore & Company* v. *Emerick*, 38 Ark. 203. With concern to the effect on the forum court of sister state judgments, Dr. Robert A. Leflar, in his work on the Conflict of Laws, § 70, p. 132, states: "The mere pendency of an action in one state has no effect upon the

[1]It is not clear from the record whether appellee commenced the criminal proceedings before or after his having been enjoined from removing the children from Puerto Rico, but, for purposes of this decision, this fact is immaterial.

[2]Counsel for both parties apparently concede that some type of proceeding was pending in the Puerto Rican courts.

right to bring an action in another. Whichever suit is first carried to judgment then bars the other, but it is only the rendition of judgment which has that effect." As the case at bar involves only a *pending* suit in a *foreign,* rather than a sister state, court, it is obvious that the court below was in no way deprived of its jurisdiction to hold one in contempt for failure to comply with its valid custody order. See *Lyerla* v. *Lyerla,* 195 Kan. 259, 403 P. 2d 989. There is no contention that the Independence Chancery Court lacked jurisdiction to enter the 1966 temporary custody order, which required that appellant return the children to the grandparents at the end of two weeks. By her failure to return the children, appellant subjected herself to punishment for contempt. *Meeks* v. *State,* 80 Ark. 579, 98 S. W. 378; *State* v. *Dowdy,* 86 Ark. 140, 109 S. W. 1175.

The pendency of the habeas corpus proceeding in this court likewise could have no effect on the jurisdiction of the trial court to hear the citation for contempt. It is true that once an appeal is taken to, and docketed in, this court, the trial court is deprived of jurisdiction to further act in the matter. *Andrews* v. *Lauener,* 229 Ark. 894, 318 S. W. 2d 805. This is not to say, however, that the institution of a separate and distinct contempt hearing is precluded by the mere pendency of habeas corpus proceedings in this court. Proceedings in this court which are original in form, though appellate in nature, do not have the effect of stopping proceedings in the lower court, in the absence of action by this court so requiring. *Henry* v. *Steele,* 28 Ark. 455.

Appellant next avers that she was not given valid notice of the contempt hearing. We feel there is merit in this contention, and the portion of the decree holding appellant in contempt must be quashed for this reason. In *Ex Parte Coulter,* 160 Ark. 550, 255 S. W. 15, we held that it was the province of the court, and not that of an attorney, to cite one to appear and answer a charge of contempt. In the case at bar, the appellant received a

"Notice of Citation," but it was issued by the clerk of the trial court at the behest of appellees' attorney, and, from all that appears of record, without ever having been brought to the attention of the trial court whose exclusive duty it was to determine whether a prima facie showing of contempt had been made.

With regard to the modification of the 1959 custody award, appellant contends that she was not adequately notified that the custody issue would be heard by the court. With this we also agree. Appellees' attorney filed his "Petition for Citation" on May 2, 1967, and by mail requested the Chancery Court Clerk to forward a copy of the notice of citation, together with a copy of the petition, to appellant and her attorneys. Although this was done, it cannot be said that appellant was sufficiently apprised of the nature of the hearing, as neither the petition nor the notice mentions the custody issue. While the Independence Chancery Court retained jurisdiction of the custody issue (*Myers* v. *Myers,* 207 Ark. 169, 179 S. W. 2d 865), before it could lawfully take any further action thereon, it was necessary that the interested parties be properly notified. The mode of notice, not being specified by statute, must be "reasonably calculated" to afford the opposite party an opportunity to be heard. *Seaton* v. *Seaton,* 221 Ark. 778, 255 S. W. 2d 954. "Once a defendant is effectively brought into court, however, by whatever method, he is subject to all the processes of the court which may legitimately be applied in that case. This includes * * * new orders or modifications in alimony and custody awards * * * provided only that the new step in the proceeding be brought within the limits allowed by law for it * * * Further, he is entitled to reasonable notice of the reopened proceedings. This does not require new service, but only some formal notice having a reasonable tendency to give actual notification." Leflar, The Law of Conflicts of Laws, § 32, pp. 52-53. Even if the notice was actually received by appellant, it was not reasonably calculated to make ap-

pellant aware of the custody issue. For this reason, the custody modification will be reversed.

The decree is reversed.

WARD, J., not participating.

INSURED LLOYDS *v.* O. L. MAYO

5-4520 427 S. W. 2d 164

Opinion delivered May 6, 1968

Harper, Young, Durden & Smith, for appellant.

Donald Poe, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant insurance company seeks reversal of an adverse judgment in a suit by one of its insured for an automobile collision loss. The only dispute between the parties was the amount to which appellee was entitled under the policy. Appellant states three points for reversal, to wit:

I. The jury's verdict was contrary to the law and to the evidence.

II. The trial court committed reversible error in giving instruction no. four.

III. The trial court committed reversible error in refusing to grant a mistrial for the improper remarks of counsel for plaintiff in his opening statement.

I.

The gist of appellant's argument on this point is that there was no definite proof of the value of the Rambler automobile at the time of the purchase or at the time immediately preceding the accident and that the person testifying as to the salvage value of the automobile was not qualified to do so. The dealer who sold the automobile to appellee was the only witness called by appellee on the question of values. He had been a

Rambler dealer for 10 years. He sold the vehicle to appellee about May 23, 1965. He could not recall the date when appellee's car was wrecked, but it was brought into his place of business and had remained there. This dealer stated that he was familiar with the vehicle, that he believed that he was acquainted with its fair, reasonable market value immediately before the wreck and that he made an inspection of the car to determine its salvage value. He testified that the salvage value was about $350.00 and that the market value before the collision was approximately $2,350.00 or $2,400.00. He considered the vehicle to be a total loss. He estimated that the total cost of repair would be about $1,650.00, but that the vehicle could not be restored to the condition it was in immediately before the wreck. On cross-examination he stated that the list price of the automobile was $2,400.00 or $2,500.00 and that the actual sales price was probably less than, but close to, that amount. He could not give the date of the wreck, but could only say that it was in November 1965. His estimate of repairs was made in April 1966.

Appellant now complains that there was no definite proof of the value, either before or after the collision, since the dealer was not qualified to testify about salvage values and since he prefaced his statements of value with the words "about" and "approximately." Because of this, appellant claims that appellee's recovery was limited to the cost of repairs. Appellant made no objection to the testimony of this witness in this regard, however, and he is not now in any position to raise these questions. *Sandidge* v. *Sandidge,* 212 Ark. 608, 206 S. W. 2d 755. Absolute certainty should not be required of a witness on values. The use of the qualifying words by the witness in stating values does not make his testimony legally insufficient to support a verdict. See *St. Paul Fire & Marine Ins. Co.* v. *Martin,* 204 Ark. XVIII, 165 S. W. 2d 606.

Appellant urges that its witness Crabtree was a

highly qualified appraiser and that his testimony, contrary to that of the dealer, established that the vehicle could have been repaired for a total of $547.48. The testimony presented fact issues for the jury. The credibility of these witnesses and the weight to be given their testimony were matters which have been resolved against appellant by the verdict.

II.

Appellant asserts that the trial court erred in giving an instruction to the jury describing the measure of damages as the difference in the fair market value of appellee's automobile immediately before and immediately after the collision, but permitting consideration of the reasonable costs of repairs. This contention is based upon a limitation of liability in the policy which reads:

> "The limit of the company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the property or such part thereof with other of like kind and quality, nor with respect to an owned automobile described in this policy, the applicable limit of liability stated in the declarations."

Appellant made only a general objection to the giving of the instruction and offered no instruction. Since appellant made no specific objection pointing out the defect in the instruction and did not offer an instruction containing the limitation on recovery which it now contends should have been incorporated, we can only consider whether the instruction given was inherently wrong. *Laflin* v. *Brooks,* 180 Ark. 1167, 22 S. W. 2d 169; *Vogler* v. *O'Neal,* 226 Ark. 1007, 295 S. W. 2d 629; *St. Louis San Francisco Ry. Co.* v. *Friddle,* 237 Ark. 695, 375 S. W. 2d 373. The instruction was not inherently wrong. An instruction is inherently erroneous only when it could not be correct under any circumstances. *Abel of*

Arkansas, Inc. v. *Richards,* 236 Ark. 281, 365 S. W. 2d 705. Where an alternative limit on the liability of an insurance company is the actual cash value of an automobile, the instruction given is correct. *Southern Farm Bureau Ins. Co.* v. *Gaither,* 238 Ark. 50, 378 S. W. 2d 211; *Resolute Ins. Co.* v. *Mize,* 221 Ark. 705, 255 S. W. 2d 682.

III.

In his opening statement, the attorney for appellee stated that the jury would have to allow the appellee the full amount prayed for in the complaint to enable appellee to recover attorney's fees and a statutory penalty. Motion for mistrial was made and denied after the trial judge admonished the jury not to consider the remarks. We need not consider whether there was error in the failure of the court to grant a mistrial because of the improper statement. Appellee sought a $2,000.00 recovery in his complaint, but during the trial reduced this amount to $1,950.00. The jury returned a verdict for $1,750.00. It is obvious that appellant was not prejudiced. We will not reverse for error where it is evident that it did not affect the verdict. *Lamden* v. *St. Louis Southwestern Ry. Co.,* 115 Ark. 238, 170 S. W. 1001; *U. S. Express Co.* v. *Rea & Co.,* 121 Ark. 284, 181 S. W. 888; *Williams* v. *Newkirk,* 121 Ark. 439, 181 S. W. 304; *Street* v. *Shull,* 187 Ark. 180, 58 S. W. 2d 932; *Van Houten* v. *Better Health Ins. Ass'n of America,* 238 Ark. 815, 384 S. W. 2d 465.

Since we find no prejudicial error, the judgment is affirmed.

PAUL BRYANT *v.* V. J. BRADY

5-4455 427 S. W. 2d 179

Opinion delivered May 6, 1968

Thompson & Thompson, for appellant.

Jones & Stratton, for appellee.

CONLEY BYRD, Justice. This litigation arises over a contract whereby appellant Paul Bryant employed appellee V. J. Brady to do certain clearing. Brady initiated suit claiming that after credit for payment of $1,000 he was entitled to a balance of $1,933.50. Bryant denied that Brady had performed his contract and filed a cross action claiming damages, among other things, for loss of rental, for loss on sales of cows, and for pain and mental anguish, all in the amount of $6,050. From a jury verdict awarding Brady a judgment of $1,500, appellant appeals, contending that he was not permitted sufficient time to

make discovery; that the verdict was excessive and not warranted by the facts; and that the "jurors did not truthfully answer questions proposed to them by the judge as to their knowledge and acquaintance with the plaintiff as they were qualified." Since we reverse the case upon the third point, we do not reach the first two.

The record on the third point shows that juror Estel York had known Brady all of his life and that during the time of the lawsuit Brady was purchasing gasoline from him. He did not recall Judge Roberts'[1] asking the jurors, "Do you, or any of you, know the plaintiff or the defendant?"

Juror T. F. Bryant (not related to appellant) had known Mr. Brady all of his life. During 1960 and 1961 he and Brady had together bought a cotton stripper and used it in their farming operations. When first asked if he recalled Judge Roberts' asking him, "Do you know the plaintiff or defendant?" juror Bryant answered, "No sir, that question was not asked." Subsequently juror Bryant testified that he did remember Judge Roberts excusing one or two jurors. Thereafter the following occurred:

"Q Do you know what questions were asked of them?

A Well, not particularly I don't. Seems like one of them had business with him the last year or two or something, maybe currently doing business with him.

Q What prompted that answer—that response, Mr. Bryant, by that prospective juror?

A I don't know. Maybe he was asked, I don't

[1]Although Judge Roberts qualified the jury, he disqualified himself, and Hon. Rolland Bradley was elected to serve as special judge in his stead.

know. Maybe he was currently doing business with him.

Q Well, are you saying that these jurors may have been asked some question that prompted that response, or you don't know, or didn't hear, or what is your recollection of that?

A Well, I believe the question was asked, 'Have you done business with Mr. Brady, or currently doing business with him, in the last year or so?'

Q You did hear that question, 'Have you done business with Mr. Brady in the last year or so?'

A Yeah.

Q You heard that question?

A Yeah.

Q And did you see anyone that made a response to it?

A Well, there was some left the room; I suppose that was the cause of it."

Juror J. M. Cartwright testified that he had known Mr. Brady for a long time and that he did not respond when Judge Roberts asked if any of them knew the plaintiff or the defendant.

Juror Ellis Lasley testified that he had known Brady all of his life, that he had operated a gin from 1920 to 1963 and that Brady had ginned cotton with him. He recalled Judge Roberts' asking some questions and people raising their hands and indicating an answer or response to those questions. He remembered that a

Mr. Hiegel had made a statement and that Judge Roberts had excused Mr. Hiegel. When specifically asked, "Do you remember Judge Roberts asking the jury panel, '. . . Do any of you know the plaintiff or defendant?' " juror Lasley answered, "I don't know whether he said that or not."

The record on the motion for a new trial obviously shows that Judge Roberts, in qualifying the jury, asked if any of the jurors knew Brady or Bryant and if any of the jurors were doing business with either Brady or Bryant. The record also establishes that these four jurors remained silent to the questions of the judge, although other prospective jurors raised their hands or otherwise responded to the judge's questions.

In *Missouri Pac. Transportation Co.* v. *Johnson,* 197 Ark. 1129, 126 S. W. 2d 931 (1939), we recognized that the silence of a juror in a situation such as this amounts to an answer. Certainly here, where other jurors understood the questions and responded, we must accept the jurors' silence as a responsive answer to the court's questions.

In *D. F. Jones Construction Co.* v. *Fooks,* 199 Ark. 861, 136 S. W. 2d 487 (1940), two of the jurors were qualified by the trial court on the basis that they had not formed any opinion about the lawsuit and "that they had not been talked to by anyone relative to the case." On motion for a new trial it was shown that one Clyde Robins, prior to the trial, had offered the two jurors a bribe to return a verdict for Fooks. In holding that the trial court abused its discretion in failing to set aside the verdict, we said:

> "The jury system is a great institution and should hold itself aloof from any and all corrupt influences. Members of juries owe it to themselves and to the great system to preserve the integrity of their verdicts. If there is substantial evidence in the case to

support the verdict of the jury this court will not try a case *de novo,* but will accept and receive the verdict of the jury as final on issues involving not only property rights, but issues involving life and death. The only way to preserve the integrity of the verdicts of juries and keep the stream of justice pure is to set aside verdicts returned by juries which have been tampered with or attempted to be tampered with."

Here we think the trial court abused its discretion by not setting aside the verdict. Obviously, the jurors did not fairly answer the questions put to them by the court. Of course, truthful answers to the questions would not necessarily have disqualified the jurors, but how can we assert that they returned a fair verdict when they did not give fair answers to questions of the court? When viewed from the standpoint that "justice ought not only to be fair but appear to be fair," *Arkansas State Hwy. Comm'n* v. *Young*, 241 Ark. 765, 410 S. W. 2d 120 (1967), we think the trial court under the record here abused its discretion in not setting aside the verdict.

Appellee argues that the motion for new trial can not be considered because it was not verified as required by Ark. Stat. Ann. § 27-1905 (Repl. 1962), which provides:

"*Form of application.*—The application must be made by motion, in writing, setting forth in separate paragraphs the grounds or assignments of error relied upon for reversal of the verdict or decision. The grounds mentioned in the second, third and seventh subdivisions of section 1536 [§ 27-1901] must be sustained by affidavits or other competent testimony, showing their truth, and may be controverted in the same manner. [Civil Code § 374; C. & M. Dig., § 1315; Pope's Dig., § 1540; Acts 1939, No. 167, § 1, p. 402.]"

We do not agree with appellee's interpretation of the statute. As amended by Act 167 of 1939, the statute requires only that the grounds mentioned in the second, third and seventh subdivisions of Ark. Stat. Ann. § 27-1901 (Repl. 1962) must be sustained by "affidavits or other competent testimony, showing their truth." In this case appellant sustained his grounds by the sworn testimony of the jurors in open court. Furthermore, the motion for new trial may be considered as having been brought under the first section of § 27-1901, which is not affected by § 27-1905.

Reversed and remanded.

JONES, J., dissents.

J. FRED JONES, Justice, dissenting. I do not agree with the majority opinion in this case and I would affirm the judgment on all three points.

Appellant's motion for a new trial and his third point based thereon carry implications not sustained by the record in this case. Appellant alleged in his motion for a new trial "that two of the jurors, when asked the question, 'Do you know or have any business with either party of this law suit?' remained silent; that one of said jurors lives approximately one mile from the plaintiff, and one of the other jurors operates a grocery store and was doing business with the plaintiff immediately prior to the date of trial." The *record* does not reveal that such question was even asked.

The record is completely silent as to the form and substance of any of the questions propounded to the jurors by the trial court judge in qualifying the jury on voir dire, and the record does not reveal that appellant's attorney asked any questions at all, or attenpted to do so, until some two months after the case was tried when four of the jurors were questioned at the hearing on appellant's motion for a new trial.

The only record pertaining to the questions propounded, and the answers given, in qualifying the jury on voir dire, lies wholly within the allegations in appellant's motion for a new trial, and within the memory of the four jurors who testified at the hearing on the motion for a new trial, none of whom were sure what questions were propounded to them by the trial judge.

In the case at bar it is not contended that the jurors answered falsely concerning their qualifications when questioned by the trial court on voir dire, the allegation is, that they remained silent when the questions were propounded to them. I recognize that silence in this connection amounts to an answer, but, even assuming that the questions were asked and had been answered in the affirmative, knowing the parties to a lawsuit or having done business with them obviously does not disqualify a juror. If the appellant desired information on this point to assist him in the exercise of his peremptory challenges, he had a perfect right to call any failure to answer to the attention of the trial court, and he had a statutory right to propound further questions (within the discretion of the trial court) to the prospective jurors concerning their qualifications. Ark. Stat. Ann. § 39-226 (Repl. 1962).

In *Jones Construction Co.* v. *Fooks,* 199 Ark. 861, 136 S. W. 2d 487, cited by the majority, the jurors had been promised, as a bribe, 2% of the amount of any verdict they would return in favor of the plaintiff. They did return a verdict for the plaintiff but they had failed to reveal the offer of the bribes in answer to questions propounded to them on voir dire. The record is clear in the case at bar that Brady was well known in Faulkner County as well as in Prairie and Lonoke Counties. The failure of jurors to reveal that they were acquainted with him, as alleged in the case at bar, is not even close to the failure to reveal an offer of a bribe as testified to, and admitted, by both the offeror and the jurors in the *Fooks* case. The only prejudice appellant could have

claimed, in the case at bar, by the jurors' failure to answer the questions he says were propounded to them, would have been in exercise of his three peremptory challenges in the selection of a drawn and struck jury.

At the hearing on appellant's motion for a new trial, the trial court heard the testimony of four jurors, York, Bryant, Cartwright and Lasley. York testified as follows on the point in issue:

"Q. Do you know Mr. Brady?

A. Sure, everybody knows him.

Q. Do you recall Judge Roberts asking the jurors before they were chosen, 'Do you, or any of you, know the plaintiff or defendant'?

A. No, sir.

Q. You don't recall that question being asked?

A. No, sir, I sure don't."

On this point Bryant testified as follows:

"Q. Do you recall the questions that Judge Russell Roberts asked you as you were sitting on the other side of the courtroom, before you went on to the jury?

A. I pretty well recall them.

Q. Do you recall him asking you a question, 'Do you know the plaintiff or defendant?'

A. No, sir, that question was not asked.

Q. That question was not asked?

A. It sure wasn't.

* * *

Q. Do you know Mr. V. J. Brady?

A. All my life.

Q. And how far do you live from him?

A. Well, it's about two mile.

Q. What is your acquaintance with him, Mr. Bryant?

A. Well, I just know him, I know everybody that lives around here.

* * *

Q. Have you ever done any business, bought cattle or had work done by Mr. Brady?

A. Not in the past several years.

Q. Well, what business had you had with Mr. Brady at any time?

A. Well, about '60 or '61 we bought a cotton stripper, and I run it and stripped our cotton that fall."

On redirect examination Mr. Bryant testified as follows:

"Q. Mr. Bryant, do you recall a man who was working for the bank here in Conway raising his hand and making some statement when you were inquired of by Judge Roberts?

A. No, I don't.

Q. Do you remember Judge Roberts excusing any jurors; telling them they would be excused from the panel that day?

A. Yeah, I remember one or two being excused.

Q. Do you remember who those were by name?

A. No, I don't.

Q. Just remember some people? Do you know why they were excused?

A. No, I don't.

Q. Do you know what questions were asked of them?

A. Well, not particularly I don't. Seems like one of them had business with him the last year or two or something, maybe currently doing business with him.

Q. What prompted that answer—that response, Mr. Bryant, by that prospective juror?

A. I don't know. Maybe he was asked, I don't know. Maybe he was currently doing business with him.

Q. Well, are you saying that these jurors may have been asked some question that prompted that response, or you don't know, or didn't hear, or what is your recollection of that?

A. Well, I believe the question was asked, 'Have you done business with Mr. Brady, or currently doing business with him, in the last year or so?'

Q. You did hear that question, 'Have you done business with Mr. Brady in the last year or so?'

A. Yeah.

Q. You heard that question?

A. Yeah.

Q. And did you see anyone that made a response to it?

A. Well, there was some left the room; I suppose that was the cause of it.

Q. Do you know whether or not Mr. York responded to that question?

A. I don't know.

On this same point Cartwright testified as follows:

"Q. Do you know Mr. Brady?

A. Yes, sir.

Q. How long have you known Mr. Brady?

A. Oh, a long time.

Q. What relationship have you had with Mr. Brady, either business or social?

A. None.

* * *

Q. Do you recall the day of this trial?

A. Yeah.

* * *

Q. Do you recall Judge Roberts asking questions of the jury panel; the entire panel at the time the jury was seated at the Judge's right?

A. Well, I don't remember.

Q. Do you recall that he asked some questions?

A. Yeah.

Q. Do you recall any of those questions?

A. (Shakes head negatively)

Q. Do you recall whether or not you made a response to any of those questions?

A. I didn't.

Q. You did not?

A. (Shakes head negatively)

Q. Do you remember whether or not Judge Roberts asked if any person—if any member of the jury had done any business with Mr. Brady?

A. He might have.

Q. Do you remember if any person made a response to that question?

A. (Shakes head negatively)

Q. You don't remember whether anyone did or not?

A. (Shakes head negatively)

Q. Do you know whether or not—do you remember whether or not Judge Roberts asked the question, 'Do any of you know the plaintiff or defendant?'

A. Yeah.

Q. Did he ask that question?

A. I think so.

Q. Did you make any response to that question?

A. No.

Q. You did not?

A. (Shakes head negatively)

Q. How long have you known Mr. Brady?

A. Oh, several years.

* * *

A. I've been acquainted with him for a long time, as far as knowing him, and as far as talking with him, I've talked with him very little.

Q. All right. How recently immediately preceding the trial had you had discussions with Mr. Brady?

A. I don't remember of any."

Mr. Ellis Lasley testified as follows:

"Q. How long have you known Mr. Brady?

A. All his life.

* * *

Q. Do you recall some questions being asked and people raising their hand, or indicating an answer or response to those questions?

A. Yes, I think so.

Q. Do you recall a comment or a statement by a man who was an employee of the Conway Bank?

A. I remember Mr. Hiegel *making a statement.*

Q. Do you remember what his statement was?

A. Nothing more than they were both customers of his, and as I understand that's what he said.

Q. Do you remember what prompted him to make that response? Did Judge Roberts ask him a question, or ask the jury panel a question?

A. *Really, I don't know whether he did, or whether he just asked if he could get off because he was*—I'm not sure on that question.

Q. Do you recall Judge Roberts asking any questions to the panel as they sat over there?

A. Well, I remember him saying the reason he would be excused.

Q. The reason Judge Roberts was being excused?

A. Yes, from choice; that he was related to him.

Q. Do you remember Judge Roberts asking the jury panel, 'Do you know the plaintiff or defendant? Do any of you know the plaintiff or defendant?'

A. I don't know whether he said that or not.

Q. Would you say it again, please, sir?

A. I say I don't know whether he said that or not. I don't remember.

Q. Do you remember whether he asked the question, 'Do you, or any of you, have any busi-

ness transactions recently with the plaintiff or defendant?'

A. I don't remember; I sure don't.

* * *

Q. You do not recall Judge Roberts asking if you knew or were acquainted with either party?

A. No, I sure don't." (Emphasis supplied).

The record is silent as to *why* Judge Roberts disqualified himself, but the record does reveal Judge Roberts' statement to the jury in disqualifying himself, and the record does not sustain Mr. Lasley's version if Lasley was, in fact, referring to Judge Roberts disqualifying himself because of relationship to the appellee. According to the record before us, Judge Roberts' statement to the jury in disqualifying himself was as follows:

"Ladies and Gentlemen of the jury, due to circumstances beyond my control and under the laws of our State, it is necessary I disqualify this morning, and Judge Bradley has been elected by the Bar of the City of Conway, Arkansas, Faulkner County, to take my place."

In the case of *Fones Brothers Hdw. Co.* v. *Mears,* 182 Ark. 533, 32 S. W. 2d 313, the trial court in qualifying the regular panel of jurors on their voir dire, inquired of all members of the panel if they were related by blood or marriage to either of the parties to the lawsuit by consanguinity or affinity, to which all except one, replied in the negative. After the verdict, it was learned that one of the accepted jurors was a first cousin to the defendant. Upon appeal from an order of the trial court overruling a motion in arrest of judgment and for a new trial, this court said:

"We have stated the rule on this subject to be that 'when objection is made to a juror after the ver-

dict for the first time, due diligence must be shown by the objecting party,' and that it then 'becomes to some extent a matter of discretion with the trial court as to whether or not the verdict shall be set aside; and when there is no fraud intended or wrong done or collusion on the part of the successful party, it is not reversible error for the trial court to refuse to set aside the verdict."

In the *Mears* case, as in the case at bar, the record did not show what questions were asked. The motion was supported by affidavits in that case, however, and it was brought here on certiorari. In sustaining the trial court in the *Mears* case, we said:

"The majority is of the opinion that in the state of the record there was no such showing of due diligence made by the objecting party (the objection being made to the juror after the return of the verdict for the first time) as would require the granting of the motion to refuse to enter judgment on the verdict and refusing to grant the motion for a new trial on the ground of the alleged relationship of the juror to appellee. As heretofore held, it is a matter of discretion of the trial court as to whether the verdict should be set aside when objection is made to a juror after the verdict for the first time, and the majority of the court from the state of the record is not able to say that the court abused its discretion in overruling the motion and refusing to grant a new trial because of the alleged relationship."

The juror in the *Mears* case was *legally disqualified,* but in that case, as in the case at bar, the record did not show diligence on the part of appellant. See *Mo. Pac. RR. Co.* v. *Bushey,* 180 Ark. 19, 20 S. W. 2d 614; *James* v. *State,* 68 Ark. 464, 60 S. W. 29.

It may be that appellant now feels he could have

done a better job in the exercise of his peremptory challenges, but I am unwilling to accept the allegations in any motion for a new trial as recorded evidence supporting the allegations in the motion, and I am unwilling to put Faulkner County and the parties to this lawsuit to the additional expense of a new trial because of alleged failure of jurors to answer questions they do not recall having been asked; questions that neither the record nor the proof reveal were asked, and questions that if asked and answered in the affirmative, would not have disqualified the jurors anyway.

By the exercise of due diligence, appellant could have learned all he had a right to know about the jurors at their examination on voir dire. Appellant has failed to show due diligence in support of his motion for a new trial and I would affirm the trial court in denying the motion.

ROBERT L. CROUCH ET AL *v.* JOHN CROUCH ET AL

5-4573 431 S. W. 2d 261

Opinion delivered May 13, 1968

[Supplemental opinion on denial of rehearing, September 9, 1968.]

Kirsch, Cathey & Brown, for appellants.

Rhine & Rhine, for appellees.

CARLETON HARRIS, Chief Justice. This is the second appeal in this case. In *Crouch* v. *Crouch,* 241 Ark. 447, 408 S. W. 2d 495, this court, in reversing the Chancery Court decree, held that tax deeds, obtained by two heirs of W. M. Crouch, deceased, to a certain 160 acres of land in Greene County, Arkansas, amounted only to a redemption for all heirs of W. M. Crouch, the two being co-tenants with the others. The two who had purchased the tax titles deeded the property to Harold J. Conrad and wife, appellees herein, endeavoring to convey absolute ownership. The appellees cleared the 160 acres, and farmed the land in 1964. The Greene Chancery Court, following our opinion, held on April 3, 1967, that appellants owned collectively an undivided 5/7 interest in the 160-acre tract, and that Conrad and wife owned a 2/7 interest, and it was determined that a partition sale should be held. No testimony was taken at that time, and the court, on the basis of the evidence at the first trial (before the reversal), held that the Conrads should have compensation for the clearing of the acreage, from the sale proceeds, to the extent of $200.00 per acre, totaling $32,000.00. It was found that the value of the lands before the clearing was $150.00 per acre ($24,000.00), and that the total value of the lands, as of the time of the order, was $350.00 per acre, totaling $56,000.00. The sale was held on June 3, 1967, with appellees being the highest bidders, the amount of the bid being $28,500.00, approximately $178.00 per acre. Pursuant to a motion filed by appellants, and after a hearing, the court set aside all portions of its April 3 decree with respect to the amount which the Conrads were to receive for clearing the lands, and refused to confirm the sale due to the inadequacy of the bid. A new hearing was set for August 2, 1967, at which time ap-

pellants asked that the hearing be postponed on the matter of improvements until after another sale (which request had also been made at the April 3 hearing). The court refused the request, and proceeded to take evidence relating to the value of the land. At the conclusion of the hearing, the court found that the value of the lands was $48,000.00, holding that the value of same before being cleared was $24,000.00, and that the clearing had given an additional value of $24,000.00. Though the Conrads had not complied with the provision of the April 3 decree which required them to account for rents they had received since 1963 (this particular provision not having been vacated), the court awarded appellees a lien on the proceeds of the sale to the extent of the first $24,000.00 received therefrom, and authorized the Conrads to bid at the new sale without making any bond, except as to bids in excess of $24,000.00. At the sale, the Conrads were again the highest bidder, the bid, however, this time, amounting to only $25,100.00, or approximately $157.00 per acre. The Greene Chancery Court overruled appellants' objection to this sale, and refused to vacate or modify its findings of August 2. This appeal is from the August 2 decree, it being contended that the court erred in awarding the Conrads a lien upon the first $24,000.00 received, and that the court should have held that the primary equity was the right of appellants to receive 5/7 of this amount; further, that the award to appellees for clearing the land should have been based upon the actual sale price obtained at the sale, and that the court should have required appellees to render an accounting for any rents or profits before ordering the sale.

Though, as pointed out by appellants, the fact that the sales only brought the prices of $28,500.00 and $25,100.00 somewhat indicates that the values established by the Chancellor were erroneous, it is not necessary to discuss that phase of the case in this opinion, for we think clearly that the court erred in not first requiring appellees to account for any rents or profits derived

from farming the lands. Ark. Stat. Ann. § 34-1423 (Repl. 1962), the first section of the "Betterment Act," provides that any person who, believing himself to be the owner, under color of title, has peaceably improved any land, which shall judicially be determined to belong to another, shall be entitled to the value of improvements made, and the amount of taxes paid. Section 34-1424, the second section of the act then provides:

"The court or jury trying such cause shall assess the value of such improvements in the same action in which the title to said lands is adjudicated; and on such trial the damages sustained by the owner of the lands from waste, and such mesne profits as may be allowed by law, shall also be assessed, and if the value of the improvements made by the occupant and the taxes paid as aforesaid shall exceed the amount of said damages and mesne profits combined, the court shall enter an order as a part of the final judgment providing that no writ shall issue for the possession of the lands in favor of the successful party until payment has been made to such occupant of the balance due him for such improvements and the taxes paid; and such amount shall be a lien on said lands, which may be enforced by equitable proceedings at any time within three [3] years after the date of such judgment."

It is at once apparent that appellees are not entitled to any lien until it is established that the value of the improvements exceed any profits made, or any damage to the land.

Under this statute, appellants were entitled to receive credit for 5/7 of any rents and profits realized before the sale was held. Of course, appellees were given an advantage in being permitted to bid with a credit of $24,000.00, for they were only required to give bond for any amount in excess of that figure. Then too, the amount awarded actually was, in effect, a judgment against the appellants, and they were entitled to the

proportionate share of rents and profits more or less as an offset against the amount awarded for clearing the land. This view was expressed as early as 1909 in the case of *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88, which probably has been cited more than any other Arkansas case in litigation involving the betterment act. The case is comprehensive, and covers most, if not all, questions that might arise under this statute. Relative to rents and profits, the court further said:

"The various rules that have been formulated by courts of equity in attempting to make equitable adjustments of the rights of the occupant, on the one hand, to the value of the improvements and the taxes paid, and, on the other hand, of the owner to the rents and profits, were based upon such principles of equity as in the opinion of those courts were right. In the uncertainty of these decisions, the betterment act was enacted to definitely fix these respective rights, and it fixed as a substantive right for the owner of the land the rents of the lands for the period therein named, with the improvements which the lands then possessed. The general rule adopted by the courts for the measure of damages in cases for the recovery of mesne profits is the fair rental value of the lands during the period of the withholding. Analogous to that ruling, the betterment act is the fair rental value of the lands in their improved condition during the period named in the betterment act. This means the net rents—that is to say, the amounts expended for necessary repairs and for such necessary expenses as under the custom of the country have been paid for management and collection of the rents should be deducted from the gross rental value."

Appellees argue that appellants have lost their right to prosecute this appeal, and are estopped to challenge any findings of the lower court set out in the original decree (April 3), or amendment thereto. This argument is based on the fact that appellants had filed a notice of appeal to the original decree of April 3, but

did not prosecute same. The sale was held and subsequently set aside by the trial court, which amended its decree on August 2. We do not agree with appellees' contention. The court had a right to set aside the sale, and, at any rate, appellees are not in a position to complain, since they did not appeal from the order setting aside the sale and amending the April 3 decree. Appellees further state that appellants did not make a supersedeas bond, but permitted the commissioner to proceed with the sale, and actually took part in the bidding. We do not consider this last fact (taking part in the bidding), since this does not appear in the original record, and is offered as a supplement to the transcript through the affidavit of Gerald Phillips, Chancery Court Clerk and Commissioner in Chancery. The affidavit relates to matters that took place at the sale, was not offered into evidence at any hearing, and was not designated by either side as a part of the record for the purpose of this appeal. As to the failure to make a supersedeas bond, it may well be that appellants were unable to make this bond, and were therefore powerless to prevent the sale. Of course, it is quite likely that, if the property had been purchased for a price commensurate with the value placed upon it by appellees (and found by the court), this appeal would not have been pursued, but, feeling aggrieved at the findings of the court, appellants are entirely within their legal rights in bringing this appeal.

Because of the court's error, as herein pointed out, the decree is reversed, and the cause remanded for further proceedings.

AMERICAN AVIATION, INC. *v.* AVIATION INSURANCE MANAGERS, INC.

5-4575 427 S. W. 2d 544

Opinion delivered May 13, 1968
[Rehearing denied September 3, 1968.]

Crouch, Blair & Cypert, for appellant.

Little, Enfield & Lawrence, for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Aviation Insurance Managers, Inc., hereafter called A.I.M., instituted suit seeking to recover from appellant, American Aviation, Inc., hereafter called American, a 1961 Cessna 172 Skyhawk aircraft of the alleged value of $3,125.00. A bond was filed by appellee, but a cross-bond was filed by appellant, and the airplane remains within the possession of appellant. This plane was damaged in an accident in Texas in May, 1965. The registered owner in the office of the Administrator of the Federal Aviation Agency, Oklahoma City, is Texas Airmotive Company, Inc., hereafter called T.A.C., of Bryan, Texas. The plane was insured by appellee, and on June 7, 1965, appellee issued a settlement draft in payment of the loss to T.A.C., and received in return a signed bill of sale to

the aircraft on a Federal Aviation Agency form. The name of the buyer was left in blank. The plane was taken to Weiss International Airport at San Antonio, Texas, where a number of salvage bids were received, the highest bid being made by Charles Collier in the sum of $3,125.00, which was accepted. Collier had previously purchased aircraft salvage from appellees. On June 13, 1965, Walter Kostich of Tulsa, Oklahoma, went to the Weiss Airport for the purpose of picking up the airplane, and the aircraft was delivered to him by a representative of A.I.M., apparently under the belief that Kostich was acting for Collier. The log books for the engine and aircraft were forwarded to Collier. On June 23, 1965, Collier was informed by letter from A.I.M. that the company understood that he had picked up the aircraft, and he was advised that the bill of sale would be immediately forwarded upon receipt of his draft in the amount of $3,125.00. Upon Collier's making inquiry as to whom the draft should be made payable, A.I.M. advised that it should be made payable to the company. Thereafter, several letters seeking payment were sent to Collier, and on October 22, 1965, following a telephone request by Collier, A.I.M. sent a customer sight draft to a Dallas bank, which was returned "unpaid," and a second sight draft was also returned stamped likewise.

On March 31, 1966, A.I.M. received a request from Mr. Kostich to forward a bill of sale to him. Thereupon, the insurance company made an investigation, and learned the following facts:

Kostich, after obtaining the craft in San Antonio, took it to Tulsa, Oklahoma, and had the wings rebuilt. On September 8, 1965, Collier gave Kostich a bill of sale for the airplane, and was paid $1,000.00 by Kostich, the latter applying for registration of the aircraft in his name, but the application was rejected by the Federal Aviation Agency, because Kostich did not have a bill of sale from the registered owner, T.A.C. On

November 20, 1965, Kostich sold the aircraft to American, and gave that company a bill of sale. Appellant paid Kostich $4,175.00, and likewise made application for registration, but the application was rejected for the same reason that the application by Kostich had been rejected. In the meantime, American took the aircraft to Rogers Municipal Airport, Rogers, Arkansas. The case was tried on stipulated testimony, and on October 18, 1967, the Benton County Circuit Court ordered American to deliver possession of the plane to A.I.M., or upon its failure to do so, awarded appellees a money judgment in the amount of $3,125.00, together with interest. From the judgment so entered, appellant brings this appeal.

The question in this litigation is very simple, "Who owns the airplane?" This is a case of first impression in this state, and there does not seem to be a great deal of case law over the country. Appellee's contention is that it holds the executed bill of sale from the registered title holder, is the owner, and therefore, is entitled to the aircraft, *i. e.,* A.I.M. stands in the shoes of T.A.C., having paid that company the loss on the plane, and having received the bill of sale in return. Appellant's argument is that it is a bona fide purchaser of the plane without notice that anyone other than Kostich was claiming any interest thereto.

Congress has preempted the field of registration and recording of title instruments affecting civil aircraft. *Pacific Financial Corporation* v. *Central Bank and Trust Company,* 5 Cir., 296 F. 2d 68. A central office has been established at Oklahoma City, Oklahoma for this purpose. Pertinent portions of 49 U.S.C.A. § 1403, provide as follows:

"(a) The Administrator shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or

any interest in, any civil aircraft of the United States; * * *"

This covers sales, mortgages, leases, contracts of conditional sale, or any other instrument executed for security purposes. Subsection (c) provides as follows:

"No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator: * * *"

Appellee did not record its bill of sale from T.A.C.; in fact, it is still holding same in blank, and as stated, its contention is that it still holds title to the aircraft, since it is holding the bill of sale. According to Bill McKamey, manager of the New Orleans office of A.I.M., the reason that his company did not record the bill of sale was due to the fact that the company was following the customary practice in the aircraft salvage business. The witness stated that a salvage buyer often sells the salvage to someone else, and it may change hands two or three times before a salvage buyer delivers it to the ultimate purchaser; the latter then receives the bill of sale with his name inserted, and files it with the Federal Aviation Agency. The reason, according to McKamey, is to avoid delay and eliminate the costs of registering the aircraft with every person who purchases the salvage.

"Our customary procedure in salvage cases is to deliver the blank bill of sale to the salvage buyer upon receipt of the salvage money. The salvage buyer then delivers it to his buyer, if any. When the last buyer receives the bill of sale, he then files it with the Federal

Aviation Agency. The bill of sale was never delivered by Aviation Insurance Managers, Inc. in this case because the salvage money has never been paid."

We do not agree that there was no conveyance of the plane from A.I.M. to Collier, even though no bill of sale was given to the latter. A.I.M., according to the stipulated testimony, sold the craft to Collier. McKamey's testimony reflects:

"Mr. Collier had previously purchased aircraft salvage from our company in behalf of Oak Grove Airport. It was my understanding that this was what he was doing in the present case."

"* * * *We sold the salvage to Mr. Collier* [our emphasis.] We looked to him for payment and we held the bill of sale for delivery to him upon payment of the salvage price. This is the only manner in which business has been done with Mr. Collier in the past."

The stipulated testimony of both Collier and Kostich appears in the record, but we do not see that their testimony is particularly pertinent to the determination of this litigation. Collier testified that he bought the Cessna for Kostich, and he said that he advised McKamey of this fact, telling the latter that Kostich was to pay for the plane.

According to Kostich's testimony, he purchased the plane from Collier, received a bill of sale from the latter, who at the same time promised to obtain a bill of sale from either T.A.C. or A.I.M.

It has previously been pointed out that Congress has preempted the field as far as recordation and registration of aircraft is concerned, but we do not mean to say that Congress has preempted the entire field relating to conveyances of aircraft, for it has been held otherwise. In *Aircraft Investment Corp.* v. *Pezzani & Reid*

Equipment Company, 205 F. Supp. 80 (1962), the United States District Court E. D. Michigan, S. D., said:

"Plaintiff suggests that Congress has preempted the entire field of conveyancing of interests in aircraft. This view is erroneous, notwithstanding In re Veterans' Air Express Company, 76 F. Supp. 684 (D. N. J. 1948), which contains dicta on which plaintiff relies. Congress has said only that until an instrument purporting to convey an interest in an aircraft is recorded, in accordance with the Act, it is void as to third parties without notice. Upon federal recordation, it is valid without further recording. In providing for the recordation of various instruments pertaining to transactions affecting title or interest in aircraft, Congress has not impaired the existence and effectiveness of state laws creating and defining such instruments. Excepting the recording section of the Federal Aviation Act, the validity of the chattel mortgage here in question must be measured by the appropriate state law."

Appellee did not plead the application of the Texas statutes,[1] and the law of this state applies.

Let us then look to our appropriate statutes. Ark. Stat. Ann. § 85-2-106 (Add. 1961), being a part of the Uniform Commercial Code, states:

"* * * A 'sale' consists in the passing of title from the seller to the buyer for a price."

This section then refers to § 85-2-401. Subsection (2) of the last section provides:

"Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical de-

[1]Ark. Stat. Ann. § 27-2504 (Supp. 1967) provides that a party who intends to raise an issue concerning the law of any jurisdiction or governmental unit outside this state shall give notice in his pleadings or other reasonable written notice.

livery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading * * *."

We have already pointed out that McKamey's testimony flatly states, "We sold the salvage to Mr. Collier." The plane was physically delivered to Kostich (for Collier) though the document of title was to be delivered at a different time. Under subsection (2), just quoted, it appears that title passed to the buyer when the aircraft was delivered. Appellee, in holding on to the blank bill of sale, was actually endeavoring to reserve a security interest in the plane—but whatever interest was retained, even had there been a conditional sale—or a chattel mortgage—had to be recorded in the central office to become valid as against innocent purchasers. We are not concerned with the validity of the sale from A.I.M. to Collier (or Kostich) as it affects the rights between those parties; we are only concerned with their transaction as it affects the rights of appellant.

Under the evidence, there is no doubt but that appellant was a good faith purchaser; in fact, it is not otherwise argued. In *State Securities Co.* v. *Aviation Enterprises, Inc.*, 355 F. 2d 225 (1966), the question of the recording of conveyances was discussed. That litigation was affirmed on the basis of two points, the second being that a chattel mortgage on an airplane was invalid, as to a purchase made in good faith from the mortgagor, where the mortgagee had not followed the provisions of Section 1403 (c). The court said:

"Further, under § 1403 (c), supra, Securities' mortgage is invalid as to good faith purchasers, since it did not register its mortgage with the Federal Aviation Agency. And the failure of Owens to register its title does not benefit Securities, since Securities must

stand on the strength of its own title and cannot recover on the weakness of Owens's title."

Reversed.

GEORGE ROSE SMITH, J., dissents.

GEORGE ROSE SMITH, Justice, dissenting. The governing federal statute, quoted by the majority, reads in part:

> "No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid . . . against any person other than the person by whom the conveyance or other instrument is made or given . . . until such conveyance or other instrument is filed for recordation in the office of the Administrator."

An essential element in the Congressional scheme is that the conveyance or other instrument be *in writing,* so that it *can* be recorded. So interpreted, the statute achieves a worthwhile result, by requiring a registration of aircraft titles similar to that which applies to motor vehicles and the title to land. I think we ought to adhere to the basic requirement that the instrument of conveyance be in writing, else the registration system loses much of its practical value. I would reject the appellant's assertion of title, on the ground that the legislative intent to give *de facto* validity to unrecorded conveyances was intended to apply only to written instruments.

MARY ALICE MOORE, ADM'X ET AL *v.*
MICHAEL ROBERTSON

5-4566 427 S. W. 2d 796

Opinion delivered May 13, 1968

Bernard Whetstone, for appellants.

John M. Graves and *Louis Tarlowski,* for appellee.

GEORGE ROSE SMITH, Justice. This action arose from a collision between a car being driven by Ezell Walters and a truck being driven by the appellee, Michael Robertson. Clayton Moore, a passenger in the Walters car,

was killed, and Wallace Montgomery, another passenger, was injured. This action for wrongful death and for personal injuries was brought by two of the appellants, Moore's widow and Montgomery. Moore's daughter later intervened as a plaintiff. There were ultimately three defendants in the case: The appellee Robertson, who was driving the truck, Jim Ritchie, who owned the truck, and J. O. Ashcraft, who was Robertson's regular employer. The plaintiffs alleged alternatively that at the time of the collision Robertson was acting as the agent of each of his codefendants.

Robertson failed to plead to the complaint within the time required by statute. The court entered a default judgment against Robertson, reserving the issue of damages for a later determination. Later on, however, the court set aside the default judgment and allowed Robertson to defend the suit. Upon a trial on the merits the court found in favor of all three defendants, finding specifically that none of the three defendants was negligent and that Robertson was not acting as agent for either Ritchie or Ashcraft at the time of the collision.

When the trial court announced his decision counsel for the plaintiffs made a rather unusual request, asking that the court, despite his decision in favor of the defendants, nevertheless find the amount of the plaintiffs' damages, to provide for the possibility that on appeal the court's action in setting aside the default judgment against Robertson might be reversed. With some reluctance the court acceded to that request and made offhand findings of damages totaling $24,620.60.

Counsel for the plaintiffs proved to be a good prophet, for on the first appeal we held that the court should not have set aside the default judgment. We remanded the case "for reinstatement of the default judgment." *Moore* v. *Robertson,* 242 Ark. 413, 413 S. W. 2d 872 (1967). Upon remand the trial court heard a number of witnesses on the issue of damages and made

awards to the plaintiffs totaling $9,200.00. The case now reaches this court for the second time, on appeal and cross appeal.

On direct appeal the plaintiffs insist that on remand the trial court had no choice except to make awards totaling $24,620.60 in accordance with its findings at the end of the first trial. That same argument was made on the first appeal and was rejected, our direction on remand being only that the default judgment be reinstated. That conclusion is now binding as the law of the case. *Storthz* v. *Fullerton,* 185 Ark. 634, 48 S. W. 2d 560 (1932). We may appropriately add that we are still of the same opinion as we were then. To allow the losing litigant to encumber the appeal with contingent or provisional issues would needlessly complicate the proof in the trial court, the responsibilities of counsel on appeal, and this court's consideration of the controlling question. Moreover, as this record demonstrates, the trial court's treatment of semifictitious issues is apt to have all the disadvantages of a curbstone opinion, with hardly any countervailing benefit.

On cross appeal Robertson first contends that the trial court's decision in favor of his codefendants, on the merits, should enure to his benefit as well. That contention is based upon a common-law rule that where one defendant answers and another defaults, a decision on the merits in favor of the answering defendant—upon a defense common to both defendants—operates as a release of the defaulting defendant. *Burt* v. *Henderson,* 152 Ark. 547, 238 S. W. 626 (1922).

The appellee's contention is not now available to him, because it could and should have been made on the first appeal. The rule is that the decision on the first appeal is conclusive of any arguments that were or could have been made at that time. *Storthz* v. *Fullerton, supra.* The case at bar confirms the wisdom of the rule. If the appellee's contention has merit—a point which

we do not decide—its assertion on the first appeal would have done away with the necessity for a second trial and a second appeal, with their attendant expenditure of time and money. Such waste can be effectively prevented only by a strict adherence to the principle that points not urged upon the first appeal are not available later on.

The appellee also contends on cross appeal that the several awards made by the trial court are all excessive. For the most part we regard them as somewhat modest —so much so that a discussion of each award would be of no value as a precedent. We must, however, sustain the contention that the proof does not support the allowance of $500 to Mabel Edwards as compensation for mental anguish occasioned by the death of her father. It was settled by *Peugh* v. *Oliger,* 233 Ark. 281, 345 S. W. 2d 610 (1961), that compensable mental anguish means something more than the normal grief occasioned by the loss of a loved one. Mrs. Edwards's father was 74 years old at his death; she was a mature woman with grown children. There is no proof of any special ties of affection between Mrs. Edwards and her father. In fact, the sole proof pertinent to the issue of mental anguish consists of a single question and answer: "Q. You had love and affection for your father? A. Yes, I did." Under the rule adopted in the *Peugh* case that meager proof is not sufficient to support any award for Mrs. Edwards's mental anguish. To that extent only the judgment must be reversed and the cause of action dismissed.

Affirmed on direct appeal; reversed in part on cross appeal.

JAMES B. SPRADLIN *v.* REX KLUMP ET AL

5-4577 427 S. W. 2d 542

Opinion delivered May 13, 1968
[Rehearing denied June 3, 1968.]

Richard W. Hobbs, for appellant.

Wooton, Land & Matthews, for appellees.

GEORGE ROSE SMITH, Justice. This is an action by the appellant against his former employers, the appellees, for damages for the loss of his right hand and forearm in an accident not covered by the workmen's compensation law. The trial judge directed a verdict for the defendants at the close of the plaintiff's proof. We have concluded that the appellees are right in their contention that Spradlin's asserted cause of action is barred by the doctrine of assumption of risk.

The appellees, Klump and Raceland Farms, Inc., were engaged in raising and training thoroughbred race horses on a farm near Hot Springs. They also raised beef cattle and conducted general farming operations. At the time of his injury in 1965 Spradlin had been employed for several months as general manager of the farm, except that he had nothing to do with the race horses.

When Spradlin was hurt he was operating a hay baling machine by himself. The testimony and photographs describe the hay-baling process. The operator rides a tractor which pulls the baler through a field where the hay has already been cut. The baler itself is run by power drawn from the tractor by means of a power-takeoff. In operation the baler picks up loose hay and carries it by a conveyor belt to a pair of rollers, somewhat larger than, but essentially similar to, a clothes wringer. The hay, after passing through the rollers, is compressed into a cylindrical bale, tied with twine, and dropped to the ground.

When Spradlin was hurt he had been baling hay for an hour or more. He stopped the tractor and went back to try to adjust the baling machine, which was turning out poorly tied bales that were conical rather than cylindrical. Spradlin unwisely left both the tractor engine and the power-takeoff running, so that the baling machine's rollers continued to turn while he tried to correct its performance. Unfortunately Spradlin put the fingers of his right hand too close to the rollers, which drew his lower arm into the machine and inflicted injuries that led to the amputation of the arm just below the elbow.

Assumption of risk is a harsh doctrine, not favored by the courts, but we are nevertheless unable to say conscientiously that it does not govern this case. Spradlin, a mature man of about 36, had had 20 years experience in farming and in the use of farm machinery. As manager of the farm he worked without supervision. His proof charged his employers with negligence in failing to instruct him adequately in the operation of this particular kind of baling machine and in failing to equip the machine with safety shields. Even so, the danger presented by the moving rollers was completely open and obvious. Spradlin readily admitted on cross examination that he fully appreciated the peril involved in letting his hand get too close to the moving parts of

the baler. In cases which we cannot distinguish in principle from this one we have held upon similar facts that the injured employee must be charged with assumption of risk as a matter of law. *Standard Oil Co. of Louisiana* v. *Gray*, 175 Ark. 702, 300 S. W. 405 (1927); *Jones* v. *Mayberry,* 143 Ark. 390, 220 S. W. 479 (1920); *Fullerton* v. *Henry Wrape Co.,* 105 Ark. 434, 151 S. W. 1005 (1912). We are forced to conclude that the trial court did not err in directing a verdict for the appellees.

Affirmed.

CHARLES ESTEP AND PAUL CRYAR *v.* STATE OF ARKANSAS

5332 427 S. W. 2d 535

Opinion delivered May 13, 1968

Carl Stewart and *Jeff Duty,* for appellants.

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

PAUL WARD, Justice. This is an appeal by Charles Estep and Paul Cryar from a conviction for burglary and grand larceny.

When appellants were arraigned in circuit court on

August 18, 1967 they entered pleas of not guilty, and the court appointed Attorney Carl Stewart to defend them. The case was then continued and set for trial on September 5, 1965.

On the last mentioned date the following occurred: (a) Lawrence Hamilton who was also charged along with appellants, and who was sixteen years old, pleaded guilty and was sent to the Arkansas Industrial School. He is not involved here. (b) Appellants asked that they be furnished a copy of a confession of guilt signed by Estep on August 18, 1967, and that the hearing be set for a later date. The trial court granted both requests, and set the hearing for September 28, 1967.

During the trial the State offered to introduce in evidence the previously mentioned confession of Estep, which appears in the record as the State's Exhibit No. 1. At this point appellants objected to the introduction of the exhibit, but were overruled. Then appellants noted their exceptions to the ruling of the court, and further stated: "And we ask, and I make this motion out of the presence of the jury, that it be ascertained by investigation that the testimony of these witnesses, whether or not this was a free and voluntary statement". This motion was overruled by the court, and appellants again saved their exceptions. In overruling appellants' exceptions the court said: "Its a question of fact. The jury will consider all of the facts. Proceed." The exhibit was introduced in evidence, and the trial was continued. The trial resulted in a jury verdict of guilty on both counts, and sentences were fixed at not more than five years—to run concurrently.

For a reversal appellants urge four separate points. We will, however, discuss at any length only one point.

We have concluded the trial court erred in failing to determine, out of the presence of the jury, the voluntariness of Estep's confession. In reaching this con-

clusion we deem it unnecessary to discuss the decision of the U. S. Supreme Court cited by both parties, because we think Ark. Stat. Ann. § 43-2105 (Supp. 1967) is controlling in this case. It reads:

> "Issues of fact shall be tried by a jury, provided that the determination of fact concerning the admissibility of a confession shall be made by the court when the issue is raised by the defendant; that the trial court shall hear the evidence concerning the admissibility and the voluntariness of the confession out of the presence of the jury and it shall be the court's duty before admitting said confession into evidence to determine by a preponderance of the evidence that the same has been made voluntarily."

The above section was cited and approved in *Mullins* v. *State,* 240 Ark. 608, 401 S. W. 2d 9.

In view of the above, the case must be reversed and remanded for a new trial.

We have examined carefully the other alleged errors and find no merit in any of them.

Reversed and remanded.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur because it appears that the trial judge never made a ruling that the confession was voluntary as required by *Jackson* v. *Denno,* 378 U. S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), and Ark. Stat. Ann. § 43-2105 (Supp. 1967). On the other hand, he seems to have left the determination of the question of voluntariness entirely to the jury. I agree that this was reversible error.

If he had held the confession voluntary and not left

the determination entirely to the jury, I feel that his action would not have been prejudicial. Where a confession is held voluntary and there is no showing that a hearing thereon in the presence of the jury was inadequate or had any other unfair consequences, there is not necessarily any prejudice to the defendant. See *Pinto* v. *Pierce*, 389 U. S. 31, 88 S. Ct. 192 (1967). 19 L. Ed. 2d 31 (1967). While objection was made and a hearing outside the presence of the jury was requested here, the defendant did not avail himself of the opportunity to testify or to offer any testimony on this question when the trial judge recessed the hearing, excused the jury and gave defendant that opportunity. Had the trial judge then ruled the confession voluntary, I cannot see how there would have been any prejudice to the defendant.

[redacted]

GUARANTY FINANCIAL CORP. *v.* JAMES HARDEN ET UX

5-4546 427 S. W. 2d 548

Opinion delivered May 13, 1968

[redacted]

Griffin Smith, for appellant.

Brockman & Brockman, for appellees.

LYLE BROWN, Justice. Our first appeal in this case,

Guaranty Financial Corp. v. *Harden,* 242 Ark. 779, 416 S. W. 2d 287 (1967), was limited to that portion of the trial court's decree that held void for usury the note and mortgage executed at the time of the construction contract for the building of the shell house. When the mandate of this court was issued, appellant Guaranty Financial Corporation presented a precedent for foreclosure decree. It was based upon the premise that it was entitled to judgment for the amount of the contract less $1,000 that the chancellor had found it would take to correct the deficiencies. Appellees protested that they were entitled to a rescission of the construction contract unless appellant remedied the defects in the house. Appellant at first objected to the trial court's requirement that it remedy the defects, but subsequently acknowledged by letter that rather than appeal it would undertake to remedy them. Upon the hearing for final decree of foreclosure, appellant introduced proof that the defects had been remedied. Appellees, after inspecting the property, testified that the defects were not remedied—particularly those having to do with cracks in the sheetrock and the front picture window. Due to the conflicting testimony, the chancellor made a personal inspection of the premises, accompanied by counsel for the respective parties, and upon return stated that the property was not as good as appellant had said it was and not as bad as appellees contended, but that there were serious cracks in the sheetrock and a defect in the picture window.

From a decree refusing a foreclosure and giving appellant thirty days in which to remove the house, appellant appeals, contending that since the portion of the original decree not appealed from had become final, the trial court was in error in refusing to enforce his decree, and in the alternative that the chancellor's findings relative to the defects were contrary to a preponderance of the evidence.

The original opinion of the trial court in this case

first set forth the facts; held the note and mortgage void for usury but upheld the validity of the construction contract; then it took up the issue as to the amount due on the contract, finding that the total deficiencies amounted to $1,000; determined that interest on the contract should be at the legal rate of 6 per cent, and concluded:

> "The court finds that the plaintiff and/or its assignor, Joe-Lee, shall have thirty days in which to remedy the defects to the satisfaction of the defendants; that in the event such defects are not remedied in said time then the contract shall be void and each party shall be released therefrom; provided, in lieu of remedying said defects plaintiff or its assignor shall have the right to remove said house from said lot within said period."

The decree in the first case, after setting forth the formalities as to parties, appearances, and process, made findings of fact and provided as follows:

> "IT IS, THEREFORE, by the court CONSIDERED, ORDERED, ADJUDGED and DECREED that the opinion of the court dated November 22, 1966, is to be incorporated by reference in this decree in its entirety.
>
> "IT IS FURTHER ORDERED, ADJUDGED and DECREED that the note and mortgage signed by the defendants, James Harden and Erma Lee Harden, and given to the cross-defendant, Joe-Lee Homes, Inc., who subsequently assigned it to the plaintiff, Guaranty Financial Corporation, be, and they are hereby declared to be usurious and therefore void.
>
> "IT IS FURTHER ORDERED, ADJUDGED and DECREED that the contract executed between the defendants, James Harden and Erma Lee Harden,

and Joe-Lee Homes, Inc., be, and the same is hereby valid and enforceable.

"IT IS FURTHER ORDERED, ADJUDGED and DECREED that the sum of $1,000.00 shall be allowed to correct all deficiencies for which the cross-defendant, Joe-Lee Homes, Inc., is responsible under the contract.

"IT IS FURTHER by the court ORDERED, ADJUDGED and DECREED that the plaintiff, Guaranty Financial Corporation and/or its assignor, Joe-Lee Homes, Inc., be, and they are hereby allowed thirty days in which to remedy the defects to the satisfaction of the defendants, James Harden and Erma Lee Harden; that in the event such defects are not remedied in said time then the contract shall be void and each party shall be released therefrom; provided, in lieu of remedying said defects the plaintiff or its assignor shall have the right to remove said house from said lot within said period.

"IT IS FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff be, and it is hereby ordered and directed to pay all costs of this action."

The portion of the decree not appealed from in the first appeal, *Guaranty Financial Corp.* v. *Harden, supra,* leaves much to be accomplished in the way of draftsmanship, but when it is considered together with the opinion of the trial court we can not say that the trial court erred in refusing to enter a foreclosure decree until appellant had complied with its construction contract by remedying the defects. The only practical effect of our former opinion on the first decree entered by the trial court was merely to reinstate the mortgage lien executed by the parties. It did not in any way affect those portions of the decree from which no appeal was taken.

We have consistently held that where the testimony of the parties is sharply contradictory and the vital issue is one of credibility, the chancellor's finding of facts is entitled to great weight on appeal. *Dearien* v. *Lancaster,* 221 Ark. 98, 252 S. W. 2d 72 (1952). From the contradictory evidence in the record here, we are unable to say that the chancellor's finding is contrary to the weight of the evidence.

Affirmed.

FOGLEMAN, J., disqualified and not participating.

GEORGE ROSE SMITH, J., dissents.

MARJORIE ANN STONE *v.* DANA ALLAN STONE

5-4576 427 S. W. 2d 538

Opinion delivered May 13, 1968

Fred A. Newth, Jr., for appellant.

Bailey, Trimble & Holt, for appellee.

LYLE BROWN, Justice. This appeal concerns custody rights to the parties' four children. Appellant Marjorie Ann Stone was unsuccessful in her petition to have the custody reinvested in her and she appeals.

Marjorie obtained a divorce and custody of the children in 1963. Apparently because of the tender ages of the children, Dana Stone, father and appellee here, made no contest. One year later Marjorie remarried, on which occasion she delivered the children to Dana. The father petitioned the court for official custody and, with Marjorie in agreement, that petition was granted early in 1964. In 1965 Marjorie petitioned for custody, alleging changed conditions. From the denial of that petition there was no appeal. In 1966 Marjorie filed another petition for custody. At the hearing in June 1966 she offered proof to support five contentions:

(1) She had regained her health; (2) she had a nice three-bedroom home; (3) the income of her second husband had increased to $800 a month; (4) Dana mistreated the children physically; and (5) Dana's personal relations with a baby sitter were immoral.

An extended hearing was conducted. The chancellor decreed that custody remain with the father. From that order there was no appeal.

Comes yet another petition by the mother for change in custody. Her proof at this 1967 hearing covered precisely the five points we have enumerated with respect to the June 1966 hearing. Testimony on one additional matter was interjected and that pertained to her detention of the children beyond the permissible visitation period in 1966. She contended that her holding the children over was because of an agreement with the father. Based on the history of the bitterly contested proceedings, the court found that no such agreement existed. Again the court found no change in conditions. That ruling is the basis of this appeal.

The order of June 1966, wherein the mother's request for custody was denied, was a final, appealable order. Marjorie elected not to appeal so the facts there litigated were put to rest. Before she could prevail on

her 1967 petition it was incumbent on her to produce evidence of changed conditions brought about subsequent to the 1966 decree. *Jackson* v. *Jackson,* 151 Ark. 9, 235 S. W. 47 (1921); *Wilkins* v. *Davis,* 244 Ark. 304, 424 S. W. 2d 530 (1968). To the recited general rule there are some exceptions but it is not argued that any such exception is here applicable.

Initially the trial court sustained an objection to testimony relating to incidents occurring prior to the 1966 hearing. However, at appellant's request, she was permitted to proffer such testimony for the record. Averring to *Swindle* v. *Swindle* 242 Ark. 790, 415 S. W. 2d 564 (1967), appellant asserted that "child custody was a fluid thing" and that any matters, irrespective of time element, which concerned the welfare of a child would be here considered if reproduced for us in question and answer form. What we did hold in *Swindle* was to the effect that if testimony appropriate for our consideration is proffered, it should be by examination of the proffered witness, rather than by a summary statement of what the testimony of the witness would be if present and testifying. Since appellant's proffered testimony at the 1967 hearing was actually in support of contentions litigated in the 1966 hearing, we do not consider the evidence. Our holding on this point was also approved in *Swindle.*

Affirmed.

JAMES A. HINSON *v.* CULBERSON-STOWERS CHEVROLET, INC.

5-4562 427 S. W. 2d 539

Opinion delivered May 13, 1968

Ward & Mooney, for appellant.

Barber, Henry, Thurman, McCaskill & Amsler, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant seeks reversal of an order of the trial court quashing the process and dismissing the complaint in his action against appellee for malicious prosecution. The transcript shows only that summons was issued and served upon appellee. Neither the form nor manner of service is disclosed. There appears in the transcript a receipt for certified mail which was addressed to Frank Culberson, Culberson-Stowers, Pampa, Texas. The receipt was signed for Frank Culberson by one Ulm Eads, purportedly as the agent of the addressee. Appellant asserts that service was proper under the provisions of Ark. Stat. Ann. § 27-339.1 (Supp. 1967). Appellee does not question that service was had in the manner and form required by that section, but contends that the section is not applicable and that the court's action in granting its motion to quash was proper. Consequently, we will treat this case as if the record reflected service pursuant to

this section and will determine this appeal on the question of applicability of the statute.

Appellant relies solely and entirely on the application of the above named statute. The pertinent portion thereof reads:

> "(1) Any cause of action arising out of acts done in this State * * * by an agent or servant in this State of a foreign corporation may be sued upon in this State * * * by process served upon or mailed to the * * * corporation outside the State."

Appellant's complaint alleged that appellee caused a warrant of arrest issued in Gray County, Texas, to be sent by United States mail to the Sheriff of Craighead County, Arkansas, along with instructions from the defendant, by way of both telephone and mail, to place appellant under arrest and imprison him unless and until he paid over an indebtedness asserted by appellee to be due it.

Appellant argues that appellee, a foreign corporation without an agent for service of process in the State of Arkansas, was subject to service under this statute, and contends that the corporation's use of the mails and the services of the telephone company in furthering its alleged malicious prosecution of appellant made the United States postal service and the telephone company his agents or servants in Arkansas and that the acts of these representatives performed in this state gave rise to appellant's cause of action. Appellant also contends that the Sheriff of Craighead County was the agent of appellee in this matter. The complaint does not state whether the warrant was placed in the mails by appellee or by an officer of Gray County, Texas, and appellant admitted in oral argument that the identity of the person placing the warrant in the mails is undisclosed by the record.

A telephone company is a common carrier of communications. As such it must supply all who are alike

situated and cannot discriminate in favor of or against anyone. *Montgomery* v. *Southwest Arkansas Telephone Co.,* 110 Ark. 480, 161 S. W. 1060. Thus, its relationship to a user is hardly compatible with the relationship of principal and agent. In *Campbell* v. *Bastian,* 236 Ark. 205, 365 S. W. 2d 249, we cited with approval authorities on the relationship as follows:

> "* * * In the American Law Institute's Restatement of the Law of Agency, § 1 Comment A, this appears:
>
> 'The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control.'
>
> In 2 Am. Jur. p. 13, 'Agency' § 2, this appears:
>
> 'An agency may be defined as a contract, either express or implied, upon a consideration, or a gratuitous undertaking, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account, and by which that other assumes to do the business and render an account of it.'
>
> In Black's Law Dictionary an agent is defined as: 'A person authorized by another to act for him, one entrusted with another's business.' "

We find that the essential elements of authorization and control are absent. We have also approved the definition of servant in the Restatement of Agency as an employee whose physical conduct is subject to the master's right of control. *Southern National Insurance Co.* v.

Williams, 224 Ark. 938, 277 S. W. 2d 487. The relationship of the telephone company is more nearly that of independent contractor. This relationship is created when there is no intent on the part of an employer to retain control or direction of the manner or methods by which the party contracted with shall perform the work and there is no direction relating to the physical conduct of the contractor or his employees in the execution of the work. *Massey* v. *Poteau Trucking Co.,* 221 Ark. 589, 254 S. W. 2d 959.

By the same tests, the United States mails could not be either the agent or the servant of appellee.

There is nothing to indicate that the warrant of arrest was not regular on its face, and both parties agreed on oral argument that it was to be so considered. None of the allegations of the complaint suggests that the sheriff followed the instructions of appellee or did anything except to perform his duty in the service of the warrant. Ark. Stat. Ann. § 12-1110 (Repl. 1956) makes it the duty of the sheriff to execute all lawful process directed to him by legal authority. In so doing, he is the agent of the law, not of any private party. *Griffin* v. *Thompson,* 2 Howard (U. S.) 244, 11 L. Ed. 253 (1844); *M'Ghee* v. *Ellis,* 4 Littell (Ky.) 244, 14 Am. Dec. 124 (1823); *Horton* v. *Maffitt,* 14 Minn. 289, 100 Am. Dec. 222 (1869). In the absence of a showing to the contrary, there is a presumption that the sheriff performed his duty lawfully, correctly and in good faith. *McCamey* v. *Wright,* 96 Ark. 477, 132 S. W. 223; *Matthews* v. *Bailey,* 128 Ark. 703, 130 S. W. 2d 1006; *Beaumont* v. *Faubus,* 239 Ark. 801, 394 S. W. 2d 478.

Since neither the telephone company, the United States mails nor the sheriff can be said to be the agent or servant of appellee in the sense of § 27-339.1, there is no error in the court's order quashing service thereunder.

The judgment is affirmed.

J. N. HEISKELL ET AL *v.* H. C. ENTERPRISE, INC.

5-4478 429 S. W. 2d 71

Opinion delivered May 13, 1968
[Rehearing denied July 15, 1968.]

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

Howell, Price & Worsham, for appellee.

J. FRED JONES, Justice. This appeal is from a judgment of the Pulaski County Circuit Court and arises from litigation growing out of the construction of the

Little Rock Public Library building because of defect in the construction of concrete floors. H. C. Enterprise, Inc. was the general contractor for the construction of the building; J. N. Heiskell et al, constituted the Library Board of Trustees, and Guy Swaim and James C. Wellborn, d/b/a Swaim, Allen, Wellborn & Associates, were the architects for the building.

In order to permit work on the various levels of the building to proceed without damage to finished floors, the plans and specifications prepared by the Architects called for the concrete floors to be poured in two separate slabs or layers. The base slab, containing coarse aggregate, was to be poured in forms and was to be from four to five inches thick. The base slab was designed to have poured on top of it the second layer, containing fine aggregate, and to be one and one-half inches thick. These two slabs or layers will hereafter be referred to as "base slab" and "fill slab." The fill slab is designated "fill or mortar setting bed" in the specifications, and was to receive a vinyl tile finish floor covering. The defect giving rise to this litigation occurred between the two slabs of concrete.

The base slab was first poured by the Contractor and about 18 months later the fill slab was poured. After both slabs were poured, the fill slab started cracking and separating from the base slab and it was found that the fill slab had not bonded with, or adhered to, the base slab, and it became necessary to remove and replace the fill slab. An intensive investigation was conducted to determine the cause of the difficulty, which included reports by several testing laboratories employed by various parties.

Finally, in August of 1962, the Architects gave specific written instructions to the Contractor describing the manner of removal and replacement of the fill slab in the affected area. The Contractor replied in October of 1962, that a record of all labor, material and

equipment costs was being kept on a time and material basis and as the original base slab and fill slab were installed in a workmanlike manner, this constituted a change in the work and requested a written change order under the contract. The Architects responded in November 1962, that in light of the laboratory testing reports, they felt the obligation of replacing the fill was on the Contractor and refused to issue a change order, requesting that the Contractor proceed under Article 19 of the contract whereby the Contractor must replace all work condemned as not in conformance with the contract, and that if this was not proceeded with immediately, an appeal would be made to the Contractor's bonding company.

The Contractor proceeded with replacement of the fill without further correspondence until August 1965, at which time he requested and was refused payment for the work by the Architects.

Since the litigation involved the pouring and finishing of the two slabs, the specifications pertaining to them are fully set out as follows:

> "Interior Slabs to Receive Fill or Mortar Setting Bed shall be finished by tamping the concrete with special tools to force the coarse aggregate away from the surface, and screeding with straight edges to bring the surface to the required finish plane.
>
> "Interior Slabs—that are to receive a finish floor covering (this does not include ceramic tile covering) shall be finished by tamping the concrete with special tools to force the coarse aggregate away from the surface, then screeding and floating with straight edges to bring the surface to the required finish level. While the concrete is still green but sufficiently hardened to bear a man's weight without deep imprint, it shall be wood floated to a true and even plane with no coarse aggregate visible.

Sufficient pressure shall be used on the wood floats to bring moisture to the surface. After the surface moisture has disappeared, surfaces shall be steel-trowelled to a smooth, even impervious finish, free from trowel marks. After the cement has set enough to ring the trowel the surface of all slabs shall be given a second steel trowelling to a burnished finish. Where fill is applied and will receive a floor covering (not ceramic tile) fill shall be finished smooth in like manner."

On January 14, 1966, the Contractor requested arbitration of its right to compensation under the contract, and the Library Board denied the request. The Contractor then brought suit against the directors for the additional cost of labor and materials in taking up and replacing the fill slab and the Architects were made third parties defendant.

Appellants argue that the plans and specifications called for a bonding of the two slabs by implication, and that the failure to secure a bond was the result of improper workmanship and failure of the Contractor to follow the plans and specifications. Appellee contends that the plans and specifications do not call for a bond and that the plans and specifications were followed explicitly in a good workmanship manner. All the parties seem to recognize that the trouble arose from the failure of the two slabs of concrete to bond with each other; that this resulted in the cracking of the fill slab and that it was necessary to remove and replace the fill slab. The Architects contended that the Contractor was negligent in pouring, curing, and finishing the concrete, and the Contractor contended that he poured, cured, and finished the concrete according to the plans and specifications prepared by the Architects and under the visual observation of the Architects. It was the Contractor's contention that the fault lay in the plans and specifications prepared by the Architects and in the di-

rect instructions of the Architects during the course of construction.

A jury trial resulted in a judgment in favor of the Contractor against the Trustees for $50,201.50 with judgment over in favor of the Trustees against the architects for the same amount.

The Architects and the Trustees are joint appellants here and they rely on the following points for reversal:

> "Under the terms of the contract, the contractor cannot recover against the owner.
>
> There is no competent evidence that the plans and specifications were deficient in any manner.
>
> The undisputed evidence shows that the original work was not performed by the contractor in accordance with the plans and specifications.
>
> The contractor is estopped to claim compensation and has waived any claim.
>
> The Court erred in refusing to declare a mistrial when insurance was improperly brought to the attention of the jury.
>
> The Court erred in admitting certain exhibits and testimony concerning change orders."

As to point one, it is not disputed that the contract provides for changes in the work to be approved in writing prior to their execution. Appellee admits that this provision was not complied with, but argues that strict compliance with this provision was waived by appellants through course of conduct. As to this course of conduct, appellee produced exhibits and testimony tending to prove that on many occasions the Architects gave oral directions to the appellee to do certain work and after

the work had been completed, the Architects would have the Library Board to pay for it. Appellants disputed this evidence as not being relevant to *remedial* work and that in this instance, the Architects specifically stated, prior to the execution of the work, that a change order would not be issued and thereby did not waive, but refused to waive, the written order. In addition to the exhibits and testimony pertaining to waiver, the appellee contends that it proceeded with the work in good faith, relying on the provision in the contract for arbitration of any of the Architects' decisions.

Thus, a fact question was properly submitted to the jury on this issue and there was substantial evidence from which the jury could have found in favor of the Contractor, especially in light of the desire for completion of this public building as speedily as possible and within the time limit of the contract, and the threat by the Architects of proceeding against appellee's bonding company for delay. This court has upheld waiver in similar circumstances in *Rivercliff Co., Inc.* v. *Linebarger*, 223 Ark. 105, 264 S. W. 2d 842, when it was stated:

> "For a second ground, appellant contends that the Master and the trial court should not have made any allowance to the Contractor because the extra work was not authorized in accordance with the terms of the contract. This contention appears to be supported by the terms of the contract, which provides that extras must be approved in writing prior to execution. This provision was not complied with but it does not constitute a defense available to appellant, because, as we hold, a strict compliance with this provision of the contract was waived by appellant in this instance. It is not disputed that the extra excavation was done with the knowledge and at the direction of Smith who was not only the architect supervising the work for Rivercliff but was also a part owner of the appellant corporation.

From his testimony we gather that he refused to approve an allowance for extras mainly because he did not think the Contractor was entitled to anything as a result of the changed method of constructing the foundation. It appears that other changes in construction had been made and paid for where no written change order had been previously issued. Although it was shown that several such changes had been made and paid for during the construction of the four buildings, yet Mr. Smith testified that only one written change order had been made."

Appellants' second and third points involve the same problems and will be discussed together. In total effect, their contention is that there is no evidence that the plans and specifications were deficient, but that the evidence shows that they were not followed by the appellee.

The opinion reports from laboratory testing experts were offered in evidence by stipulation. Master Builders reported:

"* * * Any excess water in the concrete exhibited itself as bleeding water since relatively little of it was absorbed by the forms or, lost through it. This caused segregation to occur which in turn resulted in the accumulation of a highly carbonated cement paste layer on the top surface. Insufficient curing also helped in detrimental carbonation of the top layer in the base concrete.

Secondly, *the surface of the base concrete was not scarified enough to expose good concrete and individual grains of aggregate and cement.* * * *

The placement of a lightweight topping over a hardened base concrete is difficult at best since shrinkage stresses in the topping may cause trouble.

In replacing the topping, the base slab will have to be physically scarified to sound concrete." (Emphasis supplied.)

Masters Builders concluded:

"* * * Disruption of the bond between the base slab and the topping resulted from differential shrinkage of the two concretes, the topping being subject to the greater shrinkage subsequent to completion of the floor. * * * [T]he concrete of the base slab was not adequately cured or protected from drying so that a layer of weak, porous mortar exists in the upper 1/8 to 1/4 inch of the base slab."

Oklahoma Testing Laboratory found and concluded:

"* * * A white material was noted on the bottom of the two separate sections of lightweight concrete but none was noted on the interfaces of the sections of the cores. * * * An analysis was made of the white material. From this analysis it was apparently cement. * * * According to our understanding a period of eighteen months elapsed between these pours. According to our examination of the samples it would be our opinion that the lack of bond was due to one or a combination of the following:

1. Lack of proper surface preparation. An examination of the interfaces of the cores, and of the slabs submitted, shows the concrete to have been fairly smooth. On concrete of this age, to insure good bond, we believe the floor should have been roughened by some method."

St. Louis Testing Laboratories reported:

"* * * The unsound material at the top of the base concrete is, in our opinion, a major factor for the

lack of bond between the base concrete and the lightweight concrete on the 1st and 2nd floors.

The cause for the unsound material at the top of the base concrete may be attributed to three factors or a combination of these three factors—excessive water at top surface, excessive vibration, and improper curing."

After a study of these reports, the appellant Architects advised appellee as follows:

"It is this office's understanding, after a careful reading of these reports, that the major factor involved in the failure of the topping to bond with the base slab was the presence of a layer of unsound material in the top of the base slab. The laboratories recommended that this unsound material be removed by scarifying the base slab with a Tennant machine; cleaning the base slab carefully; saturating the base slab; brooming in a grout coat immediately ahead of placement of topping. * * * You are hereby instructed to proceed with the installation of the lightweight concrete topping throughout the building in accordance with the following procedure:

1. Remove all remaining original topping from the base slab in all areas and rooms. (Test panel on 1st floor to remain.)

2. *Remove all laitance and the weak, unsound surface portion of the base slab by scarifying with Tennant machine so as to expose sound mortar and coarse aggregate.* Areas of slab adjacent to walls and columns not scarified by machine shall be scarified by hand." (Emphasis supplied).

Appellants presented evidence that the appellee did not follow the plans and specifications as designed, and

that, according to custom and practice, a bond is called for between sections of concrete in situations such as this, unless it is provided in the contract that a bond is not desired and positive action to prevent a bond is provided in the contract. On the other hand, appellee presented evidence that the work was done in accordance with the plans and specifications and in a good workmanlike manner; that the Architects' representatives were present and inspected the work without complaint; and that the contract specifically called for a bond at construction joints (not a part of the concrete slab or topping in question), but did not call for a bond between the base slab and the fill, or provide for a bonding agent between the two. Appellee presented evidence pointing out that the Architects' plans and specifications specifically called for the coarse aggregate in the base slab to be tamped away from the surface, leaving a layer of laitance in the surface of the base slab, which together with the slurry coat of cement ordered by the Architects' representative, constituted the weak white substance found by the testing laboratories and that this was the cause of the trouble. Suffice it to say, there was ample evidence presented on both sides to present a jury question on the points here involved, and there was substantial evidence from which the jury could have decided in favor of appellee on these points as they did.

Appellants' point four contends that when the Contractor was directed to proceed with the work at its own expense and the work was done without protest, then the Contractor is estopped from later claiming compensation, but it is noted that appellants did not plead estoppel in its answer. This court has held that estoppel must generally be pleaded to be available as a defense to a claim. In the case of *Jewell* v. *General Air Conditioning Corp.*, 226 Ark. 304, 289 S. W. 2d 881, it was stated:

> "Since neither laches nor estoppel was pleaded as a defense below, the court was not afforded an op-

portunity to pass on such issues and the attempt to raise them for the first time on appeal comes too late. *Gerard B. Lambert Co.* v. *Rogers,* 161 Ark. 307, 255 S. W. 1089; *Bell* v. *Lackie,* 210 Ark. 1003, 198 S. W. 2d 725; *Steele* v. *Steele,* 214 Ark. 500, 216 S. W. 2d 875."

Notwithstanding appellants' failure to plead estoppel, when the appellee advised that a record would be kept of the additional costs and requested the change order, the appellants were put on notice that appellee expected pay. When the Architects refused to issue the change order, stating that the obligation to replace the fill was on the Contractor, a standoff was presented as to who was responsible, and we are of the opinion that the appellee was justified in proceeding with the work, not as a waiver of his rights to dispute the Architects' decision, but in reliance on the contract provisions calling for arbitration of any decision by the Architects, as testified to by Mr. Carty. Appellants contend, however, that the appellee did not make his request for arbitration until three years after the Architects' decision not to issue a change order, and thus not within a reasonable time as required by the contract. The contract provisions as to notice of arbitration states:

"The demand for arbitration shall be made within a reasonable time after the dispute has arisen; in no case, however, shall the demand be made later than the time of final payment. . ."

It is not disputed here that the demand for arbitration came prior to the final payment. Appellee testified that the delay was due to ascertaining the cost of doing the work, but in any event, the reasonableness of the delay was a question for the jury. It is noted, however, that arbitration was rejected by appellants without prejudice to appellee's rights to litigate his claims for additional compensation. We are of the opinion that the

evidence does not support appellants' contention that appellee waived its rights to compensation.

Under point five, appellants contend that the trial court erred in refusing to declare a mistrial after the attorney for appellee asked the jurors, on voir dire examination, whether they held stock in, or had any interest in, a liability insurance company. We have held that it is reversible error to unnecessarily bring to the attention of a jury that insurance is involved and that the issue in questioning, on voir dire, as to interests in insurance companies is one of good faith by the attorney questioning the prospective juror. See *DeLong* v. *Green,* 229 Ark. 100, 313 S. W. 2d 370; *Dedmon* v. *Thalheimer,* 226 Ark. 402, 290 S. W. 2d 16. In the case at bar, the question was a general one and was not pursued after a negative reply. There were insurance clauses in the contract that would have supported good faith in believing that insurance was involved, and the jury was affirmatively advised that no insurance was involved. Under these circumstances, we agree with the trial court that there was no prejudice involved, and we find no prejudicial error on the part of the trial court in refusing to declare a mistrial.

Under appellants' sixth point, they contend that the trial court erred in allowing exhibits and testimony to be admitted to show a course of conduct whereby appellants had waived strict compliance with contract provisions calling for a written change order prior to execution of the work, and on several occasions had verbally authorized changes without written order and later had paid for the work. Appellants contend that this evidence was not relevant to *remedial* work and did not involve situations where the Architects had specifically refused to issue a change order prior to the work being done. The Architects demanded that the appellee scarify the base slab and replace the fill slab. The appellee requested a change order which was refused. The Architects threatened appellee on its bond and we think that

the appellee made it plain that it would demand pay when it proceeded with the work. We are of the opinion that the change order requirement of the contract did not go to *liability* for the costs of the remedial work in this case. There was no dispute as to the amount, necessity, or nature of the work to be done in this case. The question was whether the appellee was liable for redoing work it should have done right in the first place, or whether the Architects had made the error and were liable for the additional costs. The Architects refused to indicate an acceptance of liability by making the change order, and although appellee did the work without the change order, it did so with the appellants under no misapprehensions that demand would be made for the cost of the work and without prejudice to appellee's right to sue for that amount. We conclude that if error was committed by the admission of the evidence pertaining to prior waiver of written change orders, such error was harmless to the appellants in this case.

To summarize—This entire case simply boils down to pouring a heavy aggregate concrete slab base for a floor in metal forms designed by the Architects under specifications requiring that this base be finished by tamping the concrete with special tools to force the coarse aggregate away from the surface, and screeding with straight edges to bring the surface to the required finish plane. When the coarse aggregate was forced away from the surface, a layer of laitance, referred to by some of the witnesses as "soup," but actually water, cement and fine sand, was drawn to the surface and after screeding, either with a bull float or some other straight edge, this base slab, laitance and all, was seasoned in use (as apparently planned) for an approximate period of 18 months. When all the parties were ready to install the fill slab, the hardened laitance was not removed and the surface of the base slab was not scarified to the aggregate or sound concrete. The base slab was swept and mopped, wetted down and applied with a slurry coat of cement and water, under orders

and directions of a representative of the Architects, and then a 1½ inch slab of light aggregate concrete was poured on top of the base slab and it failed to bond with the base slab.

The evidence is undisputed that it was necessary to remove the hardened laitance from the surface of the base slab and to expose the sound concrete, by scarifying the surface of the slab, in order to pour the fill slab in such manner as to obtain a satisfactory floor in compliance with the contract. It is obvious to us that a jury question was presented by all the evidence in this case and the jury apparently found that the fault lay in the Architects' plans and specifications. We conclude that there was substantial evidence to support the jury's verdict and that the judgment must be affirmed.

Affirmed.

FOGLEMAN and BROWN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I would reverse the judgment of the lower court. The major basis for my disagreement with the majority is the belated application of the contractor for arbitration. The difficulty giving rise to this cause of action became known to all in December 1961. After considerable investigation of the cause of the problem, the architect, by letter of August 14, 1962, gave specific written instructions as to procedure with reference to the defect discovered. No reply by the contractor was made to the architect until October 12, 1962. The contractor's letter of that date advised that the work directed in the architect's letter had been undertaken and a considerable part of the required removal completed. This was the first advice that the contractor considered the instructions of August 14, 1962, to constitute a change in the work in accordance with Article 16 of the General Conditions of the Contract. There was a specific demand for a change order, and the contractor advised that it was keeping a record

of all labor, material and equipment cost incurred. On November 12, 1962, the architect advised that it was his opinion that the work was the obligation of the contractor and refused in unequivocal terms to issue a change order. This letter contained the following paragraphs:

> "This matter must be immediately resolved. On several occasions, we have been advised verbally as to dates when the building would be turned over for occupancy, and this information has been passed on to the owner. It is not now possible to meet these dates. In the meantime, the city is deprived of the use of the New Library which should have been completed months ago.
>
> We are asking you to proceed immediately with the replacement of the topping under those parts of Article 19 of the General Conditions of the Contract as they apply. If this is not done immediately, we must advise the Owner to act under Article 21 of the General Conditions of the Contract and appeal to your Bonding Company."

Nothing further was said or done about this decision of the architect until sometime in August 1965 when the contractor advised the architect that its costs in carrying out the architect's instructions of August 14, 1962, amounted to $49,702.45 and again demanded a change order. This demand was refused by the architect in a letter dated December 27, 1965, in which reference was made to the architect's decision set out in the letter of November 12, 1962. The contractor communicated with the owner about this demand for the first time by letter of January 14, 1966, in which a demand for arbitration was made. There is no evidence that the contractor's contentions were ever made known to the owner prior to this time. The contractor stated that it did not send copies of its letters to the architect to the library board. The owner, through its attorney, A. F. House, re-

jected the demand for arbitration in a letter dated January 31, 1966. The letter contained this paragraph:

> "The Library rejects your demand for arbitration with respect to each and all of the items set forth in your letter of January 14th. Article 40 of the General Conditions provides that 'The demand for arbitration shall be made within a reasonable time after the dispute has arisen.' On November 12, 1962, the architects notified you that no change order would be issued, and, in their opinion, 'the removal and replacement of the topping is the obligation of the contractor.' A delay of more than three years in asserting the claim set forth in paragraphs 1 and 3 of your letter is patently unreasonable. Furthermore, witnesses who were familiar with the inadequacy of your work have moved away, and one has died, and as the Library was not given notice that you intended to contest the ruling of the architects with reference to the items set forth in paragraphs 1 and 3, it has exhausted the funds allotted to it for constructing a new building."

To me, the conclusion that the contractor accepted the decision of the architect is so inescapable that reasonable minds could not come to any other conclusion. I consider that appellee did not conform to the requirements of its contract. I further consider that it waived any right to arbitration that it might otherwise have had. These points were raised in appellants' Point IV. This point related to both estoppel and waiver.

In considering these matters, it is necessary that the applicable terms of the contract be reviewed. They are:

GENERAL CONDITIONS

Article 12 (in part): "He [the Contractor] shall make good any such damage, injury or loss, except such as may be directly due to errors in the Contract

Documents or caused by agents or employees of the Owner, or due to causes beyond the Contractor's control and not to his fault or negligence."

Article 15 (in part): "In giving instructions, the Architect shall have authority to make minor changes in the work, not involving extra cost, and not inconsistent with the purposes of the building, but otherwise, except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written order from the Owner signed or countersigned by the Architect, or a written order from the Architect stating that the Owner has authorized the extra work or change, and no claim for an addition to the contract sum shall be valid unless so ordered. ¶The value of any such extra work or change shall be determined in one or more of the following ways: * * * (c) By cost and percentage or by cost and a fixed fee. ¶ If none of the above methods is agreed upon, the Contractor, provided he receives an order as above, shall proceed with the work. In such case and also under case (c), he shall keep and present in such form as the Architect may direct, a correct amount of the cost, together with vouchers. In any case, the Architect shall certify to the amount, including reasonable allowance for overhead and profit, due to the Contractor. Pending final determination of value, payments on account of changes shall be made on the Architect's certificate."

Article 16: "If the Contractor claims that any instructions by drawings or otherwise involve extra cost under this contract, he shall give the Architect written notice thereof within a reasonable time after the receipt of such instructions, and in any event before proceeding to execute the work, except in emergency endangering life or property, and the procedure shall then be as provided for changes in the work. No such claim shall be valid unless so made."

Article 19 (in part): "The Contractor shall promptly remove from the premises all work condemned by the Architect as failing to conform to the Contract, whether incorporated or not, and the Contractor shall promptly replace and re-execute his own work in accordance with the Contract and without expense to the Owner * * *. ¶ If the Contractor does not remove such condemned work within a reasonable time, fixed by written notice, the Owner may remove it and may store the material at the expense of the Contractor."

Article 31: "DAMAGES—Should either party to this Contract suffer damages because of any wrongful act or neglect of the other party or of anyone employed by him, claim shall be made in writing to the party liable within a reasonable time of the first observance of such damage and not later than the final payment, except as expressly stipulated otherwise in the case of faulty work or materials, and shall be adjusted by agreement or arbitration."

Article 38: "The Architect shall have general supervision and direction of the work. He is the agent of the Owner only to the extent provided in the Contract Documents and when in special instances he is authorized by the Owner so to act, and in such instances he shall, upon request, show the Contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract. As the Architect is, in the first instance, the interpreter of the conditions of the Contract and the judge of its performance, he shall side neither with the Owner nor the Contractor, but shall use his powers under the Contract to enforce its faithful performance by both. ¶ In case of the termination of the employment of the Architect, the Owner shall appoint a capable and reputable Architect against whom the Contractor makes no reasonable objection, whose

status under the contract shall be that of the former Architect; any dispute in connection with such appointment shall be subject to arbitration."

Article 39 (in part): "The Architect shall, within a reasonable time, make decisions on all claims of the Owner or Contractor and on all other matters relating to the execution and progress of the work or the interpretation of the Contract Documents. ¶ The Architect's decisions, in matters relating to artistic effect, shall be final, if within the terms of the Contract Documents. ¶ Except as above or as otherwise expressly provided in the Contract Documents, all the Architect's decisions are subject to arbitration."

Article 40: "ARBITRATION—All disputes, claims or questions subject to arbitration under this contract shall be submitted to arbitration in accordance with the provisions, then obtaining, of the Standard Form of Arbitration Procedure of The American Institute of Architects, and this agreement shall be specifically enforceable under the prevailing arbitration law, and judgment upon the award rendered may be entered in the court of the forum, state or federal, having jurisdiction. It is mutually agreed that the decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the other. ¶ The Contractor shall not cause a delay of the work during any arbitration proceedings, except by agreement with the Owner. ¶ Notice of the demand for arbitration of a dispute shall be filed in writing with the other party to the contract, and a copy filed with the Architect. The demand for arbitration shall be made within a reasonable time after the dispute has arisen; in no case, however, shall the demand be made later than the time of final payment, except as otherwise expressly stipulated in the contract. ¶The arbitrators, if they deem that the case re-

quires it, are authorized to award to the party whose contention is sustained, such sums as they or a majority of them shall deem proper to compensate him for the time and expense incident to the proceeding and, if the arbitration was demanded without reasonable cause, they may also award damages for delay. The arbitrators shall fix their own compensation, unless otherwise provided by agreement, and shall assess the costs and charges of the proceedings upon either or both parties."

The specifications provide: "Re-examination of questioned work may be ordered by the architect and if so ordered the work must be uncovered by the contractor. If such work be found in accordance with the contract documents, the owner shall pay the cost of re-examination and replacement. If such work be found not in accordance with the contract documents, the contractor shall pay such costs."

The contractor relies on Articles 15, 16 and 38 for recovery, but admits that the work was neither a minor change nor an emergency. It does contend that the architect is the agent of the owner under Article 38. Its only excuse for not making an earlier demand for arbitration is that it could not do so until the architect turned down its claim on December 27, 1965. Of course, this excuse should avail the contractor nothing because the architect had clearly made a decision rejecting this contention more than three years previously. Article 40 specifically provides for the continuation of the work during arbitration. The dispute to be determined originally was the decision that the contractor was at fault. The matter of cost, in case of a decision favorable to appellee, would have required a later decision by the architect under Article 15. This would not have been a matter for award under Article 40 incidental to the determination of the matter disputed.

Appellee admitted that it was directed by the archi-

tect on November 12, 1962, to proceed in accordance with Article 19 of the General Conditions of the Contract at its own expense, and that it did proceed until the job was finished. Appellee's president and only stockholder admitted that after receiving that letter, there was no doubt in his mind that it was the opinion of the architect that appellee was not entitled to payment for this work. He also admitted that there was not any doubt in his mind that the request for a change order had been rejected. He also admitted that there was no correspondence about this work between the contractor's letter of December 1962 and that of August 1965. Although he says that there were numerous conversations with the architect and his representative in the intervening period, he does not suggest that there was any indication of an alteration of position in any of these conversations. He states that the architect did tell him in a conversation prior to the letter of November 12, 1962, to keep track of this cost, but did not say that payment would be made. The director of the Little Rock Public Library, the person designated to approve change orders on behalf of appellants, had no idea that appellants were going to be asked to pay for this work prior to receipt of the demand of January 14, 1966.

Mr. William Allen, the partner of the architectural firm having this job under his direction, died on March 13, 1967, before the trial. Mr. Kellogg, the construction inspector for the architects, died on August 25, 1964.

I do not see how it can be said that the request for arbitration, a necessary prerequisite to this action, can be said to have been timely made. For nearly three years every act of the contractor was consistent with the idea that it conceded the correctness of the architect's decision, and inconsistent with any other thought.

The time limitation on a demand for arbitration was clearly stated. The decision of arbitrators was clearly a condition precedent to this action. It was to

be made within a reasonable time after the dispute had arisen. This court has defined, or approved, definitions of the phrase "reasonable time." In a case where the question was whether a notice to terminate a lease was given within a reasonable time, this court approved a definition declaring a reasonable time to be so much time as is necessary under the circumstances for a reasonably prudent and diligent man to do, conveniently, what the contract or duty requires should be done, having regard for the rights and possibility of loss, if any, to the other party to be affected. *Citizens Bank Building* v. *L. & E. Wertheimer, Inc.,* 126 Ark. 38, 189 S. W. 361, Ann. Cas. 1917E 520. In *Federal Land Bank of St. Louis* v. *Goodman,* 173 Ark. 489, 292 S. W. 659, we said:

> "* * * It may be said that what is a reasonable time in any case depends on the circumstances of that particular case, and means such time as a prudent man would exercise or employ about his own affairs. It, of course, does not mean indulgence in unnecessary delay on the one hand, nor does it mean that he is to act without any regard to the circumstances and convenience of transacting business of that kind. It is whatever time is necessary to conveniently do what should be done in the particular case. It has been said that it means such length of time as may fairly, properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances."

A reasonable time is such a period as would suffice for the performance if the one whose duty it was to perform used such diligence, care and prudence as a person of ordinary diligence, care and prudence would use in the performance of a like duty under like circumstances. *Alphin* v. *Matthews,* 175 Ark. 1020, 1 S. W. 2d 79.

While the determination of what is a reasonable time under the circumstances is usually a question of

fact, it becomes a question of law when the facts are clearly established, undisputed or admitted. *First National Bank of Litchfield* v. *Pipe & Contractors' Supply Co.*, 273 F. 105 (CCA 2d 1921); *Colfax County* v. *Butler County,* 83 Neb. 803, 120 N. W. 444 (1909); *Rudolph Wurlitzer Co.* v. *Strand Enterprises,* 7 Ohio Op. 336, 32 N. E. 2d 62 (1936); *Goltra* v. *Penland,* 45 Ore. 254, 77 Pac. 129 (1904); *Hazelton* v. *First Nat'l Stores,* 88 N. H. 409, 190 Atl. 280 (1937); *Ridglea Interests, Inc.* v. *General Lumber Co.*, 343 S. W. 2d 490 (Tex. Civ. App. 1961). This is the case where the question is one of construction of a contract in writing. *Alford* v. *Creagh,* 7 Ala. App. 358, 62 So. 254 (1913). See, also, *Corneil* v. *Swisher County,* 78 S. W. 2d 1072 (Tex. Civ. App. 1935). In *Citizens Bank Building* v. *L. & E. Wortheimer, Inc., supra,* the court reached the conclusion that under the undisputed testimony the time was reasonable and the facts did not call for a submission of that issue to the jury.

Two years delay in bringing suit on a note not arising from the conduct of the adverse party was held to be more than a reasonable time. *Mehelm* v. *Barnet,* 1 N.J.L. (Coxe) 86 (1791). A delay of nearly one year by vendor in obtaining title from a supposed owner upon whom he had some claim for a conveyance was held to be unreasonable. *Saunders* v. *Curtis,* 75 Maine 493 (1883). Three years after notice that a claim on a contractor's bond was disputed was held not to be anything approximating a reasonable time for bringing of suit. *Hurst* v. *Dawson Bros. & Beaver,* 167 Tenn. 572, 72 S. W. 2d 767 (1934). Six weeks delay was held to be in violation of a rule requiring that a motion to set aside a judgment be made within a reasonable time but not later than six months after judgment. *Marquez* v. *Rapid Harvest Co.,* 1 Ariz. App. 138, 400 P. 2d 345 (1965). A delay of three years in moving to set aside a judgment was held to be unreasonable as a matter of law where a rule required the motion to be made within a reasonable time. *Osterhus* v. *King Construction Co.,* 259 Minn. 391, 107 N. W. 2d 526 (1961).

Under the circumstances existing here, I do not see how a conclusion that the time was reasonable could be reached.

Appellee's argument that the time limitation is the time of final payment is not well taken. The language on which it relies is that "in no case, however, shall the demand be made later than the time of final payment." It is quite clear that the expression of this ultimate limit did not in any way operate as a determination of what constituted a reasonable time or to extend the period for demand beyond a reasonable time. If this had been the intention, no reference would have been made to a demand being made within a reasonable time. The clause simply would have read: "The demand for arbitration shall be made not later than the time of final payment." There is nothing ambiguous about the clause in Article 40 and its meaning is clear. The reference to the limitation on demands as the time of final payment actually serves as a diminution of the period to what might be said to be a shorter time for disputes which arise near the conclusion of the performance of the contract.

Appellee also contends that appellants have effectively waived the condition precedent to appellee's right of action and the time limitation contained therein. Mr. House, the attorney for appellants, in a letter of February 22, 1967, stated that "acceptance of final payment [by the contractor] will not prejudice the rights of H. C. Enterprises, Inc. to litigate the claims for additional compensation." I cannot agree that this statement constitutes an express waiver of the arbitration clause by appellants. Mr. House, by his statement, certainly cannot be held to have voluntarily relinquished his client's right to stand upon the requirement of a decision by arbitrators prior to legal action by the contractor. Such is an absurd interpretation of his statement, if due and proper consideration be given the circumstances of the case. Appellants have denied liability throughout this

proceeding. To say that by the above statement appellants' counsel intended to thereby abandon a contractual defense to any possible right of recovery by appellee is preposterous. It seems inescapable to me that the only inference to be drawn from the statement is that the Library Board agreed not to contend that acceptance of final payment waived any breach by the Library Board, as it might have contended under the authority of such cases as *Truemper* v. *Thane Lbr. Co.,* 154 Ark. 524, 242 S. W. 823. The contractor needed to receive payment for the uncontested work which it had performed. By the letter of February 22, 1967, counsel for the appellants agreed to allow it that payment without prejudice to its right to sue, but retained all defenses due the Library Board under the contract. He simply agreed that the contractor would not be giving up any rights.

It is not clear whether appellee is contending that this defense by appellants was barred by failure to plead estoppel. If it is, the point is not well taken because the trustees of the Little Rock Public Library did plead waiver by alleging that appellee had a right to ask for arbitration in 1962 but failed to do so and never informed the Little Rock Public Library of its claim for extra compensation until January 1966.

The distinction between waiver and estoppel has been clearly made by this court in cases such as *Sovereign Camp W. O. W.* v. *Newsom,* 142 Ark. 132, 219 S. W. 759, 14 ALR 903. Estoppel arises only where one party has been innocently induced to change his position for the worse by the act of the other party. Not so, in case of waiver. It is simply the voluntary surrender of a known right. Waiver has been clearly defined in *Sirmon* v. *Roberts,* 209 Ark. 586, 191 S. W. 2d 824, quoting from 67 C. J. 290, 291:

> "* * * the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered

> and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such right, or the intentional doing of an act inconsistent with claiming it. Thus, 'waiver' occurs where one in possession of a right, whether conferred by law or contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it."

I also feel that the trial court should have held as a matter of law that there was no waiver of the requirement for a change order as a basis for extra compensation. I do not agree that any course of conduct was shown which would have constituted a waiver under the circumstances existing here. In all of the previous instances there was no doubt that the work directed was "extra work." None of the previous instances required any removal of work already done by the contractor, except where this was admittedly done because of a specific change in design. None of the previous instances followed an extensive investigation to determine the cause of a defective condition. In none of the previous instances had a change order been specifically and unequivocally refused. In each of the previous instances a change order was issued before payment was made. Nowhere is there an indication by any conduct that the Little Rock Public Library Board intentionally and voluntarily surrendered the right to require a change order before payment for any work, much less the type and nature of work required in this instance. The fact that change orders were issued after the work had been done in some cases did not justify an assumption by the contractor that the requirement of a change order was waived, and it proceeded at its peril. See *Savignano* v. *Gloucester Housing Authority,* 344 Mass. 668, 183 N. E. 2d 862 (1962). Certainly appellee proceeded at its peril in the face of a refusal of a change order after request therefor. In no instance had the owner paid for extra

work where a change order had been refused. The contractor obviously did not think that the requirement of a change order had been waived, else he would not have requested one.

I feel that the trial court should have directed a verdict for appellants.

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

FORD MOTOR CO. ET AL *v.* LANELL G. TRITT, ADM'X

5-4486 430 S. W. 2d 778

Opinion delivered May 13, 1968

[Rehearing granted September 3, 1968]

Wright, Lindsey & Jennings and *Shaw, Jones & Shaw*, for appellants.

Sam Sexton Jr. and *H. Clay Robinson,* for appellee.

CONLEY BYRD, Justice. This personal injury action arising out of the death of Chester L. Tritt was brought by appellee, Lanell G. Tritt, Administratrix, for the benefit of herself as wife and next of kin, against appellant, Burnham-Ray Company, Inc., the local Ford dealer, for breach of an implied warranty of fitness of a 1963 Ford pickup truck. Burnham-Ray filed a third party action against appellant, Ford Motor Company. From a $40,000 judgment in favor of the administratrix against Burnham-Ray Company, and a judgment against Ford Motor Company in favor of Burnham-Ray Company, both Ford and Burnham-Ray appeal, contending (1) that there was no substantial evidence that a manufacturing defect was a proximate cause of the accident; (2) that the provisions in the "Dealer Warranty" precluded a suit for personal injuries; (3) that there was a waiver or estoppel as to breach of a warranty other than the express warranty; (4) that the accident resulted from subsequent acts and omissions and intervening causes; and (5) that the contract between Burnham-Ray and Ford precluded the judgment against Ford.

The allegation with reference to the defect was:

"There is an implied warranty of fitness extending from the defendant to the deceased. This warranty

was breached because the vehicle sold to the deceased had a defective axle and/or right rear wheel which resulted in the collapse of the wheel and proximately caused the death of Mr. Tritt."

Decedent purchased the truck in December 1962. From the beginning, he had a problem with vibration. Burnham-Ray made numerous warranty repairs to the truck, including replacement of the rear axle housing and a new drive shaft. At the time of the fatal accident in March of 1964 at 11:00 p.m., the vehicle had 16,000 miles on it.

Harold Sorey was following some fifty to seventy feet behind the pickup at the time of the accident. The pickup was zigzagging or fishtailing back and forth after it rounded an "S" curve. It then ran off the pavement with the two left wheels, came back on the pavement, ran off the pavement with the right two wheels, came back on the pavement, turned sideways and turned over. Sorey said he saw the right rear wheel break down before the truck turned over.

Dr. Paul Cushman, retired professor of mechanical engineering of the University of Oklahoma and chief engineer of the L & S Roller Bearing Company, testified that he was consulted about a wheel that had been destroyed in the accident. After studying the wheel and learning something about the history of the truck he was asked:

"Q. Now, Dr. Cushman, what was there about the wheel that caused you to want to examine the axle?

A. Well, I knew something about the history of the truck besides what I had seen examining the wheel.

Q. But outside the history of the truck, just the physical evidence of the wheel itself?

A. I will point to several of these rivet holes of having apparently broken down one or two at a time, and the three on this side not being displaced and two of them being practically not displaced at all. Well, because of that I thought that there was evidence of vibration, that vibration had taken place there and gradually—

MR. LINDSEY: We object to that on the grounds that he is giving a conclusion without any basis or foundation for it.

WITNESS: You have to estimate some of these things.

MR. LINDSEY: But he is taking into consideration what he has been told about the vehicle, and we object.

THE COURT: Now his testimony should be confined to what he learned from the pieces themselves.

MR. ROBINSON:

Q. Now, that is what I am asking you, Dr. Cushman, if from the examinations of the wheel itself, did you draw these conclusions?

A. From that alone, I couldn't, but I would say that there were suspicions that there was vibration."

Dr. Cushman stated definitely that the right rear axle was defectively manufactured and that the defect would cause a vibration that would be transmitted to the wheel. Due to objections by appellant's counsel, Dr. Cushman was prevented from testifying as to what effect the defective axle and vibration would have on the wheel. The proffer of proof was that:

"If permitted by the Court to do so, Dr. Cushman would have further testified that the wobble caused by this defective axle could have caused and would have caused the eventual breakdown of the wheel, that it would have caused the rivets to fail and they would have failed progressively and the wheel would have broken down."

The wheel introduced into evidence consisted of a rim and a spider. The spider (the part of the wheel that is bolted to the hub of the truck) was attached to the rim at four points by the use of three rivets at each point. As introduced the spider was broken loose from the rim at three of the four points. Opposite the point remaining intact, the outside of the rim was crimped or bent toward the inside of the vehicle as if it had received a horizontal impact in that direction.

Thus it is seen that from the record there is no direct evidence of any manufacturing defect in the wheel, nor is there evidence to show that the defective axle was the proximate cause or could have been the proximate cause of the wheel's collapse.

It is well settled in the law that before a party can be held liable in damages for a wrong, the person claiming the damages must show that the wrong was the proximate cause of the damages suffered. *Garner* v. *Missouri Pac. Railroad Co., Thompson, Trustee,* 210 Ark. 214, 195 S. W. 2d 39 (1946).

Appellee argues, however, that if a wheel that is not defective will not collapse when the vehicle is being driven under normal conditions, a fortiori, a wheel that does collapse must be, in some respect, defective. This is, in effect, an attempt to apply the res ipsa loquitur doctrine. That doctrine is not applicable. *Ford Motor Co.* v. *Fish,* 232 Ark. 270, 335 S. W. 2d 713 (1960). This is a much different situation than that involved in *Vandermark* v. *Ford Motor Co.,* 37 Cal. Rptr. 896, 391 P. 2d

168 (1964), upon which appellee relies, for there the alleged defective brake mechanism was destroyed in the accident. Furthermore, Judge Traynor there pointed out facts showing that the brake mechanism at the time of the injury was in the same condition as when it left the factory. Here we have a wheel used from December of 1962 to March of 1964 with some 16,000 miles of use, and the record is devoid of any proof relative to the use of the vehicle which might affect the condition of the wheel. Under such circumstances, it is almost imperative that expert testimony be used to show that a defect in the wheel was a manufacturing defect.

Therefore, we hold that there was insufficient evidence to show any manufacturing defect in the wheel or that the defect in the axle was a proximate cause of the collapse of the wheel. This of course calls for a reversal of this case; but since the reversal is for a lack of proof of causation, a matter which may be supplied by expert testimony, we are remanding same for a new trial. *Continental Geophysical Co.* v. *Adair,* 243 Ark. 589, 420 S. W. 2d 836 (1967).

In view of the possibility of a new trial, we point out that the issues with respect to waiver or estoppel as to any breach of warranty are, under the facts in this case, issues that were properly submitted to the jury. It is certainly not a question of law on review, for one seldom waives or is estopped with respect to a defect of which he had no knowledge. Furthermore, we think that whether the accident resulted from subsequent actions and omissions and intervening causes was also a fact question.

The issues between Ford Motor Company and Burnham-Ray Company have to do with the warranty which provides:

"Ford Motor Company has warranted to the Dealer who, pursuant to his sales agreement with the Com-

pany, hereby, on his own behalf, warrants to the owner each part of this Ford vehicle to be free under normal use and service from defects in material and workmanship for a period of 24 months from the date of delivery to the original retail purchaser or until it has been driven 24,000 miles, whichever comes first. This warranty shall be fulfilled by the Dealer (or if the owner of the vehicle is traveling or has become a resident of a different locality by any authorized Ford dealer) replacing or repairing at his place of business, free of charge including related labor, any such defective part.

* * *

"This warranty is expressly in lieu of any other express or implied warranty, including any implied warranty of merchantability or fitness, and of any other obligation on the part of the Dealer."

The waiver of the implied warranty of merchantability or fitness certainly does not protect Burnham-Ray from liability, for to do so would be unconscionable under the Uniform Commercial Code within the meaning of Ark. Stat. Ann. § 85-2-719 (3) (Add. 1961), which provides:

"(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

As between Ford and Burnham-Ray, however, Ford takes the position that the phrase "consumer goods," as used in the above statute, must take the definition given to consumer goods in the U. C. C., Ark. Stat. Ann. § 85-9-109(1), (4) (Add. 1961), which provides:

"Goods are

(1) "consumer goods" if they are used or bought

for use primarily for personal, family or household purposes;

* * *

(4) "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service or if he has so furnished them, or if they are raw materials, work in process or materials used or consumed in a business. Inventory of a person is not to be classified as his equipment."

Since § 85-9-109(1) also contains a definition for inventory, Ford argues that as between it and the dealer the automobile was inventory with the dealer and that the unconscionable clause does not apply. We do not agree, for as we read § 85-2-719(3), the first sentence—*i. e.,* "Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable"—is not limited by the second sentence to consumers.

The composition and assembly of the modern automobile is such that as between a manufacturer and a dealer there is relatively little difference between the position of the dealer to the manufacturer as to consequential damages for latent defects and the position of the ordinary purchaser to the dealer. As to whether a waiver of the implied warranty of merchantability or fitness is unconscionable, a fact question is presented where it is shown that the defect is latent and such that the automobile dealer is not charged with notice or knowledge of the defect and with notice or knowledge that it could result in consequential injuries or damages. Nothing could be more unconscionable than to hold the dealer, a mere conduit between the manufacturer and the ultimate consumer, liable for consequential damages on breach of an implied warranty for a fault or defect caused by the automobile manufacturer of which the dealer had no notice or knowledge. The defect, as shown by the record here, was obviously one which a reasonable inspection would not have disclosed, and under the cir-

cumstances we hold that the unconscionability of the exclusion of the implied warranty between the dealer and Ford was a fact issue.

Reversed and remanded.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the remand of this case because I consider that the offer of proof by the witness Cushman to have been improperly excluded and that it would have made a jury question. I take the position that if Cushman had testified in the exact words of the offer of proof, reasonable minds might well have drawn an inference that the rivets, or some of them, failed gradually rather than serially, until one or more became so weak that the wheel broke down suddenly.

FORD MOTOR CO. ET AL *v.* LANELL G. TRITT, ADM'X

5-4486 430 S. W. 2d 778

Opinion delivered September 3, 1968

[Original opinion delivered May 13, 1968.]
[Rehearing granted September 3, 1968]

CONLEY BYRD, Justice. In our original consideration of this case, *Ford Motor Co.* v. *Tritt, Admx.*, 244 Ark.

883, 430 S. W. 2d 778 (1968), we reversed the judgment entered in favor of appellee because there was no evidence in the record to show that the defect in the rear axle of the pickup truck was the proximate cause of the collapse of the wheel attached to the hub thereof.

On rehearing appellee contends that this court should not reverse a case because of the exclusion of admissible evidence that was excluded at the request of the party claiming that the record is insufficient for lack of such proof. For authority appellee cites *White* v. *Moffett,* 108 Ark. 490, 158 S. W. 505 (1913), and *Western Union Telegraph Co.* v. *Hearn,* 110 Ark. 176, 161 S. W. 1025 (1913).

In the *Western Union* case the telegraph company claimed that Mrs. Hearn's cause of action should fail because she did not allege and prove that she gave notice to the company within sixty days of her intention to claim damages. This was required by the blank upon which the message was sent. After pointing out that Mrs. Hearn's offer of proof to show compliance with the sixty-day stipulation had been excluded by Western Union's objection, it was there held that a party can not on appeal take advantage of a defect in the proof that was brought about by a ruling of the court made at his own request.

To the same effect, see *Zainudin* v. *Meizel,* 259 P. 2d 460, (Cal. Ct. App. 1953); *Pataray* v. *Lee Hing,* 37 Hawaii 14 (1944); and *Union Pacific Ry. Co.* v. *Harris,* 63 Fed. 800 (8th Cir. 1894). The reasoning behind the rule is stated in the *Union Pacific* case as follows:

> "... The defendant will not be allowed to thus take advantage of his own wrong, or the errors of the court induced on his own motion, and then compel the plaintiff to suffer the consequences. Such a proceeding would be the merest trifling with the court.

> . . . If the rule were otherwise it would encourage and reward unfounded and groundless objections to the plaintiff's evidence . . ."

The record here shows that Dr. Cushman, except for an objection by appellants sustained by the trial court, would have testified that the wobble caused by the defective axle could have caused and would have caused the eventual breakdown of the wheel. The trial court, after examination upon voir dire, had ruled that Dr. Cushman was a competent expert to testify on the subject. We find that the exclusion of the proffered testimony was erroneous.

Under the authority of the *Western Union* and *White* cases, *supra,* it follows that the rehearing must be granted and the judgment of the lower court affirmed.

CARL W. WIDMER *v.* ROY G. WOOD AND HELEN L. WOOD

5-4548 427 S. W. 2d 537

Opinion delivered May 13, 1968

Carl W. Widmer, pro se.

Hardin, Barton, Hardin & Jesson, for appellees.

CONLEY BYRD, Justice. Appellant Carl W. Widmer appeals from a decree sustaining a plea of res judicata to his action for specific performance. His grounds for reversal are that the trial court erred in not holding all his requested admissions of fact as being admitted, in not granting his motion for summary judgment, and in sustaining the plea of res judicata. Since a plea of res judicata is in actuality a plea of confession and avoidance, we do not reach the first two points because we hold that the trial court was correct in entering a summary judgment upon the plea of res judicata.

Appellant's complaint is based upon a sales agreement with appellees Roy G. Wood and Helen L. Wood, under date of October 19, 1961, for the sale of lands located in Sequoyah County, Oklahoma. After appellant had filed requests for admissions of fact and motions for summary judgment, appellees filed a motion for summary judgment specifically pleading as a defense a judgment entered in the Sebastian Circuit Court on May 12, 1967, between the same parties. Attached to appellees' motion for summary judgment was the circuit court judgment which contained detailed findings of fact and a detailed statement of the issues between the parties. The circuit court judgment was the result of a suit brought by Roy G. Wood against Carl W. Widmer to recover the abstract to the real estate involved. It showed that as a defense to the recovery of the abstract Carl W. Widmer pleaded the same breach of the sales agreement upon which he here relies. The trial court there specifically found the issues relative to the sales agreement in favor of Roy G. Wood. The motion for summary judgment was filed on July 18, 1967, and the record shows no response by appellant Widmer to this motion. The order granting the summary judgment on the plea of res judicata was entered September 1, 1967, more than 30 days after the filing of the motion for summary judgment.

"In *Mid-South Ins. Co.* v. *1st Nat. Bk., Ft. Smith,* 241 Ark. 935, 410 S. W. 2d 873 (1967), we held that the motion for summary judgment requires the opposition to remove the shielding cloak of formal allegations and to demonstrate a genuine issue as to a material fact. Under the circumstances we think the plea of res judicata was well taken and that the trial court was correct in awarding the summary judgment. Nor can we find anything in *Southern Farmers Ass'n* v. *Wyatt,* 234 Ark. 649, 353 S. W. 2d 531 (1962), that would require us to arrive at a different conclusion.

Affirmed.

YARNELL ICE CREAM CO., INC. *v.*
J. A. WILLIAMSON, ET UX

5-4399 428 S. W. 2d 86

Opinion delivered May 21, 1968

Barrett, Wheatley, Smith & Deacon, for appellant.

Pickens, Pickens & Boyce, for appellees.

CARLETON HARRIS, Chief Justice. This is an appeal

from an order of the Jackson County Circuit Court, setting aside a judgment in favor of Yarnell Ice Cream Company, appellant herein, and granting a new trial. J. A. Williamson and Mary Frances Williamson, appellees herein, instituted suit against appellant, alleging severe personal injuries to Mrs. Williamson and property damage loss to Mr. Williamson, as the result of a collision which occurred in the city of Newport on April 4, 1963. On that date, Mary Frances Williamson was a passenger in the automobile owned by her husband, J. A. Williamson, and driven by appellees' daughter, Sharon Pugh. The Williamson vehicle stopped for a red traffic light at the intersection of Malcolm and Pecan Streets, and was struck from the rear by appellant's truck, which was being driven by an employee, Robert Davis. According to the evidence, the Williamson car was knocked 119 feet, and the truck, which continued on after the collision, came to rest 180 feet west of the intersection. The defense offered by appellant at the trial was that the brakes on the truck had failed, and Davis was accordingly unable to stop the vehicle. Mr. Davis, 25 years of age, and employed by appellant for seven years, testified that he had had no trouble at all with the brakes until just before the accident; that he had just gone through a green light, and as he approached the Williamson car, pressure was applied to the brakes, and they "collapsed." The witness testified that he then pulled the emergency brake, and shifted the truck into third gear, but by that time, he had struck the rear of the Williamson automobile. The truck was carrying a load of 170 fifty-pound boxes of sweet cream. Davis testified that he endeavored to have the truck repaired before leaving Newport, and that he observed the cause of the failure of the brakes:[1]

"Well, the brake line had rubbed on part of the truck on the under part and it had rubbed so thin that when I applied the brakes it burst the hose and all the fluid run out."

[1]Appellant did not offer the brake line into evidence.

The driver testified that traffic was approaching from the opposite direction (though this was disputed by appellees' witnesses), and when asked why he did not turn to the right and drive his car up over a curb where a service station was located, replied, "Sir, after the brakes went out, I was busy trying to stop it."

Gerald Holbrook, a barber, who operates a shop at the intersection of Malcolm and Pecan, heard the crash, and then looked around to observe what was happening; he testified that Davis appeared to be having difficulty getting the truck under control: "He was racing the gears, you know, like he was trying to get it in gear and it was bucking and jumping trying to slow down, you know, to get it stopped." He said that the driver subsequently told him that "his brakes went out."

Mr. J. T. Rocka of Searcy testified that he worked on this truck on December 12, 1962, and had fixed the brakes on that occasion. He added that the truck was kept in excellent condition at all times. The witness said that it is possible for the hydraulic brake system on a truck to become ineffective because of a ruptured brake line without any prior warning of any defect, and that this is particularly true of a loaded truck.

Mr. James Turner of Kensett, also a mechanic, agreed with Mr. Rocka.

The jury returned a verdict for appellant, and when appellees filed a motion asserting that the verdict was against the preponderance of the evidence, the court set aside the jury verdict and granted a new trial. Appellant argues that in returning a verdict for the ice cream company, the jury unanimously agreed that Davis did not commit any act of negligence which caused or contributed to the collision. The company relies upon testimony of Davis, Holbrook, Rocka, and Turner, and also points out that the two investigating officers testified that Davis told them, after the accident, that his brakes had

failed as he approached the stop light. Pat Babb, one of the officers, also testified, "In checking the truck, I found out that it had no brakes."

It is asserted that the trial judge granted the motion because he misconstrued the case of *Houston* v. *Adams,* 239 Ark. 346, 389 S. W. 2d 872, and felt that that case compelled a setting aside of the verdict.

We find no error. In numerous cases we have said that, where a judgment is set aside, the sole issue is whether the trial judge abused his discretion. In *Bowman* v. *Gabel,* 243 Ark. 728, 421 S. W. 2d 898, quoting *Twist* v. *Mullinix,* 126 Ark. 427, 190 S. W. 851 (this case quoting from *Blackwood* v. *Eads,* 98 Ark. 304, 135 S. W. 922), we said:

" ' ' "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. " * * *'

" ' * * *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.' "

Certainly, we cannot say that it is here evident that the court "manifestly abused" its discretion. At the outset, let it be stated that there is no allegation of any

negligence on the part of the driver of the Williamson vehicle. The driver of this car, observing the law, had stopped at a red light, and was simply waiting for the light to change when struck by appellant's truck. According to the evidence of Davis, the truck driver, he had been traveling approximately 20 to 25 miles per hour prior to striking the Williamson car. Under the undisputed evidence, this estimate of speed seems somewhat conservative, since the testimony reflected that the Williamson automobile (though stopped) was knocked 119 feet—over a third of the length of a football field.[2] Not only that, but the truck, although Davis, according to his statement, was frantically pulling on the emergency brake, and shifting gears in the truck to try and stop it, traveled approximately 180 feet before being brought to a standstill. Mr. Babb testified that the "whole rear end" was torn out of the automobile. Certainly, a much greater speed is indicated than that testified to by appellant's driver. There is also evidence that Davis could possibly have avoided this crash by turning his vehicle to the right, though it does appear that he might have struck a telephone pole had this been done.[3]

Appellant states that the trial court interpreted our decision in *Houston* v. *Adams, supra,* to require every motor vehicle to be equipped with two separate braking systems, each independent of the other, and each capable of stopping the vehicle in substantially the same distance,[4] and appellant states that this is an erroneous

[2]During the trial, appellant endeavored to show through cross-examination that the automobile was not "knocked" 119 feet, but rather, was "pushed" 119 feet; however, the witnesses who were interrogated as to this point were unable to give a definite answer. The only positive testimony was that the car was knocked for that distance.

[3]Of course, Mrs. Williamson and her daughter both testified that, while they were stopped at the light, there was no traffic meeting them.

[4]This interpretation does not appear in either the order signed by the court, nor in its memorandum opinion, in which the court, in finding that the verdict was clearly against the preponderance of the evidence, merely cited *Houston* v. *Adams.*

interpretation. It is argued that Ark. Stat. Ann. § 75-724 (Supp. 1967) only requires that the hand brake be capable of stopping and holding the vehicle. The statute reads as follows:

"75-724. Brakes.—(A) Brake equipment required.

(1) Every motor vehicle, other than a motorcycle or motor-driven cycle, when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two [2] separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two [2] wheels. If these two [2] separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two [2] wheels."

We agree that the statute does not require two separate braking systems, each capable of stopping the vehicle in substantially the same distance, nor did *Houston* v. *Adams, supra,* so hold. We did, however, in that case, hold that the hand brake must have stopping power, and the statute so requires. In the present case, there were circumstances (herein pointed out) that the trial court could have found clearly indicated the truck was being operated at a much greater speed than stated by appellant's driver, or the hand brake had practically no stopping power.

We find no abuse of discretion by the court in setting aside the verdict.

Affirmed.

JAMES PAUL DANIEL *v.* PATSY MARIE DANIEL

5-4561 428 S. W. 2d 73

Opinion delivered May 21, 1968

[redacted]

Penix & Penix, for appellant.

Marcus F. Fietz and *Arthur L. Adams,* for appellee.

CARLETON HARRIS, Chief Justice. This is a child custody case. Appellant, James Paul Daniel, 22 years of age, is a member of the United States Air Force. He was married in 1962 to appellee, Patsy Marie Daniel, at a time when he was 17 years of age, and she was 16. When barely 18, appellant joined the Air Force, and has been in the service since that time. Two little girls were born to the marriage, Paula Marie, 4 years of age, and Pamela Sue, 2 years of age. In July, 1966, Daniel was sent to Vietnam, where he was stationed until the last of April, 1967. In December, 1966, according to the evidence, appellant ceased receiving mail from his wife, but after a month, he received a letter from her asking for a divorce. James was told by Patsy, according to his evidence, that she loved another man. Subsequently,

appellant filed an action, seeking a divorce and custody of the children, but later withdrew the petition for divorce, and confined his suit to a prayer for custody of the little girls. His wife filed a counter-claim for divorce, custody of the children, and support and alimony. After hearing evidence, the court denied a divorce to appellee, but held that appellant had failed to show that his wife was unfit to have custody of the minor children, and such custody was awarded to Patsy. The court further directed that the sum of $125.00 per month be paid for child support. From the decree so entered, appellant brings this appeal.[1] For reversal, it is first asserted that Mr. Daniel should have been awarded custody of the children, and it is also argued that the amount awarded for support was excessive.

After a close study of the record, we have reached the conclusion that the Chancellor's findings should not be disturbed. Appellant testified that, when he, by virtue of his military duties, had to leave his wife, a mobile home which had been purchased by the parties was left parked at her mother's house, the monthly payments being $60.75 . . . a 1962 Comet automobile was also left with her. He said that, after being in the service two months, he made an allotment, and after going to Vietnam, he sent her practically all of his money, except about $10 a month; that this, for some period of time, amounted to about $500.00 per month. The witness stated that, when he reenlisted in August, 1966, he received a bonus, and sent her $850.00, but that, despite receiving these amounts of money, the mobile home had been lost due to her failure to make payments. Appellant testified that, after returning home, he went to his wife's apartment, knocked on the door, and a man, J. C. Foreman, came to the door; that the two little girls were standing in the apartment, calling the man "Daddy." Daniel said that the door was slammed in his face, but,

[1]Appellee gave notice of a cross-appeal, but same has apparently been abandoned, since, in her brief, she urges that the decree should be affirmed.

after his continual knocking, it was opened again, and the man said that he was a repairman. Appellant is presently stationed at the Larado Air Force Base, and he testified that he was applying for a transfer to the Blytheville Air Base; that, if the transfer is approved, he will be able to go to Cash, where he will live with his parents, after finishing his regular work day at Blytheville. He desires that the custody of the children be given to him, and he stated that his parents would keep the children. Daniel said that, despite all that had happened, he would still be willing to talk with his wife about a reconciliation.

Grover Gent testified that he was the employer of a man named J. C. Foreman (who had worked for him for two months), and that Patsy Marie Daniel would generally bring Foreman to work. He said that she regularly would pick Foreman up when he finished his work about 11:00 P.M. W. E. Cooksey, manager of an apartment house in Jonesboro, rented appellee an apartment, and he said that Mrs. Daniel informed him that she had a husband and two children, and that her husband worked at Berry's truck shop.

A brother and brother-in-law of appellant testified that they had observed Patsy in the car with J. C. Foreman, appellee having her arms around Foreman. The brother-in-law stated that appellee was a messy housekeeper, and that the children were not taken care of: "Their clothes was dirty, their faces was dirty and their hair wasn't combed, and dirty dishes setting around, setting on the floor." His wife agreed with this testimony, and said that the children were not properly dressed in the winter. She also said that appellee spent all afternoon with a "preacher." Appellant's mother, 51 years of age, and father, 67 years of age, testified that they owned a farm near Cash, had plenty of room to keep the children, and would be glad to do so. Both testified that their daughter-in-law neglected the children.

Appellee testified that it had been necessary for her to work at various times after her marriage to appellant; that she worked at the sandwich department at the base, and worked at a drive-in as a car hop. According to her testimony, she turned all checks over to her husband, prior to his going overseas. The witness stated that the trailer was repossessed after she had gone to Little Rock to try and find work.[2] According to Patsy, the couple had become heavily involved in debt, because of purchases made, including the automobile, and $800.00 worth of furniture. She said that most of the money was spent in paying debts, including payments to the bank for money which her husband had borrowed. She denied that she did not care for the children properly, denied that she had an affair with the minister heretofore referred to, and denied that she had had improper relations with Foreman. She said that her husband had accused her of being intimate with several men; that he mistreated the children, having whipped them with a leather belt.[3] Patsy's mother, Mrs. Simms Decker, during a period when her daughter was working, kept the children from the last of December, 1966, until May, 1967.

Counsel for appellant urges that we give this case a real *de novo* hearing, and suggests that, all too often, we rely upon the findings of the trial court, commenting that the Chancellor had the opportunity to observe the litigants, and that we will not reverse his findings unless they are clearly against the preponderance of the evidence. Counsel is correct in stating that we do rely, in large measure, upon the findings of the trial court, and we are convinced that this is the better practice; though it is repetitious, we do think that the trial court is in a better position to render fact findings than this court, and we have commented that this is particularly

[2]She was subsequently employed at Dobbs House in Little Rock.

[3]Appellant testified, "I may have lightly, but I didn't beat them."

true in a child custody case. In *Wilson* v. *Wilson,* 228 Ark. 789, 310 S. W. 2d 500, we said:

"* * * 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."

There can be no entirely satisfactory conclusion of a contested child custody case. We, of course, are prone to be sympathetic with the position of the appellant, who is serving his country, and has been in Vietnam, and it does appear that his wife has not spent her time grieving over his absence. However, it is noticeable that there is no evidence of appellee drinking, carousing, or frequenting undesirable places. Likewise, there is no actual evidence of adultery between appellee and Foreman, though he seems to have had a close association with appellee; the Chancellor, we think stated it correctly, when he said:

"Gentlemen, it is just this simple. She had a complaint for a divorce on the grounds of general indignities on his part and she has utterly failed to show anything at all. Any claim of infidelity, she denies, but there is sufficient conduct to put a reasonable person on notice that she might be guilty of it. I will have to deny her divorce and I will give her custody of the children. There is no showing that she is not a fit and proper person to have custody of the children and that will be my decree."

It will also be observed that the evidence was not entirely one-sided, though there is no testimony that would indicate that appellant was guilty of intimate

relations with other women. At any rate, whatever our thoughts in the matter, the fact remains that this court has, many times, said that children of tender years will not be taken from a mother solely because of her infidelity to the husband. *Harris* v. *Gillihan,* 226 Ark. 19, 287 S. W. 2d 569, and cases cited therein.

We have many times said (in fact, so many that a citation of authority is unnecessary) that the paramount consideration in child custody cases must always be the welfare of the child. In taking this rule as the guiding star, we cannot say that the court was wrong in awarding custody of the little girls to their mother. Appellant's mother is 51 years of age, and his father is 67, and appellant himself did not seem to feel that his mother was a proper person to have the custody of the children. This is evidenced by the fact that appellant wrote a will just before he went to Vietnam providing that if anything happened to him and his wife, appellee's mother was to have the care of the two children. He also admitted that he had, both by mail, and in talking to his wife, stated that his mother was not the proper one to have custody of the two little girls, though he said that this was based on the fact that his wife "told me about some things that my parents done." It might also be added that, though appellant states that if he or his parents be given custody of the children, he would apply for a transfer to the Blytheville base, there is no assurance that the transfer would be granted.

It is also argued that the award of $125.00 per month is excessive. Let it be remembered that this money is not being paid for the benefit of the wife, but rather the decree makes it plain that the amount is for child support. With living costs mounting each day, we are unable to agree with appellant that this amount is excessive. It also appears that $105.00 of this sum will be paid by an allotment from the government, that amount being provided for children. It thus appears that appellant will actually be called upon to pay only $20.00.

Of course, under a change of circumstances, appellant can always move to modify the provisions of the decree.

Appellee's counsel is allowed an additional fee of $100.00 for services in connection with this appeal.

Affirmed.

IMOGENE M. WILLIAMSON ET AL *v.* CLAUDE CHILDERS, ADM'R ET AL

5-4463 428 S. W. 2d 85

Opinion delivered May 21, 1968

Osborne W. Garvin and *Imogene M. Williamson,* for appellants.

Moncrief & Moncrief, George E. Pike and *Macom, Moorhead & Greene,* for appelles.

GEORGE ROSE SMITH, Justice. W. C. Honeywell, Jr., whom we will call the Decedent, died intestate on March

1, 1964, survived by collateral heirs on both sides of his family. His administrator filed the present petition for a determination of heirship with respect to the Decedent's three tracts of land in Arkansas county (which have since been converted by public sale into cash). This appeal and cross appeal are from the probate court's determination that Tracts 1 and 2 were ancestral estates coming by the Decedent's mother and that Tract 3 was a new acquisition.

There is no longer any substantial dispute about Tracts 1 and 2. The decedent, an only child, inherited those two tracts from his mother, who died intestate in 1960. The trial court was unquestionably right in holding those two tracts to have been maternally ancestral. On the maternal side the Decedent was survived by an uncle, who was his mother's half brother, and by a number of cousins who were descendants of six deceased half brothers and half sisters of the Decedent's mother. The trial court made a slight error in the division of the proceeds of sale of Tracts 1 and 2, but in the course of preparing their appellate briefs the several attorneys for the maternal heirs have reached agreement that a one-seventh interest goes to the surviving uncle and that the other six-sevenths interest is to be divided per stirpes among the surviving cousins. The cause will be remanded for the entry of a decree to that effect.

The maternal heirs question the trial court's finding that Tract 3 was a new acquisition. The proof is meager. By stipulation the parties introduced an abstract of title which shows that on February 18, 1948, the Decedent's mother conveyed Tract 3 to him by warranty deed. The abstract pages contain a number of printed entries for the insertion of information about the instrument being abstracted. With respect to the deed now in question the abstractor typed the letters "OK" after the printed entry, Consideration. That same "OK" was used to describe the consideration for

almost every deed in the chain of title. We are not sure just what it was intended to mean.

Upon the scant proof in the record we cannot say that the probate court's decision is against the weight of the evidence. An administrator's petition for a determination of heirship is similar to a bill of interpleader, in that the rival claimants are called upon to assert their claims. Here we think it fair to apply the rule that prevails in interpleader cases: Each claimant is regarded as a plaintiff and must establish his claim by a preponderance of the evidence. *Connelly* v. *Thomas,* 234 Ark. 1024, 356 S. W. 2d 430 (1962).

The maternal heirs did not meet that burden. For an estate to be ancestral there must have been no other consideration than that of blood. *Martin* v. *Martin,* 98 Ark. 93, 135 S. W. 348 (1911). The record contains no testimony about the transaction between the Decedent and his mother. Manifestly the most important available evidence was the exact recitation of the consideration in the deed. The abstract of title shows that the deed is of record, but the claimants failed to produce a certified copy. That deficiency in the proof is so significant that it tips the scales in favor of the trial court's conclusion. In closing, we should add that we attach no importance to the fact that the abstract of title does not indicate that any revenue stamps were attached to the Decedent's deed. It was evidently not the abstractor's practice to mention such stamps, because there is no reference to them anywhere in the entire abstract, which includes many conveyances.

Affirmed in part and reversed in part.

B. BRYAN LAREY, COMMISSIONER OF REVENUES *v.* DUNGAN-ALLEN, INC.

5-4565 428 S. W. 2d 71

Opinion delivered May 21, 1968

Lyle Williams, L. Phillip McClendon, John F. Gautney and *Hugh L. Brown,* for appellant.

Smith, Williams, Friday & Bowen, for appellee.

GEORGE ROSE SMITH, Justice. The Arkansas Gross Receipts Tax, usually called the sales tax, is basically a 3 percent excise tax levied upon gross proceeds derived from sales of tangible personal property. The statute, however, also imposes the tax upon a number of transactions that might not otherwise be thought to fall within the scope of what was originally a retail sales tax. Here we are called upon to interpret that section of the act which levies the tax upon "[p]rinting of all kinds, types and characters, including the service of overprinting, and photography of all kinds." Ark. Stat. Ann. § 84-1903 (d) (Repl. 1960). Our task is that of construing the phrase, "photography of all kinds."

Dungan-Allen, Inc., is a corporation engaged in commercial photography. During the sixteen-month pe-

riod now in question the company's gross receipts were $65,079.79. The company filed no gross receipts tax return and paid no gross receipts tax. The Commissioner of Revenues assessed the tax upon $44,170.08 of the company's gross receipts, conceding that the rest of its revenue was exempt, as it involved out-of-state transactions, sales to national banks, and other nontaxable activity. Dungan-Allen followed the statutory procedure of paying the assessment under protest and bringing suit to recover the money. This appeal is from a decree directing a refund of the entire amount paid.

Dungan-Allen contends primarily that about 85 percent of its revenue is recompense for services not falling within the statutory phrase, "photography of all kinds." Secondarily it insists that the assessment in its entirety is so discriminatory as to be unconstitutional. The chancellor sustained both contentions.

The first contention is the more important of the two. Upon that issue the facts are hardly in dispute. Rodney Dungan and Willie Allen, who conduct their business in corporate form, are skilled commercial photographers. Much of their work is done for advertising agencies, magazines, television, and large advertisers such as banks and insurance companies. Their business is decidedly different from that of a neighborhood photographer who devotes most of his time to making pictures of family groups, wedding receptions, high school graduating classes, and similar subjects.

Dungan and Allen, in the course of their business, frequently have long consultations with their patrons about matters such as advertising layouts, promotional planning, material for magazine publication, and other activities going beyond the mere taking and developing of pictures. An excerpt from Dungan's testimony:

> "We take pictures—the least of what we do. We spend a lot of time planning, deciding which way

> it would be better to do what, get props together, picking the right locations. There's a thousand other things before the actual picture taking. Actually, that's a minor point. Anybody can make a picture, and it's the arranging and the doing what is necessary to make a photograph that has . . . a meaning, that does what you want it to do."

In billing customers Dungan-Allen stresses its services rather than its photographic prints. A $25 hourly charge is made for services, but the prints are furnished for $2 each—a sum too small to include any profit. Thus for a day's work an advertising agency might be charged $200 for photographic services and $10 for five different pictures. In this litigation the taxpayer insists that the incidence of the gross receipts tax should be similarly divided between nontaxable revenue from professional services and taxable revenue from the taking of pictures.

We do not so interpret the statute. Hardly any tangible article or commodity is priced solely on the basis of its constituent materials. Invested capital, education or technical training, professional skill, labor, and overhead expenses, or some combination of them, can be expected to contribute to the value and selling price of the finished product. A familiar example is the conversion of a pound of steel into watch springs worth a thousand times as much as the original metal.

A similar question was before us in *Ferguson* v. *Cook*, 215 Ark. 373, 220 S. W. 2d 808 (1949). There a monument dealer sought to deduct from the taxable selling price of his tombstones the labor cost necessary to make and install them. In holding that the entire selling price was subject to the tax we relied upon the language, which is still in the statute, forbidding any deduction from the selling price "on account of the cost of the property sold, labor service performed, interest paid, losses or any expenses whatsoever." Ark. Stat. Ann. § 84-1902 (d). There we said: "This language appears

to mean, and we so construe it, that where one sells an article in the preparation of which for sale he has expended labor, which adds to its value and was necessary to make it salable, he must pay the sales tax on the price received, without deduction for the value of the labor performed.''

So in the case at bar. Regardless of how Dungan-Allen bills its customers, what its patrons are buying and paying for are photographs. No doubt the photographers' experience and skill are essential to their work, but it is plain enough that the company's customers would not ordinarily pay for the exercise of that skill if it did not enhance the value of the end product. Counsel for the Commissioner conceded in oral argument that the tax should not apply in instances in which Dungan-Allen were paid for services only, such as consultations, without any photographs being involved. That concession is well taken, but the principle cannot be extended to the point of separating the sale of the photograph from the exercise of that skill ''which adds to its value and was necessary to make it salable.'' *Ferguson* v. *Cook, supra.*

Secondly, the taxpayer asserts unconstitutional discrimination in the legislative or administrative failure to tax physicians for the making of x-rays or architects for the making of blue prints, which, it is said, also fall within the purview of ''photography of all kinds.'' We find no merit in that contention. Classification is permissible if the differences are reasonably related to the purpose of the law. *Jacks* v. *State,* 219 Ark. 392, 242 S. W. 2d 704 (1951). Dungan-Allen is paid to produce and sell photographs suiting the particular needs and demands of its customers. By contrast, a physician is engaged to diagnose and treat illnesses, not to produce and sell x-rays. An architect is employed to design and supervise the construction of buildings, not to produce and sell blue prints. The situations are so fundamentally different that no prohibited discrimination can be said

to exist in the language of the statute or in its administration.

Reversed.

ARKANSAS COMMERCE COMMISSION *v.* KANSAS CITY SOUTHERN RAILWAY CO.

5-4564 428 S. W. 2d. 83

Opinion delivered May 21, 1968

Claude Carpenter Jr., for appellant.

Thomas Harper, for appellee.

PAUL WARD, Justice. This is an appeal from the trial court's judgment reversing the action of the Arkansas Commerce Commission (appellant) wherein it denied the Kansas City Southern Railway Company (appellee) authority to close its station located at Winthrop in Little River County.

The above proceeding was initiated and prosecuted in accord with the provisions of Ark. Stat. Ann. § 73-809b. (Supp. 1967) which, in parts material here, 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 . . . 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 . . . and such agency station may thereupon be closed . . . ninety [90] days after date of filing of such notice unless a petition for the re-establishment of such . . . 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 . . . 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, *dualization or modification, or whether operating economies would result therefrom.*" (Our Emphasis)

It is not disputed here that both parties followed the procedural steps outlined in the statute. That is: appellee gave the notice and statement; twenty-five qualified electors filed a petition, opposing the closing of the station, with appellant, and; in due time a hearing was held.

The Commission (appellant), on June 19, 1967, found: (a) The continuance of the station is required by

the public convenience and necessity, and; (b) Discontinuance of the station should not be granted, and it was so ordered. This order was appealed to the Pulaski Circuit Court which, after reviewing the record, reversed the Commission and directed it to enter an order allowing appellee to discontinue the Winthrop agency station.

On appeal appellant relies on two separate points for a reversal. *One,* the trial court erred in finding the station was operated at a loss for one year, and; *Two,* the trial court erred in finding that operating economies will result to appellee consistent with public convenience and necessity if the station is closed.

One. The decisive issue here is whether appellee showed, by "standard accounting procedures", that the station operated at a loss (as required by the statute).

It is undisputed that the exhibits introduced by appellee before the Commission showed the station did operate at a loss for the required time. The only question then is, was the showing arrived at "according to standard accounting procedures"? This was one of the decisive issues in the case of *CRI&P RLD. Co.* v. *Ark. Commerce Comm.,* 243 Ark. 661, 420 S. W. 2d 917. There the Commission and the trial court held against appellant because no such showing was made. There we said: "There was no testimony to show that the method used by appellant . . . was according to standard accounting procedures required" . . . by the statute. That is not the situation in the case here under consideration, as is shown by the undisputed testimony of appellee's witness, Mr. Johnson.

"Q. Is this allocation of 50% to origin and destination stations standard railway accounting procedure?

"A. Yes, sir, it is.

"Q. Is the allocation of system expenses which you have described in Exhibits No. 1 and No. 2 standard railway accounting procedure?

"A. Yes, sir."

No evidence was offered by appellant to contradict Johnson's testimony, and none to show he was not competent and qualified to testify.

Since we conclude the trial court must be affirmed on this point it becomes unnecessary to discuss point *Two* which is only an alternative ground for an affirmance but not for a reversal.

Affirmed.

MARION BOBO *v.* G. C. SEBREE ET AL

5-4574 429 S. W. 2d 95

Opinion delivered May 21, 1968

[Rehearing denied July 15, 1968.]

Ross & Ross, for appellant.

Reinberger, Eilbott, Smith & Staten, for appellees.

PAUL WARD, Justice. This is an appeal by Marion Bobo (appellant) from a chancery decree denying him a lien for material and labor under the provisions of Ark. Stat. Ann. §§ 50-601 et seq. (1947). The factual situation out of which this litigation arises, and about which there is no dispute, is summarized below.

FACTS. In February, 1966 Mr. G. C. Sebree, his wife and her mother (appellees) contracted with A. F. Kelley to construct a dwelling on a parcel of land owned by them and located in Spring Lake Addition south of Pine Bluff. To finance the project, appellees borrowed $20,414 from a savings and loan association. Appellant, as a subcontractor, furnished and installed 178 yards of carpeting in the dwelling for which he charged $1,613.15.

Before construction was completed Kelley encountered financial difficulties which caused certain materialmen to file a suit on November 4, 1966 to perfect liens on the property. On December 9, 1966 appellant filed an Intervention which contained, in substance, the following allegations:

(a) On July 25, 1966 he sold to appellees and Kelley the carpeting as stated above.

(b) The carpeting was used in the dwelling on appellees' property (described in detail).

(c) On October 5, 1966 notice was given to appellees that a lien would be filed against the property on or after October 15, 1966.

(d) On October 20, 1966 said lien was filed in the office of the Circuit Clerk in Jefferson County.

(e) Appellees are indebted to him in the amount of $1,613.15 which is a first lien on said property.

The prayer was for judgment and a lien.

Appellees, in answer to above Intervention, stated that appellant had not substantially complied with the statutory requirements for perfecting his lien.

After a hearing, based on testimony and exhibits, the trial court, in a written statement, found: "In view of the fact that the materialmen's lien law is in derogation of the common law, it must be strictly construed. See *Dix* v. *Olds,* 242 Ark. 850, 415 S. W. 2d 567." Accordingly the court held that appellant was entitled to a judgment against Kelley for the amount prayed, but that such judgment did not constitute a lien on the property of appellees. The reason given by the court for said holding was that the Notice "did not state from whom the same (the amount) is due."

On appeal appellant contends that the trial court erred in holding that the "Notice of claim" did not substantially comply with Ark. Stat. Ann. § 51-608 (1947). For reasons hereafter stated, we agree with appellant.

Section 51-608, in all parts material here, reads:

> "Every person, except the original contractor, who may wish to avail himself of the benefit of the provisions of this act . . . shall give ten days' notice before the filing of the lien, as herein required, to the owner, owners or agent, or either of them, that he holds a claim against such building or improvement, setting forth the amount and from whom the same is due."

We now examine the "Notice" to determine if it did in fact constitute a compliance with the above statute. We are here concerned with only two items; (a) the amount due appellant and (b) who owed the amount to appellant. The Notice began with "Marion Bobo . . . claimant and sub-contractor" and was direct to appellees (naming them) as property owners, and to A. F.

Kelley as the contractor, and was, in form and substance, as follows:

> Notice is hereby given: that appellant has a claim against the following property (describing appellees' property) to secure the amount of $1,613.15 for furnishing and installing said carpeting.

The Notice was signed by appellant's attorney.

Item (a), the amount claimed, presents no problem since the trial court, in the written opinion, specifically found that the Notice "stated the amount of the claim".

(b) In considering the issue here presented, we should first determine whether the lien section involved must be *strictly* construed or whether it should be *liberally* construed. It is our conclusion that, in this case, the section should be liberally construed to effect its purpose.

There are many decisions by this Court wherein it was stated that the lien statute should be *strictly* construed and there are many decisions where we said it should be *liberally* construed. Among the first classifications are: *Flournoy* v. *Shelton & Co., et al,* 43 Ark. 168; *Van Etten* v. *Cook,* 54 Ark. 522, 16 S. W. 477; *St. Louis Iron Mountain & Southern Ry. Co.* v. *Love,* 74 Ark. 528, 86 S. W. 395, and the recent case of *Dix* v. *Olds,* 242 Ark. 850, 415 S. W. 2d 567 relied on, apparently, by the trial court. Among the cases which applied to the *liberal* construction rule or hold a *substantial* compliance with the statute is sufficient, are: *Anderson* v. *Seamans,* 49 Ark. 475, 5 S. W. 799; *Buckley* v. *Taylor,* 51 Ark. 302, 11 S. W. 281; *Speer Hardware Co.* v. *Bruce,* 105 Ark. 146, 150 S. W. 403; *Bruce Brown* v. *Turnage Hardware, Inc.,* 181 Ark. 606, 26 S. W. 2d 1114; and, *Geisreiter* v. *Standard Lbr. Co.,* 187 Ark. 893, 63 S. W. 2d 347.

The above apparent conflicts in the decisions are not as real as they appear. Briefly stated, it appears from the noted opinions, that the *strict* construction applies where there is a doubt as to whether the subject matter comes within the purview of the statute. For example, in the *Dix* case, supra, the claimant sought a "lien on all the lands . . . and improvements described in the bill of assurance" for work performed "on a street or roadway surfacing contract". There we properly applied the *strict construction* rule, and denied the lien. This Rule is very well stated in 18 R. C. L., at page 879, in these words ". . . . though a mechanic's lien is said to be a favorite of the law, a statute cannot be so extended as to be applied to cases which do not fall within its provisions."

In the case under consideration here we do not have a situation like that in the *Dix* case. Here, no one questions the facts; that appellant furnished appellees' home with carpeting: that it cost $1,613.15; that appellees knew he furnished it; that he filed his Notice in due time, and; that the Notice appraised appellees of all these facts, and they were in no way misled.

Applying the rule of *liberal* construction and substantial compliance, we conclude the case must be, and it is hereby, reversed.

HARRIS, C. J., not participating.

FOGLEMAN & BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I disagree with the majority because I do not feel that the notice to the property owners was in substantial compliance with the lien statutes. The deficiency was in the failure to state from whom the amount claimed was due. The notice was directed to both the owners and the contractor. There is no language from which the recipient of this notice could ascertain whether appellant contended

that the amount was due from the owners or the contractor. This is important because, in addition to a lien on the property, appellant was entitled to personal judgment against one or the other, but not both. If the amount was alleged to be due from the contractor, then the owners could call upon him and the sureties on any performance bond to protect their property from the lien. It would have been necessary for them to have proceeded promptly in this regard in order to hold a surety. The stage of construction at the time of the notice is not apparent, nor is there any indication whether final settlement between the owners and general contractor had been made. If it had not, but was imminent, then it was necessary for the owners to be clearly advised as to whom the liability was asserted against in order to adequately protect themselves in these dealings.

The contention of appellant in the trial court was based entirely on an alleged contract with the owners, not the general contractor. Now he asserts that his notice was sufficient to advise the owners that he was claiming that the amount was due from the contractor, the trial court having held that the contract was with the contractor, not the owners. Thus, he has pointed up the significance of the statutory requirement that the notice state from whom the amount is claimed to be due.

I agree with the majority in the distinction made as to strict and liberal construction of these lien statutes, but I fear its absorption in this salutary effort has obscured the real issue in this case. While the majority opinion states that the notice apprised the owners of certain facts, it is nowhere pointed out how the owners were advised from whom the amount was due. The majority opinion has, in effect, wiped the words "and from whom the same is due" from the statute—a prerogative which is not ours. In *Scott* v. *LeGrande*, 225 Ark. 1022, 287 S. W. 2d 456, this court said that a notice was defective because it did not set forth *in the notice* "the amount claimed and from whom the same is due." This

is a rule of property which should not be departed from so effortlessly.

I therefore respectfully dissent. I would affirm the decree of the lower court.

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

JOE HOYT MERRITT *v.* STATE OF ARKANSAS

5343 428 S. W. 2d 66

Opinion delivered May 21, 1968

Louis W. Rosteck, for appellant.

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

LYLE BROWN, Justice. Appellant Joe Hoyt Merritt, an inmate at the Arkansas Penitentiary, moved to dismiss two charges of felonious escape pending in the Pulaski County Circuit Court. Two terms of court intervened since the filing of the charges, and that fact would

ordinarily entitle him to have the charges dismissed. His motions were denied and he appeals.

Merritt was committed to our penitentiary in 1960. In 1962 he was brought to Pulaski County for mental observation and he escaped. He was apprehended and returned to the penitentiary. That escape resulted in a charge being filed in the Pulaski Circuit Court. In July 1963 he was returned to Pulaski County for the purpose of arraignment on that charge. Arraignment was not perfected because he escaped again. That flight brought on a second charge of felonious escape. Within a few months he was in the Texas Penitentiary. He remained there until 1964, at which time he was delivered to our penitentiary authorities to serve the balance of his sentence. So far as the record discloses, Pulaski County authorities had no knowledge of Merritt's return to this State.

Pulaski authorities apparently learned of Merritt's whereabouts in 1966, at which time he was still serving out time in our penitentiary. He was again brought before the court and entered pleas of not guilty. At that time more than two terms of court had elapsed since the filing of the charges. Before the cases were reached for trial, Merritt's motions to dismiss were filed. Those motions were grounded on Ark. Stat. Ann. § 43-1708 (Repl. 1964) which requires that an accused who is incarcerated be brought to trial before the end of the second term after the filing of the charges; however, delay which happens "on the application of the prisoner" effects a waiver.

The problem before us should here be succinctly stated. In the absence of a showing of knowledge on the part of Pulaski authorities of the return of Merritt, is he entitled to a dismissal of the charges?

When Merritt made his successful escape he removed himself from the protective provisions afforded him by § 43-1708. That is true for two reasons:

(1) The purpose of the statute is to implement Ark. Const. Art. 2, § 10, which guarantees a speedy trial in criminal cases. While the constitutional and statutory provisions were enacted to prohibit oppressive delays, they do not preclude the rights of public justice. See *Beavers* v. *Haubert,* 198 U. S. 77 (1905). The rights of public justice and the theory that the provisions afford relief to fugitives in all cases are not harmonious. Kansas has a statute almost identical with our § 43-1708. We agree with the holding in *State* v. *Aspinwall,* 252 P. 2d 841 (Kan. 1953), to the effect that an escaped fugitive removes himself from the protective coverage of the statute.

(2) The phrase, "unless the delay shall happen on the application of the prisoner," includes any affirmative act by the accused which prevents a speedy trial. *State* v. *Hess,* 304 P. 2d 474 (Kan. 1956). Merritt's escape and refuge in Texas at a time when the first charge was being processed for trial effected postponement of the proceedings.

We are next faced with a more puzzling question. When our penal authorities brought Merritt back to the penitentiary from Texas, was he ipso facto reinvested with the privileges afforded him by § 43-1708? Considerable research afforded no pointed answer. We start with the premise that the provisions for a speedy trial are not inflexibly mandatory. See *Leggett* v. *Kirby,* 231 Ark. 576, 331 S. W. 2d 267 (1960). This court, in the exercise of sound discretion, should endeavor to blend the two cardinal principles afforded by the provisions —the prohibition against vexatious delay and the rights of public justice—and produce an answer which harmonizes with both principles. Guided by that approach, we conclude that in the absence of a showing that the authorities in Pulaski County were made aware of Merritt's return and took no action within the prescribed two terms, Merritt's rights under the recited statute did not reinvest.

Although the facts were slightly different, we are encouraged by the holding in *State* v. *Pederson,* 88 N. W. 2d 13 (Minn. 1958). There the fugitive returned to the State but did not make known his presence and request a trial. It was held that he waived his rights by escaping and only a return *and a request for trial* could restore his rights under a statute limiting the time for prosecution.

Any other rule would tend to defeat the rights of public justice as it pertains to returning fugitives. To hold otherwise would make it possible for a fugitive from justice to return to this State, become incarcerated under an alias in any one of our more than seventy-five county jails for a period of two terms of court and thereby nullify a pending felony indictment. The same immunity could be gained by being so confined on one of the several penal farms in the State, or in either of the branches of the penitentiary.

An escapee being returned to our penitentiary and who feels aggrieved by the pendency of other charges, can without the least difficulty make known his return and his desire that those charges be processed. Either a word to his warden, a letter to the trial court, or a letter to this court, or the federal district court, would accomplish the result. For Merritt, who feloniously fled the State to avoid trial, to rest in silence for a statutory period and thereby nullify the charge, does not comport with the rights of public justice.

Affirmed.

JAMES ROBERT EVERS, D/B/A SUBURBAN MOTORS *v.* GUARANTY INVESTMENT CO., A CORPORATION

5-4578 428 S. W. 2d 68

Opinion delivered May 21, 1968

Kirsch, Cathey & Brown, for appellant.

Dudley & Burris and *Vernon J. King,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellant contends that reversible error was committed in the trial court's granting appellee a summary judgment. The action was brought by appellee, a finance company, to recover from appellant, a used car dealer, on the latter's endorsement and guaranty upon a number of past due notes given by purchasers of automobiles. Appellant alleged that these notes were void because given as a part of a scheme and plan of appellee to violate the Arkansas

usury laws. After appellant had answered a request for admissions made by appellee, appellee took a discovery deposition of appellant. Appellant had previously taken the discovery deposition of John V. Baltz, president of appellee company. Upon the record so made, appellee's motion for summary judgment was granted upon the ground that the defense of usury is not available to appellant by reason of his participation in what he had alleged to be the plan to violate the usury laws.

We do not agree with the trial judge. In considering a motion for summary judgment, the evidence and all reasonable inferences which may be drawn therefrom must be considered in the light most favorable to the party against whom the judgment would go. *Russell* v. *City of Rogers*, 236 Ark. 713, 368 S. W. 2d 89; *Deltic Farm & Timber Co.* v. *Manning,* 239 Ark. 264, 389 S. W. 2d 435; *Akridge* v. *Park Bowling Center, Inc.,* 240 Ark. 538, 401 S. W. 2d 204. A summary judgment may not be granted if there is any genuine issue as to any material fact. *Westinghouse Credit Corporation* v. *First National Bank of Green Forest,* 241 Ark. 287, 407 S. W. 2d 388. The burden rested on appellee to show the absence of any genuine or justiciable fact issue and to establish that appellant had no defense when the facts on the record considered were viewed in the light most favorable to appellant. *Wirges* v. *Hawkins*, 238 Ark. 100, 378 S. W. 2d 646; *Van Dalsen* v. *Inman,* 238 Ark. 237 379 S. W. 2d 261; *Kratz* v. *Mills,* 240 Ark. 872, 402 S. W. 2d 661.

Viewing the record as we must, we find material fact issues. The notes in question were given over a period of several months' dealings between the parties. It was admitted that appellant made a sale of an automobile to each of the makers of said notes, after having reached an agreement as to the base price to be paid therefor, independent of any voice or control of the finance company. Thereafter, the notes were delivered to

appellant made on forms it furnished to the dealer. They were payable to appellant, but he executed an unconditional guaranty on each note, along with his transfer of all his interest in the vehicle sold. Appellee was under no obligation to buy or accept any particular note from appellant. The dealer did not deal with any other finance company and recommended appellee to his customers. There is a conflict in the testimony as to whether appellee had ever refused any note offered by appellant. Appellant testified that the finance company never turned down a financing arrangement offered, but he admitted that they did, on occasion, say that too much money was involved on certain transactions. Baltz was sure that they did refuse to discount some notes. Some of the notes accepted were signed in blank at the office of appellant and taken by appellant or his authorized agent to appellee's office where an officer of the finance company filled it in, adding to the price appellee was to receive for the vehicle a "discount" previously agreed upon and the amount of any insurance premium. Some of the notes were taken to the finance company by the customer, either alone or in company with appellant or his agent. Appellant states that the notes were all filled out at the office of the finance company, but Baltz testified that some of them were filled in when brought to him by the dealer who figured the discount and interest. Baltz was certain that some notes were brought in with the amount already filled in, without any previous arrangements for the purchase of the note by appellee. At any rate, the purchaser decided the term of each note which was payable in monthly installments. After the price and term were negotiated, the dealer usually called the finance company which advised the amount of the monthly payment. Neither party made any credit investigations. According to Baltz, repossessed automobiles were delivered to the dealer, who repaired and sold them and turned the proceeds over to appellee together with reimbursement for any loss. Evers stated that one of the vehicles repossessed was sold by appellee.

The parties disagree as to the amount of this "discount." Appellant says that there was a stated rate, but Baltz testified that it varied. Baltz states that they told Evers the amount in each case and the option to accept or reject was up to Evers. Baltz says that they merely purchased the notes for collection and depended entirely on the dealer's endorsement.

Under this evidence, a trier of the facts might well determine that these transactions really constituted loans by appellee to appellant, and if the discount was greater than ten per cent, per annum, were void for usury. In such a case, we find the following statement from Restatement of The Law of Contracts, § 532, to be applicable:

> "The sale of a pecuniary obligation of a third person at a discount greater than the rate of interest legally permissible is not usurious, but if the seller assumes responsibility for the payment of the obligation, the transaction, if intended as a device for a loan, is usurious."

Even if these transactions are found upon trial not to constitute loans to appellant, the trial court might well find that the parties were engaged in a common scheme or design to obtain usurious contracts from appellant's customers, and were equally cognizant of the illegality thereof. If so, neither would have any right of recovery against the other. *Womack* v. *Maner,* 227 Ark. 786, 301 S. W. 2d 438, 60 ALR 2d 1271.

Perhaps other questions of law or fact, or both, may be involved on trial of this case, but, as illustrated hereinabove, there clearly was no basis for a summary judgment in favor of appellee.

The decree is reversed and the cause remanded for further proceedings.

HARRIS, C. J., dissents.

STELLA MAY WOOD *v.* HENRY J. SWIFT, TRUSTEE OF THE T. E. (DICK) DILL TRUST ESTATE ET AL

5-4527 428 S. W. 2d 77

Opinion delivered May 21, 1968

Swift & Alexander, for appellees.

J. FRED JONES, Justice. This is an appeal from a decree of the Mississippi County Chancery Court, Osceola District, dismissing a complaint filed by the appellant, Stella May Wood, to set aside a deed executed and delivered by her to T. E. Dill.

The appellant, Mrs. Wood, was 87 years of age at the time of trial. Her husband had been dead some thirty odd years and she had lived alone at her home in Luxora, Arkansas, since her only son was killed in line of duty as a federal prohibition officer in 1934. From about 1934, Mrs. Wood had owned, in her own right by inheritance and purchase, a 160 acre farm in Mississippi County. A part of the farm had been taken for highway purposes leaving 115.74 acres which Mrs. Wood leased for cash. T. E. Dill was some sixteen years younger than Mrs. Wood and he owned a farm of some 400 acres near Mrs. Wood's farm. In 1950 when Mrs. Wood was 70 years of age and Mr. Dill was 54, through the encouragement of mutual friends, they became acquainted with each other. Upon Mr. Dill's second or third visit with Mrs. Wood in 1950, he assured Mrs. Wood, upon inquiry, that he was divorced and not married, so their acquaintance quickly developed into deep affection attended by constant companionship.

In August 1960, Mrs. Wood conveyed the title in her farm to Mr. Dill by warranty deed, which, except for the description and covenants of warranty, recited as follows:

"WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That I, Stella May Wood, a widow, for and in consideration of the sum of Ten ($10.00) Dollars to me in cash in hand paid by T. E. Dill, and other good

and valuable consideration had and received by me from him, and in consideration for invaluable services rendered and to be rendered me by Grantee, do hereby grant, bargain, sell and convey unto the said T. E. Dill, and unto his heirs and assigns forever, subject to the reservation hereinafter expressed, the following lands lying and being situated in the Osceola District of Mississippi County, Arkansas, to-wit:

* * *

Grantor hereby expressly reserves unto herself during the full term of her natural life the right of possession and occupancy in and to the above described property and the rents and profits arising therefrom, it being her specific intention by this instrument to convey to the Grantee herein the full fee title to said real estate, subject only to the life estate herein reserved by her.

TO HAVE AND TO HOLD the same unto the said T. E. Dill, and unto his heirs and assigns forever, together with all and singular the tenements, appurtenances and hereditaments thereunto belonging or in any wise appertaining, subject to the life estate herein reserved in Grantor."

This deed was dated August 31, 1960, and was filed for record on September 2, 1960. It was prepared by Mrs. Wood's attorney upon Mrs. Wood's request and at Mr. Dill's direction. Mrs. Wood then went to her attorney's office and signed the deed. The deed was delivered to Mr. Dill after it was recorded and the relationship of the parties continued as before. About two and one-half years after the deed was executed and delivered, Mr. Dill suffered a heart attack and moved into the home with Mrs. Wood. About the time Mr. Dill moved into the home with Mrs. Wood, she executed a will devising her home, without remainder over, to Mr. Dill, and Mr. Dill also executed a will including all his real property in a testamentary trust for the benefit of his three

daughters and his grandchildren. On June 14, 1965, Mr. Dill died and after his death, Mrs. Wood filed the present action to set aside the deed for lack of consideration, mutual mistake, failure to conform to the intent of the parties as orally agreed, unilateral mistake, unjust enrichment, undue influence, fraud and duress.

Upon trial of the case, the chancellor dismissed the complaint for want of equity and upon appeal, Mrs. Wood designates the following points for reversal:

> "The court erred in finding and holding that the plaintiff failed to carry the burden of proof in every instance and in dismissing plaintiff's complaint for want of equity and in failing and refusing to grant the relief prayed for in the complaint and amendment thereto.
>
> The court erred in refusing to receive in evidence and consider in this case the Arkansas Supreme Court opinion in the *Dill* v. *Dill* case reported in volume 209 Arkansas Reports at pages 445, *et seq.*"

Primarily, a fact question was presented to the chancellor in this case and upon trial de novo in this court, we are of the opinion that the decree of the chancellor is not against the preponderance of the evidence.

Aside from the land involved here, the Dill estate was by no means insolvent. Mrs. Wood had one sister in a rest home in Missouri, and another in California at the time of Mr. Dill's death. Mrs. Wood had a brother living at the time the deed was executed, and according to her own testimony she told her brother that she intended to deed the property to Mr. Dill, but did not ask her brother's advice in the matter and did not advise him of the details of the transaction. The brother has since died, and the two sisters are her nearest relatives.

From appellant's own testimony, Mr. Dill made overtures to meet her in 1950 and she finally permitted

him to call on her. Upon her inquiry, he assured her that he had obtained a divorce and had been separated from his wife for six years. They quickly became very close friends and constant companions. According to Mrs. Wood's own testimony, Mr. Dill visited her several times a day, seven days a week, four weeks per month, and twelve months per year; and their relationship grew stronger as the years went by from 1950 when they met, to 1960 when she deeded the property to him, and that intimate relationship continued for an additional five years until Mr. Dill's death.

Concerning the execution of the deed, appellant testified:

> "[M]y health was beginning to fade in 1960 and I was afraid I would not be able to carry on much longer and I worried quite a bit about it and Mr. Dill, in order to relieve me of all of these worries, offered to take over for me.
>
> * * *
>
> He offered to take over, look after the farm, see it was planted, collect the rents and see I got my rent and he would see I was taken care of if I got sick, he would see my doctor bills and medical bills were paid and I had a home as long as I lived. After my death—*we never figured I would out-live him*—after my death he was to collect the rents and divide the profits with my two sisters, my oldest sister is in Sikeston, Missouri in a nursing home and the other sister is in California. He was to divide the income between them and after their death he was to have full possession.
>
> * * *
>
> I decided I would rather give him a deed to it than leave it in a will because I was wanting to save him inheritance taxes. He would have to pay inheritance tax if he inherited through a will." (Emphasis supplied).

Appellant denied receiving the Ten Dollars consideration recited in the deed and contended that she intended, and that Mr. Dill knew, that their full agreement as to looking after and caring for her during her lifetime, and then paying the rents from the farm to her sisters during their lifetime, was to have been incorporated into the deed. Appellant's life estate was very clearly incorporated in the deed and certainly the chancellor could have concluded that ten years of close daily companionship, as testified by the appellant, would have included "services performed" as sufficient consideration to support a deed for the remainder following a life estate. According to appellant's testimony, she trusted Mr. Dill to have their entire agreement incorporated in the deed; she did not read the deed when she signed it, and after she delivered it to Mr. Dill, she did not see it again until after Mr. Dill's death on June 14, 1965, when she read the deed for the first time, and learned that all of their agreement was not incorporated in the body of the deed.

According to appellant's testimony on cross-examination, she had been receiving cash rent from her farm, but after the deed to Mr. Dill the land was leased on a crop rent basis, which enabled them to transfer the cotton allotment to more productive land. Mr. Dill went to the farm two or three times a week and appellant went with him on many occasions. Mr. Dill took appellant anywhere she wanted to go, and when Mr. Dill was on his way to Florida he was advised that appellant was ill and he returned without finishing his trip.

Mrs. Johnnie Meadows, one of the daughters of Mr. Dill, testified:

"Q. Did you or did you not know such a deed was in existence?

A. No, sir, I certainly don't know a thing about it.

Q. Did you, after your father's death, visit with Miss Stella?

A. Very often.

Q. During that period of time did you and she discuss this land and her getting it back?

A. On the telephone a few times we have. I don't think on visits we ever did.

Q. That was the only mention of that?

A. On the telephone we have discussed it.

Q. Did you offer to release your interest in these lands to her on the basis that you knew your father had not put any money in these lands or paid any consideration for them?

A. No, not on that basis because I didn't know about their business particularly.

Q. What was the basis?

A. Because Miss Stella and I have always been real good friends and that friendship means more than the money or the land.

Q. Do you know whether or not your father put any money in this land?

A. I have no idea."

A cousin of Mr. Dill's visited him in 1963, and was introduced to appellant. He testified as follows:

"Well, she showed me around her house and her flowers and Dick told her I was his cousin, used to work for him, used to live in Osceola and she

told me how fond she was of Dick and how much he helped her in her business, that she gave him that farm for what he had done for her, she wanted to do something for him, he had been so good to her, she didn't know what she would have done without him.

* * *

. . . [S]he said he had really been good to her. She said, 'Now, I have been good to him too.' She went ahead to say she had somebody to stay there with her, he was not staying there regularly at that time, I don't think, but she enjoyed being with him, he had helped her so much with her business that she wanted to do something for him."

Mr. Swift, an attorney and the trustee of the Dill estate, prepared a lease for Mr. Dill and Mrs. Wood and testified as follows:

"That was the first occasion I had met Mrs. Wood and she proceeded in the course of our discussion to tell me how Mr. Dill acquired the property, advised me she made him a gift of this property prior to this time and was very proud of it and gave me the reason for having done so. * * * She was pleased to have made him a gift because of what he had done for her during their long relationship. She went into that relationship at great length. She was very proud of the fact Mr. Dill had brought some happiness to her. Always in Miss Stella's mind when I met with her were three paramount things that had stayed in her mind. One was upon her husband's death his family had beat her out of some property. That was always a constant bother to her. She was always obsessed with the anguish of having lost her son many years before and third, she was so pleased that after Mr. Dill came into her life she had somebody to look after her. * * * She talked about the fact she had an income from it.

That's using her terminology. There was no doubt in her mind she had a life interest in the property."

Mr. Swift testified that Mrs. Wood had told him that she had given the land to Mr. Dill, reserving to herself a life estate; that the relationship between Mrs. Wood and Mr. Dill seemed to be more of a mother-son relationship; that Mrs. Wood had inquired as to whether she had successfully avoided inheritance tax in the execution of the deed; and that she had expressed satisfaction in the disposition of the property under the testamentary trust executed by Mr. Dill.

On recall, Mrs. Wood testified that about the time Mr. Dill moved into her home, she told Mr. Dill that she wanted to make a will, and how and why she wanted it made, and that she dictated her will to attorney Hyatt; that the will was prepared by him and in it she left her home and everything to Mr. Dill. In discussing the will, Mrs. Wood testified:

"Q. At the time the will was discussed, was any discussion had as to where he should live when he was managing these properties, the farm lands?

A. At my death he was to maintain the home and keep it for his own personal home, occupy it, I suppose.

Q. Where would it go at his death?

A. There was no provision made after his death.

Q. There were no strings attached to the house?

A. No, as long as he lived he was to maintain it as a home.

Q. Was that a part and parcel of the agreement you had at the time you delivered the deed?

A. No, this was not mentioned when I delivered the deed."

In January 1945, Mr. Dill was granted a divorce from his wife by a decree of the Mississippi County Chancery Court and on appeal to this court the decree was reversed. *Dill* v. *Dill,* 209 Ark. 445, 191 S. W. 2d 829. The appellant contends that the chancellor erred in not admitting into evidence, and considering at the trial of this case, our opinion in the *Dill* case, *supra.* We are of the opinion that the chancellor was correct and committed no error on this point. There was no controversy in the case at bar concerning Mr. Dill's marital status at the time of his death and there is no contention that he was ever married, or ever proposed marriage, to the appellant. It is true that the appellant testified that Mr. Dill told her that he was divorced and that she believed him and had confidence in him. Appellant satisfied herself as to Mr. Dill's marital status on his second or third visit and it would appear that her confidence in him at that stage of their acquaintance was based more on infatuation, or desire for companionship, than on what Mr. Dill told her. On this point appellant testified as follows:

"A. There was one or two of my old friends, kind of gossipy, told me they heard he never had the divorce then I would approach him on the subject and he would deny it and tell me to quit worrying about that, that Judge Barham had got him a divorce and it was final.

* * *

Q. I believe you told people on various occasions you made this gift to Mr. Dill?

A. I don't remember bragging about it, I remember telling one or two of my closest friends I had fixed the deed, had it made out to him.

* * *

Q. Miss Stella, do you recall the heart attack Mr. Dill had?

A. Yes.

Q. You brought him from the hospital to your home?

A. Yes.

Q. That's when he began living with you?

A. Yes, two and a half years before he died. He had no home to go to and I offered him my spare room and he accepted it and he liked it so well he just stayed on.

Q. After you brought him from the hospital these so-called friends called you again and warned you he was not divorced?

A. I believe so."

We can see no connection between the character of Dill as it might have been revealed by the record in previous divorce proceedings, and the character of Dill and his overt acts in dealing with appellant during the ten years of their close association prior to the execution of the deed, and the additional five years after its execution and delivery as revealed in the record before us.

The record does not reveal the ages of appellant's sisters, but the record does reveal that no provision was made for them in the will appellant dictated to her attorney. The record does reveal, from appellant's own testimony, that it never occurred to her or Mr. Dill that she would outlive him, and the record also reveals, from appellant's own testimony, that the reason she conveyed the property by deed rather than a will, was to save Mr. Dill inheritance tax on the transaction.

We agree with appellant's contentions, and with the cases cited in support of them, that support deeds are

recognized in this state; that when a deed is executed in consideration of future support and maintenance and the grantee fails to fulfill the provisions of the deed, the grantor may sue at law for damages, or may sue in equity to cancel the deed for failure of consideration. We agree with the appellant that "the real consideration in a deed can always be shown by parole evidence." We also agree that a suit may be maintained in equity for revision of a deed for condition broken, the rationale of the doctrine being that an intentional failure upon the part of the grantee to perform the condition constituting the consideration for a deed, raises the presumption of fraudulent intention from the inception of the contract, and therefore vitiates the deed based upon such consideration. Such contracts are in a class peculiar to themselves, and where the grantee intentionally fails to perform the contract, the remedy by cancellation, as for fraud, may be resorted to regardless of any remedy the grantor may have had also at law. *Goodwin* v. *Tyson,* 167 Ark. 396, 268 S. W. 15. While reformation of a deed or contract for fraud or mistake is a proper matter for equitable jurisdiction, the burden of proving fraud, mistake or lack of consideration rests upon the one alleging it.

We conclude that the chancellor's finding that appellant failed to meet the burden of proof in the case at bar is not against the preponderance of the evidence, and that the decree of the chancellor should be affirmed.

Affirmed.

JOHN A. RAUCH *v.* FIRST NATIONAL BANK IN LITTLE ROCK

5-4510 428 S. W. 2d 89

Opinion delivered May 21, 1968

Smith, Williams, Friday & Bowen, for appellee.

CONLEY BYRD, Justice. John A. Rauch appeals from a judgment in favor of appellee First National Bank in Little Rock upon a guaranty signed by Rauch to accommodate John L. Copeland, Jr. For reversal he contends that his signature on the guaranty was obtained by fraudulent misrepresentation on the part of Finley Vinson, officer of the First National Bank; that the note or other instrument executed by John L. Copeland, Jr., was void under Ark. Stat. Ann. § 34-1604 (Repl. 1962,) having been executed for payment of a gambling obligation; and that, since the bank waived its rights as to the guaranty of Barron Lange upon the same indebtedness, it thereby waived its rights as to appellant Rauch under Ark. Stat. Ann. § 85-3-606 (Add. 1961).

The record shows that John L. Copeland, Jr., when the guaranty agreement was executed, was manager of

the Riverdale Country Club and had gotten into financial troubles because of some gambling losses. He approached Mr. Finley Vinson of the First National Bank relative to an $11,000 loan, which the bank refused to make upon the security offered. Subsequently Mr. Copeland informed Mr. Vinson that Rauch, William E. Darby, William S. Miller, Jr., and Barron Lange would sign his note. Pursuant to a conversation between Vinson and each of the guarantors a separate guaranty instrument was drawn for each party. Rauch's guaranty agreement covered $4,250; Darby's $4,250; Miller's $1,500; and Lange's $1,000. Upon execution of the agreements a total of $11,000 was disbursed, and the record indicates that some of the money was used to pay off gambling debts that Copeland had incurred. Barron Lange died while Copeland's payments were current and the time for filing claims against his estate expired before Copeland defaulted.

Rauch bases his claim of fraudulent misrepresentation upon the allegation that Vinson assured him the bank had sufficient collateral to cover the $11,000 note. Needless to say, Rauch's testimony was controverted by Vinson's, and under the circumstances we must hold that there was substantial testimony to support the verdict of the trial court sitting as a jury.

We find no merit in Rauch's contention that Copeland's obligation was void under § 34-1604, *supra.* A close reading of that statute shows that it voids obligations only where the money is "lent to be bet at any gaming or gambling device." There is no testimony here showing that the money was lent for purposes of gambling.

The bank's release or failure to claim against Lange's estate had no effect upon Rauch's guaranty because he specifically agreed that he would be liable notwithstanding a release of any other guarantor. Section 85-3-606, *supra,* recognizes that the release of one guar-

antor does not release another when the release is made with the consent of the latter. We know of no reason why the consent given by Rauch at the execution of the agreement should not be binding.

Appellee filed in this court a claim for additional attorney's fee. We grant an attorney's fee which, when added to that allowed by the trial court, does not exceed 10 per cent of the principal plus accrued interest.

Affirmed.

WARD, J., not participating.

GUY DWIGHT SAWYER D/B/A SAWYER'S ALL STAR FOODS *v.* PIONEER LEASING CORPORATION

5-4501 428 S. W. 2d 46

Opinion delivered May 27, 1968
[As amended upon denial of petition for rehearing September 3, 1968.]

McMillen, Teague, Bramhall & Davis, for appellant.

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

CARLETON HARRIS, Chief Justice. This case involves an ice machine. Appellant, Guy Dwight Sawyer, is an independent grocer, operating in Little Rock. Appellee, Pioneer Leasing Corporation, is a Delaware corporation, which instituted suit against Sawyer for the sum of $2,039.40, pursuant to a written instrument termed "Master Lease Contract." The instrument recites that the lessor is Pioneer Leasing Corporation and the lessee is Guy Dwight Sawyer d/b/a Sawyer's All Star Foods. The parties agreed that lessee was leasing a Linco Ice Station, and provided:

"This schedule is for a period of 60 months, at $45.32 per month beginning July 23, 1963. First and last 4 payments payable at time of signing this Schedule in the amount of $226.60."

Section 5 of the agreement recites:

"No warranties or representations regarding the items herein leased or their condition, quality or suitability, or their freedom from latent defects, have been made or shall be deemed to be made by the Lessor, and Lessee has selected the items leased and the same have

been delivered to Lessee at Lessee's sole risk and discretion."

Section 8 states:

"At the expiration of the term of this lease for any item(s) leased hereunder, Lessee shall immediately redeliver such item(s) at Lessor's place of business or such other reasonable place as Lessor may designate within the State where the item(s) was leased, in like condition as it was received, less normal wear, tear and depreciation; properly crated with freight prepaid."

Section 9, a rather lengthy section provides, *inter alia,* that in case of default in payment for a period of ten days, lessor is authorized to take immediate possession of the leased property, and lessee shall remain liable for the payment of the total rental, all such rental being immediately due and payable. Both pages of the instrument provide, "This lease cannot be cancelled."

The contract commenced on July 23, 1963, and appellant made his down payment, and several monthly payments, the last payment being made in May, 1964. Upon default, the suit was filed, and Sawyer, in his answer, asserted that the performance of the machine had been misrepresented at the time he entered into the contract, and that it was not suitable for the purpose for which he desired to use it, though represented to be suitable, and that there had been an implied warranty of fitness upon which he relied; that such warranty had been breached, since the machine had ceased to operate, and was incapable of being repaired. On trial, appellee moved for a directed verdict at the conclusion of the evidence, which motion was granted, the jury returning its verdict for appellee in the amount of $2,039.40. From the judgment so entered, appellant brings this appeal.

Sawyer testified that he had a number of customers who desired that he acquire an ice maker, in order that

they might obtain packaged ice. He made inquiry, and subsequently, a man named Don Barnett from Benton (evidently learning of Sawyer's inquiries) contacted him about a machine. Barnett showed appellant pictures of a Linco ice making machine, and advised that the machine would work either inside or outside of the building. They decided the best location would be the front porch. Sawyer further stated that Barnett told him that the machine would manufacture 400 pounds of ice per day, and appellant, in agreeing to take same, stated that he understood that he was purchasing the property. Subsequently, Barnett brought back the lease agreement, heretofore referred to, and when Sawyer inquired why he was being asked to sign a lease agreement, instead of a purchase agreement, was told, according to the witness, "Well, it was just like buying a car, after you pay so many payments, it is your box." Sawyer testified that he did not read the provisions of the contract in detail, and that he had only a sixth grade education.

Still further, according to the witness, the machine, after being installed, worked satisfactorily for about six months, in fact, until "the first cold spell came." It then ceased to function. Appellant called Barnett to get the name of the mechanic for the company, and was advised that the company did not have one, and that Sawyer should call any refrigeration company. Ralph Henderson, a refrigeration man, was contacted, and the witness related that Henderson worked for over a month on the machine, and was paid "around $100.00 for his work," but Henderson was unable to get the machine to produce more than fifty pounds of ice per day. Nothing further was done until spring, when a man named Byers was contacted; Byers, too, was unable to get the machine in any better working order, and only charged around $100.00 for his work, instead of the original intended charge of $150.00. After the unsuccessful efforts of Byers, appellant testified:

"Well, I called Mr. McCoy . . . well, I first call Mr. Barnett and in turn called Mr. McCoy, then I called Mr.

Carter from Memphis and I called a fellow from Warren, then I called the ice making company itself, down in Texas . . . tried to get all of them to do anything about the box, tried to get it to operate. * * * None of them would do anything."

Thereafter Sawyer quit making payments, and the suit followed.

C. H. Turner of Memphis, Treasurer of Pioneer Leasing Corporation, and in charge of all the records of the company, testified that Pioneer Leasing Corporation is in the equipment leasing business. He stated that his company buys equipment after it has been selected by the lessee, and he has signed lease agreements; that all items are delivered to a lessee at the latter's sole risk, and that the company only purchased the ice making machine because Sawyer had selected it. Turner testified that he had no idea what Sawyer was told at the time he signed the lease; that Barnett had never been an employee of appellee, but rather, was a sales agent for the supplier of the equipment; that the machine had been purchased from the Tri-State Ice Machine Company, and Sawyer had paid a total of $679.80. The company official said that the expected life of the machine was eight or ten years, and at the end of the five-year lease period, Pioneer "more than likely would have offered to sell it to Mr. Sawyer" for a price that would have to be negotiated. He stated that appellee had had no leases on ice machines that had expired.

John P. McCoy, who had been employed by Pioneer in 1964, 1965, and 1966, stated that prior to the transaction, he had never met Sawyer or Barnett; that he did not write up the agreement and did not know who did write it. The witness had directed a letter to Turner, relating that Sawyer was very unhappy with the machine, had spent money endeavoring to have it repaired, and had expressed the thought that Pioneer should "put the pressure on Tri-State to get the machine working.

He claims he is not going to make any more lease payments until the machine is fixed. I told him that maintenance was not our problem.'' McCoy had no idea what Barnett might have told Sawyer about his relationship with the company. These were all of the witnesses who testified.

Of course, the only question before this court is whether appellant offered sufficient evidence to warrant the submission of the case to the jury. There are no express warranties, and the appellant relies upon alleged misrepresentation by Barnett, and a breach of implied warranty. The testimony of Sawyer relative to Barnett's statements has heretofore been set out. Appellee's first answer to this argument is that Barnett was not an agent of Pioneer. The testimony of Turner (that Barnett was never an employee of Pioneer) is pointed out, as well as the fact that Sawyer never did testify that Barnett said he was an agent or employee of Pioneer. Nonetheless, it is undisputed that Barnett was the man who presented the contract to Sawyer, and obtained his signature thereto. In fact, it appears that all proceedings in connection with the execution of the lease by appellant were handled by Barnett—who did not testify. Certainly, the obtaining of the lease was called to the attention of appellee company, for the instrument was subsequently executed by the president of the company, Barclay McFadden—evidence that the contract was thus ratified. More than that, the company accepted payments from Sawyer of over $600.00. In *Mark* v. *Maberry,* 222 Ark. 357, 260 S. W. 2d 455, we held that when one accepts the fruit of another's agency in the sale of property, he cannot subsequently be heard to disclaim such agency. That case involved real estate, but the principle applies likewise to the sale of personal property. We think the testimony on the question of agency was certainly sufficient to make a jury question.

Appellee calls attention to the fact that the ''spec sheet'' describing the features of the Linco machine, and

prepared by the C. M. Lingle Company, maker of the machine, is stamped at the bottom as showing the distributor of this machine to be Arkansas Ice Making and Vending Equipment Company of Benton. However, we consider this only a circumstance to be presented for the jury's consideration in reaching its verdict.

This brings us to the question of the implied warranty. Sawyer stated that Barnett told him that the machine would make four hundred pounds of ice per day, and it would operate either on the inside or outside of a building. The literature which was shown to Sawyer states that the ice maker has a capacity of "up to 400 lbs." According to appellant's evidence, representations as to the ice making capacity were not limited to the function of the machine during warm months; in fact, the literature shown Sawyer points out "bonus features," one of which reflects the machine to be "winterized." What this may mean is not entirely clear, but it would appear that it could well mean that the ice maker will operate efficiently in the winter, as well as in the summer. Whether Sawyer was entitled to rely upon this representation is simply another matter for the jury to pass upon.

It is also pointed out that the machine worked well for the first several months, and that, even if Barnett was an agent of Pioneer, and made the representations testified to by Sawyer, such representations (that the machine would operate outside), in order to afford appellant relief, must have been false at the time Sawyer claims to have relied upon them; since the machine did operate, as represented, for six months, there could be no misrepresentation of this fact. As a matter of law, we cannot say that we agree. After all, six months is about one-tenth of the total period to be covered by the lease, a lease that was non-cancellable. Could it be said that, if one purchases a new automobile which operates entirely satisfactorily for a few months, any implied warranty that the vehicle was suitable for the purpose

for which it was bought has been fully complied with even though it practically falls apart thereafter?

It is likewise argued that appellant employed mechanics to work on the machine, and continued payments for about ten months, and (says appellee) this confirms that Sawyer understood that there were no warranties, and that maintenance was solely his obligation. Of course, the record also reflects that Sawyer contacted Barnett and McCoy relative to the malfunction of the machine, but again, we simply point out that these were circumstances to be considered by a jury when determining the controversy, *i. e.,* these acts by appellant over the period of time involved, do not, *as a matter of law,* bar him from obtaining relief.[A]

Ark. Stat. Ann. § 85-2-316 (2) (Add. 1961), a part of the Uniform Commercial Code, provides:

"Subject to subsection (3) [which does not here seem applicable], to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and *in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.* [Our emphasis.] Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.' "

In the contract before us, this provision has not been complied with. In fact, the entire agreement itself, including Section 5, heretofore quoted, is in very small print.

Of course, appellant contends the transaction is governed by the code, but the code is generally thought of as applying only to sales. Appellee points out that the contract under discussion was not a sale, since the lease does not provide for the passing of title. We agree with

See[A] page 962 for paragraph inserted here by amendment September 3, 1968.

that contention. Item 8, previously set out, describes what shall be done with the property at the end of the sixty months.

It is entirely possible, in fact, probable, as testified to by Turner, that Pioneer would have sold the machine to Sawyer if a price could be agreed upon, and the transaction is very close to being a sale. Still, the lease agreement definitely sets out that appellant shall, at the expiration of the term of the lease, immediately redeliver the leased property to lessor. It would thus be difficult to say that the instrument is not a lease—but we have reached the conclusion that it is subject to the pertinent provisions of the code, more specifically, the quoted subsection of Section 85-2-316. In reaching this conclusion, we are impressed with the reasoning of several authorities in this field. E. Allen Farnsworth, Associate Professor of Law at the Columbia University Law School, in an article, "Implied Warranties of Quality in Non-Sales Cases," 57 Colum. L. Rev. 653 (1957), states:

"To say that a warranty is implied in a sale is not to say that none is implied if there is no sale. Implied warranties of the quality of goods are today firmly entrenched in sales law and their growth has been paralleled by that of similar warranties where goods have been supplied under conditions not amounting to a sale. Yet so little attention has been directed to the latter that it is not unusual to find the assertion of an implied warranty rejected with the explanation that since the transaction was not technically a sale, no warranty could be implied. Conscious of this, the draftsmen of the Uniform Commercial Code state in a comment:

" 'Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as a part of a contract for sale, the warranty sections of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales

contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as in the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents.'

The writer then compares other uniform acts (Uniform Sales Act and Negotiable Instruments Law), pointing out that, though the sales act does not expressly provide for the implication of warranties in non-sales cases, it has influenced cases involving the non-sale of goods; further, that the Negotiable Instruments Law has, at times, been used as a source of rules to govern non-negotiable bills and notes.

Continuing, the writer says:

"A bailment for hire differs from a sale in that, while a sale transfers ownership in exchange for the price, a bailment for hire merely transfers possession in exchange for the rental and contemplates the return of the chattel to the owner. Yet it is very like a sale in regard to the reliance upon the supplier of the goods, and it is not surprising that a warranty of fitness for the intended use has been implied in a variety of such cases.[1] * * *

"The obligation is in many respects similar to that of the seller of goods. For example, there is no warranty where the bailment is gratuitous, nor does the duty extend to those not in privity with the bailor, and if the bailee has inspected the chattel, there is no warranty as to defects which the inspection should have revealed. The warranty is commonly described as though analogous to that of fitness for a particular purpose under the Uniform Sales Act, rather than that of merchantability."

[1]These were not cases under the code.

Still further, it is added:

"It has been suggested that just as the mass production of goods gave momentum to the growth of the modern law of the seller's obligations for the quality of those goods, so too the mass production of housing can be expected to create new obligations of sellers for the quality of that housing. Even more certainly, the boom in enterprises which thrive on the rental of everything from automobiles and floor waxers to linens and diapers portends an increase in the obligations of entrepreneurs now operating largely under rules formulated during the time of the horse and carriage.

* * *

"The preceding discussion indicates that there is respectable authority for the extension of implied warranties to non-sales cases, in spite of a tendency to overlook the possibility. In borderline cases reasoning by analogy to sales law should not be merely a technique of last resort to be used only where the facts will not support the finding of a sale. It is preferable to categorization of the contract as one of sale and direct application of the sales statute."

In Hart and Willier, Forms and Procedures Under the Uniform Commercial Code (1966), a similar view is expressed.[2] The authors state in Paragraph 12.02, Subsection 1, Page 1-64:

"The warranty question is an example of application of Code provisions by analogy. While rented goods are not 'sold,' a property interest short of 'title' is transferred as in a sale and the transaction is in the nature of a bargain. Thus, express warranties, promissory or affirmatory in nature, could as well be a basis of the bargain under Section 2-313 as in a sale, and implied warranties, collateral to the transfer aspect, could logically accompany the transaction. More specifically, the lessor

[2]Willier and Hart are professors of law at Boston College Law School.

may expressly affirm that a machine to be leased will be of a certain model or capacity or the lessee may rely upon the lessor's skill and judgment in supplying goods suitable for a particular purpose to the lessor [sec. 2-315]. How much simpler and more certain it is for courts, counsel and parties if they can apply the rules of Article 2 by analogy to determine their obligations and their remedies. Still, courts at the trial level have shown a reluctance to do this. One court, however, *has* done so with reference to the sale of securities, expressly excluded from the definition of 'goods' in Section 2-105, insofar as Article 8 contained no rules relevant to the particular conduct in dispute. Both the leasing-of-goods and sale-of-securities examples involve commercial transactions and the Code encompasses commercial transactions."

It is pointed out that Section 2-102 (Ark. Stat. Ann. § 85-2-102 [Add. 1961]) applies to *transactions* in goods, and that Section 2-202 (Ark. Stat. Ann. § 85-2-202 [Add. 1961]) omits all direct reference to *sales transactions*. The authors then state:

"* * * It should, therefore, apply to a lease of goods —a transaction in goods—by this simple construction of statutory language."

It is thus clear that there is respectable authority for applying code provisions in some instances *where the transaction is analogous to a sale*. It is true that the authorities cited do not discuss the disclaimer provision in the code, nor do we find cases where this provision, as applicable to a lease, has been decided. However, in *Fairfield Lease Corp.* v. *Colonial Aluminum Sales, Inc.*, 3 UCC Rep 858 (NY Sup Ct., 1966), a case from the New York Supreme Court (not the court of last resort), a coffee vending machine had been leased by a vending company to the defendant. This lease had subsequently been transferred to a vending credit corporation, and suit was instituted against the defendant for a

balance of payments due under the lease agreement. After passing upon one point, the court then stated:

"The defendants also claim the lease, when considered in its entirety, is unconscionable (see, Uniform Commercial Code, § 2-302). This contention is based on the absence of any provision in the lease obligating the lessor to service and repair the machine, and the inclusion of a clause reciting that: 'Lessee agrees . . . .[the machine] is suitable for its purposes, and that Lessor has made no representation or warranty with respect to the suitability or durability of [the machine] for the purposes and uses of Lessee, or any other representation or warranty, express or implied with respect thereto.' In view of the denial of summary judgment, the court at this time need not decide whether the disclaimer of warranties is enforceable (Uniform Commercial Code, § 2-316) * * *."

So, at least, the question of whether the disclaimer provision is applicable, in appropriate circumstances, to a lease agreement, though not passed upon by the court, has been noted and urged as a point of reversal. We see no reason why, if appropriate lease transactions can properly be governed by the rules applying to sales, the disclaimer section should not also apply. If, in a sales transaction, one is required to exclude an implied warranty of fitness by a writing that is conspicuous, we see no reason why the same provision should not apply to leases that are analogous to a sale.

The comment by the New Jersey Supreme Court in the case of *Cintrone* v. *Hertz Truck Leasing, Etc.,* 212 A. 2d 769, somewhat expresses our thinking in the matter. This case was not decided under the Commercial Code, but under common law warranties,[3] although the code is referred to. The litigation related to the injury of Cintrone while a passenger in a truck which had been

[3]Under the common law, there was an implied warranty of fitness in leasing contracts of personal property.

leased by his employer from appellee. The complaint, *inter alia,* alleged a breach of appellee's warranty that the vehicle was fit and safe for use. The trial court dismissed this warranty claim by Cintrone, but on appeal, the Supreme Court reversed, holding that, on the facts proved, the contract for the leasing and use of the truck gave rise to an implied warranty that it was fit for the use contemplated by plaintiff's employer. It was further held that the evidence adduced created a jury question as to whether a breach of the warranty had been shown, and whether, if shown, it was the producing cause of the accident. It is true that this action was in tort, but we find it entirely logical to apply the same rationale to cases in contract. The court's discussion as to this feature is as follows:

"There is no good reason for restricting such warranties to sales. Warranties of fitness are regarded by law as an incident of a transaction because one party to the relationship is in a better position than the other to know and control the condition of the chattel transferred and to distribute the losses which may occur because of a dangerous condition the chattel possesses. These factors make it likely that the party acquiring possession of the article will assume it is in a safe condition for use and therefore refrain from taking precautionary measures himself. 2 Harper and James, Torts, § 28.19 (1956). Harper and James point out that the presence of such factors in sales set in motion the development of the doctrine of implied warranties. *They decry the notion, however, that because the doctrine had its origin in sales, the warranty protection should be withheld in other situations when the same considerations obtain. And they argue persuasively that in the face of present-day forms of business enterprise, development of the warranty doctrine in sales should point the way by suggestive analogy to similar results in cases where a commodity is leased.* [Our emphasis.]

"In this connection it may be observed also that

the comment to the warranty section of the Uniform Commercial Code speaks out against confining warranties to sales transactions.* * *"

The court continued, first quoting the article from Farnsworth (not included in our earlier quote):

" 'The expansion of enterprises engaged solely in bailment for hire seems to justify increasing imposition of absolute warranties, at least to the extent that they would be imposed upon a seller of similarly used goods. In addition, reliance is greater than in the typical sale, for it is generally true that the bailee for hire spends less time shopping for the article than he would in selecting like goods to be purchased, and since the item is not one he expects to own, he will usually be less competent in judging its quality.'

"A sale transfers ownership and possession of the article in exchange for the price; a bailment for hire transfers possession in exchange for the rental and contemplates eventual return of the article to the owner. By means of a bailment parties can often reach the same business ends that can be achieved by selling and buying."

We are holding that Section 85-2-316 (2) is applicable to leases *where the provisions of the lease are analogous to a sale.* Here, the contract provides that the lessee shall pay all expenses of repairs and maintenance; further, Mr. Turner, the company treasurer, testified that it was probable that the machine would be offered for sale to appellant at the end of the sixty months' period. The transaction really seems to be a sale in every respect, except for the fact that the instrument provided that the ice machine should be returned to the lessor.

Let it be remembered that this subsection refers only to implied warranties; this holding has no effect

on any other provisions in the code—and, of course, to protect himself, the lessor need only, in his disclaimer, to use conspicuous language. He is thus fully protected. After all, what legitimate objection can be made to using type (for the disclaimer) that is conspicuous?

This is the first case of this nature to come before this court since the Uniform Commercial Code was enacted into law by the General Assembly, and, though not meaning to imply that subsequent remarks are directed to the case at bar, we think it well to point out that agreements of this nature will be examined closely by this court. It is possible that similar agreements could be used to cloak usurious charges, *i. e.,* a transaction which was actually a sale could be set up as a lease in order to enable charges to be made that would, under a credit sale, constitute usury.

In accord with the reasoning set out in this opinion, we are of the view that the court therefore erred in directing a verdict for appellee. The judgment is reversed, and the cause remanded, with directions to proceed in a manner not inconsistent with this opinion.

FOGLEMAN and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent because the majority opinion extends the provisions of the Uniform Commercial Code to leases of personal property. I find nothing in the Commercial Code which remotely suggests that it has any such application. The definitions in the Chapter on Sales, from which the majority has applied certain sections, would definitely eliminate leases. See Ark. Stat. Ann. §§ 85-2-103, 85-2-106 (Add. 1961).

I agree with the majority that the transaction here involves a lease and I think that this conclusion is inescapable. Yet, I cannot justify using the Uniform Commercial Code as a vehicle merely to reach what would

seem to be a desirable result in this case. The majority, in making this application, cites comments and authorities as to the desirability of extending to leases the doctrine of implied warranty of quality, so long and well associated with sales transactions. I would find no great fault with this extension of the common law doctrine. Such an extension would not reach the result reached by the majority, however, because under the common law the disclaimer in this contract would exclude any implied warranty. It is only by resort to the code that the requirement that such an exclusion must be "conspicuous" can be applied. By doing this, I feel very strongly that the court is acting legislatively. I fear the problems that will arise in the future when the application of other sections of the Commercial Code to leases is sought. The draftsmen of the code did not have in mind that the provisions thereof would be extended to leases, and it may well be that the application of other sections will be somewhat clumsy. See, *e. g.,* §§ 85-2-701 to 85-2-725, both inclusive.

I do not take the case of *Cintrone* v. *Hertz Truck Leasing and Rental Service,* 45 N. J. 434, 212 A. 2d 769, cited by the majority, to extend the Uniform Commercial Code to leases. It seems to me that the Supreme Court of New Jersey there extended the common law doctrine of implied warranty in sales to leases. Reference was there made to a comment by the draftsmen of the code. That reference to this comment (also quoted in the majority opinion) was made solely to demonstrate that the Uniform Commercial Code did not limit the court in applying case law doctrines of implied liability to transactions other than sales. It is interesting to note that the courts of New Jersey have refused to extend the doctrine in the *Cintrone* case in subsequent cases. *Magrine* v. *Krasnica,* 94 N. J. Super. 228, 227 A. 2d 539 (1967); *Jackson* v. *Muhlenberg Hospital,* 96 N. J. Super. 314, 232 A. 2d 879 (1967); *Conroy* v. 10 *Brewster Ave. Corp.,* 97 N. J. Super. 75, 234 A. 2d 415 (1967).

It is significant that when there is an intention that a lease be covered by any of the provisions of the Uniform Commercial Code, that intention is given expression. In Ark. Stat. Ann. § 85-9-102(2) (Add. 1961) it is specifically stated that the Article on Secured Transactions applies to security interests created by lease intended as security. I have not been able to find any other mention of leases in the code, nor have I found any definition of terms in the statute that would include leases other than the definition of "security interest" [§ 85-1-201(37)] and "security agreement" [§ 85-9-105(1)(h)]. These sections only make a lease subject to the code provisions on "Secured Transactions" when it is intended as security. This seems to be a very strong indication that no other code provisions were intended to apply to leases under any circumstances.

In *Victor* v. *Barzelski*, 19 Pa. Dist. & Co. R. 2d 698 (Pa. 1959), it was held that the "merchantability" warranty of Uniform Commercial Code § 2-314 (Ark. Stat. Ann. § 89-2-314) and the "fitness" warranty of UCC § 2315 (Ark. Stat. Ann. § 89-2-315) depend upon a "contract of sale" made by a "seller" for applicability. There an apartment owner sought to recover damages from one who contracted to install a heater in the apartment, alleging breaches of these warranties. The contractor purchased the unit from a supplier and installed it. The evidence showed that the owners made known to the contractor that they were relying on his skill and judgment to furnish a suitable heating unit. The court said that the agreement did not create the buyer-seller relationship necessary to bring it within these code provisions. The parallel between these cases is close. While the authority may not be one entitled to the greatest weight, the reasoning by which the conclusion was reached is certainly applicable.

The majority opinion implies that its effect is only to apply one isolated section of a chapter of the Uniform Commercial Code to leases rather than to sales.

This particular section (85-2-316) relates, however, only to warranties defined in §§ 85-2-313 and 85-2-314. These sections refer only to warranties by a "seller" to a "buyer." The meaning of these terms is that given in § 85-2-103(1) (a) & (d) unless the context otherwise requires. The warranties mentioned are also connected with contracts for sale. "Sale" and "contract for sale" are also clearly defined in § 85-2-106. None of these definitions remotely fit the situation before the court, principally because no passing of title from the seller to the buyer is contemplated here. The inapplicability of § 85-2-316 is further demonstrated by reason of the limitation of implied warranties to "contracts for * * * sale if the seller is a merchant with respect to goods of that kind." Appellee cannot be said, even by the wildest stretch of the imagination, to be a merchant with respect to ice machines.

It seems singular to me that this court, in holding this section applicable, would place reliance upon an argument with reference to this section made before, but not decided by, a trial court in New York.

The majority opinion attempts to confine its application of the code section to leases analogous to a sale. I cannot tell, and it is not suggested, when a lease of personal property is analogous to a sale. Is the length of the term significant? Are the courts to examine a lessor about his intentions with reference to the disposition of the property at the end of the term? Is the requirement that the lessee shall repair (not unusual in leases) to be the decisive factor?

I am unable to discern how we will be able to decide the application of code provisions to leases on a section by section basis in the absence of clear statutory intent. Nor do I see any guide to the trial bench or bar, much less to the business community, in making these decisions. The purpose of clarifying, stabilizing and making uniform the commercial laws of the various

states is thus defeated by creating an atmosphere of confusion about the whole thing.

I would affirm the judgment.

CONLEY BYRD, Justice, dissenting. I dissent from the majority opinion because I believe the lease under consideration was nothing more than a financial arrangement whereby appellee, Pioneer Leasing Corporation, was to loan money to Mr. Sawyer for the purchase of the ice-making machine. The record conclusively shows that such was the purpose of this arrangement. Mr. Don Barnett told Mr. Sawyer, "Well it was just like buying a car, after you pay so many payments it's your box." Mr. C. H. Turner, treasurer of Pioneer Leasing Corporation, stated that they purchased the machine from the C. M. Lingle Company because Mr. Sawyer had selected it as the machine he wanted.

Prior to the Uniform Commercial Code and our usury decisions, this transaction would have been handled by a conditional sales contract. Therefore, Pioneer stands in the same position as would the bank if Mr. Sawyer had borrowed the money from the bank—*i. e.*, it is entitled to collect the money it loaned. I would affirm the trial court without prejudice to the rights of the parties to sue the vendor of the machine for breach of warranty.

[A]The same is true of appellee's argument as to waiver; the fact that appellant made payments for approximately six months after learning of the malfunction, does not, of itself, operate as a waiver. The general rule, of course, is that a notice of a breach of any type of warranty must be given within a reasonable time after becoming aware of the breach. The determination of what is reasonable depends upon the factual situation presented in each individual case. See *Dailey* v. *Holiday Distributing Corporation* (Iowa), 151 N. W. 2d 477, where the plaintiffs continued to use purchased equipment for eleven months after learning of defects, and endeavored during that period to remedy such defects.

[A]This paragraph was added by amendment May 27, 1968, after petition for rehearing. [See page 950.]

THE FIRST NATIONAL BANK OF CONWAY, ARKANSAS *v.* CONWAY SHEET METAL CO., INC.

5-4504 428 S. W. 2d 293

Opinion delivered May 27, 1968

Robert W. Henry and *J. Ted Blagg,* for appellant.

Clark, Clark & Clark, for appellee.

CARLETON HARRIS, Chief Justice. T. & C. Construction Company was the owner of Lot 8, Heritage Subdivision, in Conway. This lot, along with others, was subject to a mortgage held by Capitol Savings and Loan Association, such instrument providing that any lot which was subject to the mortgage would be released by payment of $2,000.00 toward retirement of the debt. Lot 8 was sold by T. & C. Construction Company on January 31, 1966, to John W. Fent and wife, the consideration being $2,900.00. First National Bank of Conway, appellant herein, loaned the amount of the purchase price to the Fents, this indebtedness being evidenced by a note for that amount, signed by Fent and his wife, and by the president of T. & C., George Shaw, Jr. Two thousand

dollars of this loan was paid at that time to release the lot from the Capitol Savings and Loan Association mortgage, and the $900.00 was paid to T. & C. by deposit to its account. The bank officer who handled the transaction knew the specific purpose for which the $2,900.00 would be used.

On February 2, 1966, the Fents executed a mortgage to the bank on Lot 8, which recited an obligation on the bank's part to lend $12,900.00 to be used solely in the construction of a residence on this lot, funds to be advanced from time to time as the work progressed. The bank recorded the mortgage, and did, over a period of time, advance $10,000.00, which the Fents used to pay the general contractor. Thereafter, the Fents encountered financial difficulties, and Conway Sheet Metal Company, Inc., appellee herein, and other sub-contractors, filed suits to foreclose materialmen's and laborers' liens, and the bank sought to foreclose its mortgage. On trial, the court found the bank's mortgage to be a valid construction mortgage upon the property in question, prior and superior to all asserted liens. A few months later, following our decision in the case of *Planters Lumber Company, Inc.* v. *The Wilson Company, Inc.*, 241 Ark. 1005, 413 S. W. 2d 55, appellee filed a motion to vacate the judgment, and on March 24, 1967, still within term time, the Chancery Court set aside and vacated the order of distribution which it had earlier entered, insofar as it pertained to the relative priority of appellee's claim. The cause was thereafter submitted upon the stipulation of the parties, and the court, on May 19, entered a new decree in which it held, as follows:

First, that all costs should be paid; second, that First National Bank should be paid the sum of $13,666.98, representing the $10,000.00 actually advanced for construction purposes, the $2,000.00 advanced in discharging Lot 8 from the mortgage in favor of Capitol Savings and Loan, and $1,666.98, representing interest, costs, and attorney fees provided for in the note and

mortgage held by the bank. Third, the court held that appellee should be paid the sum of $1,133.49, it having established its right to a lien upon the property in the amount of $1,472.06.

"* * * Said lien claimant is entitled to share pro rata in any sums remaining in the hands of said commissioner after payment of the two aforementioned prior claims upon said funds, pro rata and to the same extent as if all other lien claimants remained parties to this action, in which event Conway Sheet Metal Company, Inc., would be entitled to receive a total of 77% of its aggregate lien claim of $1,472.06."

Finally, the decree directed that, since other lien claimants had not moved to set aside the original decree, any balance of funds remaining would be paid to the bank to apply on the indebtedness owed it by the Fents and George Shaw, Jr. From the decree so entered, the bank brings this appeal. Appellee cross-appeals from that part of the decree which awards the bank a first lien upon the property involved for any amount above the $10,000.00 actually advanced for construction purposes, plus interest, costs, and attorney fees therein.

The priority given the bank on the $10,000.00 advanced by the bank for construction is not questioned, the mortgage having been recorded before construction was begun, the bank being obligated to advance that amount, and admittedly having done so. Therefore, the only items involved in this litigation are the $2,000.00 advanced for release of the lot, and the $900.00 which was used to pay the balance due the seller of the lot. Appellant asserts that it is entitled to the entire $2,900.00, and appellee asserts that it is entitled not only to priority over the $900.00, but also to priority over the $2,000.00.

The question then is, "Can a construction money mortgagee, who is obligated under the mortgage to ad-

vance a certain sum of money solely for construction purposes, divert a part of the funds to some other purpose, and still claim (as to the funds diverted) the protection that would be afforded had the entire amount been used for construction? Appellant relies in large measure, upon *Ashdown Hardware Company* v. *Hughes,* 223 Ark. 541, 267 S. W. 2d 294, and argues that the controlling circumstance is the purpose for which the money was borrowed.

Hughes is easily distinguishable from the case at hand in that there, the portion of the money which was to be used to retire an already existing mortgage was given particular mention in the new mortgage, same providing that the grantors were justly indebted to the lender of the money in the amount of $4,500.00; the instrument further recited, "And this mortgage likewise secures an additional advance to be made by the mortgagee in the total sum of Five Thousand, Five Hundred dollars * * * ." This last amount was to be used for the construction of tourist cabins. In the instant case, according to the mortgage given, the entire $12,900.00 is "to be used solely for and in the construction of a residence upon the lands hereinabove described, and Grantee has agreed to make said loan for such purposes, and Grantors are justly indebted to Grantee for advances made or to be made hereafter by Grantee to Grantors from time to time for such purposes, aggregating the principal sum aforesaid* * *. Grantee agrees that the acceptance and recordation of this mortgage binds Grantee, its successors and assigns, absolutely and unconditionally to make said loan in advances. Such advances will be made as requested by Grantors as such work progresses."

The distinction is at once apparent, for in *Hughes,* materialmen and laborers could quickly ascertain that, though the entire amount loaned by the mortgagee was $10,000.00, only $5,500.00 was to be used for construction.

In *Planters Lumber Company, Inc.* v. *The Wilson Company, Inc., supra,* we held that where a lender withheld certain sums from the amount of construction funds stated in the mortgage, *inter alia,* the cost of the lots, he could not claim priority in those amounts withheld. Appellant endeavors to distinguish the case before us from *Wilson* by pointing out that there, The Wilson Company owned the lots, and did not advance any money for the payment of same, nonetheless holding out the price of the lots, while here, the bank actually did advance the $2,900.00, which was used for the purchase of Lot 8. It may be, from the standpoint of equity, that appellant, in the present case, is in a better position than Wilson—but the principle which is controlling is exactly the same. Actually, *Wilson,* to some extent, modified earlier holdings in that the following principle is announced: Where a construction money mortgage recites that a certain amount of money will be advanced for construction—it must be used for that explicit purpose if the mortgagee is to have priority over lien holders. Certainly, this is only fair. A materialman or laborer, who plans to furnish materials, or labor, on a particular job is entitled to know how much money the lender is bound absolutely and unconditionally to advance as work progresses. As stated in *Wilson*:

"With this information gleaned from the record, an alert materialman might desire to make another financial check as the work progresses; namely, to check with the disbursing agent to get the total expended for construction."

It might also be mentioned that the purpose clauses in *Wilson* and the present case are practically identical. Appellant asserts that a decision adverse to their side of the case "cannot help but result in great harm to the building industry and the well-being of the state, as the impact of this decision will be felt for many years to come. That is the primary reason for this appeal." We are unable to agree with this statement, for there

is more than one way that the bank can give itself absolute protection. One has already been mentioned in this opinion, in referring to the *Hughes* case. We see no great difficulty in having the mortgage recite that a portion of the money (giving the amount) has, or will be, used to pay off an existing indebtedness. Complete protection for the full amount (advance for retirement of indebtedness and construction advances) is thus afforded.

In accordance with what has been said, it follows that the court erred in giving the bank priority on any amounts advanced in excess of the $10,000.00 used for construction. The decree is therefore affirmed on direct appeal (involving the $900.00), and is reversed on cross-appeal (as to the $2,000.00), and the cause is remanded with directions to enter a decree not inconsistent with this opinion. It is so ordered.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot distinguish this case from *Sebastian Building & Loan Association* v. *Minten,* 181 Ark. 700, 27 S. W. 2d 1011. There the borrower agreed to buy a lot for $1,000.00. He then obtained a loan for construction purposes from the savings and loan association. On February 14th, the borrower signed the mortgage with the "construction purpose clause." The lender gave the seller a check for $1,000.00 of this loan and the deed to the borrower was then delivered. The deed and mortgage were recorded simultaneously. Counsel for the lien claimant contended that the lien of the mortgagee was not preferred over that of the lien claimant where the loan was made upon the representation that it is borrowed for the purpose of improving the mortgaged property, unless it is in fact expended for that purpose and that it is incumbent upon the mortgagee to establish this fact. This court then specifically held that the *purpose* for which the mortgage was given determined its superiority over

subsequent mechanic's liens. While the trial court had held that the mechanics and materialmen had a lien on a parity with the lender's lien to the extent of $1,000.00 but superior to the lender's lien for the balance of the loan, this court held that the lender's lien was the prior lien. One of the authorities cited for this decision was *Shaw* v. *Rackensack Apartment Corporation,* 174 Ark. 492, 295 S. W. 966, where it was clearly held that a mortgage given to obtain money to erect a building given prior to commencement of the work was superior for its full amount to a lien for work and materials going into the construction, notwithstanding the fact that a portion of the loan proceeds was used for clearing the title to the land. I submit that neither case has been overruled or limited in respect to this question by any subsequent decision. The *Minten* case was cited as authority and followed in *Clark* v. *General Electric Co.,* 243 Ark. 399, 420 S. W. 2d 830.

In my opinion, the decision in *Planters Lumber Company* v. *Wilson Co.,* 241 Ark. 1005, 413 S. W. 2d 55, did not overrule, limit or modify the rule in the *Minten* case or the *Shaw* case, both of which are mentioned in that opinion without any suggestion that they were not correct. They simply were held inapplicable to the facts. In the *Wilson Company* case the decision turns entirely upon the fact that the lender owned the property and delivered to the borrower a deed reciting that the purchase price was paid, without mention of any encumbrance. The lender *then* caused this deed to be recorded. *Thereafter,* the borrower executed the construction money mortgages. After the mortgage was executed, the lender withheld the purchase price of the lot in spite of its *previous* representation that the purchase price had been paid.

The distinction pointed out in the *Clark* case applies here. Prior to the making of this loan, appellant never at any time or in any way represented that the purchase price of the lots had been paid prior to the loan, nor

did it receive or retain any part of the purchase price.

I submit that we are dealing with rules of property which should not be lightly regarded or overturned.

While the deed in this case was dated January 31, 1966, it was not delivered until February 2, 1966, the date of the construction money mortgage and the date of the advance of $2,900.00. Two thousand dollars of this was by check for the purpose of paying off a first lien on the property held by Capitol Savings & Loan Association. The balance of the purchase money due T. & C. Construction was paid by depositing $900.00 to its account. This advance of $2,900.00 was evidenced by a note dated February 2, 1966. The advance thus came after the loan was made.

It must be remembered that the statutes we are considering are designed to protect a lien of mechanics or materialmen and that the purpose is not to assure them of a source of funds for payment.

If appellant had not advanced the money to pay for the lot, the liens of the materialmen and mechanics would have been subject to these prior liens of $2,900.00 insofar as the land is concerned. Ark. Stat. Ann. § 51-605 (1947) only gives priority over existing encumbrances on the building erected. By the court's decision, the position of these lienors has been improved at the expense of appellant. Their liens are now upon both land and building, subject only to the lien for $10,000.00 advanced for construction. If the bank had advanced the entire $12,900.00 to the borrower without the purchase price having been paid, the mechanics' and materialmen's liens would be subject to the $12,900.00 plus the original debt on the property insofar as the lot is concerned and to $12,900.00 on the building. Or if the bank had advanced the $12,900.00 to the borrower and he had paid for the lots without the bank's knowing he intended to do so, the mechanics' and materialmen's

liens would still have been subject to the $12,900.00 on the lot and building. The bank was not acting for its own benefit by withholding funds as was the case in *Planters Lumber Company* v. *Wilson, supra.*

There is a distinction in the *Hughes* case not noted in the majority opinion. The $4,500.00 was advanced at the time the loan was made, but the balance was not to be advanced until the various cabins to be built were completed. The court there relied on the *Minten* case to declare priority in favor of the mortgagee for the entire debt, and followed the rationale of that case and the *Rackensack* case in giving priority for that part advanced to pay off the mortgage on the land.

I cannot follow the suggestion that there is any real difference in the *Minten* case and the *Hughes* case insofar as the point raised here is involved. Nor can I follow the reasoning by which the bank lost when it advanced the full amount of the loan and acted as much for the benefit of appellee as anyone.

I would reverse on direct appeal and affirm on cross-appeal.

CARL W. WIDMER *v.* FORT SMITH VEHICLE & MACHINERY CORPORATION

5-4568 429 S. W. 2d 63

Opinion delivered May 27, 1968

[Rehearing denied July 15, 1968.]

Carl W. Widmer, pro se.

Hardin, Barton, Hardin & Jesson, for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal from a decree of the Sebastian County Chancery Court dismissing appellant's complaint with prejudice after the latter failed to offer any proof, or go forward with the evidence on the day set for trial. In November, 1965, appellant, Carl W. Widmer, instituted suit in the Sebastian Circuit Court against the Fort Smith Vehicle and Machinery Corporation, appellee herein, alleging that appellee had, through their employees and agents, entered illegally upon his farm, and removed a certain John Deere disk harrow, which belonged to him, having been purchased by appellant on June 12, 1962. According to the complaint, this purchase had been financed in part with an equipment note of that date, which was later marked, "Paid," by the First National Bank of Fort Smith on March 12, 1963. It was alleged that the value of the disk harrow at the time of the wrongful taking was $980.00, and that the yearly rental value of same was $300.00; further, that after obtaining posses-

sion of this machinery, appellee had unlawfully converted and disposed of the same, and appellant had sustained actual damage in the amount of $1,702.00. Punitive damages were also sought in the sum of $2,500.00.

Appellee answered, denying that Widmer owned the harrow or that it had been wrongfully taken; it was asserted that on June 12, 1962 the company sold the disk harrow to appellant, and also a grain drill, but that on March 12, 1963, Widmer purchased a John Deere drill with fertilizer attachment, agreeing to pay the sum of $7,700.00; that there was still a balance of $757.11 on the June note, and the drill purchased on the June date was traded in on the new drill; further, that as a matter of accommodation, the disk harrow was placed in a new contract, and combined with the purchase made in March, 1963, a new note being executed for the balance then due in the total amount of $1,602.10. Thereafter, according to the answer, the company proceeded to cancel the note of June 12, 1962. It was further stated that on December 8, 1963, appellee proceeded to take possession of the equipment under a provision of the March 12 contract which permitted it to do so if there was default in the payment of any installment due on the note, or if the company deemed itself insecure. According to the answer, there was a default, and the company acted in accordance with the agreement. A counterclaim was filed, stating that the drill and disk, after being repossessed, were sold, but the company sustained a loss in the amount of $750.00 for which it was entitled to judgment.

Widmer responded to this answer, and counterclaim, by alleging that appellee had fraudulently and materially altered the contract and note after their execution without his knowledge and consent by adding the John Deere disk harrow to these later instruments; that appellee held no valid agreement or note as to the disk harrow, the indebtedness for that particular machinery having been paid under the note of June 12, 1962. Ap-

pellant filed requests for admissions, all of which were answered, and either admitted or denied. Thereafter, interrogatories were served on appellee on July 5, in effect asking for the reasons for the denial of a number of the requests for admissions. Another set of interrogatories was filed on July 8, asking for additional information, and still again, interrogatories were filed on July 15. Appellee filed a motion to quash these interrogatories, asserting that they had been propounded simply for the purpose of annoyance, expense, embarrassment, and oppression.

The court granted this motion as to the interrogatories of July 5 and July 8, and also as to those of July 15, except as to interrogatories No. 3 and 4, which the court directed appellee to answer not later than September 8. This was done, and appellee also took a non-suit as to its counterclaim. Widmer then filed a motion for summary judgment, and appellee filed a motion to transfer the cause to equity, alleging there was a need for reformation of the contract. The court entered its order, finding that there appeared to be discrepancies in the written instruments as to the description of the property purchased and the due dates for payments; that the terms of the contract needed to be more clearly defined, and the case was transferred to the Chancery Court.

There, appellant moved for a summary judgment, and filed an affidavit in support of same. Appellee responded, stating that a mutual mistake had been made as to due dates in the contract, but that irrespective of this fact, appellee had been given the right under the contract and note to repossess the property, should appellant be in default. It was prayed that the motion for summary judgment be denied, and that the instruments be reformed to reflect the true intentions and transactions of the parties. On August 16, the Chancellor denied the motion for summary judgment, holding that there were genuine and material issues of fact raised by

the pleadings, and by the statement of the parties, and that the matter could only be resolved by a trial. On September 11, the case was called for trial, at which time Mr. Widmer stated that he did not choose to call any witnesses or testify in his own behalf but would instead stand on his motion for summary judgment, with affidavit attached. Counsel for appellee, when asked if he desired to place a witness on the stand, replied that, since the motion for summary judgment had been previously overruled by the court, the appellant had the burden of establishing a prima facie case based on evidence, and this not being done, appellee was entitled to judgment. When appellant again stated that he would stand on his motion, the court granted defendant's motion, and subsequently signed a decree dismissing appellant's complaint.[1] From that decree, appellant brings this appeal.

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[1]The full proceedings of September 11, 1967, are as follows:

"The Court: Let the record show that the parties are present and represented by counsel, with Mr. Carl W. Widmer appearing in person on behalf of himself as his own attorney. Upon announcing ready for trial the plaintiff states that he does not choose to call any witnesses or to testify in his own behalf but does desire to stand on his Motion for Summary Judgment, with Affidavit attached or in support thereof and the matters set out in his Motion. In other words, the Plaintiff desires to stand on the pleadings which he has filed in this case. Is there anything further that you wish to offer, Mr. Widmer?

Mr. Widmer: Nothing at this time.

The Court: Mr. Thompson, in behalf of the defendant, Fort Smith Vehicle and Machinery Corporation, do you choose to call a witness at this time or put on any testimony?

Mr. Thompson: Your Honor, it is our understanding that plaintiff's Motion for Summary Judgment has been overruled previously by this Court and further, that plaintiff, in a situation such as this, has the burden of establishing a prima facie case based on the evidence. Having chosen to do neither of these, we would at this point ask the Court to grant the defendant a verdict as to plaintiff's Complaint.

The Court: Mr. Widmer, do you wish to respond to counsel's statement?

Mr. Widmer: No. We will stand on our Motion.

The Court: All right. Both of you gentlemen are aware that

For reversal, it is first argued that the trial court erred in not deeming all requested admissions of fact contained in request for admission of facts dated February 25, 1966, as admitted. Appellant points out that no sworn statement denying the requested admissions was ever served on appellant. Admittedly, the original was signed and sworn to, but the signing of the copy was apparently overlooked—we say overlooked, because there would have been no reason to sign the original and purposely fail to sign the copy. The offer was made by appellee to sign and verify the answers before the case was disposed of. We find no merit in appellant's assertion. In *Kingrey* v. *Wilson,* 227 Ark. 690, 301 S. W. 2d 23, the appellant submitted a request for admissions which appellee answered within the time designated, but not under oath. The trial court however, allowed appel-

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we have had a pre-trial conference in this matter since it was transferred to the Chancery Court from the Circuit Court on Motion of the defendant, which was acquiesced in by the plaintiff. Subsequently, on August 11, 1967, this Court, after the pre-trial conference and full discussion and review of the pleadings with you gentlemen, the Court rendered a pre-trial memorandum which each of you were furnished a copy of, and you do have a copy of it?

Mr. Widmer: Yes, sir.

Mr. Thompson: Yes.

The Court: The Court again set forth the chronological filing of the pleadings and brought the matter up to the day of the conference. You will note in this Opinion or this pre-trial memorandum that it was the Court's opinion, based on the review of the file, the plaintiff's Motion for Summary Judgment which the Court has under consideration, considered all matters in the case and the Court was of the opinion that this Motion for Summary Judgment of the plaintiff's should be denied and overruled, the Court feeling that there were general and material issues of fact raised in this case by the statement of counsel or parties for themselves in this instance, and in view of this, this Motion should be denied. This was done and has been done. In view of this statement of counsel for defendant's position in this case, do you have anything further that you might want to offer at this time, Mr. Widmer?

Mr. Widmer: No, I believe we will just stand.

The Court: All right then, the defendant's Motion for a Verdict in this case will be granted. The defendant may draw a Precedent accordingly.

lee to verify her answers to the questions at the beginning of the trial, and this court refused to declare error, stating, "In so doing, the court was clearly acting within its discretion."

It is next asserted that the trial court erred in not requiring all interrogatories which were presented to appellee to be answered. We do not agree. Part of these interrogatories were apparently for the purpose of having appellee enlarge upon its answers to the requests for admissions, and the court, on the third group of interrogatories, did require appellee to answer two of them, but granted appellee's motion to quash the rest. Ark. Stat. Ann. § 28-355 (Repl. 1962) gives the court, on motion of the party interrogated, the authority to enter whatever protective order justice may require, *i. e.*, an order may be entered "to protect the party from annoyance, expense, embarrassment, or oppression." In *Widmer* v. *Fort Smith Vehicle and Machinery Corporation,* 244 Ark. 626 (April 15, 1968), we said:

"The purpose of discovery procedure is to simplify the issues at the actual trial and is not intended to take the place of the actual trial, nor is it intended to relieve the plaintiff of the burden of proving the allegations of his complaint in a civil case."

In *Widmer* v. *Modern Ford Tractor Sales,* 244 Ark. 696 (April 22, 1968), we held that the trial court did not abuse its discretion in quashing appellant's interrogatories, and we are unable to say, in the present instance, that there was any abuse.

Finally, it is urged that the trial court erred in not granting appellant's motion for summary judgment. Mr. Widmer points out that, though he filed an affidavit, no counter-affidavit was filed by appellee.

We cannot pass on the question of whether the summary judgment should have been granted, for this is not

an appealable order. In the Kentucky case of *Bell* v. *Harmon,* 284 S. W. 2d 812, the court rendered a comprehensive discussion on this subject, as follows:

"The Federal courts seem to assume that an order denying a motion for summary judgment is not reviewable because not appealable. [Citing authorities.] Clearly such an order, being interlocutory, is not *appealable.* See Clay CR 56.03, Comment 7. However, though not independently appealable, certain interlocutory orders are *reviewable* in conjunction with a final judgment; *e. g.,* an order overruling a motion for a directed verdict; an order granting a new trial. Thus the determination that an order denying summary judgment is not appealable does not necessarily resolve the question of whether such an order may be reviewed when properly presented.

"However, we think sound reasoning supports the conclusion that an order *denying* summary judgment should not be reviewed on appeal. (In passing it may be noted that an order *granting* such judgment is a final order and is of course forthwith appealable.)

"Summary judgment procedure is not a substitute for a trial. It is a time saving device, and the motion should only be sustained if the court is fully satisfied that there is an absence of genuine and material factual issues, and all doubts are to be resolved in favor of the party opposing the motion. * * *

* * *

"Our refusal to review an order denying a summary judgment can in no sense prejudice the substantive rights of the party making the motion since he still has the right to establish the merits of his motion upon the trial of the cause. If the contrary were held, one who had sustained his position after a fair hearing of the whole case might nevertheless lose, because he had

failed to prove his case fully on an interlocutory motion.

"We therefore decline to consider the possible error in the denial of defendant's motion for summary judgment. * * *"

In our own case of *Douglas* v. *Citizens Bank,* 244 Ark. 168, 424 S. W. 2d 532 (February, 1968), we stated that an order denying a motion for summary judgment is merely interlocutory, and is not appealable.

In connection with his argument relative to the trial court's failure to grant the summary judgment, appellant says that since appellee asked for a reformation of the contract, the burden shifted to appellee to go forward with the proof, and the court was in error in directing that Widmer go forward with his evidence. This argument is erroneous. In the first place, appellee has denied the allegations in plaintiff's complaint, *i. e.,* that Widmer was the owner of the disk harrow, that it illegally entered or trespassed upon Widmer's lands, or that it wrongfully and unlawfully converted same to its own use. Since these allegations were denied—and since the court refused to grant the motion for summary judgment—it became incumbent upon appellant to present the evidence upon which he relied for recovery. Following this, the burden would have shifted to the appellee to go forward with his evidence relative to reformation of the contract. There is also another reason why the point is without substance. No objection was made to the trial court's directive to Widmer to proceed with his proof. Nor did appellant point out to the court that, in his (appellant's) view, the burden was on the appellee to go forward, but rather twice stated that he would stand on his motion (for summary judgment). In other words, the issue of who should first proceed with the proof was not raised before the Chancery Court. We have said many times that an issue cannot properly be raised for the first time on appeal. *Banks* v. *Jones,* 239 Ark. 396, 390 S. W. 2d 108, and cases cited therein.

If appellant desired a review of the merits of the case, he should have proceeded to offer evidence instead of standing on his motion for summary judgment. As stated in *Widmer* v. *Modern Ford Tractor Sales, supra*:

"* * * Knowledge of *how* to prepare and file the various instruments permissible under our civil code is, of course, an elementary necessity in the practice of law, but a thorough knowledge of the office of the instrument, and *when* and *why* it should be used, is indispensable in the proper preparation and trial of a lawsuit. A knowledge of how to proceed in the trial of a lawsuit after a motion has been granted or denied, or after requests for admissions have been complied with, refused, or ignored, is more important in resolving differences by a fair and impartial trial in a court of law than is the knowledge of how to prepare and file such motions or requests."

Affirmed.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent as I think the rule indicated with reference to reviewability of an order denying a motion for summary judgment is wrong. I agree that no appeal lies from an order denying a summary judgment, as such order is interlocutory. *Douglas* v. *Citizens Bank,* 244 Ark. 168, 424 S. W. 2d 532.

I also agree that a motion for summary judgment should not be reviewed on appeal after a trial on the merits. See *Bell* v. *Harmon,* 284 S. W. 2d 812 (C. A. Ky. 1955); *Safeway, Inc.* v. *Johnson,* 311 F. 2d 387 (5th Cir. 1962); *The Home Indemnity Company* v. *Reynolds & Company,* 38 Ill. App. 2d 358 (1962). A motion for summary judgment is somewhat like a motion for a directed verdict. The theory underlying both is substantially the same, *i. e.*, that there is no genuine issue of fact to be resolved and that the movant is entitled to judgment on the applicable law. *Russell* v. *City of Rogers,* 236 Ark.

713, 368 S. W. 2d 89; 6 Moore's Federal Practice, § 56.04[2] p. 2066. In testing the propriety of granting a summary judgment, we have applied the rules by which we test the propriety of directed verdicts. *Russell* v. *City of Rogers, supra.* By the same analogy, we should deny review after a trial on the merits, just as we deny review of a motion for directed verdict made at the conclusion of a plaintiff's proof, because deficiencies in the evidence may be supplied by the subsequent proceedings. *Fort Smith Cotton Oil Co.* v. *Swift & Company,* 197 Ark. 594, 124 S. W. 2d 1; *Granite Mountain Rest Home, Inc.* v. *Schwarz,* 236 Ark. 46, 364 S. W. 2d 306; *Campbell* v. *Bastian,* 236 Ark. 205, 365 S. W. 2d 249; *Lytal* v. *Crank,* 240 Ark. 433, 399 S. W. 2d 670. Following the analogy and for the same reasons, we should review the denial of a motion for summary judgment where a movant elects to stand thereon and let final judgment go against him. This is the same procedure we follow when a defendant elects to stand on an overruled demurrer to a complaint and have judgment rendered against him, or when he fails to offer evidence after denial of a motion for directed verdict. *Nunez* v. *O. K. Processors, Inc.,* 238 Ark. 346, 381 S. W. 2d 754; *Portis* v. *Board of Public Utilities,* 212 Ark. 822, 208 S. W. 2d 772, 213 Ark. 201, 209 S. W. 2d 864; *Hall* v. *Waters,* 118 Ark. 427, 176 S. W. 699.

The United States 5th Circuit Court of Appeals, in denying review of a motion for summary judgment after a trial on the merits, emphasized this analogy by pointing out that error in overruling a demurrer to the evidence or a motion for directed verdict might be cured by further proceedings or admission of additional evidence. *Safeway, Inc.* v. *Johnson,* 311 F. 2d 387 (5th Cir. 1962).

The finality of an order denying summary judgment where the movant elected not to avail himself of an opportunity to offer testimony in support of his case was recognized in *W. J. Dillner Transfer Company* v.

United States, 101 F. Supp. 506 (W. D. Pa. 1951).

I can perceive no sound reason why one may not stand on his right to a summary judgment just as he can stand on his right to a directed verdict or to have a demurrer sustained. There is no question raised here as to the insufficiency of the affidavit or the credibility of the affiant or to his lack of personal knowledge of the content of the affidavit.

The injustice of any other procedure was sharply pointed up by the Appellate Court of Illinois in *The Home Indemnity Company* v. *Reynolds, supra,* in arriving at its holding that the result of denial of a motion for summary judgment was not appealable because it became merged in the subsequent trial on the merits. There it was said:

> "An incorrect ruling deprived the moving party of a judgment it should have had. It could not immediately appeal from the orders denying its motions because the orders were not final and appealable. * * * If it cannot appeal after judgment, if it does not come under the rule that an Appellate Court may review interlocutory orders (where a separate appeal did not lie from such orders, 2 I. L. P. Appeal and Error § 651), what remedy does it have? To deny a review seems to be unjust."

The reason for denying review of an interlocutory order is obviously because it is not final and does not conclude the action or determine the rights of the parties. The objective in all instances is to avoid piecemeal appeals and the hazard of delays that would unduly postpone a final judgment. When a judgment becomes final, however, the unsuccessful party who has elected to stand on the interlocutory determination should be entitled to a review thereof.

On the basis of the summary judgment act as the

record now appears, appellant was entitled to a summary judgment.

Appellee in this case was confronted with an affidavit which completely set up a state of facts entitling appellant to relief, when considered along with the admissions of fact and answers to interrogatories by appellee. On a motion thus supported, appellee could not rest upon the allegations or denials of his pleadings. Ark. Stat. Ann. § 29-211(e) (Supp. 1967). Its response must have been by counter-affidavits, depositions or answers to interrogatories setting forth specific facts showing that there was a genuine issue of fact or by affidavits showing reasons why it could not present by affidavits facts essential to justify its opposition. Ark. Stat. Ann. § 29-211(e); § 29-211(f) (Repl. 1962); *Mid-South Ins. Co.* v. *First Nat'l Bank of Fort Smith,* 241 Ark. 935, 410 S. W. 2d 873; *Douglas* v. *Citizens Bank,* 244 Ark. 168, 424 S. W. 2d 532; *Scarboro* v. *Universal CIT Credit Corp.,* 364 F. 2d 10 (5th Cir. 1966). Appellee only filed an unverified response which did not set out any specific fact entitling it to the reformation of the note necessary to its counterclaim and defense. An unverified pleading does not meet the requirements of summary judgment procedure. *Mid-South Ins. Co.* v. *First Nat'l Bank of Fort Smith, supra.* If the movant makes a case for summary judgment, the opposition is required to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact. *Deam* v. *Puryear & Sons, Inc.,* 244 Ark. 18, 423 S. W. 2d 554. What we said in *Mid-South Ins. Co.* v. *First Nat'l Bank of Fort Smith, supra,* is applicable here:

> "* * * Mid-South would force the case to trial by merely contending that an issue exists, without any showing of evidence. This would defeat the whole purpose of summary judgment procedure."

I would reverse and enter judgment for appellant.

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

GENERAL ELECTRIC CREDIT CORP. *v.* BANKERS COMMERCIAL CORP. ET AL

5-4560 429 S. W. 2d 60

Opinion delivered May 27, 1968
[Rehearing denied July 15, 1968.]

Wootton, Land & Matthews, for appellant.

Mike J. Etoch Jr. and *Anderson & Anderson,* for appellee.

GEORGE ROSE SMITH, Justice. This is primarily a dispute between two finance companies about their security interests in a dragline that was sold on credit by Southland Tractors, Inc., to the appellee J. T. Arnold, III. Both security agreements held by the rival finance companies are defective, that of Bankers Commercial Corporation not having met the filing requirements of the Uniform Commercial Code and that of General Electric Credit Corporation being a forgery. This is an appeal by GECC from a judgment holding that Bankers alone has a valid security interest in the dragline. Arnold, the debtor, cross appeals upon another issue.

On April 13, 1966, Southland sold the dragline to Arnold for $33,850.04. The contract of sale was in the form of a three-year lease which recited that Arnold had paid $5,000 as advance rental and would pay the remainder in 36 equal monthly installments. Arnold was given the option of purchasing the dragline at any time during the term of the lease by paying the $33,850.04, less the total amount of rents already paid. Under the Code such a lease is treated as a security agreement. Ark. Stat. Ann. § 85-1-201 (37) (Add. 1961).

On the same day Southland (*a*) duly filed a financing statement showing itself as the creditor and Arnold as the debtor and (b) assigned the lease contract to Bankers for a cash consideration of more than $24,000.00. Bankers did not file anything to show its security interest; so Southland continued as the creditor of record.

About three months later Southland informed Arnold that it had arranged to refinance the debt with General Electric Credit Corporation. The identity of the creditor made no difference to Arnold, who readily signed another financing statement showing GECC as the creditor. Southland then forged Arnold's signature to a three-year lease, similar to the one held by Bankers, and assigned it to GECC. In that transaction GECC, whose manager realized that Southland was having fi-

nancial troubles, paid Southland $4,107.06 in cash and credited delinquent Southland accounts with $20,091.94. GECC's manager had talked with Arnold by telephone to be sure that he had the dragline and that he understood the gross amount due and the size of the monthly payments. Neither Southland nor Arnold mentioned the outstanding contract with Bankers; so GECC's manager (who had checked the financing statement of record) did not realize that Bankers had a security interest in the dragline. At GECC's request Southland terminated the earlier financing statement, as authorized by the Code. Section 85-9-404. Southland soon went into bankruptcy.

Arnold assumed that the debt had been refinanced, but he soon received demands for payment from both Bankers and GECC. Since that time Arnold has consistently taken the position that he will make his payments when he learns which creditor is entitled to the money.

This action to replevy the dragline was brought by GECC against Arnold. Bankers intervened to assert its claim. The trial court, sitting without a jury, upheld Bankers's security interest, permitted it to accelerate the maturity of its entire claim, and ordered the property sold as in a foreclosure suit. The order of sale was superseded by GECC pending the appeal.

Upon the main dispute the trial court's decision was right. Bankers holds a valid security agreement, admittedly signed by Arnold. Bankers's failure to file any notice of its creditorship might have allowed later valid claims to take priority, but as between the two of them Bankers has an enforceable cause of action against Arnold.

By contrast, the only genuine instrument held by GECC is its financing statement. A financing statement, standing alone, does not create a security interest in the debtor's property. It merely serves notice that the

named creditor may have a security interest. Section 85-9-402, Comment 2; Meek, "Secured Transactions Under the Uniform Commercial Code," 18 Ark. L. Rev. 30, 40 (1964). Of course the forged lease assigned by Southland to GECC had no effect upon Arnold's interest in the dragline. *Hall* v. *Mitchell,* 175 Ark. 641, 1 S. W. 2d 59 (1927).

Counsel for GECC insist that Bankers and Arnold have estopped themselves from contesting the GECC claim: Bankers by its failure to perfect its security interest and Arnold by his failure to mention the Bankers contract during his conversation with GECC's manager. We need not speculate whether such an estoppel would run counter to the Code requirement that security agreements be in writing. Section 85-9-203. If Bankers was at fault in failing to file notice, GECC was also at fault in accepting the lease from an assignor of doubtful solvency without verifying Arnold's signature. Arnold's good faith was attested by his own testimony. The issues of estoppel narrow down to disputed questions of fact, upon which there is ample substantial evidence to support the circuit court's judgment.

On cross appeal Arnold is entitled to relief. Both GECC and Bankers sought to accelerate the maturity of their total claims, but their failure to reserve that power in the contracts precluded them from exercising it. *Farnsworth* v. *Hoover,* 66 Ark. 367, 50 S. W. 865 (1899). At best Bankers may be entitled to damages resulting from Arnold's failure to make his payments when due —the measure of such damages presumably being interest at the legal rate and certainly not being the rents to accrue during the remaining life of the lease.

Affirmed on direct appeal; reversed on cross appeal and remanded for further proceedings.

ARKANSAS STATE HIGHWAY COMMISSION *v.* CONWAY DEVELOPMENT CORPORATION

5-4567 428 S. W. 2d 291

Opinion delivered May 27, 1968

Thomas B. Keys, Philip Gowen and *Virginia Tackett,* for appellant.

Guy H. Jones and *Clark, Clark & Clark,* for appellee.

GEORGE ROSE SMITH, Justice. The appellee is a non-

profit corporation organized to attract industry to Faulkner county. It owns two adjoining tracts of land, Tract A containing 178 acres and Tract B 140 acres. This suit was brought by the Highway Commission to condemn 15.81 acres in Tract B as a right-of-way for Interstate Highway 40. The jury fixed the value of the land at $20,000. The principal issue here is whether the court correctly allowed the jury to treat the land as two separate tracts in determining the benefits and damages resulting from the proposed improvement.

Tract A, roughly in the shape of a square, is bounded on the west by U. S. Highway 65. Tract B is an L-shaped tract lying immediately northeast of Tract A. Tract B abuts Tract A on the north for about three fourths of Tract A's northern boundary and on the east for about one half of Tract A's eastern boundary. Interstate 40, running north and south, will cross the eastern side of Tract B, the right-of-way being the strip involved in this case. Continuing southward, Interstate 40 will pass to the east of Tract A. The Brumley interchange will lie just east of Tract A and just south of Tract B. That interchange will provide a connection with U. S. Highway 65 to the west by means of State Highway 286, which will cross the southern part of Tract A.

The remaining essential background facts are best stated in chronological sequence.

February, 1962. Tract A purchased by Conway Development Corporation.

January 31, 1963. CDC sent a letter to the Highway Department, (A) asking that the proposed Brumley interchange be relocated at a point just east of Tract A and (B) offering to facilitate that relocation by providing without cost to the Highway Department a right-of-way across the southern part of Tract A for Highway 286.

February 14, 1963. The Highway Department informed CDC by letter that it was recommending to the Federal Bureau of Public Roads that the suggested relocation of the interchange be put into effect. (That recommendation was eventually approved and the interchange relocated.)

June 19, 1963. CDC took an option to buy Tract B from its owner for $800 an acre.

December, 1963. CDC dedicated and platted Tract A as Conway Industrial Park.

April 3, 1965. CDC conveyed to the Highway Department 11.33 acres of the Industrial Park as a right-of-way for Highway 286, as previously suggested.

June 19, 1965. CDC exercised its option, to buy Tract B for $800 an acre.

July 15, 1966. This suit to condemn a right-of-way across Tract B was filed by the Highway Commission.

At the trial counsel for the Highway Commission insisted that Tract A and Tract B should be treated as a unit, so that the benefits accruing to Tract A from the construction of Interstate 40 could be offset by the jury against the compensation to be paid by the Commission for the right-of-way across Tract B. That contention is renewed in this court.

Upon the particular facts of this case the court was right in allowing the jury to consider the two tracts as separate parcels. It will be remembered that before CDC even had an option to buy Tract B it offered to provide the Highway Department with a free right-of-way across Tract A for Highway 286 in return for the Department's relocation of the Brumley interchange at

a point where it would benefit industries eventually occupying Tract A. That offer was accepted. Thus the parties in effect made an agreement by which CDC received the benefit of convenient access to Interstate 40, a controlled access facility, in return for the conveyance of 11.33 acres of Tract A for use as a right-of-way for Highway 286. The jury were certainly entitled to treat that exchange of benefits as a closed transaction by which CDC had paid the Highway Department in full for whatever enhancement in value might accrue to Tract A as a result of the construction of Interstate 40 and its Brumley interchange.

There are controlling differences between the situation in this case and that considered in *Arkansas State Highway Commn.* v. *Dean,* 244 Ark. 405, 425 S. W. 2d 306 (1968). In the *Dean* case the owners of a tract of land, at a time when they knew with reasonable certainty where the proposed highway would be located, bought an adjoining tract and then contended that the two parcels should be treated as a unit for the purpose of increasing their severance damages. We rejected that contention.

There is no parallel between that case and this one. Here the benefits accruing to Tract A from the construction of the highway would have been received by CDC whether or not it owned Tract B. Likewise the Highway Department would be required to pay exactly the same amount for the right-of-way across Tract B whether it was owned by CDC or by CDC's predecessor in title. Thus to sustain the Highway Department's present contention would unjustly enrich the Department by making CDC pay twice for the benefits accruing to Tract A—once by the conveyance of the Highway 286 right-of-way and a second time by the offset of those benefits against the compensation for the right-of-way being taken in Tract B. (The appellant is not in a position to argue that the jury may just possibly have awarded damages for the severance of the eastern edge

of Tract B from Tract A, because the appellant made no objection to the only instruction that could be construed to submit such an issue to the jury.)

On the day of trial counsel for the Department filed motions to quash the jury panel and to disqualify Judge Roberts on the ground that he had a direct pecuniary interest in this case for the reason that there was pending in the same court a suit by the Highway Department to condemn land owned by Judge Roberts. A similar contention was rejected, for want of proof, in the *Dean* case, *supra,* and in *Arkansas State Highway Commn.* v. *Lewis,* 243 Ark. 943, 422 S. W. 2d 866 (1968).

Here again the proof is deficient. In fact, counsel for the condemnor declined to offer proof in support of their motions. The burden was on the movant to establish the facts indicating Judge Roberts's disqualification. *Bass* v. *Minich,* 194 Ark. 589, 109 S. W. 2d 139 (1937). There are no such facts in the record. Indeed, we are at a loss to see how the mere pendency of a condemnation action against Judge Roberts could give him a "direct pecuniary interest" in the case at bar. Of course the judge would be disqualified in his own case, but we have not been shown how that disqualification extends to other cases. To set aside the present verdict and judgment, upon some speculative assumption wholly unsupported by proof, would be a gross injustice to the appellee.

Affirmed.

CARL W. WIDMER *v.* FORT SMITH VEHICLE AND MACHINERY CORPORATION

5-4569 429 S. W. 2d 993

Opinion delivered May 27, 1968
[Rehearing denied July 15, 1968.]

Carl W. Widmer, pro se.

Hardin, Barton, Hardin & Jesson, for appellee.

PAUL WARD, Justice. This is an appeal by Carl W. Widmer (appellant herein) from a chancery decree which denied appellant's motion for summary judgment, and also directed a verdict in favor of Fort Smith Vehicle and Machinery Corporation (appellee herein).

A brief summary of the background facts and court proceedings is sufficient for an understanding of the issues here involved.

On November 29, 1965 appellant filed a complaint in circuit court alleging appellee had illegally entered upon his farm and carried away a grain drill which he purchased March 12, 1963 on a "conditional sales contract". He asked for the value of the drill, and also for punitive damages. Appellee answered on December 9, 1965, denying all material allegations. From that date until September 20, 1966 appellant filed numerous pleadings —including interrogatories, Motions for Admission of Facts, and Motions for Summary Judgment. To all of these motions appellee replied by motion or answer.

On the last mentioned date appellee filed a Counterclaim, and a Motion to Transfer to a court of Equity, alleging a need to reform portions of the conditional sales contract in accord with the intention of both parties. Six days later the circuit judge entered an Order transferring the cause to the chancery docket. This was done without opposition on the part of appellant.

On August 7, 1967, approximately eleven months after the case had been transferred to the Chancery Court, appellant filed a "Motion for Summary Judgment" supported by his own affidavit, Appellee responded to the above Motion, stating "there are genuine issues as to material facts in this case"—pointing out the issues in detail. On August 14, 1967 the Chancery Judge delivered to both parties a "Pre-Trial Memorandum and Order" in which he stated: the Motion for Summary Judgment is denied; there are genuine material issues of facts to be decided; it was agreed at a pretrial conference that both sides would present testimony, and; the case is now ready for trial.

When the case was called for a hearing both sides announced ready. Upon being asked to proceed, appellant declined to put on any witness but stated that he was standing on his Motion for a Summary Judgment. Then on appellee's Motion, the trial court found:

> "That the plaintiff, having the burden of proof and the burden of going forward with the evidence as to these issues, has failed to go forward with the evidence, or otherwise establish a prima facie case against the defendant, and judgment should be given, therefore, for the defendant as to plaintiff's complaint."

Accordingly, the court dismissed appellant's complaint with prejudice—hence this appeal.

It is our conclusion that the decree of the trial court

must be affirmed because the Order of the trial court, denying appellant's Motion for a Summary Judgment, is not on appealable order. See: *Carl W. Widmer* v. *Fort Smith Vehicle & Machinery Corporation* (No. 4568)—opinion delivered this date.

Affirmed.

SMITH and FOGLEMAN, JJ., dissent.

JOHN FOGLEMAN, Justice, dissenting. I dissent for the reasons stated in my dissenting opinion in *Widmer* v. *Fort Smith Vehicle & Machinery Corporation,* § 5-4568, 244 Ark. 971,42 9 S. W. 2d 63. I would reverse and enter summary judgment in favor of appellant.

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

JAMES A. COUDRET *v.* CAREW W. SANDERS JR.

5-4582 428 S. W. 2d 243

Opinion delivered May 27, 1968

Thomas B. Tinnon, for appellant.

Poynter and *Huckaba,* for appellee.

PAUL WARD, Justice. On September 27, 1966 an automobile owned by Carew W. Sanders, Jr. (appellee), driven by his son, collided with an automobile owned and driven by James A. Coudret (appellant) at a street crossing in Mountain Home, Arkansas. The damage done to appellee's car amounted to $117.50—as later stipulated.

On March 30, 1967 appellee notified appellant that if he did not pay the above mentioned amount within sixty days he would file suit for double the amount plus attorney fees and costs—pursuant to the provisions of Ark. Stat. Ann. § 75-918 (Repl. 1957) which reads:

> "In all cases wherein loss or damage occurs to property resulting from motor vehicle collision amounting to two hundred ($200.00) dollars or less, and the defendant liable therefor shall, without meritorious defense, fail to pay the same within sixty days after written notice of the claim has been received, such defendant shall be liable to pay the person entitled thereto, double the amount of such loss or damage, together with a reasonable attorney's fee which shall not be less than fifty dollars ($50.00) and court costs. This liability, which is limited to damage to property, attaches when liability is denied and suit is filed."

When appellant failed to pay appellee filed a complaint on August 1, 1967, alleging the collision was caused by appellant's negligence. Appellant denied the allegation of negligence, and stated: (a) he had a meritorious defense and (b) said statute is unconstitutional.

The trial resulted in a jury verdict in favor of appellee, fixing the damages at $117.50. Based on the verdict, the trial judge ordered appellant to pay appellee

the sum of $235, being double the amount of the verdict, together with all costs of this action, plus attorney fees in the amount of $200. Appellant here seeks a reversal on the two points presently discussed.

One. The trial court erred in giving appellee's requested Instruction No. 7, which reads:

> "When vehicles are approaching an intersection from different streets the driver of a motor vehicle must yield the right of way to another driver who in the exercise of ordinary care has already entered the intersection.
>
> "If vehicles are approaching an intersection from different streets at such relative speeds and distances from the intersection that both vehicles will enter the intersection at the same time, then the law requires the driver of the vehicle on the left to yield the right of way to the vehicle on the right.
>
> "A violation of these rules governing the approach to an intersection although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in this case."

We are unable to agree with appellant's contention. When Instruction No. 7 was offered by appellee the only objection made by appellant was that "there is no evidence before the jury from which they could find that the defendant (appellant) was approaching the intersection, but was in fact in the intersection before a reasonable and prudent person would have realized the danger existed". The record does not support appellant's evaluation of the evidence.

Dean Sanders (the son of appellee) was driving appellee's car in an easterly direction along 13th Street, and appellant was driving his own car in a southerly

direction along Maple Street which intersected 13th street. Dean testified, in effect, that when he was about thirty feet west of the intersection he saw appellant's car (to the left) about twenty feet north of the intersection. The testimony further shows Dean was traveling about twenty five miles per hour and appellant was traveling from twelve to fifteen miles per hour. This testimony, we think, justified the court in giving the instruction.

Two. Appellant here contends the court erred in refusing his requested Instruction No. 1. We deem it unnecessary to copy in full the instruction which covers three pages in appellant's brief. Set out below is a summary of what we consider to be the essence of the offered instruction:

> You are instructed that appellant had a "meritorious defense" if he believed in good faith, acting as a reasonable prudent person and based on the surrounding facts, that he was in fact free of negligence.

Put another way—appellant is contending it should be left to the jury to say whether or not he believed he was free from negligence.

The answer to appellant's contention is found in *Ford* v. *Markham,* 235 Ark. 1025, 363 S. W. 2d 926. There, in construing the same statute here involved, this Court said:

> "Thus the want of a meritorious defense relates not to the issue of ultimate liability but to the failure to pay the claim within 60 days after notice. Apparently the phrase was inserted in the statute to provide for instances when the defendant had a valid reason for not making payment within 60 days, such as the failure of his liability insurance carrier to process the claim within that time or the occurrence of some unavoidable casualty that prevented the defendant

from meeting the 60-day deadline."

The Markham opinion is, we think, sound and in harmony with our holding in *Missouri State Life Insurance Co.* v. *Fodrea,* 185 Ark. 155 (p. 157), 46 S. W. 2d 638. The Court there was considering § 615 C. & M. Digest, which authorized assessment of 12% damages and attorney's fee. Appellant contended "no damages and attorney's fee should be assessed where defense is made in good faith and refusal to pay is based upon an honest and fairly debatable difference of opinion as to the law involved". In answer to the above contention the Court said: "We do not agree with appellant in this regard, and we think the Supreme Court of the United States has decided the question adversely to appellant's contention".—citing cases.

The judgment of the trial court is affirmed, and appellee is awarded $250 attorney's fee.

Affirmed.

BROWN, FOGLEMAN and BYRD, JJ., concur.

CONLEY BYRD, Justice, concurring. I concur in the result reached here because appellant's proffered instruction did not correctly state the law. But I do not agree that the term "meritorious defense" is limited to those situations involving unavoidable casualty or other inability to pay damages within sixty days.

To me the statute, Ark. Stat. Ann. § 75-918 (Repl. 1957), allows a recovery of double damages only when the amount of the loss or damages to property is $200 or less. In *Rouse* v. *Weston,* 243 Ark. 396, 420 S. W. 2d 83 (1967), we held that the claimant could not bring himself within the statutory limit by making claim for less than the damages sustained. I can make no distinction for purposes of double recovery under the statute between a voluntary reduction of a loss and that reduction of a loss that occurs by operation of law as a result of our comparative negligence statute, Ark. Stat.

Ann. § 27-1730.2 (Repl. 1962).

Therefore, I consider that the term "meritorious defense" includes not only the defense that the claimed amount of the loss is excessive but also the defense of comparative negligence. I concede, however, that these issues should be submitted to the jury in terms of damages and comparative negligence rather than "meritorious defense." In this manner the "meritorious defense," which would avoid the penalty, is established any time a verdict is returned for less than the amount of the loss to the property or for less than the amount claimed.

BROWN and FOGLEMAN, JJ., join in this concurrence.

THERON S. McGHEE ET AL *v.* W. A. GLENN, COUNTY JUDGE

5-4502 428 S. W. 2d 258

Opinion delivered May 27, 1968

Thorp Thomas, for appellants.

Jack L. Lessenberry, for appellee.

LYLE BROWN, Justice. Theron McGhee and other taxpayers of Perry County brought this suit in 1966 to enjoin County Judge W. A. Glenn from using county labor and equipment on private property. They also sought a money judgment against Judge Glenn to reimburse the county. A permanent injunction was granted but compensation was denied. From the disallowance of a money judgment the taxpayers appeal.

At the time of the trial in 1967, Judge Glenn was in his eleventh year as presiding judge of the county court. During his tenure numerous private property owners had been the recipients of work projects performed with county labor and equipment, including work on three farms owned by the judge himself. There was no direct payment to the county. Among other powers the county court has exclusive original jurisdiction over all matters relating to county roads and bridges; it has control and management of all county property,

which of course includes varied types of road machinery. Ark. Stat. Ann. § 22-601 (Repl. 1962). It is the county court, not the county judge, in which these responsibilities and powers are vested. *Needham* v. *Garner,* 233 Ark. 1006, 350 S. W. 2d 194 (1961). It is not clear whether any or all the projects were performed (1) solely at the direction of the county judge, (2) under orders duly entered by the county court, or (3) possibly by virtue of an order entered by the quorum court. More will be said about this deficiency, which we consider significant.

The taxpayers asserted that the county was entitled to be compensated for six projects. For the purpose of this opinion they fall into four categories:

Project One. This project concerned work performed on property owned by Joe Majors and Virgil Pearson. In response to a motion by Judge Glenn to make more definite and certain the taxpayers listed thirteen projects which they considered illegal. The Majors-Pearson project was not listed. The trial judge, and properly so, restricted the taxpayers to those projects enumerated.

Projects Four and Five. These ventures involved work performed on lands belonging to Bossy Glenn and on Judge Glenn's farm east of Adona. If the claim to compensation were otherwise valid, they would be barred by the statute of limitations. The best evidence is to the effect that the work was performed in 1958, 1959, and 1960. The claim would be governed by our three-year statute of limitations. Ark. Stat. Ann. § 37-206 (Repl. 1962).

Project Two. Work was performed on town lots owned by O. O. Oates and his son. There was substantial evidence to show that over the years Mr. Oates had given to the county several hundred loads of gravel and shale from his farm. The material was used on the county roads. Judge Glenn considered the work performed for

the Oateses to be small pay for the large quantities of raw materials Mr. Oates had furnished gratis to the county. The chancellor's finding that Judge Glenn had acted in good faith cannot be said to be against the preponderance of the evidence. Of course this is not to say that the correct procedure was followed.

Projects Three and Six. Project Three involved improvements made on the county judge's farm at Perry. Project Six consisted of work done on his farm west of Adona. Our discussion to follow will be in relation to those two projects. For the improvements there constructed, Judge Glenn may be liable, depending on certain elements of proof which should be developed on remand.

On one of the vital points in this case our law is very clear. A county judge, as distinguished from the county court, has no authority to use county machinery on private property for private use. *Needham* v. *Garner, supra.* Further, Ark. Stat. Ann. § 22-612.1 (Repl. 1962) makes it unlawful for any county judge to be interested, directly or indirectly, in any transaction made on behalf of the county, or to receive anything of value for his benefit on account of any transaction made for the county. It constitutes a violation of that statute if a county judge is interested in an improvement where the county contributes to the improvement with its labor and machinery just as much as if the county had paid out cash. *State* v. *Anderson,* 200 Ark. 588, 139 S. W. 2d 682 (1940). It was unquestionably established that county machinery and labor were utilized on Projects Three and Six.

In face of the recited law and the established facts, a determinative element could possibly be the existence of a court order authorizing the projects. See *Hutson* v. *State,* 171 Ark. 1132, 287 S. W. 398 (1926).[1] On this

[1]Judge Glenn also stated—only as a conclusion—that the work on his Perry farm reduced flooding of adjacent highways. *Quantum*

point the record is far from satisfactory. The taxpayers' attorney was questioning Judge Glenn concerning work performed with county labor and equipment on his brother's farm:

"Q. Do you know to your personal knowledge when this work up at Bossy Glenn's place took place?

"A. Yes, sir.

"Q. When was it?

"A. 1961.

"THE COURT:

Before you terminate this let me ask a question of Judge Glenn; I notice this suit is against the County Judge and you in your representative capacity; Judge Glenn, have each of these occasions where work has been done have you been acting in your capacity as County Judge and exercising your judgment to the best of your ability in a judicial capacity?

"A. Judge Williams, I sure have.

"MR. THOMAS:

Did the Quorum Court ever enter an order authorizing you to do that?

"A. Yes, they did."

We are unable to determine with certainty whether

meruit has been held to be a valid defense in certain situations. See *Dowell* v. *School District No.* 1, *Boone County*, 220 Ark. 828, 250 S. W. 2d 127 (1952); and *Ward* v. *Farrell*, 221 Ark. 363, 253 S. W. 2d 353 (1952).

Judge Glenn purported to testify that the quorum court authorized all the projects to which the court's question was directed, or whether he was asserting that the quorum court authorized the work on Bossy Glenn's farm. The latter was the subject matter of Attorney Thomas' questioning before the chancellor interjected his question. Additional confusion arises from the fact that the term "quorum court" is used rather than "county court." The principal duties of the quorum court are to levy county taxes and make appropriations for public purposes. It is difficult to believe the quorum court would authorize numerous specific work projects on private property. The matters for which it makes appropriations are specified under eight headings and none of those items even remotely touch on private projects. Ark. Stat. Ann. § 17-409 (Repl. 1956).

This court was faced with an analogous situation in *Ward* v. *Farrell,* 221 Ark. 363, 253 S. W. 2d 353 (1952). There the county judge was sued for the recovery of moneys drawn in his capacity as Road Commissioner. The record was incoherent on a vital point. Judge Farrell had expended his own money and subsequently drew funds to reimburse himself. The record was not clear whether Greene County received full benefit for the claimed expenses. In that situation this court remanded the case for further development of that point in order to give Judge Farrell an opportunity to show to what extent he actually incurred necessary expenses.

In the case at bar, it can be forcefully argued that the burden was on the taxpayers to establish the absence of judicial authority for these two projects on Judge Glenn's farms. On the other hand, it can be logically reasoned (1) that there is no statutory authority to be found under any circumstances for the projects to have been performed; (2) the law is clear that a county judge, as distinguished from the county court, is strictly prohibited from authorizing the projects; and (3) it was not disputed that the work was in fact performed. In

view of the law and undisputed facts it can be reasoned that a court order authorizing the work would be in the nature of an affirmative defense to be produced by Judge Glenn. However, we do not find it necessary to fix the responsibility for presenting the proof. We try the case de novo and we find the record so confused on this particular point that no court can do equity to either of the litigants. In that situation we feel justified in following the procedure in *Ward* v. *Farrell, supra.*

The taxpayers offered testimony relating to the cost of Projects Three and Six. They employed a registered professional engineer who inspected the projects for the purpose of testifying. That inspection was very brief, and long after completion; in his own words he was "at the mercy of my source of information which tells me that certain things took a certain amount of time"; whether all of the levees and flood gates as to Project Three are on private property is not clear; and the exact source of the materials there used—tile and flood gates—is not clear. On retrial, if the court reaches the question of compensation, the subject should be more satisfactorily developed. The measure of recovery would be the price the landowner would have had to pay for machinery, labor, and materials on the competitive market at the time of construction.

We do not disturb the order of the chancellor permanently enjoining the county judge from the illegal use of county equipment on private property for private benefit. In fact there is no appeal on that point. We remand for further proceedings with respect only to those projects we have designated as numbers three and six.

Affirmed in part, reversed in part.

LEON EISEN JR. *v.* BLACK & WHITE CAB CO. ET AL

5-4580 428 S. W. 2d 56

Opinion delivered May 27, 1968

Hardin, Barton, Hardin & Jesson and *H. Clay Robinson,* for appellant.

Warner, Warner, Ragon & Smith, for appellees.

LYLE BROWN, Justice. The Workmen's Compensation Commission denied appellant Eisen's claim for benefits and on appeal to the circuit court the Commission was affirmed. The claim was rejected on the grounds that (1) Eisen was not an employee of appellee Black & White Cab Company, and (2), assuming the employer-employee relationship existed, Eisen was not within the scope of employment at the time of his injury.

On the night of October 11, 1965, Eisen was operating a taxicab. After discharging his passenger at a motel he was flagged by a motorist whose car was stalled because of battery trouble. Eisen had a set of

"jumper cables" in the cab. While Eisen was in the process of connecting the cables from his battery to the faulty battery a third car came on the scene and struck the disabled vehicle. The impact caused severe injuries to Eisen's left leg. That leg was eventually amputated because of gangrene.

Only two witnesses testified as to the recited issues. Leon Eisen, Jr. testified in his own behalf. Bob Staton, a managing executive and one of the owners of Black & White, testified for the respondents, Black & White and the insurance carrier. The activity of Eisen at the time of his injury is not disputed. As to the employer-employee relationship, Eisen testified that he was employed by the owners of Black & White; that he was operating a company car; that they directed him in his work; that on one occasion they suspended him because of a misunderstanding over money; and that Mr. Staton promulgated rules concerning the operation of the cabs. Staton's testimony was very substantially in conflict with that of Eisen. The Compensation Commission accepted the testimony of Staton as establishing the true relationship between the parties.

Commission's Findings Summarized. There are twenty-three Black & White cabs operating in Fort Smith. None are actually owned by respondent. Property rights to the cabs fall in three classifications: first, those owned outright by individual operators; second, those purchased by an operator under a conditional sales contract financed through Black & White; and third, those purchased under a conditional sales contract and financed by a finance company of the cab operator's choice. Black & White has an arrangement with the various cab owners whereby legal title to all the vehicles is registered in the name of Black & White irrespective of the equity of the individual cab owner. Such registration makes it possible for Black & White to obtain the required liability insurance on all cabs, for which the Company pays the premiums;

Claimant Eisen owned no equity in the cab he was driving. That vehicle was actually owned by Frank Braswell, who operated it on the day shift. Braswell was buying the car under a conditional sales contract. Eisen operated it at night. For the purposes already described, the legal title was in Black & White. Claimant's arrangement to drive the car was made with Frank Braswell. Black & White advertises for drivers and when an applicant reports he is referred to a particular owner who needs a relief driver;

Black & White furnishes services to the drivers. The cabs are equipped with two-way radios. When a call is received by the radio dispatcher he contacts the cab nearest the point where a cab is desired. It is optional with each driver whether he accepts or rejects a call; if he rejects it the dispatcher calls another cab. Work periods are not prescribed by the Company. The actual owner is free to use his vehicle for family and other personal uses. Black & White maintains a mechanical department but the cab owners are not required to utilize those services. Gas, oil, and repairs are the responsibility of the owner-operators;

At the end of his shift Eisen would leave $9.50 at the Company's office. Of that amount one-half would be retained by the Company as its charge and the balance would be credited to Braswell. The Company did not withhold any type of tax. On his income tax return Eisen represented he was self-employed;

No accounting of fares is made to the Company by the owner of the vehicle or his relief driver. Neither does the relief driver so account to the owner for whom he drives.

So much for the Commission's findings. It was further of the opinion that Eisen's activities at the time of his injury were outside the scope of his cab operations. We do not reach that point because we sustain

the Commission on its finding that an employer-employee relationship did not exist between claimant and Black & White.

Appellant concedes the facts in this case are substantially similar to the facts in *Rose* v. *Black & White Cab Co.,* 222 Ark. 210, 258 S. W. 2d 50 (1953). Both cases involve the same company and the plan under which they operated in 1953 is remarkably similar to their present operation. However, appellant here contends there is an important distinction in the fact situations in one respect. It is asserted that in *Rose* the legal title to the involved vehicle was not vested in Black & White, whereas the opposite is true in the case at bar. The fact that Black & White held the legal title to the vehicle was of course a proper element for consideration. On the other hand, the Commission found the Company's explanation for its holding the legal title to be plausible. Black & White was doing business under a franchise from the city; the law requires that all cabs be covered by liability insurance; and the franchise could have been jeopardized by a failure to so comply. Further, in the event of an accident, liability could possibly be fixed against Black & White. The surest way for the Company to know that the insurance was in force at all times was for Black & White to carry it.

Certainly there was evidence here, as in *Rose,* "from which the inference might be drawn that the cab company was in fact an employer." It was a disputed question of fact. The finding of the Commission was to the contrary and we cannot say there was no substantial evidence to support that conclusion. It carries the same weight as a jury finding on a controverted issue.

Affirmed.

COMBINED INSURANCE COMPANY OF AMERICA *v.* LAVERNE C. DREYFUS

5-4589 428 S. W. 2d 239

Opinion delivered May 27, 1968

N. M. Norton, for appellant.

Fletcher Long, for appellee.

LYLE BROWN, Justice. This action originated in the municipal court of Forrest City. Appellee, Mrs. Laverne C. Dreyfus, brought suit against appellant, Combined Insurance Company of America, to recover $243.33, two statutory penalties, and attorney's fees. The suit was based on a hospitalization policy issued by appellant to appellee. In municipal court appellee recovered a judgment exceeding the $300 jurisdictional limit of the municipal court. On appeal to circuit court the judgment likewise exceeded the jurisdictional limit of the municipal court.

Mrs. Dreyfus applied for hospital insurance and was issued a policy by the Company in January 1964. An issue not here pertinent although argued caused the Insurance Company to controvert the claim. The contract for insurance specifically excluded any sickness that arose prior to a 30-day waiting period. It was the Insurance Company's position that the sickness (diabetes) was known to Mrs. Dreyfus at the time of the application for insurance. The judge sitting as a jury found in favor of Mrs. Dreyfus.

On appeal the Insurance Company challenges the jurisdiction of the municipal court to award statutory penalties and attorney's fees as provided by Ark. Stat. Ann. § 66-3238 (Repl. 1966). In the alternative, the appellant argues that even if the municipal court had jurisdiction as to the subject matter, it contends the amount claimed under the policy, the statutory penalties, and the attorney's fees must be added together to determine the amount in controversy. It is clear in the case at bar that if the penalties and fees are to be included in the calculation of the amount in controversy, the cause of action exceeded the $300 jurisdictional limit.

In order to determine whether the municipal court had jurisdiction we must look to the grant of powers. The Arkansas Constitution of 1874, Art. 7, Sec. 40, defines the specific areas of jurisdiction. The powers are very limited. In matters of contract it has exclusive jurisdiction up to $100 and concurrent with circuit court in controversies up to $300. It has no jurisdiction on matters exceeding $300, not including interest. Other grants of jurisdiction are not here pertinent.

The problem in this case is not unlike that raised in *American Liberty Mutual Ins. Co.* v. *Washington,* 183 Ark. 497, 36 S. W. 2d 963 (1931). In that case a claim for statutory penalty and attorney's fee was prayed for in addition to the amount owing under the insurance policy. The suit was in a justice court. A statutory penalty

and attorney's fee were demanded under the same statute as in the case at bar. (It should be here noted that a municipal court has the same jurisdiction authority as a justice court.) We there held that the statute authorizing penalty and attorney's fees "becomes a part of the contract of insurance."

Appellant cites *Baltimore & Ohio Telegraph Co.* v. *Lovejoy,* 48 Ark. 301, 38 S. W. 183 (1886), contending that the municipal court could not exercise jurisdiction on a penalty. In that case the penalty resulted from the breach of duty by the defendant by failing to send a telegram. The statutory penalty was held to be based, not on a contract to transmit, but on a neglect of duty which sounded in tort. Jurisdiction of a penalty per se is not vested in municipal courts. The jurisdiction of a municipal court in a given case must come within the express language of the constitution or within the incidental or necessarily implied authority of the express grants of jurisdiction. *Temple et al* v. *Lawson,* 19 Ark. 148 (1857).

Support for the argument that the penalty is to be considered a part of the "amount in controversy" (Ark. Stat. Ann. § 22-709 [Repl. 1962]) can be found in decisions under the federal removal statute. Under the Arkansas decisions on computing the "amount in controversy" for federal removal of cases, this court has on numerous occasions stated that the statutory penalty was to be considered part of the amount in controversy.

Appellee contends that the attorney's fees by statute are to be considered part of the costs and not included in the calculation of the amount in controversy. Specifically, Ark. Stat. Ann. § 66-3238 provides that attorney's fees are to be "taxed up as other costs are, or may be by law collected . . . ." Appellant on the other hand contends that the mere label by the legislature cannot expand the monetary limits of the court.

There is a wide divergence of views on this matter throughout the country. Our court at one time held in a federal removal case that attorney's fees are not part of the amount in controversy. *Missouri State Life Ins. Co.* v. *Johnson,* 186 Ark. 519, 54 S. W. 2d 407 (1932). On appeal to the Supreme Court that decision was reversed. *Missouri State Life Ins. Co. et al* v. *Jones, Admr.,* 290 U. S. 199 (1933). Our court in the next statement on the subject said, "In accordance with the opinion of the Supreme Court of the United States, we must now hold that, when a reasonable attorney's fee is a matter of controversy, and when such fee, added to the specific sum in controversy, aggregates a sum in excess of $3,000, and all other requisites are present, such cause of action is removable from State to the Federal courts." *Pacific Mutual Life Ins. Co.* v. *Bierman,* 188 Ark. 703, 67 S. W. 2d 577 (1934). Although that decision is not here controlling, it would promote consistency in reasoning and definition of terms to here apply the same rule.

Kansas has a similar penalty statute as ours and their statute was interpreted in *Gants* v. *National Fire Ins. Co. et al,* 273 P. 406, 127 Kan. 251 (1929). That court said:

> "In the consideration of this question in 2 R.C.L. 30, attorney fees, when taxed as costs, were called extraordinary costs, and in a number of jurisdictions they are distinguished from the usual and ordinary costs as not being subject to the discretion of the court, and are therefore appealable matters. The allowance of such fees requires a judicial determination in two respects—first, whether the particular case under consideration is one in which it was contemplated such a fee should be allowed; and, second, the amount of the fee that would be reasonable under all the circumstances of the case. These determinations are purely and strictly judicial, and subject to review for errors in the conclusions reached, and bear no relation to costs in the case

> except as the statute provides that they are to be recovered and collected as part of the costs."

See also *People of Sioux County, Nebraska* v. *National Surety Co.,* 276 U. S. 238 (1928).

We hold that a municipal court does have jurisdiction under Ark. Stat. Ann. § 66-3238 for the amount claimed under the policy of insurance, the statutory penalty, and the statutory attorney's fees, when the sum total amount in controversy does not exceed $300.

The municipal court never had jurisdiction because the amount of recovery sought patently exceeded the jurisdictional limit. It follows that the circuit court never had jurisdiction in this action because its jurisdiction is dependent on that of the municipal court. *Whitesides* v. *Kershaw & Driggs,* 44 Ark. 377 (1884); *Markham* v. *Evans,* 239 Ark. 1154, 397 S. W. 2d 365 (1965).

Reversed and dismissed without prejudice.

GARLAND ANTHONY JR. ET UX *v.* FIRST NATIONAL BANK OF MAGNOLIA ET AL

5-4524 & 5-4525 431 S. W. 2d 267

Opinions delivered May 27, 1968

[Rehearing denied September 3, 1968.]

Dickey & *Dickey*, for appellants.

Keith, Clegg & Eckert, for appellees.

JOHN A. FOGLEMAN, Justice. These suits were originally brought to recover $100,665.65 on 10 notes of Garland (Jiggs) Anthony, Jr. dating from August 27, 1957, and to foreclose three mortgages or deeds of trust given by appellants.

After first filing a general denial, appellants admitted liability on 6 of the 10 notes, but denied liability on the remainder, among which were notes No. 65935 executed in 1958 in amount of $23,000, No. 86019 in amount of $3,980.29, and No. 87602 in amount of $2,-360.49. Appellants later admitted liability on note No. 84798 in amount of $15,321.88. Notes No. 86019 and No. 87602 were given for interest on the other two notes. In the amendment to the answer, appellants asserted as defenses: (1) lack of consideration for the original obligation; (2) a guarantee of non-liability made to Garland Anthony, Jr. by the bank acting through its president; and (3) unclean hands on the part of the bank. In the same pleading there was a cross complaint for judgment over against one W. C. Blewster in the event that appellants were found liable on the basis that a letter of guarantee over the signature of Blewster was interpreted to be his personal guarantee to Garland Anthony, Jr. rather than that of the bank. A further amendment to the answer of appellants asserted the defense of fraud and misrepresentation. This defense was based on the following allegations: that W. C. Blewster as president and agent of appellee bank misrepresented to Garland Anthony, Jr. that Anthony would not be required to repay the loan; that the note was required to assist the bank in its compliance with banking regulations and nothing more; that a letter of guarantee given by W. C. Blewster as president was further assurance that Anthony would not be called upon to repay said obligations; that Anthony relied upon these representations to his detriment and to the benefit of the bank; that the board of directors of appellee bank either ex-

pressly held out to Garland Anthony, Jr. that Blewster was acting within the scope of his authority or acquiesced in allowing said representations after it knew or had reason to know of such dealings by Blewster; that appellees occupied a superior bargaining position and influence over Anthony; and that the acts of Blewster, as the bank's president, were a breach of fiduciary responsibilities. This amendment contained a counterclaim for judgment against the bank in amount of any judgment against appellants predicated upon the execution of these notes as an accommodation to appellees.

Appellees' reply was a general and specific denial of allegations of the second amendment and counterclaim. Appellees also asserted that any guarantee to Garland Anthony, Jr. was ultra vires and denied any knowledge or acquiescence by the Board of Directors. Appellees further denied that Anthony accommodated the bank, asserting that the accommodation was for the benefit of Avalene Whitten, a sister of Garland Anthony, Jr., and her husband, Vernon. They also pleaded laches, waiver, estoppel, acquiescence and ratification on the part of Garland Anthony, Jr., based upon alleged interest payments and failure to deny liability until institution of these suits.

The chancery court gave judgment against Garland Anthony, Jr. on note No. 65935 for the principal balance with interest and attorney's fees, and judgment against Blewster in favor of appellant. It cancelled a deed of trust purportedly given by appellants on their home in Dallas County. No action was taken regarding notes No. 86019 or No. 87602. The chancellor found: that the letter of guarantee referred to in the pleadings was the personal guarantee of Blewster; that Garland Anthony, Jr. had recognized his liability from time to time by payment of interest, and never asserted that he was not liable on the note until after Blewster was dismissed as president; that the note was executed by Garland Anthony, Jr. as an accommodation for his sister and

brother-in-law as owners of Garland Anthony Lumber Company, to which credit was given for the proceeds of the note; that a guarantee of non-liability by the bank would have been ultra vires and illegal; that there was valid consideration for the note; that the defense of unclean hands was not sustained because it was not shown that any improper activities of Blewster were known or approved by the board of directors; that Garland Anthony, Jr. should not escape liability for an act which, if wrongful, was made to deceive bank examiners or other persons; and that Blewster had admitted liability to Garland Anthony, Jr.

Appellee Wilson Rogers, assistant vice president of appellee bank, was the only witness offered by appellees. He identified the note in question and stated that interest had been paid on No. 65935 to August 10, 1964, and that there had been one principal payment of $55, leaving a principal balance of $22,945.00. He said that notices for interest payments had been mailed regularly every three months to Garland Anthony, Jr. He also stated that the interest rate shown on the note had been changed from 6% to 7% with Anthony's consent. There is no question about the proceeds of this note having gone to the account of Garland Anthony Lumber Company, a concern owned by Avalene and Vernon Whitten, the sister and brother-in-law of Garland Anthony, Jr., and John Franklin Anthony, his brother.

W. C. Blewster was president and chairman of the board of directors of appellee bank from 1942 until he resigned in November 1964. Until his connection with the bank was severed, he handled all of the transactions involved in this litigation and seems to have had a rather free hand in conducting the bank's business.

Garland Anthony, Jr. had done business with the bank since 1941. While his loan account was paid in full in 1951, he seems to have had a series of business failures after that time. In all of these businesses he in-

curred debts which he liquidated by borrowing money from appellee bank. He also borrowed money for living expenses and to pay premiums on life insurance pledged to appellee bank as security. He mortgaged timber lands of the value of $82,000 to secure these debts. The notes on which he admitted liability constituted a part of these debts. He was allowed by the bank to keep a supply of blank notes on hand. He usually arranged for loans over the telephone, after which he would fill in and sign a note and attach it to a draft for the loan proceeds.

Blewster solicited the account of Garland Anthony Lumber Company for the bank in 1943. He took care of its financial needs at all times and even arranged to "farm out" loans to other banks when the company had exceeded his bank's legal limits on loans. The Whittens had the utmost faith and confidence in Blewster because they knew he could get financial assistance for them whenever they needed it. This assistance was not limited to this business venture, but included a loan of money to a wholesale lumber concern in which Whitten had to be a silent partner because OPA regulations forbade his ownership in such a business. Blewster even arranged for the purchase of lumber by this concern and was paid commissions which he later refunded when financial difficulties arose. The Garland Anthony Lumber Company was permitted to incur overdrafts in substantial amounts. The Whittens had, on occasion, left blank notes in Blewster's hands to be used in case of overdrafts. Blewster carried these as "cash items" in the bank's assets rather than permitting the bank account to be overdrawn, but they are usually referred to by the parties as overdrafts.

Shortly before the execution of the note in issue, Blewster called Vernon Whitten and said something would have to be done about an accumulated overdraft of $23,000. When Whitten went to the bank to discuss the matter, Blewster said to let him work on it. This was about the time when Blewster expected bank exam-

iners, and he was doing everything he could to get all cash items and overdrafts out of the bank. There is a conflict in the testimony as to what happened from this time on. Blewster said that the matter was discussed with the Whittens several times and that they stated that they had no way in which they could pay this amount and that he suggested that they go to Garland Anthony, Jr. to see if some arrangement could be made. He testified, however, that he went to Anthony on his own. Mr. and Mrs. Whitten both say they made no request of "Jiggs" and didn't talk to him about the matter either before or after their conversations with Blewster. They said that they were not close to "Jiggs," would not have asked him to help, and did not think he would have done so if they had asked. Mrs. Whitten says that she did not authorize Blewster to contact her brother and would have objected had she known that he intended to do so. Vernon Whitten said that they did not ask Blewster to find a solution for them, insofar as going to Anthony, individually, was concerned, but that Blewster said to give him a little time and he would see what he could work out. Blewster says he feels sure that he did tell them he was going to Garland Anthony, Jr. At any rate, Blewster called Anthony. Anthony states that Blewster said, "we're in trouble" and that he felt Anthony could help. Blewster advised Anthony of the overdraft situation. Blewster says that he discussed the matter with Anthony on the basis of his borrowing $23,000 to cover the overdrafts. Anthony says that Blewster told him these items must be paid before bank examiners appeared but assured him he would not have to pay the note. He says that he agreed to sign a note only because he anticipated future dealings with the bank, he was assured he would never have to pay the note, and he felt obligated for accommodations by the bank through Blewster. He said that it was done for the express purpose of helping the bank with examiners and that there was no request to him from the partners of Garland Anthony Lumber Company. He did say that his sister expressed her appreciation in a passing

statement made sometime later.

At any rate, Garland Anthony, Jr. did execute the note and was given a guarantee or indemnity agreement. This agreement was written on the letterhead of the bank, was addressed to Anthony, and read as follows:

> "Regarding the matter of a $23,000.00 loan to this Bank for the benefit of Garland Anthony Lumber Company, I wish to personally guarantee this loan in the full amount.
>
> Very truly yours,
> /s/ W. C. Blewster
> President"

Blewster testified that he told Anthony that efforts were being made to get a Small Business Administration loan for the Garland Anthony Lumber Company and that he thought this note would be only a temporary loan which would be paid out of the proceeds of the SBA loan. Anthony testified that Blewster guaranteed him he would never have to pay the note. He claims that he was assured that his signing this note would result in a substantial favor to the bank.

Blewster advised the Whittens of the result of his conversation with Anthony. Whitten says that when Blewster called, he asked that he and his wife come over. When they did, Blewster reported that he had worked the matter out for them. He filled out a note for them to sign and said he had to go to "Jiggs" on this. He first testified that they signed a note to "Jiggs" for $23,000, but later he was uncertain as to whether Anthony or the bank was the payee of the note. Mrs. Whitten said that Blewster stated that Anthony had done this as a favor to the bank. She signed the note presented by Blewster without looking to see who the payee was. Vernon Whitten said that Blewster said that "we gave Jiggs a letter of guarantee" and that Anthony

would not have to pay, without any suggestion that Blewster was personally guaranteeing Anthony that payment of the debt would be made. While Blewster testified that he was acting as president of the bank, his testimony leaves no doubt about his intention that the guarantee be his own personal obligation, even though he did not contemplate that the payment of the debt would be made with his own funds. Rather, he hoped that the lumber company would be able to make the payment. It was unable to do so when the SBA loan was not made. Efforts to retire this debt through a sale of the company to other owners were likewise unsuccessful. For some unexplained reason, Blewster held the Whitten note (which showed Anthony as payee when delivered) and never gave it to Garland Anthony, Jr. He delivered it to appellants' attorney only two or three weeks prior to his testimony in this case. Anthony claims that he never knew of the note.

Blewster was asked several times about the reason for getting the note from Garland Anthony, Jr. and giving the guarantee. He always emphasized getting the cash items out of the bank. He mentioned both getting the bank in condition for examination and helping the Whittens. Finally, he says that "Jiggs" Anthony was accommodating the Garland Anthony Lumber Company to get the cash items out of the bank and that both the lumber company and the bank were accommodated by getting the overdraft out. Anthony admitted that his sister benefited but now claims that this was only incidental to the transaction.

Notice of interest payments was sent to Garland Anthony, Jr. as they became due. Anthony admits that he made the first payment, although he claims he did so inadvertently. Later he forwarded the notices to Garland Anthony Lumber Company which made payments until the sale of the company to new owners in 1962. Garland Anthony, Jr. paid interest thereafter at the insistence of the bank. He admits having paid $4,500

on the note. He says that he did so for the same reasons he signed the note. He claims to have notified Winston Wilson, an officer and director of the bank, sometime in 1963 that this note and one in the amount of $20,000, written to cover an overdraft of another concern in which Vernon Whitten was interested, were not his obligations but those of Blewster. Wilson testified that Anthony never denied liability on the note, but merely said that one of the notes was made for the benefit of Blewster and that he had a note or letter of guarantee and that Blewster owed him part of the money. According to Wilson, this conversation took place "after 1963 or 1964." An inference might well be drawn that this conversation took place after Blewster left the bank, although there is testimony from which an opposite inference might be drawn.

We are unable to say that the findings of the chancellor are clearly against the preponderance of the evidence. The conduct of Blewster, even if attributed to the bank, is not the kind of corrupt conduct justifying the denial of relief under the clean hands doctrine. The actions of Blewster in the matter were not coercive in any way, nor was Anthony under any legal duress. Representations made by Blewster were not of existing facts but of future prospects and were not such as would form the basis of fraud.

In order to sustain their defense based on the "clean hands" maxim, appellants refer to the actions of the bank president in manipulating and controlling notes for the bank's sole benefit without the maker's or payee's knowledge or request, in controlling customers' accounts without their knowledge or request, in signing checks on customers' accounts himself, in directing that dummy or fictitious invoices be attached to notes as security for loans, in borrowing money from customers' accounts without their knowledge or consent, and in devising means of avoiding criticism of overdrafts from bank examiners in instances not related to the obtaining of the particular note in question. It is

well settled that wrongs collateral to a complainant's cause of action may not be invoked as a defense under this maxim. The wrong must have an immediate and necessary relation to the equity complainant seeks to enforce or must affect in some manner equitable relations of the parties in respect to some matter before the court for adjudication. *Batesville Truck Line, Inc.* v. *Martin,* 219 Ark. 603, 243 S. W. 2d 729.

Appellants also argue that replacing the overdraft of Garland Anthony Lumber Company with Garland Anthony's note on which he was protected from liability by a secret agreement constituted a fraud, bringing into play the "clean hands" maxim in his favor. If this constituted a fraud, appellants were not the ones defrauded, and Garland Anthony was a party to the fraud. It is also well settled that one guilty of fraud in a transaction may not invoke the maxim as that would violate the clean hands principle. *Sliman* v. *Moore,* 198 Ark. 734, 131 S. W. 2d 1. Even if deception of bank examiners had been the only purpose of the note in question, this was as well known to Anthony as it was to Blewster, and the "clean hands" defense would not be available to him.

Appellants also contend that there was no consideration for the note, it having been given as an accommodation to the bank. As between accommodating and accommodated parties, the consideration may be shown to be wanting. *Boqua* v. *Brady,* 90 Ark. 512, 119 S. W. 677. The burden of proof was upon appellants in this regard, however. Ark. Stat. Ann. § 68-124 [Repl. 1957]; *Johnson* v. *Ankrum,* 131 Ark. 557, 199 S. W. 897; *Fisher* v. *Rice Growers Bank,* 122 Ark. 600, 184 S. W. 36. Garland Anthony, Jr. admitted that the note was given to help his sister on account of obligations she had made in excess of her credit. There can be no doubt that Garland Anthony Lumber Company received the benefit of the proceeds of the note or that Garland Anthony, Jr. knew that it would. The accommodated party was the lumber

company. The court might well have found that the Whittens authorized Blewster to make the approach to Anthony on this matter, and they certainly accepted the benefits and acknowledged their obligation to him by executing their note, even though it was not delivered to him. The accommodation of these parties constituted valid consideration for the note signed by Anthony.

Anthony sought to establish a pattern of dealing for the benefit of the bank in this manner by testifying of another such transaction which culminated in the execution of note No. 84789 by him. Oddly, he admits liability on this very note. This transaction involved an overdraft of the enterprise in which Whitten was a silent partner. While Anthony says he executed a note for $20,000 without knowing who was involved, he received in return a note of this concern signed by the known partner for the same amount with W. C. Blewster's personal endorsement thereon. His admission of liability on the note which replaced his original note lends support to the chancellor's findings rather than to appellants' position.

In *Fisher* v. *Rice Growers Bank, supra,* this court affirmed the judgment of a chancery court sustaining the validity of a note given by the makers in order to cover overdrafts of a friend who was an officer of the payee bank. There it was said that the signing of the notes was not an accommodation merely to the bank, but was in order to help a friend out of a difficulty. We cannot say that the chancellor's finding on this point is clearly against the preponderance of the evidence, as the signing of the note to help a sister and brother-in-law out of a difficulty could well remove the transaction from the category of merely accommodating the bank. While appellants argue that the note was given wholly for a pre-existing debt, there is evidence that the amount of the note was deposited to the account of Garland Anthony Lumber Company and that a note or checks for less than the amount of the note sued on were charged

against this account subsequent to or at the time of the deposit. Whether the indebtedness to the bank was evidenced by the lumber company's checks or its note at the time, the obligation was surrendered in favor of the new note.

Many of appellants' contentions are based on their view that the guarantee executed by Blewster was that of the bank. While we cannot say that there was no basis for this contention, or that the letter is without ambiguity, there is evidence that both Blewster and Anthony considered this as a personal guarantee. We have pointed out evidence tending to support the contrary finding by the trial judge. It cannot be said that these findings were against the preponderance of the evidence, particularly in view of the fact that Blewster was indebted to Whitten on an accounting from a business venture. The letter of guarantee written by Blewster, unlike the letter written by the bank president in *Binghamton Trust Co.* v. *Auten,* 68 Ark. 299, 57 S. W. 1105, relied on by appellants, pertained only to the guarantee and not to other matters relating to the bank's participation in the transaction. (In the cited case, the bank president's fraudulent representations, not his endorsement, were charged to the bank.) Furthermore, there is evidence which would justify a finding that Blewster was acting for the Whittens in this instance.

Appellants' next point is that there was error in failing to find that the bank was barred from recovery by reason of fraud and fraudulent misrepresentations on the part of Blewster. They base this contention upon statements by Blewster that Anthony would not have to pay the note and that it would be paid out of a Small Business Administration loan and the failure of Blewster to inform him that a bank could not legally guarantee its own loan or that deceiving the bank examiners might be a violation of law. As previously pointed out, we do not feel that the trial court's finding that

the guarantee to Anthony was given by Blewster personally, rather than on behalf of the bank, is clearly against the preponderance of the evidence. An honest but erroneous expression of opinion or belief is not fraud, even though made in terms of positive personal knowledge. One making such a statement concerning a matter not susceptible of exact knowledge in good faith is not liable for its falsity. *National Life & Accident Ins. Co.* v. *Hitt,* 194 Ark. 691, 109 S. W. 2d 426. Representations that are promissory in nature or of facts that will exist in the future, though false, do not support an action for fraud. *Harriage* v. *Daley,* 121 Ark. 23, 180 S. W. 333; *Bankers' Utilities Co.* v. *Cotton Belt Savings & Trust Co.,* 152 Ark. 135, 237 S. W. 707; *Abramson* v. *Franks,* 194 Ark. 971, 109 S. W. 2d 1271. The rule just stated would not apply if Blewster had made a false promise knowing at the time it would not be kept. *Victor Broadcasting Company* v. *Mahurin,* 236 Ark. 196, 365 S. W. 2d 265. Yet, there is nothing to show that Blewster did not have absolute confidence that Garland Anthony Lumber Company would receive an SBA loan from which the note payable to Anthony, which he obtained from the Whittens, would be paid. His good faith in making this representation was indicated by his willingness to execute a personal guarantee. Appellants' contention is that the transaction violated 18 USC § 656 prohibiting misapplication of funds of the bank. But the cancellation of the overdrafts by reason of, or from the proceeds of, the Garland Anthony, Jr. note could hardly be said to make the bank's position worse or to constitute a misapplication of funds. See *Adler* v. *United States,* 182 F. 464 (1910). We find no basis here for disturbing the findings of the chancellor.

In a case such as this where the testimony is so conflicting, even to the extent that there are conflicts in different portions of the testimony of individual witnesses, the advantage of the trier of the facts in the opportunity to observe the conduct, manner and demeanor of the witness is significant. We are unwilling to

say that his findings are against the preponderance of the evidence.

Appellants argue that the court erred in not finding that appellees were estopped to assert liability on this note. While we find no support for this argument, estoppel was not pleaded and appears to be asserted for the first time on appeal.

The court failed to act on notes No. 86019 and No. 87602. It appears that they are included in judgments for interest, so they should be cancelled.

The decree is modified to cancel the notes just described, and, as modified, is affirmed.

GARLAND ANTHONY JR. ET UX *v.* FIRST NATIONAL BANK OF MAGNOLIA ET AL

5-4524 & 5-4525 431 S. W. 2d 267

Supplemental opinion delivered September 3, 1968

JOHN A. FOGLEMAN, Justice. Appellants state in their motion for rehearing that notes #86019 and #87602 have been paid from funds handled by the First National Bank of Magnolia, through mistake and without any authority from appellants. The inference is that this was done without the knowledge of the appellants until sometime after the trial of the case.

A re-examination of the record in this case shows that these notes were never offered in evidence, although

copies were exhibited with the complaint. While there is an admission on the part of Garland Anthony, Jr. that he executed these notes, appellants are correct that their validity as evidence of an indebtedness by him was questioned throughout the proceedings and on this appeal. Judgment could not have been rendered in favor of appellants without the introduction of the original notes or an explanation for the failure to do so. *Clark* v. *Shockley*, 205 Ark. 507, 169 S. W. 2d 635. This reexamination also reveals that the statement in the original opinion that these notes were included in judgments for interest may not be justified. The record reflects that it was conceded through statements of counsel that these notes related to interest attributable to note #65935. The record is not clear as to the exact manner in which these notes were handled. It is not entirely clear whether the bank loaned money to Garland Anthony, Jr. which was then applied to payment of interest, or whether the notes merely represented accrued interest. Neither is it clear whether one of these notes might represent a part of the $4,500 which Anthony admits having paid on the principal obligation. In any event, liability on the notes was controverted and they were never introduced in evidence. For this reason the decree of the trial court should have denied recovery thereon.

In appellees' brief it was stated that these notes were not in issue and that they had been previously paid by agreement of the parties during pendency of the action. In a reply brief, appellants appropriately called attention to the fact that this statement is unsupported by the record. The record does reflect that counsel for appellees, during the trial, stated that liability on these notes was still in issue.

Appellants now ask that this amount be credited against the judgment rendered against Garland Anthony, Jr. There is nothing in the record before us to justify this action. It is not clear to us whether the ap-

plication of funds complained of by him was made before or after the rendition of the decree in the lower court.

Rehearing is denied without prejudice to any right appellants might have to apply to the trial court for any relief to which the facts might show them to be entitled on account of newly discovered evidence and without prejudice to any recovery to which appellants might be entitled in a separate action because of matters arising or occurring after the rendition of the decree in the lower court.

BYRD, J., dissents.

WINTHROP ROCKEFELLER, GOVERNOR ET AL *v.* ERNEST HOGUE ET AL

5-4594 429 S. W. 2d 85

Opinion delivered May 27, 1968
[Rehearing denied July 15, 1968.]

Wright, Lindsey & Jennings, for appellants.

Sam Robinson, Gene Worsham, Nathan Gordon, William S. Arnold and *William J. Smith*, for appellees.

JOHN A. FOGLEMAN, Justice. This appeal comes from a decree of the trial court enjoining the Governor

and other appellants from proceeding with efforts to remove any of the members of the Arkansas Game & Fish Commission. The decree of the lower court was rendered on the pleadings and a stipulation of the parties. The chancery court based its decision in this suit brought by certain members of the Commission upon the finding that § 5 of Amendment No. 35 of the Arkansas Constitution was not self-executing. It is conceded by the parties that the only question on this appeal is whether this section is self-executing. Section 5 is one of eight sections of the amendment initiated by the people and adopted in 1944, dealing comprehensively with conservation and regulation of wildlife of the state. The amendment creates a Game & Fish Commission of 7 members, each of whom is appointed by the Governor for a seven-year term.[1] The first members were appointed for terms varying from 1 to 7 years, so that the terms would be staggered with the term of one member expiring each year. There are provisions for removal of commissioners, the filling of vacancies, and the election of a Chairman and an Executive Secretary. The powers and duties of the commission are also set out. This court has called the amendment complete in itself, superseding all prior legislative acts, both directive and restrictive, and covering the whole subject. *W. R. Wrape Stave Co.* v. *Arkansas State Game & Fish Commission,* 215 Ark. 229, 219 S. W. 2d 948. The section in controversy reads:

> "A Commissioner may be removed by the Governor only for the same causes as applied to other Constitutional Officers, after a hearing which may be reviewed by the Chancery Court for the First District with right of appeal therefrom to the Supreme Court, such review and appeal to be without presumption in favor of any finding by the Governor or the Trial Court."

Appellants say that the section is self-executing and may be utilized without the necessity of legislation to

[1]The Head of the Department of Zoology of the University of Arkansas is an associate, non-voting member.

make it effective. On the other hand, appellees contend that the provision is not self-executing because it constitutes a statement of principles only making legislation laying down rules providing means of carrying the principles into effect necessary to put it in force. Appellees state that they are not, at this time, particularly concerned with the question whether the hearing procedure which has been adopted by the Governor satisfies the constitutional direction of a hearing by the Governor except insofar as that procedure illustrates the lack of guidelines for procedures and the absence of limitations on the Governor's power to establish the rules for such a hearing. Generally speaking, those matters asserted to indicate that the section is not self-executing are:

I. The failure to prescribe procedures does not assure to an accused commissioner due process of law guaranteed by Article 2 of the Constitution of Arkansas and Amendment 14 to the United States Constitution in that:

A. The governor might act summarily to remove all commissioners ex parte.

B. He could remove the entire commission in order to gain control over the commission.

C. There is a lack of requirement for:

1. notice of charges;
2. reasonable notice of hearing;
3. right to make defense;
4. right to appear in person or by counsel;
5. preservation of record;
6. compulsory attendance of witnesses and production of documents;
7. public hearing.

D. No rules of evidence are provided.

E. The place and forum of hearing are not fixed.

F. The nature and type of and time limitation on, review by chancery court and appeal to this court are not prescribed.

G. The burden of proof is not placed.

H. No mention is made of the weight to be given a decision of the chancery court.

II. The section might result in vacation of a removed commissioner's position immediately upon the finding of cause for removal by the Governor in spite of the right of review by the Chancery Court of the First District and appeal therefrom to this court.

There is a presumption of law that any and every constitutional provision is self-executing. *Myhand* v. *Erwin,* 231 Ark. 444, 330 S. W. 2d 68. The impact of this presumption should be especially great where the provision in question was initiated by the people.

One of the principal tests as to whether a constitutional provision is self-executing is the determination, from its language, its nature, and its objects, whether it is addressed to the legislative branch or to the judicial branch. *Arkansas Tax Commission* v. *Moore,* 103 Ark. 48, 145 S. W. 199; *Myhand* v. *Erwin, supra.* We see nothing that suggests that Amendment 35 is addressed to the legislative branch. Considerable reliance is placed by appellees on *Griffin* v. *Rhoton,* 85 Ark. 89, 107 S. W. 380. This case is readily distinguishable. The constitutional provision there involved reads:

"§ 23. Maximum of officers' salaries or fees.—No officer of this State, nor any county, city or town, shall receive, directly or indirectly, for salary, fees

and perquisites more than five thousand dollars net profits per annum in par funds, and any and all sums in excess of this amount shall be paid into the State, county, city or town treasury as shall hereafter be directed by appropriate legislation."

In holding this section not to be self-executing, we said:

"There is a strong implication from the concluding phrase of the provision in question—' as shall hereafter be directed by appropriate legislation'—that the framers of the Constitution did not mean it to be self-executing, but intended that the whole provision should be put into force by appropriate legislation. This is greatly strengthened by a consideration of the general and indeterminate character of the language employed. In the first place, the provision for payment of the excess over $5,000 'into the state, county, city or town treasury' is, at least so far as the office of prosecuting attorney is concerned, too indefinite to be properly enforced without legislation. The language, standing alone, would mean that all state officers shall pay the excess into the state treasury, and county officers into the county treasury; yet, when we remember the source whence the fees of a prosecuting attorney come, the language is too general to warrant a conclusion that so unjust a disposition of the excess in his case as payment into the state treasury was intended. As is well said by learned counsel for appellant, probably 90 per cent of fees in felony convictions and 50 per cent of fees for convictions for misdemeanors are paid to the prosecuting attorney by the counties of their respective districts. The state pays only a small part of that officer's compensation—the maximum salary to be paid by the state is fixed at $400 in the Constitution. * * * if we give the provision in question a literal interpretation, and hold it to be self-executing, it would require the excessive fees gathered by some of the prosecuting attorneys from

the counties composing their circuits to be paid into the state treasury to become a part of the common funds of the state. We do not say that the Legislature cannot prescribe such a disposition of the surplus funds, however unjust it may appear to be, in carrying out the constitutional provision; but we do say that the apparent injustice of such a disposition of the funds affords much reason for not ascribing such a meaning to the general form of expression employed. In the next place, the words 'net profits per annum in par funds,' when applied to emoluments of office, are so indefinite that it would be extremely difficult if not impossible to judicially determine, without legislation on the subject, what are 'net profits * * * in par funds.' What basis should the court adopt in ascertaining what are net profits of the office? What expenses are to be deducted? And what tribunal is to pass upon the accounts of the prosecuting attorney, ascertain what his legitimate expenses have been, and fix the amount which he should pay into the treasury? This is a matter easy of solution for a legislative body, but not for tribunals exercising purely judicial functions, unless the Legislature first provides a basis for determining what the profits of the office are. Of course, if we should reach the conclusion that the provision in question is self-executing, then it would devolve upon the courts, in the absence of legislation on the subject, to work out in as nearly an approximately just method as possible what the expenses and net profits of this office are, but the almost insurmountable difficulties in the way of doing it without legislation affords the strongest reason for concluding that the provision was not intended to be self-executing."

The section under examination in the *Griffin* case was addressed in express words to the General Assembly, not the courts. The problems for the judicial branch here, such as confining procedural steps within the

boundaries of due process, are not as great as the problems which would have been presented in the *Griffin* case. Unquestionably, the problems there were legislative, not judicial. On the other hand, those appearing here are primarily judicial, rather than legislative. The fact that review of the action is to be by the courts is an indication that the provision is addressed to the courts. That 25 years have passed without any implementing or enabling legislation by the General Assembly would indicate that it agrees that the provision was not addressed to it and that legislation was not required to effectuate it. It seems strange that the legislature proposed Amendment No. 42, governing the State Highway Commission, using Amendment 35 language relating to gubernatorial removal of commissioners, but failed for all these years to adopt implementing legislation for either amendment if it thought such language was not self-executing. Legislative interpretation, of course, is not controlling, but is to be considered, if there be any doubt. *Hooker* v. *Parkin,* 235 Ark. 218, 357 S. W. 2d 534; *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, Starke County* v. *Kellogg,* 109 Ind. App. 117, 33 N. E. 2d 363 (1941); *Stanford* v. *Butler,* 142 Tex. 692, 181 S. W. 2d 269, 153 A. L. R. 1054 (1944); *Chatlos* v. *McGoldrick,* 302 N. Y. 380, 98 N. E. 2d 567 (1951); 2 Sutherland Statutory Construction, 3rd Ed., § 5110.

The most closely parallel case is *Cumnock* v. *City of Little Rock,* 168 Ark. 777, 271 S. W. 466. There we held the following proviso of Amendment 10 (then called 11) self-executing:

> "Provided, however, to secure funds to pay indebtedness outstanding at the time of the adoption of this amendment, counties, cities and incorporated towns may issue interest bearing certificates of indebtedness or bonds with interest coupons for the payment of which a county or city tax, in addition

> to that now authorized, not exceeding three mills, may be levied for the time as provided by law until such indebtedness is paid."

A dissenting opinion aptly pointed out that the proviso made no provision for the following rather vital matters with reference to issuance of such bonds:

1. the length of time they should run;
2. the rate of interest they should bear;
3. who should execute them;
4. whether they should be sold privately or at public auction;
5. in what denominations they should be issued;
6. whether they should be sold below par.

It seems that legislative action would have been called for to a greater extent there than here.

The remaining test, and the controlling one, is whether the people, in adopting this section, intended that it be self-executing. *Faubus* v. *Kinney,* 239 Ark. 443, 389 S. W. 2d 887. Unless it clearly appears that they did not so intend, we must hold this provision to be self-executing for reasons heretofore set out and for the further reason that no construction of a given power is to be allowed which plainly defeats or impairs the avowed objects. *Ex Parte Levy,* 204 Ark. 657, 163 S. W. 2d 529. It is our duty to construe a constitutional provision in such a way that an express purpose or implied result will be given effect. *Humphrey* v. *Garrett,* 218 Ark. 418, 236 S. W. 2d 569. The remaining arguments of appellees are addressed to this test.

We find no merit in their argument that a Governor might act summarily and that an accused commissioner might not be accorded due process of law. In the first place, we must and should presume that any officer of the state, and especially the chief of the executive branch of the government, will act lawfully, correctly, in good

faith and in sincerity of purpose in the execution of his duties. *Rose* v. *Ford,* 2 Ark. 26; *Buxton* v. *City of Nashville,* 132 Ark. 511, 201 S. W. 512; *Ellison* v. *Oliver,* 147 Ark. 252, 227 S. W. 586; *Phillips* v. *Rothrock,* 194 Ark. 945, 110 S. W. 2d; *Matthews* v. *Bailey,* 198 Ark. 703, 130 S. W. 2d 1006; *Beaumont* v. *Faubus,* 239 Ark. 801, 394 S. W. 2d 478.

Furthermore, summary action is not consistent with removal after a hearing for which there is express provision in the section itself. Where an officer can be removed for specified causes only, he must be afforded a hearing beforehand. *Lucas* v. *Futrall,* 84 Ark. 540, 106 S. W. 667. The requirement of a hearing implies that the accused be given reasonable notice with a statement of charges sufficient to apprise him of the action or actions alleged to constitute the cause or causes of removal. *Lucas v. Futrall, supra; Mechem, Public Officers,* § 454 p. 287; *State ex rel. Beck* v. *Young,* 154 Neb. 588, 48 N. W. 2d 677 (1951); *Norton* v. *Adams,* 24 R. I. 97, 52 Atl. 688 (1902). See, also, Annot, 135 Am. St. Rep. 256. The use of the word "hearing" implies certain essential elements as quoted in *Wisconsin Telephone Co.* v. *Public Service Commission,* 232 Wis. 274, 287 N. W. 122 (1939):

> "There are at least three substantial elements of a common-law hearing: (1) The right to seasonably know the charges or claims preferred; (2) the right to meet such charges or claims by competent evidence; and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides, and upon the law applicable thereto. If either of these rights is denied a party, he does not have the substantials of a common-law hearing *Ekern* v. *McGovern, supra.* [154 Wis. 157, 142 N. W. 595, 46 LRA (n. s.) 796]".

We agree with the parties that the phrase "for the same causes as apply to other constitutional officers", means for high crimes and misdemeanors and gross mis-

conduct in office. Any hearing on charges of this gravity would certainly require that one accused be heard, both personally and by counsel, and that he be permitted to produce evidence in his defense. *Etzler* v. *Brown,* 58 Fla. 221, 50 So. 416 (1909); *Emerson* v. *Hughes,* 117 Vt. 270, 90 A. 2d 910, 34 ALR 2d 539 (1952); *Farish* v. *Young,* 18 Ariz. 298, 158 Pac. 845, (1916); *State* v. *Frazier,* 47 N. D. 314, 182 N. W. 545 (1921); *People* v. *Nichols,* 79 N. Y. 582 (1880).

In short, any officer, board, tribunal or agency having the power to remove, for cause, an officer serving a fixed term acts in a quasi-judicial capacity in conducting a hearing and the procedure must be of a quasi-judicial character. *Emerson* v. *Hughes,* 117 Vt. 270, 90 A. 2d 910, 34 ALR 2d 539 (1952); *Hawkins* v. *Grand Rapids,* 192 Mich. 276, 158 N. W. 953, Ann. Cas. 1917E 700 (1916); *Speed* v. *Detroit,* 98 Mich. 360, 57 N. W. 406, 22 LRA 842, 39 Am. St. Rep. 555 (1894). As such the procedure must assure a fair trial and due process of law. *McAlpine* v. *Garfield Water Commission,* 135 N. J. L. 497, 52 A. 2d 759, 171 ALR 172 (1947); *Ekern* v. *McGovern,* 154 Wis. 157, 142 N. W. 595, 46 LRA (n. s.) 796 (1913.) It would seem highly desirable that any hearing be public, and certainly it should be if any accused commissioner so desired.

It is not necessary that every detail for application of a constitutional provision be specified in order that it be self-executing. See, *Samples* v. *Grady,* 207 Ark. 724, 182 S W. 2d 875; *Cumnock* v. *Little Rock,* 168 Ark. 777, 271 S. W. 466; *Dullam* v. *Willson,* 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128 (1884); *State* v. *Young,* 154 Neb. 588, 48 N. W. 2d 677 (1951). As to many of the matters pointed out by appellees as deficiencies in the removal section of this amendment, it is sufficient to say that review by the courts necessarily requires that the courts see that any accused person is accorded the basic fundamentals of fair play and substantial justice. These

elements seem to constitute the current test of due process.[2]

The trial court, in reaching the conclusion that section 5 was not self-executing, stated that the legislature realized that article 15, dealing with impeachment, was not self-executing by enacting Ark. Stat. Ann. § 12-1201 et seq. While this legislation was adopted before the 1874 Constitution, it doubtless remained in effect. However, we find little merit in this argument because impeachment is a matter for action by the legislative branch. Certainly, it would be expected that the branch of government having responsibility for the proceeding should adopt procedural rules subject to constitutional or statutory limitations. The grant of power to remove an officer for specified causes without provision for effectuation, carries with it, as incidents to the grant, all means necessary to effectuate the power. *State* v. *Walbridge,* 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663 (1893); *Ridgway* v. *City of Fort Worth,* 243 S. W. 740 (Tex. Civ. App. 1922); *Dullam* v. *Willson,* 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128 (1884).

One other argument of appellees that deserves consideration is the contention that there is uncertainty as to the time when a commissioner's removal becomes effective so that a vacancy might exist throughout the process of review and appeal. We feel that the provision that review and appeal be without presumption in favor of any finding by the Governor or the trial court is inconsistent with the idea that the Governor's removal would be effective during this process. It is only when the removal order becomes final that it is effective, and any order of removal by the Governor should be held in abeyance upon prompt institution of proceedings for review. Support for this construction is found in the fact that there is no provision for an interim appointment pending review and appeal.

[2]This is the test applied by this court in *Pennsalt Chemical Corporation* v. *Crown Cork & Seal Company, Inc.,* 244 Ark. 638, 426 S. W. 2d 417 (1968).

The time for application for review is certainly limited by standards of reasonableness. The situation is somewhat analogous to situations where review of the actions of a tribunal on petition for certiorari or prohibition is denied because not sought promptly when the necessity therefor appears. See, *Johnson* v. *West,* 89 Ark. 604, 117 S. W. 770; *Galloway* v. *LeCroy,* 169 Ark. 838, 277 S. W. 35.

We do not intend to imply that legislation in this field is barred. The General Assembly is the repository of all the powers of sovereignty not reserved by the people or reposed in one of the branches. *Hackler* v. *Baker,* 233 Ark. 690, 346 S. W. 2d 677. There can be no doubt that the legislative branch may implement any constitutional provision by legislation which is not inconsistent therewith or repugnant thereto, so long as the legislation does not invade specific powers delegated to one of the other branches or exceed specific constitutional limitations. *Myhand* v. *Erwin,* 231 Ark. 444, 330 S. W. 2d 68.

When we consider all governing factors, we conclude that Section 5 of Amendment 35 is self-executing. The courts of other states having similar constitutional provisions conferring upon the Governor the power to remove officers have reached the same result. See, *e. g.,* *Dullam* v. *Willson,* 53 Mich. 392, 19 N. W. 112, 51 Am. Rep. 128 (1884); *State* v. *Young,* 154 Neb. 588, 48 N. W. 2d 677 (1951). Since it has been conceded by all parties that the only question now before the court is whether this section is self-executing, the propriety of the procedure adopted by the Governor is not now before us. We have dealt only with those questions we deem necessary to consider in order to reach our conclusion that Section 5 of Amendment No. 35 is clearly self-executing.

The decree is reversed, and the injunction is dissolved.

JOHN G. ASIMOS ET AL *v.* T. L. REYNOLDS & SONS, INC.

5-4505 429 S. W. 2d 102

Opinion delivered May 27, 1968
[Rehearing denied July 15, 1968.]

Curtis L. Ridgway Jr., for appellants.

Wood, Chesnutt & Smith, for appellee.

J. FRED JONES, Justice. T. L. Reynolds & Sons, Inc., an excavation contractor, obtained judgment in the Garland County Circuit Court against Mr. and Mrs. John

G. Asimos for $19,817.40 as balance due on an excavation contract, and Mr. and Mrs. Asimos have appealed.

The appellants were the owners of the De Soto Hotel in Hot Springs, as well as Lots 13 and 14 in Block 127 on a steep mountainside across Canyon Street from the hotel. In order to construct a parking lot for the hotel, appellants entered into an agreement with the appellee under which the appellee agreed to excavate and remove the dirt from Lots 13 and 14 for a contract price of $56,000. The pertinent part of the agreement giving rise to the litigation is as follows:

> "Contractor agrees to excavate and remove dirt, etc., from the premises known as Lots 13 and 14 of Block 127 of the United States Hot Springs Reservation, as follows:
>
> (A) All of Lots 13 and 14 with exception of the Northwesterly two feet of said Lots to a grade on the Southeasterly line of said Lots equal to that of Canyon Street which border said lots at said point and from said grade rising in a Northwesterly direction, so as to have the grade along the Northwesterly line of said Lots 5 feet above the Canyon Street grade."

The agreement provided for payments to be made as the work progressed and the last paragraph provided as follows:

> "The Parties hereto agree that the cost of removing any sluff or cave-in materials shall be borne by the Contractor during the period of excavation, but that the cost of removing any sluff or cave-in materials shall be borne by the Owner at all times other than during the period of excavation."

Appellants subsequently requested that additional work be done in lowering the grade level of the floor

of the excavation and this work was performed. Appellants paid a total of $33,000 on the contract and upon failure to pay anything further, appellee sued for $26,659 as the balance due on the contract. This amount included $1,159 for additional work on the side agreement for change in the grade of the floor of the excavation. The appellants answered by general denial, except as to the execution of the contract, and appellants counterclaimed for damages in the amount of $45,000 for breach of the contract.

The case was tried in the circuit court before the judge sitting as a jury, and the judgment in favor of appellee for $19,817.40 was rendered on the findings of the trial court, as follows:

> "1. The plaintiff, T. L. Reynolds & Sons, Inc. entered into a contract with the defendants, John G. Asimos and Jane A. Asimos to excavate certain portions of Lots 13 and 14 of Block 127 of the United States Hot Springs Reservation for a total consideration of the sum of $56,000.00; that of that sum $33,000.00 was paid by the defendants to the plaintiff.
>
> 2. That the plaintiff performed the contract to the extent possible; that the plaintiff was unable to excavate a ninety degree vertical line due to the nature of the rock formation, which necessitated slopeage to protect against sloughage and cave-in of the adjoining property; that plaintiff and defendants acquiesced in the demand of the National Park Service to refrain from excavation that would undercut National Park property or permit slides that would affect the surface of National Park property.
>
> 3. That the amount of slopage remaining on said lots contemplated to be excavated amounted to 2,412 cubic yards; that the cost of excavating said cubic yards, based upon contract price, would have been $1.80 per cubic yard; that the defendants are

entitled to a set-off in the sum of $4,341.60 for the materials not removed as contemplated in the contract.

4. That the defendants, by causing the lot to be immediately paved and using same for parking purposes and by making additional payments to the plaintiff after the plaintiff had ceased work and left the job, waived and abandoned any claim against the plaintiff for completion of the work.

5. That the undisputed evidence proves that the plaintiff excavated into certain areas of the lots deeper than was required under the contract in order to provide a proper surface for paving purposes; that the work was done at the request of the defendant, John G. Asimos; and that the plaintiff is entitled to the sum of $1,159.00 for the extra work done.

6. That the defendants waived any claims for damages against the plaintiff and are estopped by their actions in causing a concrete slab to be poured and using the lot as a parking lot without first demanding that the plaintiff complete the contract; and further, the defendant, John G. Asimos admitted from the witness stand that he owed the plaintiff additional sums of money for the work."

On appeal to this court, the appellants designate the points upon which they rely for reversal, as follows:

"1. The court improperly considered certain hearsay evidence during the course of the proceeding to arrive at one of its findings of fact.

2. The court permitted recovery based on the contract when the appellee was in obvious breach thereof.

3. The court applied an erroneous formula in arriving at its judgment."

The evidence reveals that the back side or end of the excavation was sixty or seventy feet deep where it was cut into the mountain. The written agreement between the parties is silent as to whether the walls of the excavation were to be perpendicular from within two feet of the property boundary line on the side of the mountain to the floor of the excavation. Appellee based his contract price of $56,000 on the number of cubic yards to be excavated at $1.80 per yard and he estimated the number of yards to perpendicular walls, so this litigation stems from, and involves, the question of whether the walls of the excavation were to be straight up and down when the excavation was completed, or whether some deviation from perpendicular was permissible under the terms of the contract.

When appellee commenced the excavation, it soon learned, from the nature of the ground, that a perpendicular wall of an excavation sixty to seventy feet deep, would not support itself, so it sloped the wall from within two feet of the property line at the top of the excavation out to twelve to sixteen feet from perpendicular at the bottom of the excavation.

As to appellants' first point, they argue that the trial court erroneously considered certain demands made by the Park Service in a letter to appellants, with copy to appellee, the letter having been received in evidence for the limited purpose of showing it had been received. Appellants argue that outside of the contents of this letter, there is no evidence in the record that the National Park Service had made demands on the parties to refrain from making an excavation that would undercut the National Park property.

We do not agree with the appellants on this point. The demands of the National Park Service were not material to the issue in this litigation, and if the trial court erred in considering the letter beyond the limited purpose for which it was offered and received in evidence,

we consider the error harmless under the circumstances of this case. There is ample evidence that the sixty to seventy foot wall of the excavation would have sloughed or caved off if cut perpendicular in the type of soil involved in this operation, and that such sloughing or caving would have invaded the Park Service property which was only two feet away from the top edge of the wall of the excavation. All parties recognized their duty as to protecting neighboring property and the letter from the Park Service warning the appellants and the appellee against invasion, could have added no duty not already imposed by law. As a matter of fact, T. L. Reynolds testified that he discussed the contents of the letter with appellants, that appellants agreed that the property line had to be protected against sloughing off, and that they discussed, without disagreement, that the only way to protect the property line against sloughing, was to slope the wall from the top outward toward the base, as was done. Furthermore, Mr. Reynolds testified that appellants observed the work in progress every day and made no complaint about the way it was being done. Appellants denied that they discussed with appellee the necessity for sloping the walls, but Mr. Asimos did testify: "I told him we were going to have to look after the government property but I didn't tell Mr. Reynolds to go into the government or not to go in, it was up to him to take care of it."

Appellants' second point goes to the heart of the lawsuit, but we are of the opinion that there is substantial evidence in the record to sustain the trial court.

The contract simply calls for appellee to excavate and remove dirt, etc. from "all of lots 13 and 14 with exception of the northwesterly two feet of said lots. . . ." The contract then provides for the depth of the excavation by fixing the grade of the floor in relation to Canyon Street. The grade of the walls, in relation to perpendicular, could have been fixed as easily as the grade of the floor, had the parties not intended to

leave some room for variation consistent with safety, good judgment, and common sense, as the work progressed and the nature and composition of the subsoil structure demanded. Such intent is amply supported by the circumstantial evidence in this case. Even before appellants entered into the contract with appellee, and before any topsoil was removed and the structure and composition of the subsoil or strata was revealed, Mr. Faye, a former city engineer, at appellants' request, figured and estimated the number of yards of dirt to be excavated and removed from the lots. Mr. Faye discussed the situation with the appellants, and testified as follows:

> "Q. Did you ever have occasion to talk with Mr. Asimos about the slopeage, the type of rock, texture that was protecting the property lines along that line?
>
> A. Yes.
>
> Q. What was that discussion, what did that consist of?
>
> A. John had—this lot has a certain what you call a horizontal area and he wanted to get as large a parking space as he could to utilize as much of his property as he could and he wanted it coming straight down and I advised him at the time through experience on other jobs around here, similar jobs, there was danger of sloughing. In other words, cut straight up and down it's just not going to stay there, it's got to come off; so, I advised him to put a slope on it but John took it from there."

Mr. Faye furnished appellants with a written estimate, as follows:

> "I have made a survey of Lots 13 and 14 in Block 127 of the Hot Springs Reservation, and have made calculations of the yardage to be excavated.

The calculations are based on cutting the lots to street grade at the front of the lots for the entire frontage on Canyon Street, and the bottom of the cut to rise five feet toward the rear of the lots. The calculations are also based on the vertical cuts having a slope of one horizontal to five vertical.

On this basis, I have calculated the excavation yardage to be 26,500 cubic yards.

(29,000) straight down."

With this knowledge, advice, and recommendation, furnished by an expert civil engineer with broad experience in mountainside excavations in Hot Springs, appellants entered into the contract with appellee and although the horizontal elevation of the floor was specifically spelled out in the contract to accomplish drainage, the vertical position of the walls was not specifically designated and spelled out in the contract. There is no evidence in the record that the parties to the contract ever discussed with each other the interpretation or meaning of any of the terms of the contract either before or during the period of performance. The intention of the parties to a contract controls its interpretation, and in construing a contract, the court should place itself in the situation of the parties in order to arrive at their intention in making it. *Arlington Hotel Co.* v. *Rector*, 124 Ark. 90, 186 S. W. 622.

Even though the contract price of $56,000 appears to have been arrived at by multiplying the estimated number of yards of the dirt to be excavated, straight down from within two feet of the property line, by $1.80, the estimated charge for excavating one cubic yard, the overall evidence is convincing that the contract was written, and so considered, accepted and intended by the parties, that appellants were to have as much parking space in the excavation as reasonably possible, and that appellee was to excavate as much space as reasonably

possible within the designated area inside appellants' property boundary lines.

The overall evidence is indicative that the appellants and the appellee made a common sense and practical approach to the interpretation and performance of the contract, the appellant desiring the walls to be as near perpendicular as reasonably possible, and the appellee desiring to do the excavation in such manner as to leave the walls as perpendicular as reasonably possible. The evidence is clear and convincing, that it was not reasonably possible to excavate to the depth required with the walls of the excavation being perpendicular, so we conclude that there is substantial evidence in the record that appellee was not required under the terms of the contract to excavate to perpendicular walls within two feet of appellants' property lines.

The full performance of the contract by appellee, as intended and understood by the parties, is borne out by the evidence. Appellants agreed that property lines had to be protected. They observed the excavation in progress and made no objection to the manner in which appellee was performing the work (which was being done in keeping with the recommendations made to Mr. Asimos by his own engineer). Appellants started paving the floor of the excavation as soon as appellee removed its machinery. The appellants made payments on the contract after the machinery was removed and the paving completed, and Mr. Asimos admitted at the time of the trial that he still owed some amount to appellee. Considerable material sloughed off of the walls after appellee ceased work and no request was made for its removal under the last paragraph of the contract. In fact the record reveals that no dissatisfaction was registered by appellants to the entire performance, until appellee demanded pay of the balance he contended was due on the contract price. We conclude that there is substantial evidence that the contract was fully performed by the appellee according to the terms of the contract, as under-

stood and intended by the parties to the contract when the agreement was entered into by them.

In support of appellants' third point, they advance a logical argument and we agree that the trial court may have applied an erroneous formula in arriving at its judgment. But if error was committed in this connection, appellants are the beneficiaries of the error and they are not the ones to complain.

The trial court found that appellee "performed the contract to the extent possible." This being a suit on a contract in a court of law, we interpret the court's finding to be that the appellee performed the contract to the extent possible, as contemplated and intended by the parties to it. Appellant is correct in that there is an inconsistency in allowing appellee's recovery on a contract performed with a set off in damages to appellants for that portion of the contract that was not performed. There was no evidence submitted as to the number of yards actually excavated by the appellee. There was evidence as to the number of yards still remaining in the slope of walls making up the difference between the contract as performed by the appellee and a perpendicular wall as appellant contends the contract called for. There was also evidence that the appellee arrived at his contract price on the estimated cost of removing the dirt at $1.80 per yard and that he arrived at the $56,000 figure, on the theory that he would be able to excavate the area to perpendicular walls, even though the contract did not call for perpendicular walls and the parties intended that the walls be as near perpendicular as reasonably possible. Apparently, the trial court reasoned that since appellee's contract price was based partially on dirt he was unable to excavate, that equity and good conscience would not permit him to recover for work he intended but was unable to perform, and proceeded to credit appellants' account with that portion of the contract price which was based on services appellee intended but was unable to perform. In other words, the trial court apparently considered that appellee had

overcharged the appellants by overestimating the number of yards of dirt he could move at $1.80. The fallacy of this reasoning lies in the fact that appellee did not contract to do the excavating at $1.80 per yard, he contracted to do it for $56,000.

There is substantial evidence that the contract was performed as the parties intended. There is substantial evidence that appellee performed additional work at appellants' request in lowering the original grade in the excavation floor. We agree with appellant, however, that the trial court applied an erroneous formula in arriving at its judgment, but the error was favorable to the appellants, and the appellee has not appealed.

The judgment of the trial court is affirmed.

BYRD, J., concurs.

J. T. KEMP ET AL *v.* TOMMY SIMMONS ET AL

5-4581 428 S. W. 2d 59

Opinion delivered May 27, 1968

Charles F. Cole, for appellants and cross-appellees.

Ivan Williamson, for appellees and cross-appellants.

J. Fred Jones, Justice. The city of Mountain View, Arkansas, extended its airport landing strip east across a street known as Kemp Road, and diverted traffic to and from the north end of Kemp Road over a new road constructed west from Kemp Road along the north side of the landing strip. J. T. Kemp, Lloyd Kemp, Don Kemp and Dean Kemp, who owned property on Kemp Road north of the airport, filed a petition in the Stone County Chancery Court against the Mayor and City Council of Mountain View seeking a reinstatement of Kemp Road to its former condition and an injunction against doing anything in the future which would prevent or hinder the petitioners and the general public from having complete and unrestrained access and use of such roadway or street. The Mayor and Council demurred to the petition and the evidence. The chancellor overruled the demurrers and denied the petition. The Kemps have appealed and they rely upon the following points for reversal:

> "The Mayor and City Council of Mt. View were without authority to close a portion of the road in question and to erect the barricades thereon.
>
> The chancery court erred in dismissing appellants' petition, and should have granted the relief sought.
>
> Appellants are entitled to the relief requested in their petition."

The Mayor and City Council have cross appealed and they rely on the following points:

> "The trial court erred in over-ruling city's demurrer to Kemp's petition.
>
> The trial court erred in over-ruling city's demurrer to Kemp's evidence."

The facts in this case are not seriously in dispute. The appellants are relatives and for many years have owned their separate farm lands northeast and adjacent to the city of Mountain View, which is a city of the second class. A public road which has become known as "Kemp Road," has for many years extended north from state Highway 14 through the Kemp community and has been used by the appellants and others in gaining access to black-topped state Highway 14, which runs east to Batesville and west to Mountain View proper. Kemp Road was originally east of the city of Mountain View, but the city has extended its boundaries east along the north side of Highway 14 by annexation of East Subdivision to Mountain View, and the south end of Kemp Road is now inside the corporate boundaries of Mountain View and has become a street within the city limits of East Subdivision. Another road, known as "Section Line Road," also extends north from Highway 14, and leaves Highway 14 about one-half mile west of Kemp Road and runs more or less parallel with Kemp Road. The city owns and maintains an airport, or landing strip, north of, and adjacent to, East Subdivision, with the landing strip being two hundred feet wide and extending west from Kemp Road for a distance of approximately one-half mile and almost to Section Line Road. The city of Mountain View, in anticipation of outside financial assistance for the purpose of improving its airport and paving the airport runway, and in order to accommodate larger airplanes, extended the airport runway, or landing strip, some distance east, across Kemp Road. The city first constructed a new

road, or street, running from Kemp Road west to Section Line Road along the north side of the landing strip, then by resolution adopted on July 25, 1967, a two hundred foot section of Kemp Road was closed where it was crossed by the extension of the airport runway. That portion of Kemp Road south of the runway was left open from the runway to Highway 14, and that portion of Kemp Road north of the runway was left open with access to state Highway 14 *via* the new road along the north side of the landing strip then south on Section Line Road.

It became necessary for appellants, in traveling from their homes to Highway 14, to travel south to the landing strip, then west approximately one-half mile toward Mountain View to Section Line Road, then south on Section Line Road to Highway 14. For the purpose of travling west on Highway 14 toward Mountain View proper, appellants were required to travel no farther than before the change was made. But for the purpose of traveling east on Highway 14 toward Batesville, it was necessary to make two additional right angle turns and travel about one mile farther than before the change was made. Appellant Lloyd Kemp lives on Kemp Road about one-fourth mile north of Highway 14 and since the change in the access route he is required to travel about three-fourth mile instead of one-fourth mile in reaching the black-topped Highway 14.

By orders of the Mayor of Mountain View, under authority of a resolution adopted by the City Council in July 1967, the two hundred foot section of Kemp Road was torn up and barricades were erected about September 29, 1967. The petition for injunction was filed on October 5, 1967. A general demurrer, alleging "that said complaint does not state facts sufficient to constitute cause of action," was filed to the petition on October 14, 1967. On October 16, 1967, the City Council, in special session, passed an ordinance which in effect, af-

firmed the resolution adopted in July. The case was tried and the decree entered on October 18, 1967.

The appellants, on direct appeal, do not argue procedural invalidity of the legislative process by which a part of Kemp Road was closed except in reply to appellees' argument that the procedure followed by the Mayor and City Council was regular. The thrust of appellants' contention is that the state of Arkansas has never delegated to cities of the second class, authority to close a street under such facts as appear in this case. The appellees contend that cities of the second class do have such authority under the facts of this case and in support of their demurrers, appellees contend that the appellants did not allege, or prove, such special, or peculiar, damages as is necessary for the maintenance of an action for injunctive relief against closing a portion of Kemp Road in this case.

Arkansas Statutes Annotated § 19-3825 (Repl. 1956) authorizes vacation and abandonment of a street *dedicated* by the owner *in a recorded plat where the street has not been used for five years,* and this section clearly does not apply to the facts in this case at bar. Consequently, if the city of Mountain View had the authority to vacate, or close, any portion of Kemp Road, under the facts in this case, such authority must be found in Ark. Stat. Ann. § 19-2305 (Repl. 1956), the pertinent part of which is as follows:

> "In order to better provide for the public welfare, safety, comfort and convenience of their inhabitants, the following enlarged and additional powers are conferred upon cities of the second class, viz:
>
> * * *
>
> Second. To alter or change the width or extension of streets, sidewalks, alleys, avenues, parks, wharves and other public grounds, *and to vacate* or lease out *such portions thereof as may not for the time being be required for corporation purposes,* and where

lands have been or may be acquired or donated to such city for any object or purpose which has become impossible or impracticable, the same may be used or devoted for other proper public or corporate purposes or sold by order of the city council, and the proceeds applied therefor." (Emphasis supplied).

Appellant J. T. Kemp testified on direct examination: That he had lived on Kemp Road northeast of Mountain View for twenty-three years and is in the broiler business, that his principal means of ingress and egress for twenty-three years has been over Kemp Road in going to Highway 14 and to Mountain View, that he lives north of the airstrip, that trucks haul feed over Kemp Road to his place, that other people live on the road and everyone is welcome to use it, that Kemp Road has been closed or a barricade has been erected across it, that the city closed Kemp Road and built appellant, and others, a road along the north side of the airstrip. This appellant then was asked the following question and gave the following answer:

"Q. . . . How does it affect your getting in and out from your place and these trucks and feed trucks and chicken trucks getting in and out from your place?

A. Well, we have two short turns in it, and we use big trailers; and it's hard to get our chickens out over it, you know; in bad times, they can hardly make the turns."

On cross-examination this witness testified that from his doorstep to Highway 14 is five tenths of a mile, and that his house is the farthest one north on Kemp Road, that since the new access road has been built all the work has been done on it and his other road has been permitted to go down, that Don Kemp lives south of Highway 14 but has two broiler houses

north of the airport, that besides his own two broiler houses and those of his son, Don, there are three more broiler houses in the area, one belonging to his brother Lloyd and one to John Tingle, that John Tingle lives right on the side of the new access road built along the north side of the airstrip and about midway of it, that his brother, Lloyd, lives north of the airport, that Kemp Road continues north to Herpel Road and is used by himself, his son, and Howard Wade, who raises cattle and hogs, that besides himself and Howard, J. M. Green, who is with the forestry service, also uses Kemp Road out to Harpel Road and also squirrel and deer hunters use it, that his son, Dean, who is employed out of state, has a house beside his own and that his mother lives between his house and his brother, Lloyd, that there are actually four houses on Kemp Road north of the airport, that in going to Mountain View he is required to travel no farther over the new road along the north side of the airport, than he would in traveling south on Kemp Road, but in going to Batesville over Highway 14, it is more than one-half to three fourths of a mile farther since it is only one-half mile to Highway 14 over Kemp Road and one and one-tenth miles *via* the new airstrip road and an additional one-half mile east to where Kemp Road intersects with Highway 14.

Appellant, Lloyd Kemp, testified on direct examination: That he had lived north of the airport on Kemp Road for twenty-two years and that Kemp Road has been in its present location for as long as he can remember and has been used by the general public all this time. This witness was asked the following question and made the following answer:

> "Q. Well, this relocation or blocking of the street there, will it damage you in any way, or does it damage you in any way?
>
> A. It sure does.
>
> Q. Just tell the Court in what respect it does.

A. Well, it just puts me out of the way a lot. I am a quarter of a mile from where I live to the blacktop, and I am about three-quarters the other way. We had a good road there; I thought it was good. Now we have to run over gravel that is probably 6 inches deep, creek gravel, and along the airport—up on the airport."

On cross-examination, this witness testified that Kemp Road still runs in front of his place and that he has lost no ingress or egress because of cutting off the road, that the difference in time it takes him to get onto the blacktop of Highway 14 would be the difference in time it would take to travel one-fourth mile, as compared with a mile and one-fourth; that there is one person who lives on Kemp Road between the airport and Highway 14.

Appellant Don Kemp testified on direct examination: That he owns property north of the airstrip but lives south of Highway 14, that he had been acquainted with Kemp Road for twenty-two or twenty-three years, and then the following question was asked him and received the following answer:

"Q. Now, how has the closing of this Kemp Road affected you and your property up there?

A. Well, like Lloyd said, we are traveling a road now that has got 6 inches of gravel on it.

Q. Has it affected the value of the property any?

A. Yes, it has.

Q. In what respect?

A. Well, it put us about a mile out of the way from the real highway."

On cross-examination this witness testified: That in going from his home south of Highway 14 to his proper-

ty north of the airport, he travels no farther now than he would before Kemp Road was closed, but that the road is not as good since it is necessary to travel farther on gravel.

Howard Wade testified on direct examination: That his brother sold the land to the Kemps and that he is thoroughly familiar with Kemp Road, that the road has been in its present location for 50 years and has been used by the general public during that time.

On cross-examination this witness testified: That he had used the north end of Kemp Road from Herpel Road in hunting cattle and such as that; that a portion of Kemp Road in that area runs through his land and that he does not believe that the county would attempt to work the road without saying something to him about it.

The testimony offered by appellees had to do with the need for the airport runway extension, the purchase of property for that purpose, and the adoption of the resolution and passage of the ordinance in connection with closing the two hundred foot strip of Kemp Road, and that testimony is not important to the issues on this appeal.

Appellants rely on the decisions of this court in *Texarkana* v. *Leach,* 66 Ark. 40, 48 S. W. 807, and *Brooksher* v. *Jones,* 238 Ark. 1005, 386 S. W. 2d 253. The facts in both of these cases readily distinguish them from the case at bar. In the *Leach* case the steeet was being abandoned across a series of railroad tracks in favor of a crossing to be provided by the railroad company across fewer tracks. Apparently the proposed abandonment left appellant's, and neighboring property, on the dead end of the street against the railroad. In any event, it clearly appeared that appellant's property would have been reduced by at least twenty-five to fifty per cent in value by the abandonment. It is true that this court held in the *Leach* case that the city did

not have the authority to close the street in these words:

> "Texarkana being a city of the second class, the ordinance of its city council is void. The municipal authorities of a city or town cannot vacate a street or any part of it without the authority of the legislature. This power does not inhere in a municipality.
>
> * * * The statutes of this state authorize municipal corporations to lay off, open, widen, straighten, establish and improve streets, and keep them in repair, but they do not expressly, impliedly, or incidentally confer upon cities of the second class or incorporated towns authority to vacate streets."

As pointed out by the appellants, Ark. Stat. Ann. § 19-2305 was enacted by the legislature about the time of the decision in the *Leach* case. As a matter of fact, Act No. 24 of 1897 (Ark. Stat. Ann. § 19-2305) was approved on June 5, 1897, and the *Leach* case was decided December 17, 1898. The court, however, did not mention Act No. 24 of 1897 in the decision, but as pointed out in appellants' brief, this act does "grant to a city of the second class the authority to: 'alter or change the width or extension of streets, sidewalks, * * * and to *vacate* or lease out such portions thereof as may not for the time being *be required for corporate purposes.*' " (Emphasis on "vacate" supplied).

In the *Brooksher* case, supra, Birnie Avenue in Fort Smith had been dedicated to the public as a city street since 1906 and was being used daily by more than two hundred automobiles, when the city of Fort Smith attempted to abandon a portion of it to Safeway Stores, Incorporated. This court, in effect, simply held that the proof in the *Brooksher* case failed to show that the portion of Birnie Avenue sought to be vacated was not required for corporate purposes.

The Brooksher decision did not reject the decision in the case of *Risser* v. *City of Little Rock,* 225 Ark. 318.

281 S. W. 2d 949, except to state that the points decided in the *Risser* case were not decisive of the points raised in the *Brooksher* case.

Appellees rely heavily on our decision in the *Risser* case, supra. In that case the facts were very similar to the facts here. In order to expand its airport, the city of Little Rock made two efforts to close portions of East Tenth and East 26th Streets leading from the city of Little Rock to the very populous Fourche Dam Pike area. The first ordinance was enacted in accordance with Ark. Stat. Ann. § 19-3825 (Repl. 1956) authorizing the closing of streets where they have not been used for five years. This ordinance was declared void by the trial court and no appeal was perfected. The city council then enacted an ordinance abandoning a portion of these streets on authority of Ark. Stat. Ann. § 19-2304 (Repl. 1956) (which relates to cities of the first class and is the same as Ark. Stat. Ann. § 19-2305, supra, relating to cities of the second class). An injunction was sought to enjoin the city from abandoning the old routes in favor of the new ones. The contention among others being "the city had no control or jurisdiction to close the road in question." In affirming the trial court in denying the injunction, this court touched lightly on the authority of the city, but did consider at some length whether or not the appellant petitioners had suffered special and peculiar damages. As to the authority of the city, this court said: "Cities have the authority to control, supervise and regulate all streets within corporate limits, Ark. Stat. Ann. § 19-2313, § 19-2304." As to special damages in the *Risser* case, this court said:

> "Next we come to the question of whether the appellants suffered special and peculiar damages. None of the plaintiffs own property abutting the portions of the streets being closed, but even if it is conceded that appellants have been damaged by the relocation of the roads, they have suffered no peculiar or special damages which could give rise

to a cause of action. Travelers on 10th Street, as relocated, must turn two corners and travel a little farther, which requires less than a minute in additional time. This slight inconvenience, however, is not peculiar to appellants alone. This street is an outlet from the city to one of the most thickly populated sections of the county. Every person that travels the street suffers the same inconvenience as the appellants."

The Risser decision then quotes with approval from *Little Rock and Hot Springs Western Railroad* v. *Newman,* 73 Ark. 1, 83 S. W. 653, where this court said:

'"The rule of law governing cases of this kind is that no private action on account of an act obstructing a public and common right will lie for damages of the same kind as those sustained by the general public, even though the inconvenience and injury to the plaintiff be greater in degree than to other members of the public; but an action will lie for peculiar or special damage of a kind different from that suffered by the general public, even though such damage be small, or though it be not confined to plaintiff, but be suffered by many others.' "

Now in the case at bar, none of the appellants were abutting land owners to the closed portion of Kemp Road. Besides deer and squirrel hunters, only five people were shown to have used Kemp Road, and only three of them regularly used that portion that had been closed, as compared with two hundred who daily used Birnie Avenue in the *Brooksher* case and the inhabitants of the most thickly populated area in Pulaski County in the *Risser* case. The appellants here, as in the *Risser* case, have only shown inconvenience in traveling a little farther with two additional turns in the road and have shown no special and peculiar damages not common to anyone else who might have occasion to travel Kemp Road.

Appellant questions the validity of the ordinance closing a part of Kemp Road because the ordinance was not published pursuant to law (Ark. Stat. Ann. § 19-2404 [Repl. 1956]). The ordinance was passed with an emergency clause on October 16, 1967, two days prior to the trial; it was adopted by unanimous vote on suspension of the rules, and the emergency clause was voted on separately. Therefore, the ordinance was effective upon adoption under the provisions of Amendment No. 7 of the state constitution, and it was not likely that it could have been published before the trial. We do not imply that the adoption of an emergency clause dispenses with the necessity for publication, but the effectiveness of an emergency ordinance not providing for fine, penalty, or forfeiture should not be suspended until publication, at least if it is published within a reasonable time.

The question of when a street, or any part of a street, is no longer required for corporation purposes is a question of fact to be determined by the city council in the first instance, and then by the chancellor when the validity of the council's action is attacked in chancery court. Chancery cases are tried *de novo* in this court and the chancellor's decision is sustained unless it is against the preponderance of the evidence.

We conclude, therefore, that the two hundred foot section of Kemp Road, closed by the city of Mountain View, is not, for the time being, required for corporation purposes, and that under authority of Ark. Stat. Ann. § 19-2305, and § 19-2313, the city had authority to abandon and close that section of Kemp Road and to lay off, open and maintain, the new substitute road along the north side of the airport strip.

In the *Brooksher* case, supra, the opinion was concluded as follows:

> "We make it plain that we are not holding a city has no right under any factual situation to vacate

a street under § 19-2304, but we are merely holding that the Commission had no such right in this instance under the undisputed facts as shown by the record."

We also make it plain, in the case at bar, that we are not holding that a city *does* have a right under just any factual situation, to vacate a street under § 19-2305, but we are merely holding that the City Council had such right in this instance under the facts as shown by the record in this case. In the absence of future legislation on the subject, each case arising in the future must continue to rest on its own peculiar facts. The decree of the chancellor is affirmed.

Affirmed.

VERNON NELSON *v.* DAVID KEITH UNDERWOOD ET AL

5-4542

Opinion delivered May 27, 1968
[Rehearing denied July 15, 1968.]

Smith, Williams, Friday & Bowen, for appellant.

Gordon, Gordon & Eddy, for appellees.

CONLEY BYRD, Justice. Appellant Vernon Nelson was involved in a collision with appellees David Keith Underwood and Betty Lee Underwood, his wife, at the intersection of Frog Levee Road and Highway 95 near Morrilton, Arkansas. Nelson was making a left turn with his pick-up truck when he was struck in the left side by the automobile driven and occupied by the Underwoods. Nelson testified that he was giving a proper left-hand turn signal. The Underwoods deny that any signal was given. From a jury verdict awarding a substantial judgment in favor of each of the Underwoods, Nelson appeals, claiming error in the selection and impaneling of the jury; error in the trial court's failure to direct a verdict; that the verdict for Betty Lee Underwood was excessive; and that the trial court erred in instructing the jury upon Ark. Stat. Ann. § 75-609(b) (Repl. 1957).

The instruction given upon the statute by the trial court, being incorporated in AMI 601, is in part as follows:

> "There were in force in the State of Arkansas at the time of the occurrence seven (7) statutes which provided:
>
> . . .
>
> "75-609: The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions, and special rules hereinafter stated:
>
> . . .
>
> "(b) Except when overtaking and passing on the right is permitted,[1] the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.
>
> . . .

[1]In the compiled statutes the phrase reads, "except when overtaking and passing on the right as permitted." The original act says, "is permitted."

> "A violation of one or more of these seven (7) statutes although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in this case."

We hold that it was error to instruct the jury on the statute, under the facts of this case, without informing them that the statute did not apply if Nelson was making a lawful left turn—*i. e.,* if he had given the proper signals for the left turn. As given, the instruction leaves with the jury the impression that once the overtaking vehicle has given an audible signal, the overtaken vehicle must yield the right of way even though he is properly signaling for a left turn exit from the highway.

In view of this reversal we do not reach and have made no determination on the excessiveness of the verdict. We find no merit in the other alleged errors.

Reversed.

HARRIS, C. J., and JONES, J., would affirm the judgment.

HARVEY VIRGIL TOLBERT *v.* STATE OF ARKANSAS

5344 428 S. W. 2d 264

Opinion delivered May 27, 1968

G. Leroy Blankenship, for appellant.

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

J. Fred Jones, Justice. Following a jury trial in the Poinsett County Circuit Court, on information filed by the prosecuting attorney, Harvey Virgil Tolbert was convicted of a violation of "The Arkansas Hot Check Law" and was sentenced to five years in the state penitentiary. He has appealed to this court and relies upon the following points for reversal:

> "The verdict was not supported by the evidence because the evidence did not establish intent to defraud.
>
> The trial court committed reversible error in permitting the State to introduce five checks as a part of the testimony of Boyce Durham."

The facts are as follows: The defendant had become acquainted with one R. V. "Buck" Moore, a contractor living in Harrisburg, Arkansas. The defendant spent the night in Mr. Moore's home on October 1, 1966, and the following morning, being on Sunday, appellant advised Mr. Moore that he was short of cash and requested Mr. Moore to assist him in cashing a check. Mr. Moore went with the appellant to Main Highway Esso Service Station where the operator of the service station first refused to cash appellant's check, but when Mr. Moore agreed to "stand good" for the payment of the check, the operator agreed to cash it.

The appellant made out a check for $75.00 on a printed check form with blank spaces provided for the name and address of the bank. The check form had printed on its face as follows: "For value received. I represent the above amount is on deposit in said bank or trust company, in my name, is free from claims and is subject to this check." The appellant wrote "Citizens Bank of Smithville, Arkansas," into the spaces provided therefor; the check was made payable to Main Highway Esso Service Station, it was signed by the appellant and cashed by the operator of the service station. When the check was presented to the Citizens Bank of Smithville, appellant had no account in the bank and payment of the check was dishonored for that reason. Upon return of the check to the operator of the service station with the bank's notation "No Acct.," Mr. Moore was notified and he paid the operator of the service station as he had agreed to do.

Appellant was charged with, and convicted of, violation of Act 241 of the Acts of Arkansas for 1959, Ark. Stat. Ann. §§ 67-719—67-724 (Repl. 1966). The pertinent portions of which are as follows:

> "For convenience this Act [§§ 67-719—67-724] may be referred to and cited as 'The Arkansas Hot Check Law.'
>
> "It shall be unlawful for any person to procure any article or thing of value, or to secure possession of any personal property to which a lien has attached, or to make payment of any pre-existing debt or other obligation of whatsoever form or nature, or for any other purpose to make or draw or utter or deliver, with intent to defraud, any check, draft or order, for the payment of money, upon any bank, person, firm or corporation, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or on deposit with, such bank, person, firm

or corporation, for the payment of such check, draft or order, in full, and all other checks, drafts or orders upon such funds then outstanding."

The penalty provision of the act, § 67-723, as it applies to this case, is as follows:

"For a violation of this Act, in the event the amount of the check, draft or order involved is Fifty Dollars ($50.00), or more, punishment shall be by confinement in the penitentiary for not more than ten (10) years, and by a fine not exceeding Ten Thousand Dollars ($10,000)."

Appellant offered no evidence at the trial and the first point he relies on for reversal is settled by § 67-722 of the statute, as follows:

"As against the maker, or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank, person, firm or corporation. The indorsement or stamp of a collecting bank on any check, whether such check be drawn on an out-of-state or in-state bank shall constitute prima facie evidence of presentment without protest."

The check for $75.00 upon which appellant was prosecuted and convicted was dated October 1, 1966. At the trial of the case, the state introduced, over appellant's objection, five additional checks ranging in amounts from $10.00 to $16.25, and dated from October 10, 1966, to October 12, 1966, drawn by appellant on the Citizens Bank of Smithville, Arkansas, and dishonored for payment by the bank because the appellant had no account in the bank. The original information under which appellant was charged also contained counts in connection with these checks, but because the charges on these

checks constituted misdemeanors under the statute, they were dismissed from the information on motion of the trial court with direction that they be prosecuted under proper misdemeanor charges in municipal or justice of the peace courts.

These five checks were introduced at the trial, over the objections of the appellant, and the cashier of the bank was permitted to testify thereon for the purpose of showing "the mode, or method, or scheme of operation of the defendant, the motive and his guilty knowledge and intent." The checks were received in evidence for that limited purpose and the trial court so instructed the jury as follows:

> "The Court has admitted testimony of other offenses similar to the one charged in the Information. You will not be permitted to convict the defendant upon such testimony. Evidence of another similar offense, if you believe another has been proven, is admitted solely for the purpose of showing motive, design and particular criminal intent, habits and practices, guilty knowledge, good or bad faith, and you should consider such evidence for this purpose alone and it shall not be considered in fixing any punishment that might be imposed.
>
> The defendant is not on trial for any offense except the alleged offense of the issuance of the check of October the 1st, 1966 in the amount of $75, and the defendant cannot be convicted on testimony of other possible offenses."

In the light of the trial court's instructions, we conclude that the trial court did not err in permitting the introduction of the five additional checks for the purpose they were offered and accepted.

In *Kerby* v. *State*, 233 Ark. 8, 342 S. W. 2d 412, Kerby was convicted of obtaining money under false

pretenses in the sale of corporate stock by false representations concerning the assets of the corporation, and in that case this court said:

> ". . . [I]n the case at hand Kerby's actual subjective intent was of controlling importance. Guilty knowledge is an essential element of the crime, for Kerby would have committed no offense if he believed his statements to be true. In such circumstances proof of other similar conduct, not too remote in time, is admissible to aid the jury in determining the intent of the accused. 'So, when it is material to show that a given act was done with a fraudulent intention, as, for example, in a prosecution for obtaining goods by false pretenses, other disconnected false pretenses in which the presence of fraud is recognized may be proved solely to show the intent. To illustrate: Where the accused had used a fraudulent abstract of title to induce one to sell him goods in exchange for real estate, it may be shown that the accused had on the same day employed the same means to induce another person to sell him goods.' Underhill, Criminal Evidence, (5th Ed.), § 208. We applied the principle in *Myers* v. *Martin,* 168 Ark. 1028, 272 S. W. 856, which although a civil case, is basically similar to the present case. There in a purchaser's action to recover damages sustained in the purchase of certain bank stock as a result of the seller's fraudulent representations it was held that the plaintiff could introduce proof to show that the defendant had made like misrepresentations in selling shares of the same stock to others. 'It tended to show a motive and a general scheme to induce people to invest in the stock of the bank.' "

In the case of *Larkin* v. *State,* 131 Ark. 445, 199 S. W. 382, we quoted with approval from *State* v. *Raymond,* 24 Conn. 204, as follows:

> ". . . [D]efendant was charged with keeping intoxi-

cating liquors with intent to sell the same in violation of law. William Taylor was allowed to testify that he had purchased of Raymond at his place of business at two different times intoxicating liquors. This was admitted to show that Raymond kept intoxicating liquors with the intent to sell the same. The prosecuting attorney admitted that charges were pending in the superior court against Raymond for making these sales to Taylor. In that case the defendant claimed that the sales to Taylor could not be used as evidence to convict him because if they could it would subject Raymond to two or more prosecutions for the same offense. The court held that the evidence was admissible to prove that he had sold to Taylor other liquor of the same kind in his store. The court said that the evidence of the sales to Taylor was admissible, not for the purpose of convicting the defendant of keeping that liquor for sale, but only for the purpose of showing the intent with which he kept the liquor, for the keeping of which he was being prosecuted. So here the court carefully protected the defendant against conviction of any charge except the one for which he was being prosecuted. Hence we are of the opinion that the court did not err in admitting the testimony of Spriggs and the other witnesses of the sale made to Spriggs."

In *Cain* v. *State,* 149 Ark. 616, 233 S. W. 779, the appellant was charged with, and convicted of, operating a certain gambling house in Hot Springs. One of the errors assigned on appeal was the admission of evidence as to other violations, and on this point we said:

"It is next insisted that the court erred in admitting evidence tending to show that the defendant operated gaming houses at other places in Hot Springs than the Pastime place. There was no error in admitting this testimony to go to the jury. It is true the general rule is that evidence of the commission

of other crimes is admissible only when such evidence tends directly or indirectly to establish the defendant's guilt of the crime charged in the indictment or some essential ingredient thereof. The evidence of the commission of other crimes of a similar nature about the same time, however, tends to show the guilt of the defendant of the crime charged when it discloses a criminal intent, guilty knowledge, identifies the defendant, or is part of common scheme or plan embracing two or more crimes so related to each other that the proof of one tends to establish the other."

In *Wilson* v. *State,* 184 Ark. 119, 41 S. W. 2d 764, appellant was tried and convicted in Van Buren County of the crime of forgery and uttering in connection with a check made payable to R. O. Jones. The evidence on the part of the state tended to show that the appellant had drawn a check on the bank of Scotland, bearing the signature of R. O. Jones, for the sum of $6.00; that said check was returned marked No Acct.; and that there was no R. O. Jones in Van Buren County. A number of witnesses testified to different checks alleged to have been forged and passed in the same way, and the evidence also showed that the persons whose names were signed to the checks were fictitious persons. Dates on the checks covered a period of three years, and all of them ranged in amounts from $2.50 to $12.50 and were passed by the appellant about the same time the check of R. O. Jones was cashed. The appellant contended that the court erred in admitting testimony relative to other checks than the one to R. O. Jones.

In holding the evidence admissible, this court said:

"Evidence of similar forgeries is admissible to show a uniform course of acting from which guilty knowledge and criminal intent may be inferred. In other words, the evidence of other forgeries is admissible, not to prove the commission of the crime

for which the party is being tried, but to prove guilty knowledge or intent."

In the case at bar, the statute placed the appellant under a presumption of fraudulent intent and he offered no evidence to overcome the presumption. He does, however, argue failure of proof of intent to defraud the payee service station since Moore agreed to make the check good and did pay the amount of the check to the payee. One of the fallacies in this argument is that the law does not confine appellant's intent to the service station alone. Consequently, we hold that under the instruction given as to the purpose for which the additional checks could be considered by the jury, the trial court did not err in admitting them into evidence for the limited purpose they were offered, and that the judgment of the trial court should be affirmed.

Affirmed.

FOGLEMAN, J., disqualified.

A. F. HOUSE, TRUSTEE *v.* JAMES S. SCOTT, D/B/A SCOTT LUMBER CO. ET AL

5-4555 429 S. W. 2d 108

Opinion delivered May 27, 1968
[Rehearing denied July 15, 1968.]

James L. Sloan and *Stanley E. Price,* for appellant.

Tanner & Wallace and *Owens, McHaney & McHaney,* for appellees.

CONLEY BYRD, Justice. Involved in this appeal are the competing priorities between appellant A. F. House, Trustee, (a successor in interest of Modern American Mortgage Corporation), holder of a mortgage, and appellees and cross-appellant James S. Scott, d/b/a Scott Lumber Company et al, holders of material liens on Lot 27, Plymouth Park Subdivision, an addition to the City of Little Rock, Arkansas.

It is conceded that the materialmen's liens have been properly perfected and that the mortgage was recorded before the commencement of construction. All arguments on this appeal concern the construction of the mechanic's lien act, Ark. Stat. Ann. § 51-605 (1947), and the terms of the mortgage. The provisions of the mortgage here involved are as follows:

"Grantor has applied to the Grantee for a loan in the principal sum of Eleven Thousand Five Hundred Fifty and No/100 Dollars ($11,550.00) to be used solely for and in construction of a one-family residence on the lands above described, and the Grantee has agreed to make said loan for such purposes, and the Grontor is justly indebted to the Grantee for advances made or to be made hereafter by Grantee to Grantor from time to time for such purposes, aggregating the principal sum aforesaid, each such advance to be evidenced by a negotiable promissory note of Grantor, payable to the order of Grantee, of even date with the date such advance is made and in the principal sum thereof, and each such note to bear interest from date until maturity at Six% per annum and from maturity until paid at 10% per annum, said notes to be due and payable as follows: On or before January 13, 1966. Grantee agrees that the acceptance and recordation of this mortgage binds Grantee, its successors and assigns absolutely and unconditionally, to make said loan and advances. Such advances will be made as requested by Grantor as such work progresses.

"Grantee in its discretion may require the Grantor to furnish to it, its successors or assigns, certificates of supervising architect as to partial completion prior to making any advance which it has agreed to make hereunder."

Our mechanic's lien preference statute, § 51-605, provides:

Preference over prior liens—Sale and removal of improvement under execution.—The lien for the things aforesaid, or work, shall attach to the buildings, erections or other improvements, for which they were furnished or work was done, in preference to any prior lien or incumbrance or mortgage existing upon said land before said buildings, erec-

tions, improvements or machinery were erected or put thereon, and any person enforcing such lien may have such building, erection or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter; *Provided, however, That in all cases where said prior lien or incumbrance or mortgage was given or executed for the purpose of raising money or funds with which to make such erections, improvements or buildings, then said lien shall be prior to the lien given by this act.* (Emphasis supplied.)

The record shows that of the $11,550, only $8,277.50 was given by the mortgagee to its disbursing agent, Arkansas Abstract & Guaranty Company, to be spent for the benefit of the mortgagors, Roy Stillman and wife. Only $7,389.30 of this sum was disbursed. Of that, $4,639.30 went for payment of labor performed and materials used in the construction of the building; $1,700 was paid to the mortgagee to release the lot from a prior mortgage given by John E. Olsen and wife to the mortgagee; and $1,050 was paid to John E. Olsen and wife as the balance due on the $2,750 purchase price of the lot. The record further shows that the mortgagee knew of such lot payments. Construction of the house was not completed but abandoned by Stillman.

The trial court ruled that the $1,050 payment to Olsen was an improper payment; that appellant was obligated to pay the $1,050 plus the remaining unexpended portions of the construction money mortgage into the registry of the court for the use and benefit of the lien claimants, whose liens totaled $4,731.81; that the amounts of $183 paid for hazard insurance, $45 for an FHA appraisal fee, and $450 for an attorney's fee were advances secured by the mortgage, and that when such sums ordered were paid into the court's registry, the mortgagee would have a lien superior to the mechanic's lien claimants for the full amount secured by the mortgage.

The points for reversal relied on by the mortgagee are:

I. The Chancellor erred in fastening a lien on undisbursed construction funds in favor of mechanics and materialmen.

II. There was no legal basis for the chancery court's preferential treatment of mechanics and materialmen as to construction funds spent for realty.

Cross-appellant James S. Scott raises the following points for reversal:

I. The trial court erred in declaring construction money mortgage lien to be superior to appellee's mechanic's lien.

II. The trial court erred in allowing appellant a credit of $1,700.00 to pay pre-existing mortgage indebtedness.

III. The trial court erred in declaring judgment to appellant for attorney fees and court costs superior to appellee's mechanic's lien.

These issues arise as the result of our decisions in *People's Bldg. & Loan Assn.* v. *Leslie Lbr. Co.,* 183 Ark. 800, 38 S. W. 2d 759 (1931); *Sebastian Bldg. & Loan Assn.* v. *Minten,* 181 Ark. 700, 27 S. W. 2d 1011 (1930); *Ashdown Hardware Co.* v. *Hughes,* 223 Ark. 541, 267 S. W. 2d 294 (1954); *Lyman Lamb Co.* v. *Union Bank of Benton,* 237 Ark. 629, 374 S. W. 2d 820 (1964); and *Planters Lumber Co.* v. *Wilson Co.,* 241 Ark. 1005 and 241 Ark. 1100, 413 S. W. 2d 55 (1967).

In the *Minten* case, we had under consideration a lump sum mortgage wherein the issue was whether the statute (Ark. Stat. Ann. § 51-605) required the lender to see to the use or application of the money raised by

the mortgage or whether the purpose of the mortgage was controlling. In holding that the purpose for which the money was borrowed was controlling, we there said:

> "The binding force of a mortgage results from the contract between the parties as expressed in the mortgage, and becomes a lien on the real property from the time it is filed for record. The money borrowed pursuant to the terms of the mortgage is turned over to the mortgagor, and the mortgagee no longer has any control over it, *unless there should be a special clause in the mortgage looking to that end.* As said by Judge Sanborn, this would require the substitution of the word 'use' instead of 'purpose' in the statute; and the courts have no warrant to do this. There is nothing in the language used in the statute to indicate that the Legislature intended that the mortgagee must see to the use, or the application of the money raised by such mortgages." (Emphasis supplied.)

In the *Ashdown* case the mortgage specifically recited that $4,500 of the $10,000 loan was made to clear the title of the land of an existing loan, and that the balance of the $10,000, which was $5,500, was to be paid out in four installments of $1,375 each upon completion of each of four tourist cabins. We there held that the $10,000 mortgage took priority over material liens such as those involved in this case.

In the *Lyman Lamb* case the mortgage provided:

> "This loan shall be used for the purpose of construction of a dwelling house on the above described property and shall cover and secure additional advances to be made by mortgagee to mortgagors in the total amount not to exceed $14,500."

We there held that, since the mortgage terms did not bind the mortgagee to make the future advances,

made subsequent to the date of the commencement of construction did not take priority over materialmen's liens.

In the *Planters Lumber Co.* case, Wilson Co. had a mortgage similar to the one here involved, in which it had agreed to advance $15,000. The proof showed that Wilson withheld $3,200 of the $15,000 for payment of the lot that it had conveyed to the mortgagor. We there held that Wilson Co. was not entitled to priority for the purchase price of the lot and, contrary to the argument that the mortgagee recitals about the purpose of the loan, under the *Minten* case, were controlling irrespective of the application of the funds, we said:

> "In *Minten* the lender disbursed the full amount of the mortgage money. In *Minten* there was no guarantee placed of record whereby the building and loan association was committed to a stipulated advancement for construction purposes. In both these respects the opposite is true in the case at bar."

Whether valid or not, it will be observed that our cases have been much more liberal with the lender where there was a lump sum advancement for construction money purposes than where future advances were involved. This is partly due to the technical requirements of draftsmanship necessary to make a future advance relate back to the date of the filing of the mortgage, as shown in the *Lyman Lamb* case, *supra.*

Our cases point out that the mortgage, when placed of record, is constructive notice to the world of its terms, including the amounts to be advanced during construction of a building. This notice is important to materialmen such as appellees in this case. By reading the instrument they are able to ascertain that "as the work progresses" the builder will have available, for the payment of materials, periodic advances from the mortgagee which the builder has contracted will be used solely in the construction. In *Jack Collier East Co.* v. *Barton,* 228

Ark. 300, 307 S. W. 2d 863 (1957), we held that a construction money mortgage was not entitled to priority unless the "construction purpose" was stated in the mortgage.

The technical draftsmanship requirements for future advances and recordation of construction money mortgages as set forth in the foregoing cases probably account for the specific language used in the mortgage here involved.

Thus the issue arises: Can the mortgagee who has bound the builder to use the funds "solely for and in construction of a one-family residence" through its own agent knowledgeably apply the funds to uses other than construction (such as the purchase of the lot) and still claim the benefit of the purpose language in the mortgage? We think the answer can be found in the *Minten* case, where we pointed out that the "purpose recital" of a construction money mortgage could be varied by specific language in the mortgage. Our answer to the question propounded is that where the mortgagee binds the builder to use the money SOLELY in construction of a building, we hold that for purposes of priority the mortgagee is also bound when disbursing the money through its own agent to expend it for "construction purposes only."

For clarification to the construction industry, we point out that a lender, if it so desires, may make both a purchase money mortgage and a construction money mortgage, both of which could be superior to a mechanic's lien, but that when it undertakes to combine the two in the same instrument it should follow the *Ashdown* case.

We also point out that when a mortgage has in good faith been placed of record for construction money purposes, the lender may properly make cash advances to the mortgagor in accordance with its agreement and will

not be charged with any knowledge or application of the use of the funds made by the mortgagor even though the mortgagor violates the terms of the recorded mortgage and uses the funds for purposes other than construction. In other words, the only duty cast upon the lender by the statute is that it disburse the money for construction money purposes. Once it has disbursed the money to the mortgagor for such purposes, the lender's obligation under the statute is discharged, except for perhaps those instances involving self-dealings—*i. e.*, it can not put form above substance by handing the money to the mortgagor with one hand and taking it back in the other.

We do not intend this opinion to be understood as saying that a lender who in good faith has made a construction money mortgage will not be protected when he is subsequently forced to purchase or pay off an outstanding lien or title to protect its security. Good faith in each instance is the guide.

Although we do not here reach the issue involved in the *Minten* case, because of the language of the mortgage here at issue, we think it fair to point out to the industry that in the future we will re-examine the *Minten* case to the extent that it may hold that a lender can knowledgeably disburse construction mortgage money for purposes other than construction and still claim priority over the mechanic's lien.

Our mechanic's and materialmen's lien statutes extend only to land and improvements thereon, Ark. Stat. Ann. § § 51-601 and 51-605 (1947), and do not extend to any fund or money except in the case of a bond executed in favor of mechanics and materialmen under Ark. Stat. Ann. § § 51-632—51-637, 51-641 (Supp. 1967). *Stewart-McGehee Constr. Co.* v. *Brewster and Riley Feed Mfg. Co.*, 171 Ark. 197, 284 S. W. 53 (1926). Thus it follows that in the absence of an express contract making some different provision, the exclusive security

of a mechanic of materialman is the land or improvement.

Here we can find no language making the materialmen third party beneficiaries of the mortgage. Consequently, unless the materialmen are entitled to an equitable garnishment, the trial court erred in requiring the mortgagee to pay into the registry of the court the difference between the face amount of the mortgage and the portions of the mortgage properly advanced for construction purposes. The record is clear that the mortgagor abandoned his construction contract with a partially completed building. Therefore, there was no money owing by the mortgagee to Stillman that an equitable garnishment could reach.

The cross-appellant argues that since the mortgage required a construction of the building, the materialmen are entitled to priority under the *People's Bldg. & Loan* case, *supra.* In that case the vendor of the property, as a consideration for a $20,000 sale, took a contract in which the vendee paid $500 down and was required to make certain improvements on the property. We there held that the vendor, by requiring the work in question to be done, had subordinated his purchase money claim to the lien of the mechanics and materialmen.

The construction money mortgagee stands in a much different position than the vendor in the *People's Bldg. & Loan* case. The first reason is that the statute places the construction money mortgagee in a different position; the second is that the construction money mortgagee furnishes funds with which materials and labor for the improvements are to be paid, unlike the vendor in the *People's Bldg. & Loan* case.

The $1,700 returned by Arkansas Abstract to Modern American Mortgage Corporation to release the lot from the Olsens' mortgage amounts to simply applying the loan proceeds to the purchase price of the lot, and

we hold that the trial court should have treated it in the same manner as it did the $1,050 payment to the Olsens—*i. e.,* neither should have been allowed priority over the materialmen's lien.

Cross-appellant does not dispute the $183 paid for hazard insurance and the $45 paid for FHA appraisal as advances entitled to priority over its liens. It does contest the allowance for attorney's fees and court costs. We think counsel is in error to this extent, for counsel fees by statute are assessed as court costs, and we certainly think that court costs are part of the security bargained for in a construction money mortgage.

Therefore we reverse and remand this case to the trial court with directions to allow appellant as mortgagee priority for the amounts actually expended in construction of the building and the court costs, but to disallow the $1,050 and $1,700 expended by the mortgagee's agent for the purchase of the land. So much of the decree as required the mortgagee to pay funds into the court under the equitable garnishment is also reversed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I dissent from this decision for the reasons stated in *The First National Bank of Conway* v. *Conway Sheet Metal Company, Inc.,* No. 5-4504, 244 Ark. 963, 428 S. W. 2d 293, insofar as the $1,050.00 for the purchase price of the lot is concerned. The statement that the mortgagee is bound, when disbursing the money, to expend it for construction purposes only, clearly overrules *Sebastian Building & Loan Ass'n* v. *Minten,* 181 Ark. 700, 27 S. W. 2d 1011, without reservation. The suggestion that following the procedure used in *Ashdown Hardware Co.* v. *Hughes,* 223 Ark. 541, 267 S. W. 2d 294, makes a difference, puts a construction on that case which the court did not refer to or suggest when the case was decided.

The distinction between a lump sum loan and installment or future advance loan for these purposes is a strained one, to say the least. The fact that sums are to be advanced seems to me to make little difference insofar as the application of the "purpose" doctrine is concerned. The net result is that we have at least partially abandoned the "purpose" doctrine.

It seems inconsistent to me to say that the mechanics and materialmen are not third party beneficiaries of the construction money mortgage, after having said that they are entitled to look at the records to ascertain that the builder will have periodic advances, contracted to be used solely for construction purposes. I do not believe that it is the purpose of the recording statutes to do more than give notice of the lien claimed by the mortgagee and the means of ascertaining the amount secured. Reliance on them for the purpose suggested by the majority is inappropriate.

As to the $1,700.00 paid to retire the existing mortgage, I cannot see how the position of the appellees was damaged. If the disbursement had not been made, Modern American would still have a prior lien on the lot for $1,700.00. This lien was of record and I find no representation by Modern American that the debt secured thereby was paid prior to the time of the construction money loan, as was the case in *Planters Lumber Company* v. *Wilson,* 241 Ark. 1005, 1100, 413 S. W. 2d 55.

I agree that there was no basis for requiring appellant to pay the undisbursed portion of the loan into the registry of the court or to require appellant to disburse it.

I would reverse on appeal and affirm on cross-appeal.

A. F. HOUSE, TRUSTEE *v.* JAMES SCOTT, D/B/A SCOTT LUMBER COMPANY ET AL

5-4556 429 S. W. 2d 62

Opinion delivered May 27, 1968
[Rehearing denied July 15, 1968.]

James L. Sloan and *Stanley E. Price,* for appellants.

Tanner & Wallace, for appellees.

Terral, Rawlings, Matthews & Purtle, for appellees and cross-appellant.

CONLEY BYRD, Justice. This is a companion case to *House* v. *Scott,* 244 Ark. 1075, *infra.* The amounts and the parties are not wholly identical but the issues are identical except for the point raised on cross appeal by Choctaw Plumbing Company, Inc., that the court erred in not awarding it judgment against Modern American Mortgage Corporation and A. F. House, Trustee, for the amount of its lien.

We find Choctaw's contention to be without merit because it had a contract only with Stillman. Its sole remedy under the mechanics' lien statute is for a lien upon the fixtures and the premises to the extent therein allowed.

There is no evidence here that Modern American and A. F. House, Trustee, were in any way connected

with Stillman's business other than in their capacity as mortgagees.

Therefore, so much of the trial court's judgment as required A. F. House, Trustee, to pay into the registry of the court the unexpended funds and that portion which gave the mortgagee priority as to the $1,700 paid to Modern American for the release of the Olsen mortgage is hereby reversed.

Reversed and remanded.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I dissent for the reasons stated in my dissenting opinion in *A. F. House, Trustee* v. *James S. Scott, d/b/a Scott Lumber Company et al*, No. 5-4555, 244 Ark. 1075, 429 S. W. 2d 108. I would reverse on appeal and affirm on cross-appeal.

JACK C. LUKER *v.*
REYNOLDS METALS COMPANY ET AL

5-4570 428 S. W. 2d 45

Opinion delivered May 27, 1968

McMath, Leatherman, Woods & Youngdahl and *Silas H. Brewer Jr.*, for appellant.

Otis H. Turner, for appellees.

CONLEY BYRD, Justice. The issues on this workmen's compensation appeal are the finality of the Commission's order finding that appellant's disability from his heart attack arose out of and in the course of his employment, and the constitutionality of Act 501 of 1967, which provides that if the circuit court has not acted on a workmen's compensation review within sixty days, the court shall enter an order affirming the same.

The record shows that on May 26, 1967, the Commission found (1) that the heart attack suffered by appellant Luker arose out of and in the course of his employment by appellee Reynolds Metals Company; and (2) that as a result of the heart attack claimant sustained total disability for a period yet to be determined. The order provided, "... the commission expressly retains jurisdiction of this claim for the further purpose of determining the end of claimant's healing period and the extent of his permanent disability, if any." No appeal was taken within the thirty days allowed by Ark. Stat. Ann. § 81-1325(b) (Supp. 1967), but on July 28, 1967, appellees filed with the Commission a motion requesting it to enter an order finding that no "final appealable order" had been entered, or in the alternative that the May 26, 1967, order be rescinded and a new order issued clarifying said opinion. The motion was overruled by the Commission on August 24, 1967, and appellees filed their appeal with the circuit court on September 8, 1967. No action was taken by the circuit court within the sixty days allowed by Act 501 of 1967. On November 27, 1967, counsel for appellant mailed a precedent to the circuit court for affirmance of the Com-

mission under Act 501. The court refused to enter the order, and on November 29 entered its order finding that the Commission's May 26 order was so vague and indefinite as not to constitute an appealable final order. It then remanded the matter to the Commission with directions to determine the questions of partial total disability and the end of the healing period.

We do not reach the issue of the constitutionality of the statute (Act 501) or the duty of the circuit court thereunder, for in our opinion the May 26 Commission order was final for purposes of review, and the thirty-day limitation for review had expired, thus depriving the circuit court of jurisdiction in the matter.

The appealability of the Commission's order in a workmen's compensation claim is not limited to the final disposition of the matter before the Commission. See *McNeely* v. *Clem Mill & Gin*, 241 Ark. 498, 409 S. W. 2d 502 (1966). The benevolent purposes of the act requiring the employer to make payments of compensation and medical expenses during the healing period would be defeated if all contested claims were permitted to lie dormant until the Commission could determine the end of the healing period and the permanent partial disability. Many cases have been before this court in which the healing period lasted for more than a year, particularly those involving heart and back injuries.

The May 26 order determined the employer's responsibility for the injuries and specifically retained jurisdiction for the "purpose of determining the end of claimant's healing period and the extent of his permanent disability, if any." These determinations were sufficiently final for the employer to contest on review (1) its liability to the claimant, (2) whether the evidence established the termination of the healing period, and (3) whether the evidence establishd any permanent partial disability. To this extent we hold it was final for purposes of review.

Reversed and remanded.

PATRICIA G. BURDICK *v.* RICHARD L. BURDICK

5-4572 428 S. W. 2d 248

Opinion delivered June 3, 1968

Spencer & Spencer, for appellant.

No brief for appellee.

CARLETON HARRIS, Chief Justice. On July 21, 1965, Patricia Burdick, appellant herein, was granted a divorce from appellee, Richard L. Burdick, was given custody of the three minor children, and was awarded $300.00 per month as alimony and child support. In August, 1967, Mr. Burdick filed a petition requesting that he be granted custody of the minor son, Richard Leroy Burdick, Jr., and that the decree be modified by a reduction in the child support payments and elimination of all alimony. Mrs. Burdick filed a response asking that support payments be increased to $500.00 per month. On hearing, the court granted the custody of Richard Burdick, Jr., to his father, with the right for the father to leave the boy in the actual custody of an aunt in Okla-

homa, eliminated alimony,[1] and reduced child support payments to $225.00 per month.[2] At the time of the last hearing, Linda Kay, the eldest child, was 16 years of age, Richard was 15 years of age, and Elizabeth Ann was 4 years of age. From the decree so entered, appellant brings this appeal. It is first asserted by appellant that the evidence does not show such a change of conditions since the original decree as to justify cancellation of alimony and reduction of child support payments.

The proof reflects that appellee is a Major in the United States Army, and is stationed at Fort Walters, Texas, near Mineral Wells. He receives pay and allowances of $1,263.73 per month. At the time of the original divorce, Burdick held the rank of Captain, and received pay and allowances of $1,039.03 per month. Appellee admitted that he had originally agreed to pay the sum of $500.00 per month:

"* * * I agreed, we both agreed, I said I would give her $500.00 a month so she could stay at home with the baby and we agreed to $300.00 a month child support, no alimony in it, just straight child support is what we agreed on and I paid that money until actually I got in debt to where I couldn't pay the $500.00 any more, so I paid the $300.00 a month."

The $300.00 per month was taken care of by an allotment, and Burdick sent four additional checks for $200.00; however, two of these checks were not paid because of insufficient funds, and were never made good.

Burdick testified that in April, 1967, he was called by the Juvenile Court at El Dorado, and advised that his son had gotten into trouble, and that the boy wanted to live with his father. Appellee went to El Dorado, and the custody of Richard, Jr., was given to him (temporar-

[1]There is no mention of alimony at all in this decree.

[2]Appellant's brief refers to the court's order as $200.00 per month, but the transcript reflects that the order was for $225.00 per month. No brief has been filed by appellee in this case.

ily, by the juvenile court). Young Richard accompanied his father back to Texas, and entered school in Weatherford. He came back to El Dorado for a visit during the summer, stayed about three weeks, and returned to his father. The Major testified that he learned he would be sent to Vietnam around Christmas or the first of the year, and he accordingly placed the boy with his sister, Mrs. Mary Sims, at Enid, Oklahoma; Richard, Jr., attends Junior High School in Enid. After obtaining custody of the son, Burdick reduced his allotment to Mrs. Burdick to $200.00, and testified that he sent $100.00 per month to his sister to take care of young Richard. The witness testified that, after deductions of income tax, social security and the allotments, he was left with approximately $700.00 per month. He said that he was paying $100.00 per month for rent, $50.00 to $75.00 per month for gasoline, and $200.00 per month to a bank in Weatherford, having borrowed money to pay accumulated bills. He further stated that his food cost $7.00 to $7.50 a day; he had laundry and uniform expense; still further, he said:

"* * * I have social obligations which, as I told you earlier, if you don't go you're not a flight commander very long. * * * I have nothing in my bank account. In fact, I told you [his attorney] I will pay you with a postdated check. That sounds like a lot of money but at the end of the month I am broke, period."

Mrs. Burdick is employed in El Dorado, and earns $305.00 per month, with take-home pay of $246.00. She listed expenditures for the months of July, August, September and October (1967), which appear reasonable, and which average $461.25 per month. This does not include the monthly house rental, which is $100.00 per month, and Mrs. Burdick is $800.00 behind in her house rent. This fact was verified by Robert E. Hosford, who owns the property which Mrs. Burdick is renting.

As to the boy, she testified that the aunt has no tele-

phone, and that she is unable to contact her son; that she had been unable to obtain the street address; that her letters had been unanswered. Appellant stated that she and the boy had had friction because he did not wish to abide by her rules and regulations, and that he had gotten into trouble on a charge of shoplifting. She said that she had no objection when he was placed in the temporary custody of his father, and she agreed that the boy probably did not desire to live with her; however, she objected to the provision in the decree placing the actual care of the child with the aunt.

We agree that there has been no change of conditions that would justify reduction of the support money.

It need not be pointed out that general living costs are daily rising, and it is also true that the maintenance and support of the two girls will require greater financial expenditures than were necessary at the time the divorce was granted in 1965. The elder daughter, Linda, is now a junior in high school, and, of course, the younger daughter was only a baby at the time of the divorce. Since the financial situation demands that Mrs. Burdick work outside the home, it is necessary to leave Elizabeth Ann in a nursery, and this item alone amounts to $40.00 per month. Mrs. Burdick pays the G. I. Insurance on her ex-husband out of her own funds, and, as previously stated, her expenditures cannot be said to be extravagant. Certainly, it would not be proper to penalize appellant for obtaining employment, for it would appear that this step was absolutely necessary. Even then, it will be noted that she is eight months behind in her house rent. While she now has only two children to look after financially (as compared to three at the time of the divorce), it is also true that appellee's pay and allowances have been increased approximately $225.00 per month. It may be true that Major Burdick's social obligations have increased because of his promotion, but we do not think this fact has lessened his obligation to his children.

As to the custody of the boy, we are unable to say that the court erred. In the first place, it appears that he would be quite unhappy living with his mother, and she herself testified that she felt that Richard, Jr., did not desire to live with her. The record reveals that, on his last visit to El Dorado in August, the son stayed but little with his mother, preferring to stay with her parents. According to appellant's testimony, he left his mother's house when she refused to let him spend the night away from home, and thereafter, did not return.

At the time of the last hearing, young Richard was 15 years of age. While we have said many times that the paramount issue in custody cases is the welfare of the child, we have also said that, in proper cases, the wishes of the child should be given consideration. As long ago as 1906, in *Lipsey* v. *Battle,* 80 Ark. 287, 97 S. W. 49, Justice Riddick, speaking for the court, said:

"* * * Courts not only respect the rights and feelings of the parent, but also when the child is of sufficient age they give consideration to its wishes. The child in this case is nearly thirteen years of age. She expressed a decided preference to dwell with her mother. So far as this evidence shows, this mother and child are sincerely attached to each other, and this feeling should not be disregarded, nor the ties of affection sundered, unless the welfare of the child clearly demands that she be separated from her mother. We see nothing in the evidence that requires it."

This holding has been reiterated many times.

The evidence reveals that Burdick visited his son every other week, and, of course, if he is now overseas, he cannot personally maintain a home for the boy. While the present arrangement cannot be said to be entirely satisfactory, taking into consideration the apparent antipathy of Richard toward his mother, we are unable to say that the Chancellor could have rendered a more suitable order.

In accordance with the views herein expressed, the decree is reversed, with directions to reinstate the order of $300.00 per month alimony and child support; in all other respects, the decree is affirmed.

JAMES RAY EDERINGTON *v.* STATE OF ARKANSAS

5324 428 S. W. 2d 271

Opinion delivered June 3, 1968

John F. Gibson, for appellant.

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

CARLETON HARRIS, Chief Justice. This is one of the

most unusual murder cases to come before this court. J. H. Maroney, a resident of Bradley County, Arkansas, and familiarly known in the neighborhood as "Junior" Maroney, was slain, at home in his bed, between the hours of 1:00 A.M. and 3:00 A.M. on March 30, 1967. His death was caused by a fatal bullet wound in the left side of his head, the bullet having been fired from a small caliber weapon, apparently a .22 rifle. The rifle belonged to Maroney. After an investigation of over a month, appellant, James Ray Ederington, at that time 16 years of age, was arrested, and charged with the murder. The case proceeded to trial on July 19, 1967, and concluded on July 22, at which time the jury found Ederington guilty of the crime of murder in the second degree, and fixed his sentence at 15 years imprisonment in the State Penitentiary. On August 1, the motion for new trial was denied, and, from the judgment entered in accordance with the jury verdict, appellant brings this appeal. Several points are raised for reversal, the first being that the evidence was insufficient to justify the conviction.

The evidence reflects that Maroney, with his wife and children, lived a few miles south of Banks, Arkansas, there being a number of other families living in the general area, which was known as the Lanark community. The nearest neighbors were Mr. and Mrs. Sam Ormand, who lived about 400 yards from the Maroney home. About 3:00 A.M. on the morning of March 30, Glenda Maroney, 15-year-old daughter of Junior Maroney, rode her bicycle to the Ormand home and notified Ormand that her father had been shot. She requested that a doctor be called. Ormand hurriedly dressed, got in his truck, and drove to the Maroney house.[1] Ormand went into the home, but did not go into the back bedroom where the body of Maroney had been found. He was not armed: "Well, there wasn't any light in there, and I just didn't have the nerve to go on in

[1]Mrs. Maroney was not at home, but was in Little Rock studying for the Poverty Program. Two smaller children, a 4-year-old girl and an 8-year-old boy were in bed in separate rooms.

there.'' Ormand then left the house and drove to the home of Ed Green, who dressed and accompanied Ormand back to the Maroney residence. They ascertained that Maroney was dead. There was no sign of disturbance in the room, and the men did not see anyone around the house. The back door was open, and the back screen was not hooked. O. B. Williams and Therman Williams, brothers, who live about 2½ miles from the Maroney home, received notice of the shooting by telephone, and went to the house, where they found other neighbors, Mr. and Mrs. Callaway, Ormand and his wife, and Ed Green. After staying approximately an hour, they went to the home of Maxine Ederington, a widow with six children, who lived about a mile and a half to two miles from the Maroney house. Mrs. Ederington, who had been notified by Peggy Williams (wife of Therman Williams) via telephone about 3:15, of the shooting of Maroney, was awake, and the two men drank some coffee at her home. Mrs. Ederington left to go to the Maroney home,[2] and, as she left, according to O. B. Williams, called out to her son, "Jimmy, get up and lock the door," and he answered from the bedroom, "Well—um." The witness testified that he recognized the voice as that of Jimmy, appellant herein. Therman Williams was the first person to locate a .22 rifle (evidently the murder weapon), which was found lying on the ground about three or four feet from the side of Maroney's truck, the vehicle being parked facing of the front of the house. The rifle was a .22 automatic made by Sears-Roebuck.[3]

Sheriff John Cruce of Bradley County received notice of the shooting about 3:15 A.M., and, with his deputy, Harold Spraggins, proceeded to the Maroney home, arriving there about 3:40 A.M. A number of neighbors from the vicinity were present. During his investigation of the premises, the sheriff saw a box of

[2]Mrs. Ederington did not accompany the Williams brothers, but drove on ahead of them.

[3]No one was ever able to testify whether the rifle had been placed on the ground by the truck, or had been dropped.

.22 shells on the outer edge of the dash of the truck, which was taken and subsequently examined for finger prints. The rifle, which was covered with dew, was examined for finger prints, but none were obtained because of the oily surface of the weapon. Blood was on the bed where Maroney was found, and there was a small hole back of his left ear, caused by the entry of the bullet. No other wounds were found. After the body was removed, the sheriff observed a .22 hull on the bed, which had apparently been under Maroney, and he took this as evidence. On the 31st, Deputy Spraggins went to the home of the Ederingtons, but appellant was in school; his mother took him to the sheriff's office later, and Spraggins took his finger prints. The cartridge box and finger prints were sent to the F.B.I. laboratories in Washington.

Glenda Maroney, daughter of the deceased, and in the tenth grade at school, testified that she knew appellant well, and rode the same school bus with him each day to school. The families had visited back and forth many times. She testified that Jimmy came by her house on the 29th of March (when school was out for Easter holidays) to show her a fish he had caught in the Maroney pond, and he subsequently came back around noon, being brought to the Maroney home in an automobile by another boy, Barney Ross. Glenda was making icing to go on a cake, and asked Jimmy to stir it while she went to the store. Her little sister and brother were there at the time, and when she returned from the store, Jimmy had left, Ross having returned and picked him up. During this time, Junior Maroney was over in the field putting out soda. Glenda stated that she retired for bed on the night of the 29th around 10:00 o'clock, sleeping in the front bedroom with her little sister, Cathy. Her young brother slept in the middle bedroom, and her father slept in the back bedroom. This was where Junior Maroney customarily slept, together with his wife. Glenda said that she was awakened around 1:00 A.M. by the honking of a horn, and she called her father,

and told him that someone was out front, obtained his house shoes for him, and he went outside.[4] She heard the callers discussing the fact that they wanted gasoline, and she then went on back to sleep.[5] The witness continued:

"I woke up around 3:00 o'clock and I saw this figure standing at the foot of my bed and I called my daddy. I called him about twice and he just didn't answer and I got scared. He walked on back through the house and I got up and turned the light on and I saw these glasses laying on the dresser in my room and I knew that no one in our house wore glasses. I knew someone was in there and I went in and turned the light on in my little brother's room. I stood there beside the door and there was blood all over my daddy's pillow and I called his name and I heard this rattling noise in the kitchen and I called and he didn't answer me and so I ran out on the front porch and * * *

"I hollered for Mrs. Ormand two or three times and then I ran out and hopped on my bicycle and ran up there. I was screaming all the way up there and I told them that something had happened to daddy and I told them that I thought he had been shot and I told them to get his gun, get his gun, and I told him to be sure and get those glasses. I hadn't thought about picking the glasses up until I got up there to Mr. Sam's."

When asked if she could identify the person standing at the foot of her bed, she replied that it was "James Ray Ederington." This identification was first

[4]Subsequent investigation revealed that a minister, Melvin Early, who had been attending a revival meeting at Hamburg, accompanied by Ovelett Gannaway, stopped to buy the gasoline. Early testified that in pulling up to the Maroney house, he parked his car close to Maroney's truck, and noticed the .22 rifle, heretofore mentioned, in the truck. Ovelett Gannaway, who had known Maroney all of his life, and had suggested stopping at Maroney's place for gasoline, testified that it was three minutes until 1:00 o'clock when they stopped at his house.

[5]There is no testimony that anyone heard a shot fired.

given to the sheriff on the night following the day of her father's funeral, which was held on March 31:

"I told him it was Jimmy. I told him about Jimmy's actions and Jimmy's motions. That was what made me think it was Jimmy—what made me know it was Jimmy.

"His manner and I saw those glasses and I knew they were his glasses when I turned the light on. When I saw him, doing like that (Witness motions with her head) I knew it was him. Nobody I know does that.

"And the way he walked. He drags his feet when he walks."

She added:

"I saw him. I just saw him and know."

When interrogated as to why she did not immediately tell who was in the room, she replied that she was afraid to do so, and she said that the sheriff told her that it would be better if she "didn't go around" telling that she knew who it was, and he had said that her life was in danger. Admittedly, she had told some persons that she did not know who it was. From the testimony:

"Q. What did you tell the people in the community there? A. I told people I didn't know who it was, except people who needed to know. Q. What did you tell them? A. I told them that it was Jimmy. Q. What did you tell the people in the community there about who you thought it was? A. I told them that when I realized it wasn't my daddy, he done like this (Witness indicates a motion of the head), and I've seen him do that a thousand times. Q. Is that what you told the people in the community? A. Yes, sir, the ones I thought should know. Q. The ones you thought shouldn't know, what did you tell them? A. I didn't tell them anything. I told them that I didn't know who it was, it could have been a Negro or white person. I told them I didn't know

anything. Q. Do you know who you told that to? A. Just about everybody, except Mr. Ormand, my mother, Margaret Williams, the law officials."

After Ederington was arrested, he was placed in a cell with a prisoner named Herbert Chambers. Another prisoner, Albert Walker, was also with them a part of the time. Chambers testified that he was told by the sheriff that Ederington might say something about the crime with which he was charged, and the sheriff directed Chambers to give him (the sheriff) any information that might be acquired. The witness stated that Ederington first said that he did not kill Maroney, later said that he did kill him, and then subsequently, again denied committing the crime.

John F. Walters of Washington, D. C., a finger print examiner with the Federal Bureau of Investigation, with nearly 20 years' experience, testified that there was one latent print of value on the .22 cartridge box which had been found in the truck (a thumb print), and he said that this print, and the thumb print which had been taken when Ederington was fingerprinted, were made by the same individual.[6]

Harold Spraggins (the deputy sheriff) testified that the rifle was loaded with 12 cartridges when he took it back to the sheriff's office; that it would hold a total of 16 cartridges. He explained tests that had been made, and stated that the hull of the cartridge, which had been found on Maroney's bed was fired from the rifle found by the side of the truck. The witness also said that he found nothing disturbed in the death room; that Maroney's wallet was in his pants pocket, the pants lying on the table beside the bed; he found $97.00 in the wallet; he was unable to detect any sign that anyone had tried to break into the house.

[6]Ederington, when later placed on the witness stand, testified that he had been fishing the day before the murder in the Maroney's fish pond, and had asked to borrow a particular bait from Maroney; that he was told that the bait was probably in the truck, and in looking for the bait, he picked up the cartridge box.

G. O. Runnels, a doctor employed by the State Hospital, testified that Ederington had been examined by the staff, and that appellant had been found to be "without psychosis."

Appellant testified that he was a good friend of Junior Maroney, and that he had gone fishing, hunting, and on other outings with the deceased. He said that Maroney treated him kindly, had never fussed at him, and he had never had any trouble at all with Maroney.[7] The witness said that he fished at Maroney's pond on March 29, went to the house and helped Glenda with icing the cake, and he stated that he went to bed at his home about 10:00 P.M. Appellant was awakened by the telephone ringing, at which time his mother was advised that Maroney had been shot; he was in the house when Williams arrived, and answered her when his mother left to go to the Maroney's and told him to lock the doors. He denied ever stating to Chambers that he had killed Maroney.

Captain L. E. Gwyn, a veteran of 20 years' service with the Arkansas State Police, testified that he conducted two polygraph examinations of Ederington, who had agreed to take the test. When asked if he knew anything concerning the death of Maroney, or if he was at the house when Maroney was shot, appellant answered, "No." Mrs. Ederington was also examined, and was asked if she knew who has shot Maroney; she answered: "No." Gwyn testified that the chart revealed that the answer from Mrs. Ederington was very clearly the truth, but he was unable to interpret the chart made on Ederington himself, because he (Gwyn) "was never able to get him [appellant] in the proper frame of mind." The officer said Ederington did not refuse to answer any of the questions, nor did he hesitate in giving answers, but the tests were inconclusive. He could not say

[7]During cross-examination of this witness, he stated that there is a trail that leads from his house to the Maroney house through the woods, but he did not know if it was any shorter than the regular route. "I go that way a good bit."

that appellant was telling the truth, nor could he say that appellant was not telling the truth.

Both Mrs. Ederington and her eldest daughter, Linda, testified that Glenda had told them that she had no idea of the identification of the person that she saw in the room, and appellant's sister said that Glenda remarked, "Linda, I don't know if it was black or white." Cathy Ederington, a younger sister, testified that her brother was at home when she went to bed about 9:30, and that he got up from bed when the telephone call came in the early hours of the morning.

Summarizing the evidence from the standpoint of the state, Ederington was identified by Glenda Maroney as the intruder in the Maroney home on the night of the murder, and very close to the time that the killing took place.[8] She also testified that Ederington's glasses were lying on the dresser.[9] The .22 caliber rifle was identified as the murder weapon, and the box of shells contained appellant's right thumb print. Herbert Chambers testified that Ederington said that he had killed Maroney, though before making the statement, and after making it, he also denied any implication in the murder. This evidence, if believed by the jury, was sufficient to sustain the conviction. It is true that no motive was shown, but we have held several times that it is not necessary for the state to prove a motive in order to properly obtain a conviction for homicide. *Prewitt* v. *State,* 150 Ark. 279, and cases cited therein.

This question of motive brings us to another asserted error. During the Prosecuting Attorney's cross-examination of appellant, Ederington was asked:

[8]Coroner Frazier testified that, in his opinion, Maroney died about 2:30 A.M.

[9]Although several persons looked for the glasses, they were never found. It is not clear whether it was thought that the intruder had returned and taken the glasses when Glenda ran from the house. Ederington was not interrogated along this line, *i. e.,* he was not asked if he still had the same glasses he was wearing on March 29th, etc.

"Jimmy, at the time you got out of the car late in the evening on March 29, did you or did you not make a remark to Barney that you would like to have sexual relations with Glenda?"

Appellant replied, "No, sir."

After the defense had closed its case, the state placed Barney Ross on the stand, and asked that he recall the events of March 29, late in the evening, when he and Ederington had returned from Monticello. The record then discloses the following:

"MR. WYNNE:

Q. At the time you dropped Jimmy off at around 6:00 or 6:30, near the Maroney home, did Jimmy make any comment to you that referred to his desire to have sexual relations with Glenda?

A. Yes, sir.

MR. GIBSON: I object.

COURT: Ask what he might have said.

MR. WYNNE:

Q. What did Jimmy say to you?

A. Well—(Witness hesitates)

(Discussion at the Bench, off the record)

THEREUPON,

MR. GIBSON: Show my objections and exceptions.

MR. WYNNE:

Q. Did the Defendant state to you words to the effect

that he'd like to have sexual intercourse with Glenda?

A. Yes, sir.

MR. GIBSON: Note my objections and exceptions."

Appellant argues that this was prejudicial and reversible error, but we do not agree. The record does not reflect that this alleged error was brought forth in the motion for new trial, but even so, we would find no merit in the contention. Let it be remembered that this alleged statement was made late in the afternoon, approximately eight hours before the death of Maroney, and we think the evidence goes to the question of why appellant was allegedly in the Maroney home, and in Glenda's bedroom. For that reason, we think it was admissible. In *Sullivan* v. *State,* 171 Ark. 768, 286 S. W. 939, quoting 13 R. C. L., 910, § 214, this court said:

"* * * 'Where the purpose of evidence is to disclose a motive for the killing, the courts are very liberal in permitting its introduction, and anything and everything that might have influenced the prisoner to commit the act may, as a rule, be shown.' Many cases are cited in the note to sustain the text.

"See also 30 C. J. 179, § 406, and *Stokes* v. *State,* 71 Ark. 113, and at p. 117, 71 S. W. 248, where we quoted from Mr. Wills on Circumstantial Evidence as follows: 'It is indispensable, in the investigation of imputed guilt, to look at all the surrounding circumstances which connect the actor with other persons and things, and may have operated as motives and influenced his actions.' "

Likewise, during the cross-examination of appellant, the Prosecuting Attorney asked:

"Q. Jimmy, have you ever made the statement that you were going to bash Sam Ormand's brains in when you got out of jail?

MR. GIBSON: I object. It's not related to the crime which is charged against the Defendant and is not material and is prejudicial.

(Thereupon, at the Bench, in undertones, for the record, the following proceedings were had:)

MR. WYNNE: Sam Ormand was the first person to go to the house and discovered the body. This Defendant has been heard to make the statement that he was going to bash this man's brains in if he got out of jail. It is certainly material. Sam Ormand is a material witness.

He denied it and that's his privilege.

MR. GIBSON: That's something that happened after the man was arrested and certainly could not add to the jury's competent evidence. It does not relate to the crime and is prejudicial.

COURT: Objection overruled.

MR. GIBSON: Note our exceptions."

Appellant answered the question, "No." After the defense had rested, the state placed Deputy Spraggins back on the witness stand, and asked the following question, "Now, Mr. Spraggins, in your dealings with this Defendant, have you heard him make the remark that he'd like to bash in the brains of Sam Ormand?" The witness answered that he had heard appellant make the remark two or more, possibly three times. The question was objected to before it was answered, and exceptions were noted to the court's action in overruling the objection. The state contends that this evidence was admissible as a matter of showing appellant's knowledge, intent, or design. From the brief:

"* * * When the appellant denied making the statement then the State had the right to call a witness in

rebuttal to impeach him with prior statements. It was purely testimony concerning acts of a similar nature at about the same time tending to show intent, motive and design which is clearly admissible."

We do not agree that this testimony was competent. This was entirely a collateral matter, having absolutely nothing to do with the crime with which Ederington was charged. The alleged statement was made some time subsequent to the murder, and apparently while appellant was in jail. It was not an act of a similar nature—it did not happen at about the same time as the killing—and we are unable to see how a statement referring to Ormand throws any light upon the intent or motive for the murder of Maroney. In fact, the only thing the evidence could possibly show was that Ederington was a vicious and violent person—which might have been what the state was endeavoring to show—but it is clearly inadmissible. This testimony would not even have been proper as a matter of impeaching appellant's credibility, although the question asked appellant on cross-examination was permissible, as a matter of testing credibility. However, when Ederington answered, "No," that should have concluded that particular matter. *Wright* v. *State,* 243 Ark. 221, 419 S. W. 2d 320.

The court limited neither the question asked, nor the rebuttal testimony of Spraggins, to the matter of credibility. However, we emphasize that this rebuttal evidence offered by Spraggins was inadmissible on all grounds. In *Tullis* v. *State,* 162 Ark. 116, 257 S. W. 380, we said:

"* * * The court properly permitted the question to be asked solely for the purpose of testing the credibility of Jewell Tullis. Jewell Tullis answered that she had not made the statements attributed to her, and this should have ended the matter. The court erred in allowing the State to contradict Jewell Tullis by the testimony of Beatrice Norwood, as stated above. A party

cannot examine a witness as to collateral matters and then impeach him by proof of contradictory statements."

In *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684, this court said:

" 'Great latitude is allowed in the cross-examination of a witness touching his residence, occupation and habits, so as to reflect light upon his credibility, and specific acts of immorality may be thus elicited which could not be proved by other impeaching witnesses.' But, while it was proper to permit the witness to be asked as to specific acts involving moral turpitude affecting his credibility as a witness, it was error to permit the State to call Dr. Wall for the purpose of contradiction. 'Where a witness is cross-examined as to a particular act of misconduct relevant to his character for truth but disconnected with the cause on trial, the cross examining party is bound by the answer.' 7 Encyclopedia of Evidence, page 180, and cases cited.

" 'In order to avoid an interminable multiplicity of issues, it is a settled rule of practice that when a witness is cross examined on a matter collateral to the issues he cannot, as to his answer, be subsequently contradicted by the party putting the question. The test of whether a fact inquired of on cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as part of his case, tending to establish his plea.' "

The answer, in the present case, to this last question in the citation, is an obvious "No." Numerous other cases hold in the same manner.[10]

While, in *Tullis* and *McAlister,* the questions (which

[10]In *Billings* v. *State,* 52 Ark. 303, 12 S. W. 574, this court discussed the question rather fully, as follows:

"The general rule is well established, in civil as well as in criminal cases, that evidence shall be confined to the issue. It seems that the necessity for the enforcement of the rule is stronger in criminal cases. The facts laid before the jury should consist ex-

brought on the rebuttal testimony) were asked of a witness (rather than a defendant), the same rules of evidence applicable to impeachment of a witness apply where a defendant takes the witness stand in his own behalf. *Castle* v. *State,* 229 Ark. 478, 316 S. W. 2d 701.

We also agree with appellant that the court erred in permitting Margaret Williams, described by Glenda Maroney as her best friend, to testify in rebuttal that Glenda had told the witness early on the morning of her father's death that she recognized Jimmy Ederington as the intruder in her room. The state offered this evidence supposedly as a matter of rebutting the testimony of Captain Gwyn, who had given Glenda a polygraph examination, and had testified that her answer to the question of whether she recognized the intruder had been "No."[11]

Evidence of Miss Williams was inadmissible. In the first place, it was not even proper rebuttal of the testimony of Captain Gwyn. A rebuttal of the testimony of the officer would have been to the effect that Glenda

clusively of the transaction that forms the subject of the indictment, and matters relating thereto. To enlarge the scope of the investigation beyond this would subject the defendant to the dangers of surprise against which no foresight might prepare and no innocence defend. Under this rule it is generally improper to introduce evidence of other offenses; but if facts bear upon the offense charged, they may be proven, although they disclose some other offense. The test of admissibility is the connection of the facts offered, with the subject charged. Such connection exists in a variety of cases, and in them it is often proper to prove one offense in a trial for another. The Supreme Court of Alabama has indicated several classes of cases in which this may be done, as follows: First, when necessary to prove the scienter of guilty knowledge, which is an element of the offense charged; second, when the offense charged and the offense proved are so connected that they form part of one transaction; third, when the act proved and the offense charged are similar, and the one tends to fix the intent in the other; fourth, when it is necessary to prove a motive for the offense charged, and there is an apparent relation or connection between it and the other acts proved; and again when it tends to prove the identity of the offender or of an instrument used."

[11]In her testimony, Glenda stated that she had made a mistake, and that the answer was inadvertently given because she was nervous and upset in taking the test.

did not answer, "No," to his question. However, it was undisputed that this answer was given. At any rate, the evidence was inadmissible, even as an extra-judicial identification. In the case of *Burks* v. *State,* 78 Ark. 271, 93 S. W. 983, Burks was convicted of the crime of assault with intent to kill. The prosecuting witness, W. W. Reiblin, the party upon whom the assault was alleged to have been made, testified that Burks was one of his assailants. He was asked by defendant's counsel if he had not on other occasions stated that he did not recognize the persons who assaulted him. Reiblin denied that this had been done. Witnesses were introduced who testified that Reiblin had made such statements. The court then permitted the state, over the objection of Burks, to offer evidence that Reiblin stated to a witness, a few hours after the assault, that he recognized Burks as one of the assaulting parties. Justice McCulloch, writing for the court, said:

"The question is therefore presented whether or not, where a witness has denied having made a statement contradictory of those made upon the witness stand, and proof is introduced tending to establish such contradictory statements, former statements of the witness consistent with those made by him upon the stand are admissible in support of his testimony."

This court held that the trial court erred in permitting the state to offer this testimony, and reversed the judgment, stating:

"After all, the effect of proof of previous consistent statements could only be to corroborate the statement of the witness under oath by his own words uttered on another occasion. It would add nothing to his statement upon the witness stand, either as to his testimony on the main issue, or as to his denial of the contradiction. We are of the opinion that the admission of the testimony by the court was improper and prejudicial, and should not have been allowed."

We are of the view that the error in both instances, *i. e.,* the testimony of Spraggins relative to statements of the defendant about Ormand, and the admission of the testimony of Margaret Williams, constituted reversible error. This would be particularly true with reference to the Spraggins testimony, which had no connection whatsoever with the offense charged. In *Shaddox* v. *State,* 243 Ark. 55, 418 S. W. 2d 780, quoting from an earlier case, we said:

"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 rule was stated in *Crosby* v. *State,* 154 Ark. 20, 241 S. W. 380, as follows:

"Where the effect of an erroneous instruction or ruling of the trial court might result in prejudice, the rule is that the judgment must be reversed on account of such ruling, unless it affirmatively appears that there was no prejudice. No such showing is reflected by this record."

Two other matters are urged as points for reversal, one relating to the fact that one of the members of the jury was married to the sister of the sheriff's wife, and the other relating to evidence which the defense contends was suppressed. This last refers to the fact that blood was also found upon the bed in the middle bedroom. Inasmuch as the first error is not likely to occur again, and appellant is now thoroughly acquainted with all of the evidence obtained by the sheriff, there is no need to discuss whether these points have merit.

Because of the two errors committed, and herein

pointed out, the judgment is reversed, and the cause is remanded to the Bradley County Circuit Court.

JERRY HAMMOND AND TERRY EVANS *v.* STATE OF ARKANSAS

5355 428 S. W. 2d 639

Opinion delivered June 3, 1968

Stephens & Lewis, for appellants.

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

CARLETON HARRIS, Chief Justice. Appellants, Jerry Hammond and Terry Evans were convicted in the White County Circuit Court on January 25, 1968, of the crime of burglary and grand larceny, and were sentenced to the Arkansas State Penitentiary for two years on the count of burglary, and one year on the count of grand larceny. From this conviction, appellants bring this appeal. For reversal, it is first asserted that the trial court erred in admitting evidence obtained by the sheriff during a search of Evans' premises.

The evidence reflects that Pete Cole, a radio engineer in Searcy, together with Earl Baker and Billy Davis, owned a cabin two miles west of Honey Hill Church in White County. The cabin was equipped in the same manner as any house, with furniture, T.V., stereo, and various other items of personal property. This cabin was broken into and a number of items stolen therefrom. Cole made a partial list of property that had been taken, and reported the theft to Sheriff John Davis of White County. On the afternoon of November 30, 1967, the sheriff, together with the Chief of Police of Searcy, Waymon Goree, and Cole, went to the apartment occupied by Evans, and the sheriff knocked on the door. Evans responded, "Come in," and the three, without identifying

themselves, went inside. The sheriff told Terry that he (the sheriff) had heard that this appellant might have some information about the burglary:

"He said, 'Hell, here it is; you might as well take it; I've been in so much trouble already that I'm going to the penitentiary anyway.' And I said, 'That isn't what I came for,' I just wanted to talk to him because I'd heard he might have some information. Then, I advised him of his rights. * * *

"I told him I had information that he might know something about the burglary of the cabin, and I told him, 'You know you don't have to talk to me, that anything you say can be used against you,' and he said, 'Hell, here it is.' "

Asked whether he advised Evans of his right against self-incrimination, the sheriff replied that he carried a card with him which he would read to suspects, and he said Evans was told that he did not have to say anything, and that he was entitled to an attorney; that, if he couldn't pay for an attorney, the court would appoint one for him:

"I told him he had the right of an attorney, and I advised him of his rights. I have handled Terry several times before."

According to the officer, Evans replied that he did not want an attorney, and he suggested that the sheriff take merchandise which Cole recognized, on entering the apartment, as having been in the burglarized cabin.[1] However ,the sheriff refused to take the property at that time, but arrested Evans and obtained a search warrant for Terry's apartment, and also the apartment of Oscar McDougal, who was also subsequently charged on the

[1]A floor type lamp with the base missing, a bed spread, a pile of clothing and a blanket, a part of the property taken, and in plain view, were recognized by Cole when they went into the room.

burglary count[2]. The information about McDougal was furnished by Terry. After obtaining the search warrant, the sheriff found two red bed spreads, one pole lamp, one white sheet, and five stereo records on this appellant's premises. A search of McDougal's apartment revealed one Zenith TV, one stereo record player, records, a lamp, an electric clock, and an assortment of knives, forks and spoons, which were identified by Cole. Evans admitted his part in taking the property. As the officers were searching the apartment, Jerry Hammond, whose car was parked at the back of the apartment, came up, and wanted to know what was going on. The sheriff replied that they were recovering "that stolen merchandise." Hammond said that he didn't know anything about it, but Officer Hunnicutt, of the State Police, who was assisting in the search, placed Hammond under arrest, and the sheriff testified that Hunnicutt stated to appellant Hammond:

"Well, you are under arrest, and he [Hunnicutt] said I would rather you didn't say—he started to say something, and he said I'd rather you didn't say anything about it. So we arrested him and placed him in the police car. Fish [Hammond]—we hadn't placed him when he said that, but about that time Fish came out—Terry came out from under the floor with a box of this while Fish was standing there. And Terry looked up at Fish and said, 'You might as well tell them, Fish, they've caught us anyway.' He said, 'I've done told them.' So Hunnicutt told Hammonds again, he says, 'I'd rather you didn't say anything,' and he took him and put him in the police car, and we took him to the County Jail. We loaded that car and the other car with the merchandise that came from under the floor.

"When he got to the County Jail, again on the way to the County Jail he tried to indicate that he was with them and wanted to tell us about it. We told him again that we didn't want to talk to him about it. When we got

[2]McDougal's conviction is not before this court.

to the County Jail when we was going through his things, taking his things out of his pockets, he told us that he wanted to tell us about it."[3]

Appellants contend that the evidence obtained both before, and after, the search warrant was obtained, was acquired illegally. A motion to quash the information, and to suppress the evidence was filed by appellants, and this matter was heard by the court in chambers. The court overruled the motion, finding that Evans was advised of his constitutional rights before making any statement; that the search warrant obtained was valid, based upon information given to the sheriff by Cole, and voluntarily by appellant. Appellants say that the initial search was illegal, and assert that Evans did not invite the police and Cole to search his apartment, nor did he waive any constitutional right against an illegal search by saying, "Come in." There was testimony that Evans was in bed, and appeared sleepy when the officers and Cole entered the apartment, and it is argued that appellant did not understand the consequences of his act in responding to the knock on the door, and that the sheriff and police chief did not identify themselves before coming in. Appellants rely upon our case of *Mann* v. *City of Heber Springs,* 239 Ark. 969, 395 S. W. 2d 557, where we said that "voluntary consent requires sufficient intelligence to appreciate the act as well as the consequences of the act agreed to." The federal case of *Mapp* v. *Ohio,* 367 U. S. 643, holding that evidence illegally obtained is not admissible in the state courts is also relied upon.

We find no merit in this contention. We do not see that *Mapp* applies, for we are of the view that the evidence was not illegally obtained. Nor is there any showing that Evans did not have sufficient intelligence to appreciate the consequences of inviting visitors into the room. In fact, it is only argued that he was in bed and

[3]Hammond also implicated two other boys, who pleaded guilty on the morning of the trial of these appellants.

looked "sleepy," or, as the defense counsel expressed it in asking questions, "groggy." This is hardly sufficient to constitute a defense. In the case of *Harris* v. *Stephens,* 361 F. 2d 888, the proof reflected that the sheriff of Drew County went to the home of a suspect at night, and was admitted by the suspect (Trotter), who was wearing blood-stained undershorts. Trotter, being unable to explain the blood stains, was arrested, and taken to the jail and incarcerated. Thereafter, the sheriff, accompanied by city policemen, having received information that Albert Harris had been with Trotter that night, proceeded to the home of Harris and was admitted. Upon receiving an unsatisfactory explanation from Harris as to his earlier whereabouts, the sheriff asked to see the clothes the suspect had worn. Harris' clothes were stained with blood, and the victim's wrist watch was found in his billfold. Harris was advised by the sheriff of his constitutional rights, and arrested. The same contentions were made there as appellants presently make, but the United States Court of Appeals (Eighth Circuit) found no merit in these contentions, citing *Schook* v. *United States,* 337 F. 2d 563. Here, the sheriff had been advised by owners of the cabin which had been burglarized that approximately $1,500.00 worth of property had been taken. Without making a search, a number of articles were clearly visible which were identified as being part of the property taken during the burglary. Evans was arrested, and the sheriff subsequently obtained a search warrant and found additional property upon returning to the apartment.

The next two points deal with an allegation that the court and prosecutor erroneously called to the attention of the jury the fact that the appellants did not testify in their own defense. The court gave the following instruction:

"Thereupon, the Court, at the request of the Prosecuting Attorney will give the instruction which says to the jury that if they find Defendant, or either of them,

had in their possession property recently stolen that this fact is evidence from which inference of guilty may be drawn and is to be considered by the jury in arriving at guilt or innocence; to which counsel for defendants objects; and which said objection is by the Court overruled, to which action and ruling of the Court counsel for Defendants objects: Defendants object to this particular instruction, that it draw[s] inference of guilt by the mere possession of stolen property and which requires defendants to explain in that it would require defendants to testify in violation of their rights of self-incrimination."

Now, this is not a correct instruction, mainly because the court did not add, after "their possession property recently stolen," the phrase, "without reasonable explanation of that possession." However, it will be noted that the objection treats the instruction as though the latter clause had been used, *i. e.,* the objection is *not* that the court left out this last phrase, but rather, that the instruction does require an explanation from the appellants—which a correct instruction would have stated.

Appellants argue that this instruction placed them in the position of being compelled to testify, *i. e.*, offer an explanation, and that the instruction was a judicial comment upon the failure of appellants to deny the charges. In their brief, appellants state:

"* * * It is, in no uncertain terms, an instruction to the jury that the defendants are guilty because they did not deny the charges. The instruction so prejudiced the jury against the defendants, that this alone is ample reason to reverse the verdict."

There is no merit in this contention, and the court's overall instructions told the jury that the defendants were innocent until proven guilty; that the presumption of innocence remained with them throughout the trial,

and that any reasonable doubt as to their guilt should be resolved in their favor.

It is also argued that certain remarks of the Prosecuting Attorney before the jury amounted to a comment upon the failure of appellants to testify. During closing argument, the prosecutor made the following statements, and those now contended to be prejudicial are italicized:

"The proof's in here that the McDougal boy admitted it, and the proof's in here that the other boy, or Jerry Hammond, or Jerry 'Fish' Hammond, admitted it. *And it's uncontradicted and it's undisputed.*

"Now then, what does that bring us down to just purely and simply? We just have no other—there's no alternative. It's inconceivable to me of anything other than guilty on burglary, without question. There is even an inference when you've found stolen property and the possession of it is not explained. That's not enough to put you in the penitentiary itself; but, that alone is inference of your guilt. You say, 'Well, it might happen to me. They might catch me with it.' *You're going to answer pretty quick where you got it, where you bought it, and what you did with it. We have no such explanation.* * * *

"Is he guilty? or is he innocent? If he's guilty, then talk about the sentence. If there's extenuating circumstance, then, sure, take into consideration the minimum. That's why—that's what minimum sentences are for, if there's extenuating circumstances. I know of none here. *None has been called to your attention here. None has been told you here.* * * *

"These aren't boys we are jerking out of high school out here and bringing into court, bringing them up here for the first time, and they enter a plea of guilty, beg for leniency, to be placed on probation, be permitted to return back to school with certain restrictions on it

by the Court, admit they made a mistake. Gentlemen, that's not the case. That's not this case. Not at all.

"They've come in here and they've pleaded not guilty. There's been no considerations asked. *There's been no considerations for you to even consider.*

Mr. Lewis: Your Honor, this is the fourth time the Prosecuting Attorney's made comment on the Defendants' failure to testify.

The Court: No, sir; I don't think that was a comment on their failure to testify, until you brought it to the attention of the jury.

Mr. Lewis: We object to it, Your Honor.

The Court: Very well. The objection is overruled."

In the first place, it will be noted that there is no objection to the first three italicized statements. Even on the fourth occasion, there was no actual objection, defense counsel merely commenting that "this is the fourth time the Prosecuting Attorney has made comment on the defendants' failure to testify." It is not clear whether the objection made was to the statement of the Prosecuting Attorney or the statement of the court mentioning that counsel had brought it to the attention of the jury. In either event, there was no exception to the overruling of the objection.

However, entirely aside from the failure to object and except to the rulings of the court, there is no merit in the contention. The first italicized statement can simply refer to the fact that no explanation was given to the sheriff or other officers, of how, or where, the stolen property had been obtained. We cannot visualize any person, innocently holding stolen goods, waiting until he is tried by a jury to explain—rather, he would make his explanation to the officers when they made the arrest.

The second comment refers to extenuating circumstances, and certainly that testimony could as properly have been offered by friends or relatives as by the appellants themselves. It is difficult to see how "there's been no considerations for you to even consider" can be termed a comment on the failure of appellants to take the stand in their own defense. Actually, much stronger statements have been held to not constitute a comment upon the failure to testify.[4]

[4]For instance, in *Davis* v. *State*, 96 Ark. 7, 130 S. W. 547, the Prosecuting Attorney told the jury:

" 'He (referring to the defendant) told Bentley and Dr. Cunningham how he had administered the medicine to her to produce an abortion. And it is undisputed and undenied in this case, and he cannot deny it.' These remarks, we think were but the expression of the opinion of the State's Attorney as to the weight of the testimony of these two witnesses, and could not fairly be construed to refer to the fact that the defendant had not testified in the case, and did not tend to create any presumption against him by reason of his failure to testify."

In *Culbreath* v. *State*, 96 Ark. 177, 131 S. W. 676, the opinion recites:

"Another ground urged for reversal is as to alleged improper remarks of an attorney representing the State in his closing argument. The following are the objectionable remarks: 'Where was the defendant that day? He has never seen fit to say. He has not shown by any one where he was between the hours of 10 o'clock in the morning and 1:30 in the afternoon.' Taking the whole statement together, we do not think it can fairly be construed as a comment or criticism on defendant's failure to testify in his own behalf or as calling attention to that fact. It was merely an expression of the opinion of counsel that the defendant had not adduced evidence accounting for his whereabouts during the hours named."

In *Sanders* v. *State*, 164 Ark. 491, 262 S. W. 327, the opinion reflects:

"The prosecuting attorney, in his closing argument, among other things said: 'It is not denied that the defendant sold the liquors mentioned in the indictment. *He has not denied it* [emphasis supplied;] Mr. DeBois did not deny it in his argument; Mr. Miller does not deny it in his argument to you gentlemen, and no one else has denied it. The witnesses have testified that they bought it, and so the only question for you gentlemen to determine, under the law as given you by the court, is whether or not the stuff which the defendant did sell was intoxicating, or contained alcohol.' The appellant entered a plea of not guilty to the indictment, but did not testify at the trial. He contends that the court erred in overruling his objection to the above argument.

"When the remarks of the State's attorney are considered as a whole, they cannot be fairly interpreted to have reference to the

It is next asserted, "It was prejudicial error for the Prosecuting Attorney to state to the jury in his opening statement material facts without later offering proof in support of them." The transcript does not contain the opening statement of the Prosecuting Attorney, and we accordingly cannot consider this point on appeal.

Finally, it is argued that the trial court erred in admitting into evidence the confessions of the appellants, which it is argued were made before they were adequately advised of their rights against self-incrimination.

As to Evans, the testimony has already been reviewed, and it reflects that all warnings required by *Miranda* v. *Arizona,* 384 U. S. 436, were given by the sheriff to Evans, though, at the very outset, Evans stated, "Hell, here it is; you might as well take it; I've been in so much trouble already that I'm going to the penitentiary anyway." There is no evidence that appellant Hammond was given the warnings set out in *Miranda,* but there is plenty of evidence that Hammond made these statements spontaneously, and entirely voluntarily, even though being told by Hunnicutt, "I'd rather you didn't say anything." There is not a single line of evidence in the record that this statement was not made.

We do not take *Miranda* to mean that a man cannot voluntarily open his mouth. In *Turney* v. *State,* 239 Ark. 851, 395 S. W. 2d 1 (in which the United States Supreme Court denied certiorari), this court, in distinguishing Turney from *Escobedo* v. *Illinois,* 378 U. S 478, said:

"We see no resemblance in the facts related and the facts that are presently before us. Here, Officer Caldwell, of the State Police, arrested Turney at his residence on a Monday at approximately 4:30 A.M., serving

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failure of the defendant to testify, but only to the fact that the witnesses had testified that the defendant sold the liquors mentioned in the indictment, and that they had bought the same, and that such fact was undisputed by the testimony."

a warrant of arrest, which had been issued by a Justice of the Peace. Caldwell testified that he asked Turney 'point blank why would a man living in a house like he was, with his job, get involved in something like this, and he said he didn't know and that he must be out of his mind. He then admitted his part in the theft to me and told me at that time where the property was.' Thereafter, Turney directed the officers to the location of the stolen property. It will be thus observed that Sergeant Caldwell was not carrying out a process of interrogation for the purpose of obtaining incriminating statements. The simple statement, above quoted, was responded to by the spontaneous admission of guilt by Turney."

See also *Bivens* v. *State,* 242 Ark. 362, 413 S. W. 2d 653.

Finding no reversible error, the judgment is affirmed.

ARKANSAS STATE HIGHWAY COMM. *v.*
LILLIE D. CLEMMONS ET AL

5-4534 428 S. W. 2d 280

Opinion delivered June 3, 1968

Thomas B. Keys and *Billy Pease,* for appellant.

Dale L. Bumpers, for appellees.

George Rose Smith, Justice. On October 3, 1963, the State Highway Commission filed an action to condemn 8.67 acres of the appellees' land, to serve as part of the right-of-way for Interstate Highway 40. On February 7, 1964, the case was settled by the entry of a consent judgment awarding the landowners $13,300 as just compensation for their land. Nineteen months later the appellees filed the present complaint to set aside the consent judgment for fraud in its procurement. They assert that the Highway Department, by its agents and attorneys, falsely represented that it would construct a culvert under the highway of sufficient size to enable the landowners to move their cattle and machinery back and forth from one side of the highway to the other, their farm having been cut in two by the controlled-ac-

cess highway. This appeal is from an order sustaining the charge of fraud and setting aside the consent judgment. Such an order is final and appealable. *Norman* v. *Cammack,* 105 Ark. 121, 150 S. W. 563 (1912).

The controlling principles of law are not in dispute. The appellees had the burden of showing that the judgment was obtained by fraud. *Karnes* v. *Gentry,* 205 Ark. 1112, 172 S. W. 2d 424 (1943). The charge of fraud must be sustained by clear, strong, and satisfactory proof. *Graham* v. *Graham,* 199 Ark. 165, 133 S. W. 2d 627 (1939). In explaining why such a clear-cut case must be made by one who attacks a judgment we have often used this language: "The statute to vacate judgments by this proceeding is in derogation not only of the common law, but of the very important policy of holding judgments final after the close of the term. Citizens must have some confidence in the judgments of our judicial tribunals, as settlements of their controversies, and there should be some end to them. Unless a case be clearly within the spirit and policy of the act, the judgment should not be disturbed." *Hardin* v. *Hardin,* 237 Ark. 237, 372 S. W. 2d 260 (1963).

Fraud that entitles a party to impeach a judgment must be extrinsic of the issues tried in the case and cannot consist of fraudulent acts or testimony the truth of which was or might have been at issue in the case. It must be a fraud practiced upon the court in the procurement of the judgment itself. Ark. Stat. Ann. § 29-506 (Repl. 1962); *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234 (1950). Even though the fraud that vitiates a judgment may be constructive rather than actual, constructive fraud is nonetheless a species of wrongdoing. It is a breach of a legal or equitable duty, which the law declares to be fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Arkansas Valley Compress & Warehouse Co.* v. *Morgan,* 217 Ark. 161, 229 S. W. 2d 133 (1950); *Levinson* v. *Treadway,* 190 Ark. 201, 78 S. W. 2d 59 (1935).

The appellees' proof, tested by the controlling rules of law, falls decidedly short of establishing actual or constructive fraud on the part of the Highway Department. The principal point in dispute concerns the size of the culvert under the highway. That underpass, as actually built, was ten feet wide and twelve feet high. The appellees insist that the dimensions of the culvert should have been just the opposite—twelve feet wide and ten feet high—and that essential farm machinery cannot be moved through the narrower corridor.

C. A. Clemmons, one of the appellees, took the lead in negotiating the settlement with the Highway Department. C. A. and his son Frank testified that after the condemnation suit was filed they went to the office of the Department's resident engineer in Clarksville to learn the size of the culvert that was to be provided for the landowners. They talked to an assistant engineer, whose name they were unable to remember and who was not produced as a witness in the case. The two Clemmonses testified that the assistant engineer showed them the Highway Department's plans, which described the proposed culvert as being twelve feet wide and ten feet high.

C. A. Clemmons first determined the actual dimensions of the concrete culvert when its construction was commenced. "It was there at the house, and I saw it." He made no protest to the Highway Department, however, until some time after the culvert was completed. He testified that he talked to a succeeding district engineer, J. F. Price, who said that a mistake had been made in the construction of the culvert, which should have been twelve feet wide and ten feet high. Frank Clemmons gave similar testimony.

The appellees called Price as their witness, but he did not corroborate their testimony. He testified that he had checked the plans and that they specified a 10-foot width and a 12-foot height for the culvert. He positively denied having said that a mistake had been made.

E. W. Smith, the resident engineer at the time of the trial, testified for the Highway Department. He produced a copy of the original plans, which showed that the culvert was designed to be ten feet wide and twelve feet high—just as it was built. Smith described the care with which he had checked pertinent records to be sure that the plans had not been changed. There is no sound basis for questioning the authenticity or accuracy of the set of plans that were produced by Smith and received in evidence. They effectively rebut what was really the key testimony for the appellees; that is, the Clemmonses' statement that an unidentified assistant engineer showed them a set of plans with the culvert's dimensions reversed. We should add that the specifications for the culvert are set out in the plans in such a way that a layman could easily make a good faith mistake in determining the proposed width and the proposed height.

It will be seen from our summary of the evidence that there is no sound basis for a finding that the Highway Department was guilty of actual or constructive fraud in agreeing to construct an underpass for the landowners. There is in the record certain testimony going to show that the approaches to the concrete floor of the underpass were so poorly built that they were washed out by surface water produced by heavy rains. There is, however, no proof that the Department perpetrated a fraud upon the condemnees by falsely promising to construct and maintain permanent approaches to the underpass.

It is fair to say that the appellees' evidence goes to indicate, at the very most, that the Clemmonses understood that they had a certain agreement with the Highway Department about the promised underpass and that by mistake the Department failed to construct the underpass in conformity with that agreement. Even so, the proof fails to show that the Highway Department employees were guilty of actionable fraud, and the appellees are prohibited by the Constitution from suing the State for breach of contract.

Reversed and remanded for the reinstatement of the consent judgment.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I disagree with the result reached by the majority because this court should not weigh the evidence offered. It should only determine whether there is evidence to support the findings of the trial judge. He made specific findings that:

(1) Appellant, by its attorney, resident engineer and district engineer, fraudulently induced appellees to enter into this consent judgment by falsely representing to them that an underpass suitable for the movement of farm machinery and cattle of appellees would be constructed and maintained by appellant.

(2) Appellant knew that the underpass as constructed would not be adequate for the movement of either farm machinery or cattle.

I feel that there are facts and testimony worthy of consideration which support the court's order, in addition to the brief summary in the majority opinion. While neither of the Clemmonses claim that the assistant engineer made any statements or representations to them other than by showing them these plans, C. A. Clemmons testified that he stated to the assistant engineer that if the dimensions were as shown, he could "get by with the machine." Neither of these witnesses were the least bit equivocal about the dimensions shown on the plans. C. A. Clemmons understood that the highway department was going "to fix it at the end of the culvert." Neither C. A. nor Frank Clemmons says that anyone told them on that visit anything about approaches to be built at the ends of the culvert to provide access thereto from the several tracts. Frank Clemmons says, as he recalls, the plans did not show anything in regard to these approaches. C. A. Clemmons testified that Little,

the resident engineer on this construction, told him that appellant would place rock at the culvert ends so that appellees would have access to use the culvert. The time of the alleged making of this statement is not clear. This witness testified that he then told Little that the branch or creek which would run through the culvert would wash the rock out after the first big rain, but Little responded that the rock would be "rolled in." After the judgment was entered, the culvert was constructed with dimensions of 10 feet in width and 12 feet in height. The highway department caused a road to be graded at each end of the culvert which permitted passage therethrough. C. A. Clemmons says that he again told the engineer that this road would be washed out by the first rain thereafter. The base of the culvert was built below the bed of the creek flowing through it. C. A. and Frank Clemmons both state that, because of the creek flowing through the culvert after rains, it was soon filled with mud and debris to such an extent that vehicles and farm equipment could not be moved through it. According to them, cattle can only be moved through the culvert in dry weather. The culvert is too narrow for some of appellees' farm equipment to pass through.

C. A. Clemmons and Frank Clemmons also testified that they went to see John F. Price, district engineer of the highway department at Russellville, after the culvert was constructed, and that he admitted that the culvert was supposed to be 12 feet wide and 10 feet high, but that, through a mistake, the dimensions were reversed in construction. Price was called as a witness by appellees, but he testified that the culvert was constructed according to the plans and that he did not make the statement attributed to him by C. A. Clemmons. In his opinion, however, the culvert was designed to afford a passageway for vehicles and livestock. He agreed that dropoffs at the ends of the culvert, caused by scouring from the flow of water, would make the use of the culvert by vehicles and cattle difficult and that the rock was placed at the end to provide access to the culvert.

W. C. White owned a shale pit on the Clemmons farm to which he would now have no access except through this culvert. When he learned of the proposed highway construction he went to see Resident Engineer Little who advised him that the proposed culvert would be 8 feet high by 8 feet wide, but thought it might be made 12 feet high by 12 feet wide, and later told him that it would be. Little also promised that an approach would be put on both ends so that "it wouldn't be bothering" White. There is no evidence that this assurance was ever conveyed to any of the appellees. White says that he has never been able to use the culvert.

E. W. Smith, presently resident engineer for appellant in the area, testified that the culvert was built in conformity with the plans and that they showed no rock or paved aprons. He admitted that his predecessor advised that rock was placed at each end because the landowner had been promised the use of the culvert as a cattle pass.

Appellees proceeded under the fourth clause of § 29-506 [Ark. Stat. Ann. (Repl. 1962)] authorizing a trial court to vacate its judgment after the expiration of the term at which it was rendered for fraud practiced by the successful party in obtaining the judgment.

The extrinsic or collateral fraud for which a judgment may be vacated may consist of fraud or deception practiced by the one party keeping the other away from court or keeping him from asserting a defense or fully presenting his case, without negligence or fault on the part of the moving party. *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234; *Norwood* v. *Heaslett,* 218 Ark. 286, 235 S. W. 2d 955; *Johnson* v. *Johnson,* 169 Ark. 1151, 277 S. W. 535; *Hempstead & Conway* v. *Watkins,* 6 Ark. 317, 42 Am. Dec. 696. This fraud may be constructive. *Chronister* v. *Robertson,* 208 Ark. 11, 185 S. W. 2d 104; *Kersh Lake Drainage Dist.* v. *Johnson,* 203 Ark. 315, 157 S. W. 2d 39. Neither dishonesty of pur-

pose nor intent to deceive is an essential element of constructive fraud. *Lane* v. *Rachel,* 239 Ark. 400, 389 S. W. 2d 621; *Arkansas Valley Compress & Wholesale Co.* v. *Morgan,* 217 Ark. 161, 229 S. W. 2d 133. It is sometimes called "legal" fraud or "fraud at law" and consists of a breach of either legal or equitable duty, which, irrespective of moral wrong, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests. *Levinson* v. *Treadway,* 190 Ark. 201, 78 S. W. 2d 59; *Lane* v. *Rachel, supra.* Constructive fraud is presumed from the relation of the parties to a transaction or from the circumstances under which it takes place and the conscience is not necessarily affected by it. *Kersh Lake Drainage Dist.* v. *Johnson, supra.* In that case we quoted from 23 Am. Jur. 756, Fraud & Deceit, § 4, in part:

> "* * * Indeed, it has been said that it generally involves a mere mistake of fact. Hence, the terms 'constructive fraud' and 'legal fraud' both connote in certain circumstances, one may be charged with the consequences of his words and acts, as though he had spoken or acted fraudulently, although, properly speaking, his conduct does not merit this opprobrium."

Here, there is evidence Clemmons was deceived without any dishonest intent on the part of anyone. The complaint in the action to take his land stated that the highway would be constructed according to plans on file with the highway department. In order to ascertain the damages to his severed lands, it was necessary that he know these plans. He went to the appropriate source to ascertain them. He relied on the plans shown him, but says that he was told the width of the culvert also. In order to obtain the information, he must of necessity have made the purpose of his inquiry known. Both he and his son state positively that the dimensions shown indicated a culvert width of 12 feet. Appellant did not produce Little, the former resident engineer, or

his assistant to refute the testimony of the Clemmonses. Naturally, appellees relied on the information obtained from appellant in agreeing to the consent judgment. Certainly there was a duty on the part of the highway department, the only source of information, to give correct information upon appellees' inquiry. It is obvious that a lack of communication and means of travel between the several tracts would cause an enhancement of damages to the remaining lands. Appellant does not even contend that appellees would not have a "meritorious defense" to the action, if the judgment is set aside. The trial judge made specific findings that representations were made as to the adequacy of the culvert to provide the desired means of communication and as to the accessibility of the culvert to the several lands. He also found that the construction was not in accord with these representations. I cannot say that his findings are unsupported by sufficient evidence, even though it is not undisputed.

The fact findings of the trial judge are as binding on us as the verdict of a jury would have been. When the law makes the circuit judge the trier of facts in cases in which the constitutional right to trial by jury does not extend, the same presumptions attend his findings as when the issues of fact are tried before him when a jury is waived by the parties. *Schuman* v. *Sanderson,* 73 Ark. 187, 83 S. W. 940; *Matthews* v. *Cargill,* 125 Ark. 136, 188 S. W. 564. This rule applies to proceedings to vacate a judgment after the expiration of the term under § 29-506. *Cady* v. *Pack,* 135 Ark. 445, 205 S. W. 819.

Where there is substantial evidence in support of the finding of the trial court, the same will not be set aside by this court on appeal. *Gazzola & Co.* v. *Savage,* 80 Ark. 249, 96 S. W. 981. The evidence must be given its strongest probative force in favor of the finding of a trial court in law cases. *Inter-Southern Life Ins. Co.* v. *Ransom,* 149 Ark. 517, 232 S. W. 754.

The findings of a circuit judge, when the law makes

him the trier of the facts, are as conclusive on appeal as the verdict of a jury. *Schuman* v. *Sanderson, supra.* On appeal from a law court, the finding of the court on a controverted question of fact is conclusive if supported by substantial evidence. *Ward* v. *Nu-Wa Laundry Cleaners,* 205 Ark. 713, 170 S. W. 2d 381; *Bank of Atkins* v. *Wirth,* 209 Ark. 360, 190 S. W. 2d 445. The reason for the rule is that, in law cases, we only review for errors, unlike chancery cases in which there is a trial de novo by this court. *Matthews* v. *Cargill, supra.*

In an action to set aside a judgment, we must treat as conclusive the findings of the trial court on disputed issues of fact. *Collier* v. *Mississippi Beneficial Life Ins. Co.,* 164 Ark. 54, 261 S. W. 39; *Halliday* v. *Fenton,* 164 Ark. 11, 260 S. W. 961.

In determining the sufficiency of evidence, this court will consider evidence favorable to appellee only. If there is substantial evidence to support a verdict, it will not be disturbed. *Harmon* v. *Ward,* 202 Ark. 54, 149 S. W. 2d 575.

It is only required, on appeal, that the findings of the trial court in vacation of a judgment under § 29-506 be supported by substantial evidence. *O. C. Scroggin & Co.* v. *Merrick,* 176 Ark. 1205, 5 S. W. 2d 344.

The fact that the burden was upon appellees in the lower court to prove certain facts by clear, strong and satisfactory proof or clear and convincing evidence does not change the scope of review on appeal or make the findings of the trial court any less binding where the trial on appeal is not de novo. The quality of proof called "clear and convincing" is something more than a mere preponderance as required in ordinary civil cases, but not beyond a reasonable doubt as required in criminal cases. *In re Estate of Fife,* 164 Ohio St. 449, 132 N. E. 2d 185 (1956); *Cromwell* v. *Hasbrook,* 81 S. D. 324, 134 N. W. 2d 777 (1965); *Aiello* v. *Knoll Golf Club,*

64 N. J. Super. 156, 165 A. 2d 531 (1960); *Child* v. *Child,* 8 Utah 2d 261, 332 P. 2d 981 (1958).

Whether the evidence is "clear, strong and satisfactory" is to be determined by the trier of the facts and is not to be weighed on appeal. In *Graves* v. *State,* 236 Ark. 936, 370 S. W. 2d 806, we said:

> "Upon the conflicting testimony the issues of fact were properly submitted to the jury. The appellants are in error in arguing that the State's failure to prove its case beyond a reasonable doubt entitles them to a reversal. The jury must be convinced of the accused's guilt beyond a reasonable doubt, but there is no requirement that the members of this court be similarly persuaded by the proof. Here the test is that of substantial evidence. If the verdict is supported by such proof we are not at liberty to disturb the conviction, even though we might think it to be against the weight of the evidence. *Fields* v. *State,* 154 Ark. 188, 241 S. W. 901."

If this rule is applicable in a criminal case where lives and liberty of appellants are at stake, and where the quality of proof required is even greater, it should be much more appropriate in a civil case at law.

I would affirm the judgment of the trial court.

ARKANSAS STATE HIGHWAY COMM. *v.* HERMAN KAUFMAN ET AL

5-4586 428 S. W. 2d 251

Opinion delivered June 3, 1968

Thomas B. Keys and *Virginia Tackett,* for appellant.

Gordon, Gordon & Eddy, for appellees.

GEORGE ROSE SMITH, Justice. In 1964, the appellees, Herman Kaufman and Nathan Gordon, acquired a 3,775-acre tract of land in Conway county, with the intention of eventually using it as a cattle ranch. Two years later the Highway Commission brought this action to condemn two parcels in the tract, one of 15.53 acres and the other of 8.29 acres, for use in the construction of Interstate Highway 40. The jury fixed the landowners' compensation at $35,000, of which not less than $32,000 must be apportioned under the evidence to the larger parcel. For reversal the Commission contends that the $32,000 award is excessive and that the court erred in allowing the jury to consider a diagram which Kaufman had prepared to assist him in testifying.

After a careful study of the record we are unable to say that the award is demonstrably excessive. The

appellees paid $148,640 for the 3,775-acre tract, but they are unquestionably right in saying that they got it at a tremendous bargain. Between the date of their purchase and the date of trial they had received $78,980.65 from the sale of timber on the land. An estimated $70,000 worth of timber was still to be cut. Even the lowest estimate of value made by the Highway Commission's expert witnesses was $234,500. When that figure is increased by the timber proceeds already received the purchase had shown a worth of more than $300,000 by the time of trial. The landowners' witnesses put the figure at more than $400,000.

The interstate highway will cross a neck of land, containing 123 acres, which would otherwise provide access to U. S. Highway 64 and to the Missouri Pacific railroad track, which could serve the cattle ranch by means of a spur. Construction of Interstate 40 will cut the 123-acre tract in two, destroying the ranch's access to the highway and railroad and reducing the tract's usable area so materially that it cannot be used as the headquarters for the proposed ranch.

An adequate site for a headquarters is admittedly essential to the operation of a large cattle ranch. Much of the landowners' testimony went to prove that the 123-acre neck of land was by far the most suitable site for a headquarters. Its relatively high elevation is shown to be an important and desirable element in the selection of such a site. An ample supply of water is readily available there. We have already mentioned its previous access, now denied, to transportation facilities. A number of photographs in the record confirm the witnesses' description of the parcel as a desirable, comparatively level site for the headquarters.

Expert witnesses, some of them experienced in the operation of cattle ranches, enumerated their reasons for believing that the loss of the 123-acre site seriously reduced the value of the entire 3,337-acre tract as a pros-

pective cattle ranch. Those witnesses fixed the landowners' damages at from $38,475 to more than $56,000. The two expert witnesses for the Highway Department were not shown to be experienced in appraising ranch lands and really made no effort to rebut the landowners' proof. On the record as a whole it cannot be said that there is no substantial evidence to support the $32,000 award.

The appellant's other point for reversal challenges the admissibility of a simple line drawing that Kaufman used in his testimony. The diagram was intended to show how the 123-acre site, consisting of a somewhat narrow rectangle leading to the railroad and existing highway, could have been used as an efficient ranch headquarters. The drawing, which is about as simple as one could imagine, depicts a central lane running the length of the site. It provides access to the transportation facilities at one end and to the rest of the ranch at the other. On each side of the lane Kaufman drew rectangles that were labeled as feed lots, holding areas, corrals, and a storage area. Kaufman used the drawing in explaining to the jury how the cattle could be funneled into the headquarters area, be kept in pens where they could be efficiently fed by means of an auger feeder, and eventually be moved into loading chutes for shipment.

In objecting to the use of the diagram counsel for the appellant refer to several condemnation cases, including some of those reviewed recently in *Housing Authority of the City of Camden* v. *Reeves,* 244 Ark. 783, 427 S. W. 2d 196 (1968). Those cases considered the admissibility of lot-and-block plats of residential subdivisions that existed in some instances on paper only. In several cases such plats were ruled out, either because they did not take into account the expense of bringing in streets or utility lines or because they might influence the jury to value raw acreage as if it were already divided into salable building lots.

The exclusionary principle underlying those deci-

sions has no application here. Kaufman's drawing was not intended as a basis for the assignment of values to the various enclosures that were sketched. Those enclosures were nearly all mere spaces defined by lines that represented fences. The sole purpose of the diagram was to enable the jury to see how the rectangular 123-acre parcel could be used as a site for the ranch headquarters. That the witness admitted that the site might not have been completed for as much as ten years is immaterial, because Kaufman was merely explaining *how* the site could be used. (He added that he had been building on his own nearby ranch for 40 years and still hadn't completed it.)

By analogy, we have held in a condemnation case that the landowner was entitled to show that his property on a river bank possessed superior advantages as a bridge site. *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51 (1887). So here, Kaufman was properly allowed to explain the particular suitability of the parcel as a site for the necessary ranch headquarters. In that connection the use of the drawing to present to the jury a graphic explanation that would otherwise have been conveyed to them by Kaufman's admissible oral testimony falls within familiar principles governing the use of plats, diagrams, sketches, and the like as aids to a witness's testimony. See *Sanders* v. *Walden,* 214 Ark. 523, 217 S. W. 2d 357, 9 A. L. R. 2d 1040 (1949); *Howell* v. *Baskins,* 213 Ark. 665, 212 S. W. 2d 353 (1948). We find no error in the court's ruling.

Affirmed.

Brown, Jones and Byrd, JJ., dissent.

Conley Byrd, Justice, dissenting. Since the verdict was, to say the least, ultraliberal, I can only conclude that the landowners' utopian map served to produce liberality. The map demonstrated neither the present

condition of the farm nor that commonly in use by farms similarly situated—only Mr. Kaufman's ten-year dream was demonstrated by the plat.

To me the plat dripped of speculation and produced prejudice.

I would reverse.

BROWN, J., joins in this dissent.

J. FRED JONES, Justice, dissenting. In the acquisition of right-of-way for interstate highway purposes, I cannot, in good conscience, bring myself to approve a judgment in damages, to what I consider to be, a mere disturbance of some future cattleman's dream of a utopian cattle spread.

The money award in this case, was for damage to every acre in a large tract of old fields and timber land because the right-of-way crossed a corner of the tract most suitable and convenient for the elaborate headquarters of a hugh cattle ranching operation, if, and when, anyone owning the land, should have the desire, ambition, know-how and cash assets, to develop the land into such cattle ranch the appellees visualize as possible. I consider the damages entirely speculative, and I would reverse.

EDNA B. CAMPBELL ET AL *v.* LUTHER FORD ET AL

5-4605 428 S. W. 2d 262

Opinion delivered June 3, 1968

[Rehearing denied July 15, 1968.]

Roy Mitchell, for appellants.

Wood, Chesnutt & Smith, for appellees.

GEORGE ROSE SMITH, Justice. The appellants and the appellees are neighbors whose back yards abut opposite sides of Bray street in the city of Hot Springs. This suit was brought by Mr. and Mrs. Campbell to compel the appellee-defendants to remove encroachments that obstruct the street. The chancellor dismissed the complaint for want of equity, finding that the city council had not exercised its power to open the street for travel and that the Campbells had not proved that they have suffered special damages differing from those sustained by the general public. We hold the first finding

to be immaterial and the second to be against the weight of the proof.

That part of Bray now in dispute was platted, dedicated, and accepted by the city as a cul-de-sac, 30 feet wide, that runs south from Avery street for 207 feet, where it dead ends. The several appellees own the four houses on the west side of the street, all facing Mountain View street to the west. The Campbells own the southernmost two lots on the east side of Bray. Their house faces Campbell street on the east.

According to Campbell's testimony, Bray street was at least traversable until 12 or 15 years before the trial. Since then the owners of the four lots on the west side of Bray have encroached on the street and affected its grade. At the north end of the block an L-shaped latticework wall made of concrete blocks extends across the street from the Goslee lot and for some distance down the east side. (The appellee Goslee's house, the northernmost of the four, also encroaches on the street for six to eight feet, but the Campbells do not ask that it be removed.) Behind the next house, owned by the appellee Almstead, rocks have been pushed into the street to raise its grade and thereby fend off surface water. Farther south a stone wall extends east from one of the two Ford lots and obstructs the street to an extent not precisely shown by the testimony. Owing to the narrowness of Bray street it does not appear that the encroachments are off what will be the traveled part of the street, when opened.

Turning to the chancellor's first finding, we think it to be immaterial that the city has not seen fit to open and develop this part of Bray street. The city cannot divert a dedicated street to an unauthorized use, either public or private, to the special damage of abutting owners. That point was fully considered in *Osceola* v. *Haynie,* 147 Ark. 290, 227 S. W. 407 (1927), where we said:

"In the case of *Packet Co.* v. *Sorrels*, 50 Ark. 473, it was said that authorities of a town or city can not lawfully appropriate or divert a street to uses and purposes foreign to that for which it was dedicated; and that it is not within the power of the Legislature to authorize its appropriation to private use nor to public purposes except in the manner in which private property can be taken for the use of the public under the right of eminent domain. The city had no right to close the street. Upon the contrary, it was the duty of the city to keep the street open. C. & M. Digest, §§ 7570 and 7607; *Little Rock* v. *Jeuryens,* 133 Ark. 126.

"The plaintiffs here have shown a damage in addition to that sustained by the public. Their property has been damaged in value, and under numerous decisions of this court they are entitled to an injunction to remove the nuisance. *Dickinson* v. *Ark. City Imp. Co.,* 77 Ark. 570; *Matthews* v. *Bloodworth,* 111 Ark. 549; *Wellborn* v. *Davies,* 40 Ark. 83; *Packet Co.* v. *Sorrels,* 50 Ark. 474; *Texarkana* v. *Leach,* 66 Ark. 42; *Davies* v. *Epstein,* 77 Ark. 227; *Stoutemeyer* v. *Sharp,* 89 Ark. 177; *Draper* v. *Mackey,* 35 Ark. 497."

Needless to say, what the city cannot do directly by affirmative action it cannot do indirectly by passive inaction.

On this point the appellees argue that Bray street is so scarred by gullies running southward that the cost of making it even passable would be prohibitive. There are two pertinent comments to be made about that argument. First, no one contradicts Campbell's statement that the street was formerly used. Whatever gullies now exist appear to have been caused by the appellees' purprestures, which were intended to deflect the flow of surface water. The appellees cannot equitably profit by an obstacle of their own making.

Secondly, Campbell is not depending on the city council to develop the street. For several years he has had on hand a supply of drain tile to be used in the street. He testified that no additional fill would be needed. "With the amount of material that's already been put in there, a wall torn down, and a gentle slope from the north, it would make a very cozy street. It could be done in a half a day's time with a bulldozer." If, after the appellees have removed the encroachments, Campbell wishes to improve the street at his own expense, we know of no rule of law to prevent him from doing so, as long as he does not alter the original grade of the street to the detriment of his neighbors.

Finally, we cannot sustain the chancellor's finding that the Campbells have not sustained special damage entitling them to relief. The great weight of the proof is the other way round. Campbell testified that his lots would be worth 50 percent more if Bray street were opened up. Even the appellee Goslee, a real estate dealer who owns one of the lots on the west side of Bray, admitted on cross-examination that a back entrance to the Campbell property would add to its value.

Furthermore, the destruction of one means of access to a landowner's property meets the test of special damages. "The fact that appellant had other entrances to his lot would not keep him from suffering special and peculiar damages if his entrance by way of the alley in question were destroyed. The deprivation of any entrance to or exit from one's property is a special or peculiar damage to it not suffered by the public in general." *Langford* v. *Griffin,* 179 Ark. 574, 17 S. W. (2d) 296 (1929).

Reversed and remanded for the entry of a decree in harmony with this opinion.

HARRIS, C. J., and JONES, J., would affirm the decree.

PAUL EDWARDS *v.* STATE OF ARKANSAS

5339 429 S. W. 2d 92

Opinion delivered June 3, 1968
[Rehearing denied July 15, 1968.]

Murphy & Burch, for appellant.

GEORGE ROSE SMITH, Justice. By information the appellant, an employee of the Crown Coach bus com-

pany, was charged with the larceny of $2,505.15 belonging to his employer. He appeals from a verdict and judgment finding him guilty and sentencing him to serve a year in the penitentiary. For reversal he questions the charge of larceny, as distinguished from embezzlement, and the admissibility of Dr. Donald Baker's testimony for the State.

There is no merit in the first contention. On the evening of the theft Edwards was in charge of the bus station at Fayetteville. He took three money bags from the money drawer and hid them by thrusting them through a hole in the ceiling. Edwards, being a servant having mere custody of his master's property, was properly chargeable with larceny. *Atterberry* v. *State,* 56 Ark. 515, 20 S. W. 411 (1892). See also Ark. Stat. Ann. § 41-3929 (Repl. 1964), defining larceny by a bailee, and § 43-1012, with respect to a defect in the charge which does not tend to prejudice the substantial rights of the accused on the merits.

The serious issue is whether Dr. Baker's testimony should have been excluded as a privileged communication between physician and patient. Upon that issue the facts must be narrated in some detail.

At about nine o'clock on the night of the crime John Pomoransky went to the bus station on business. There was no one in the waiting room. Pomoransky saw Edwards lying face down on the floor behind the counter. A money drawer was open; papers were scattered about. Assuming that a robbery had occurred, Pomoransky called to an acquaintance next door to send for the police and an ambulance.

The ambulance drivers got there first. Officer Stout arrived a few moments later, while Edwards was still on the floor. He talked to Edwards briefly, to find out what had happened. Edwards said that he had heard the door open, but he didn't look up, and someone hit him

on the head twice. Officer Stout, seeing no indication of any injury, examined and felt Edwards's head, but he found no swelling, no blood, no abrasions. After Edwards was taken to the hospital the police officers searched the premises and quickly found the money bags above the ceiling. There were some shelves nearby that could be pulled out to serve as a ladder for access to the hole in the ceiling.

The ambulance crew, apparently acting without instructions from the police, had taken Edwards to the emergency room at the Washington General Hospital. Dr. Baker, who was not Edwards's family doctor but was on call that night was sent for and arrived within five minutes. Edwards told him that he had been struck on the right side of the head, had fallen to his knees, and had been knocked unconscious by a second blow on the top of his head.

Dr. Baker with no one else present, examined Edwards carefully. He testified that if Edwards had been knocked unconscious by blows on the head, there would have been abrasions, redness, or swelling as a result of the trauma. No such indications were found. Neurological changes in the movements of Edwards's eye muscles would also have resulted from a recent loss of consciousness, but those symptoms did not exist. If Edwards had fallen to his knees there would have been indicative marks on the skin, but such marks were wholly absent, X-rays of the skull were likewise negative. In short, Dr. Baker's testimony which the jury manifestly accepted as the truth, demonstrated that Edwards's tale of having been robbed was an out-and-out fabrication.

Counsel for Edwards objected unsuccessfully to Dr. Baker's testimony, on the ground that it was privileged. Ark. Stat. Ann. § 28-607 (Repl. 1962). In some states such statutes have been construed to apply only to civil cases; other courts have held them applicable to criminal trials as well. See, for example, *State* v. *Betts,* Ore.

384 P. 2d 198 (1963), and *State* v. *Sullivan,* Wash., 373 P. 2d 474 (1962). In the past we have assumed, without expressly declaring, that our statute does apply to criminal cases. *Wimberley* v. *State,* 217 Ark. 130, 228 S. W. 2d 991 (1950); *Cabe* v. *State,* 182 Ark. 49, 30 S. W. 2d 855 (1930); *Burris* v. *State, infra.*

We need not explore that question, because we are convinced that the trial judge correctly rejected the claim of privilege in this case. In the first place, the statute by its terms applies only to information which the physician may have acquired from his patient while attending in a professional character "and which information was necessary to enable him to prescribe as a physician. . ." § 28-607. We have given effect to that limitation. In *Burris* v. *State,* 168 Ark. 1145, 273 S. W. 19 (1925), two physicians who had treated the accused for disease on different occasions were permitted to testify for the State about his mental condition. In holding that testimony to be admissible we said:

> "It will be observed that the statute only excludes the testimony of a physician as to information 'necessary to enable him to prescribe as a physician.' The statute does not exclude all of the testimony of a physician because he had attended the person in a professional capacity, but the exclusion is limited to information which was necessary to enable the physician to prescribe. Neither of these witnesses had ever examined appellant as to his mental condition or treated him for mental disease, and they both testified that they were basing their opinions upon mere observations of the appellant during their acquaintance with him as family physician and by observing him while he was on the witness stand, but not from any information received for the purpose of treating him. . . .
>
> "Counsel rely mainly upon the announcement of the law on the subject made by this court in the case

of *Triangle Lumber Co.* v. *Acree,* 112 Ark. 534, but we find nothing on examination of the opinion in that case which would justify us in holding that his testimony was incompetent. There is nothing in the opinion to justify the conclusion that we meant to ignore the distinction that under the statute the testimony of a physician is not to be excluded except such as related to information essential to the treatment of the patient."

In the second place, the purpose of the privilege is to permit a patient to communicate freely with his physician about his disease and to prevent physicians from disclosing the infirmities of their patients. *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S. W. 720 (1914). Neither reason has the slightest relevancy here. Edwards, who did not testify or offer any witnesses at the trial below, obviously had no basis for communicating with Dr. Baker about his disease, because he knew perfectly well that he had none. To permit one in such a situation to feign injury and then exclude the doctor's testimony would enable a criminal to conceal by deliberate falsehoods the most trustworthy evidence of his offense. As we said in the *Wimberley* case, *supra*: "It could not have been intended by the Legislature that. . . the Act should be the means of protecting a criminal from just punishment."

Finally, counsel for the appellant, citing the landmark holdings in *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and *Miranda* v. *Arizona,* 384 U. S. 436 (1966), argue with apparent gravity that Dr. Baker's testimony should have been ruled out because he failed to inform Edwards that he could remain silent, that anything he said might be used against him, that he was entitled to a lawyer, and so on. The two cases cited announced principles applicable to in-custody police interrogation when the investigation has reached the accusatory stage. It would be the height of absurdity to apply those prin-

ciples to a medical examination conducted by a physician in circumstances giving him no reason to suspect, before the completion of the examination, that some offense on the part of his patient might conceivably be involved. The suggestion that Dr. Baker's testimony involved self-incrimination on Edwards's part is rebutted by the holding in *Schmerber* v. *California,* 384 U. S. 757 (1966).

Affirmed.

ROY WALKER *v.* STATE OF ARKANSAS

5350 429 S. W. 2d 121

Opinion delivered June 3, 1968
[Rehearing denied July 15, 1968.]

Oliver L. Adams, for appellant.

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

GEORGE ROSE SMITH, Justice. Roy Walker was convicted of involuntary manslaughter and sentenced to imprisonment for three years. According to the State's proof, Walker was driving a truck on a highway in or near Eureka Springs at such a high speed that he lost

control of the vehicle and struck and killed Otto Miller, a pedestrian. The information charged that Walker was intoxicated at the time. For reversal Walker contends that the court erred in allowing the prosecution to introduce evidence of a blood test that showed Walker to have been intoxicated.

After the accident Walker, who was injured, was taken by someone to a hospital in Eureka Springs, where he was treated as an outpatient. There Richard Stallman, a laboratory technician, took a sample of Walker's blood without having asked his permission and sent it to a pathologist in Fayetteville for analysis. The pathologist testified that the sample contained .140 percent of alcohol when taken and that the percentage would probably have been higher an hour earlier, when the accident occurred.

The appellant, citing *Schmerber* v. *California,* 384 U. S. 757 (1966), and other cases, insists that the taking of the blood sample amounted to such an unreasonable search and seizure as to be prohibited by the federal and state constitutions. It does not appear, however, that Stellman acted either at the direction of the police or by prearrangement with them. The search-and-seizure clauses are restraints upon the government and its agents, not upon private individuals. *People* v. *Potter,* Cal. App., 49 Cal. Rptr. 892 (1966); *State* v. *Brown,* Mo., 391 S. W. 2d 903 (1965); *State* v. *Olsen,* Ore., 317 P. 2d 938 (1957). Hence the proof does not establish a denial of Walker's constitutional rights.

Complaint is also made of the court's refusal to give an instruction informing the jury that the decedent was under a duty to keep a proper lookout. We doubt the applicability of such a civil standard to a criminal case, but in any event the point was not included in the motion for a new trial and so is not available to the appellant in this court. *Dokes* v. *State,* 241 Ark. 720, 409 S. W. 2d 827 (1966).

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION *v.* G. L. MORRIS AND CORNELIA MORRIS

5-4596 429 S. W. 2d 114

Opinion delivered June 3, 1968
[Rehearing denied July 15, 1968.]

Thomas B. Keys and *Kenneth R. Brock,* for appellant.

Eldridge & Haralson, for appellees.

PAUL WARD, Justice. This is an eminent domain proceeding, and only one point—a point of law—is involved on appeal. The pertinent background facts and procedure can be briefly stated.

Facts. The Arkansas State Highway Commission (appellant herein) filed a complaint in circuit court to acquire 37.49 acres out of a large tract of land, belonging to G. L. Morris and his wife (appellees), for construction purposes on U. S. Highway 64 in Woodruff County. Appellant having deposited in court $14,500, as estimated compensation, the trial court granted immediate possession to appellant. Appellees refused to accept the above amount, and a jury trial followed. At the trial appellees' witnesses fixed the value at different amounts —averaging around $85,000, and appellant's witnesses fixed the value at approximately the same amount as was deposited in court. The jury gave appellees a judg-

ment in the amount of $40,000, and from that judgment appellant prosecutes this appeal.

The only point urged by appellant for a reversal is that the trial court erred in giving appellees' requested Instruction No. 2, which reads:

> "You are instructed that under the law defendants are entitled to recover the fair market value of the lands actually taken; also, an amount which will fairly compensate them for the damages, if any, to the remaining lands not taken for highway purposes, considering the facility as being completed and in place. "You will, therefore, ascertain the difference between the fair market value of the entire tract of the defendants before the taking for highway purposes and the fair market value of the lands remaining in the tract after such taking, and that difference is the amount the defendants are entitled to recover, and your verdict should be for the defendants in such amount.
>
> "In other words, ladies and gentlemen, what I am saying is the way you arrive at just compensation is to determine the difference in fair market value of the property before the taking and immediately after the taking, and in arriving at that difference you may take into consideration other elements."

The essence of appellant's contention is that the first paragraph is in conflict with the second paragraph, and that this constitutes reversible error. In support of the contention appellant relies on *Young* v. *Ark. State Hwy. Comm.*, 242 Ark. 812, 415 S. W. 2d 575, and *Myers* v. *Ark. State Hwy. Comm.*, 238 Ark. 734, 384 S. W. 2d 258. The *Young* case recognized two alternative formulas for measuring compensation for a partial taking—"(ii) *Value of the part taken plus damages to the remainder rule; and,* (iii) *The before and after value* rule." Following the above quotations we also said:

"Therefore, it would be inappropriate to instruct the jury as to both formulas . . ." In the *Myers* case, *supra,* the trial court gave an incorrect instruction on the measure of damages and then gave a correct instruction. On appeal we said that the correct instruction did not cure the error in giving the erroneous instruction.

For reasons presently stated, we conclude that the above decisions do not justify a reversal of the case here under consideration.

First, in this case, the trial court did not give *two* separate instructions on the measure of damages—it gave only one instruction. *Two,* the third paragraph of the instruction explained and harmonized the first two paragraphs. *Three,* the first paragraph of the instruction is a correct statement of the measure of damages and therefore does not conflict with the second paragraph. In the *Young* case there appears this statement: "This does not mean that evidence of the value of the lands taken plus damages to the remainder is not admissible. In fact, it is appropriately considered by appraisers as two of the many guides for determining 'before and after values' ". In the *Myers* case, *supra,* we made this statement:

> "In arguing the case to the jury, counsel for the appellee would have had every right to read to the jury Instruction No. 1 and emphasize that under this instruction the landowner could only recover the value of the land actually taken . . . Such an argument would be confusing to the jury, because the real issue was the difference in the value before and after the taking."

In the case here under consideration we do not have two conflicting instructions by which the jury could be confused.

Affirmed.

SMITH, BROWN and JONES, JJ., concur.

LYLE BROWN, Justice, concurring. I believe the recited instruction should not have been given. In *Young* v. *Arkansas State Highway Comm'n.*, 242 Ark. 812, 415 S. W. 2d 575 (1967) we made it clear that the "value plus damages" formula and the "before and after" rule are alternative formulas for determining just compensation. Being alternatives, both rules should not be given. However, the objection made by appellant did not remotely call that defect to the attention of the court. The single point raised was that the giving of the instruction "would allow the defense attorney to argue the first paragraph in such a way that the jury might think they were supposed to give the landowner damages for the land taken and also damages for the remaining land not taken for highway purposes, and this is not the correct measure of damages in a suit of this kind." No general objection was made.

The statement that the "value plus damages" rule is not the law is hardly correct. As pointed out in *Young*, it has been used many times in eminent domain cases. Our court has not condemned it.

JONES, J., joins in this concurrence.

EUGENE MYRICK *v.* STATE OF ARKANSAS

5356 428 S. W. 2d 241

Opinion delivered June 3, 1968

Branch & Adair, for appellant.

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

PAUL WARD, Justice. Eugene Myrick (appellant) was charged with the crime of "assault with intent to kill" his wife, Louise Myrick. He was likewise charged with the same crime against his mother-in-law, Mrs. Strope. Both assaults were alleged to have occurred at the same time and place—on November 4, 1967 at the home of Mrs. Strope.

Upon trial, appellant was found guilty, as charged, of the assault on his wife and his punishment was fixed at imprisonment in the penitentiary for three years. He was found guilty of an aggravated assault upon Mrs. Strope, was fined $50 and imprisoned in the county jail for thirty days.

Appellant now seeks only to reverse the conviction for assault with intent to kill his wife. Set out below is a brief statement of the background facts.

Appellant and his wife have been married for sixteen or seventeen years, and they have five children who range in age from eight to fifteen years. To put it mild-

ly, their marriage has been turbulent, having separated some fifty times. About two weeks before the occurrence here in question (On November 4, 1967) Mrs. Myrick left home and moved into the home of her mother—Mrs. Strope. On the date last mentioned appellant went over to Mrs. Strope's house to give his wife $60 out of his weekly paycheck. While there the assaults took place. Mrs. Myrick was stabbed by appellant with a pocket knife twelve times about the arms, neck and torso. The picture introduced in evidence showed considerable blood on the floor and furniture. When Mrs. Strope attempted to protect her daughter she was stabbed five times. Appellant does not deny that the assaults took place, nor does he deny the extent of the injuries inflicted.

We have concluded that the case must be reversed because of the trial court's refusal to give appellant's requested instruction which reads:

> "The charge of assault with intent to kill requires that the defendant have a specific intent to take the life of the person assaulted. And in this connection if you find from a preponderance of the evidence that at the time of the doing of the thing charged the accused was so drunk that he could not have entertained the intent necessary to constitute the crime, then you will acquit the defendant of the crime of assault with intent to kill."

Appellant saved his exceptions to the court's refusal to give the requested instruction.

In the case of *Chowning* v. *State,* 91 Ark. 503, 121 S. W. 735, this precise question was under consideration. Appellant was convicted "of the crime of an assault with intent to kill one Lewellen", and the trial court refused to give appellant's requested instruction which, in material part, reads:

> "If you find and believe from the evidence that the

> defendant was intoxicated to that extent that he was not conscious of what he was doing, being drunk to the extent that he could have no specific intent to kill, under the law he would not be guilty . . . of an assault to kill."

In reversing the trial court, this Court said:

> "To constitute the crime of an assault with intent to murder or kill . . . a specific intent to take the life of the person assaulted must be shown."
>
> * * *
>
> "Where the offense can be committed only by doing 'a particular thing with a specific intent, it may be shown that at the time of doing the thing charged the accused was so drunk that he could not have entertained the intent necessary to constitute the crime.' "

It can hardly be contended here that there was no testimony to justify giving the instruction requested by appellant. Appellant testified, without contradiction, in substance: Every time my wife would leave me I would start drinking; This time I had been drinking fifteen days with nothing to eat and no sleep; On November 3rd when I got off from work I started drinking and drank until I could drink no more; I got off at 3:30 p.m. (on the day of the assault). I went to the tavern and drank six or seven beers before going to see my wife; on the way over I stopped and got another beer; and then I bought a half pint of whiskey and drank half of it; and when I got to the house my wife sent up and got six beers and they brought that down there—and I don't know—I drank one or two of the beers; by then I was so drunk I didn't hardly know what was happening. I don't remember every thing that happened.

In view of what we have said above, we conclude that the judgment must be reversed and the cause remanded for a new trial, and it is so ordered.

We have examined the other alleged errors but find no merit in them.

Reversed.

FOGLEMAN, J., disqualified.

HARRIS, C. J., and JONES, J., dissent.

PAUL SHIPLEY ET AL *v.*
NORTHWESTERN MUTUAL INS. CO.

5-4591 428 S. W. 2d 268

Opinion delivered June 3, 1968

Charles W. Garner, for appellants.

Barber, Henry, Thurman, McCaskill & Amsler, for appellee.

LYLE BROWN, Justice. Plaintiffs-appellants sued Northwestern Mutual Insurance Company to recover under a medical payment provision included in Paul Shipley's policy of public liability insurance. At the close of all the testimony the trial court entered a directed verdict for Northwestern Mutual. The appeal challenges the propriety of that verdict.

Paul Shipley's policy bound the Company to pay medical bills incurred by Shipley and his passengers. The coverage was limited to $500 per person. In the event of any payment under the policy it was stipulated that the Company would be subrogated to any right of recovery vested in the injured persons. It was further provided that those who were so insured would do nothing to prejudice the Company's subrogation rights.

On April 29, 1966, Shipley was involved in a collision with a vehicle driven by Eva M. Baldwin. The accident was reported to Shipley's insurance agent. As a result of that contact Northwestern's adjuster called on Shipley. The adjuster obtained information concerning the collision and advised Shipley to supply him with the medical bills. Shipley and the other three occupants of the vehicle, his wife and two grandchildren, were receiving medical attention. Treatment for some or all of them continued for a matter of months. When the bills would come to Mr. Shipley on the first of each month he would take them to the adjuster. Shipley seemed to be of the impression that as each bill was submitted Northwestern would forthwith supply the funds to pay it. On the other hand the adjuster understandably was desirous of garnering all the bills and disposing of the claims with final instruments of settlement and subrogation. In that connection he assured Shipley that Northwestern was not attempting to avoid its obligations under the policy.

On September 15, 1966—less than four months after the accident—the Shipleys filed suit against Mrs. Baldwin. That filing was not made known to Northwestern or its adjuster. The attorney for the Shipleys shortly began correspondence with Northwestern's adjuster concerning the claimed medical payments. Counsel was advised that numerous medical bills had been supplied but the adjuster had not been informed as to whether the Shipleys had been discharged from treatment; nor had the proofs of loss and subrogation agreements been executed as requested. After further correspondence be-

tween those two parties, the adjuster prepared all the forms and attached detailed instructions for their execution. Those were forwarded to the attorney for the Shipleys with the assurance that their execution and return would result in payment of the medical claims. Those instruments were mailed on January 4, 1967. The attorney received them but elected not to have them executed and returned. A follow-up letter from the adjuster brought no response.

On February 28, 1967, the case against Mrs. Baldwin was tried. The following awards were made: Paul Shipley, $6,602; Novella (wife), $350; Terry, $275; and Karen, $65. The same medical bills forming the basis of this suit against Northwestern were introduced in the Shipleys-Baldwin trial.

Suit against Northwestern Mutual was filed April 26, 1967. Northwestern's refusal to pay the medical claims under its policy was grounded on the recovery in the Baldwin case. The Company contended (1) that its insurance contract was one of indemnity, and (2) that the Shipleys violated the subrogation and cooperation provisions of the policy, thereby precluding Northwestern from recouping any payments made by it from the party at fault (Mrs. Baldwin).

In directing a verdict for Northwestern the trial court found that "the Shipleys have been paid for the medical expenses and that this company is not now obligated to pay same." We hold the court was correct on both findings, that is, first, the Shipleys had been paid, and second, Northwestern is not now obligated to pay. Novella Shipley contends that the judgment in her favor, and against Mrs. Baldwin, for $350 was $31.40 short of her actual medical. Her individual recovery was not for medical but for physical injuries. The instructions to the jury in the Shipleys-Baldwin trial are not in this record; however, it is shown that Paul Shipley paid the medical expenses for his wife and grandchildren. Paul

Shipley recovered $6,602. Having paid the medical, Shipley was the person entitled to recover for it. So we certainly cannot say the trial court was in error in stating that all medical payments were paid when Mrs. Baldwin paid the judgment against her. Nor is there anything in the record to show that the awards to the Shipleys were reduced by comparative negligence. To hold that Northwestern was obligated to pay the Shipleys, the court would have ignored the well established rules (1) that the object of subrogation is to prevent the insured "from recovering twice for the one harm, as would be the case if he could recover from both the insurer and from a third person who caused the harm, and (2) reimbursing the surety for the payment which it has made." Couch on Insurance 2d § 61:18 (1966).

In the contract of insurance before us the insured and the insurance company entered into an agreement whereby the insurer would be subrogated to any right possessed by the insured to reimbursement of medical expenses from a third party, in this instance a tort-feasor; the contract contained the usual cooperation clause; and it provided that the insured would do nothing after loss to prejudice the insurer's interest under subrogation. In view of those provisions, together with the fact that full medical compensation has been paid by the tort-feasor, Mrs. Baldwin, the Shipleys are precluded from recovering from Northwestern. See *Travelers Indemnity Co.* v. *Cole*, CCH 1967 Automobile Law Reports, § 5608 (Tenn. Ct. of Appeals, M. S., June 30, 1967); *Travelers Ins. Co.* v. *Lutz*, 210 N. E. 2d 755 (Ohio 1964); *DeCespedes* v. *Prudence Mutual Casualty Co.*, 193 So. 2d 224 (Fla. 1966); *Bernardini* v. *Home & Auto Ins. Co.*, 212 N. E. 2d 499 (Ill. App. 1965).

Affirmed.

WALTER H. WRIGHT ET UX *v.* RALPH MURR ET AL

5-4597 428 S. W. 2d 637

Opinion delivered June 3, 1968

Jeff Duty, for appellants.

W. Q. Hall, for appellees.

LYLE BROWN, Justice. This is a suit brought by the appellants, Walter H. Wright and wife, to establish a boundary line on the south portion of their property, plus other incidental relief. The appellees, Ralph Murr, Jim Donnohue, and Jack E. Brannon, landowners adjoining the Wrights, filed a general denial and pleaded that the cause be dismissed for want of equity. After presentation of the appellants' case in chief, which consisted solely of Mr. Wright's testimony and ten pictures as exhibits, the chancellor sustained a demurrer to the plaintiffs' evidence.

The appellants purchased and took possession of a tract of real estate in Madison County on September 12, 1959. The deed conveyed all the land lying in the SE¼ of the NE¼, Sec. 17, Twp. 17 N., R. 26 W. In addition it stated that the land was approximately forty acres. In their complaint the appellants claim title to all lands under fence by adverse possession for more than seven years. In February 1967 Ralph Murr and some helpers moved the fence on the southern boundary. Over the protests of the appellants they ran a new fence along the south end of the land but north of the old fence line.

During the course of the trial Mr. Wright testified to the following material facts: When he bought the land in 1959 it was entirely fenced; he bought "all that was within fence"; it was fenced "hog tight"; he immediately moved on the land and took possession, claiming up to the fences; and his possession was peaceful and uninterrupted save one incident. In 1963 while cutting timber on the now disputed strip, appellee Jim Donnohue told appellant that the land was Donnohue's and to stop cutting. Appellant complied. The appellant stated on cross-examination, "I told Jim's mother that if they were their logs, I'd pay for them. If they were proven to be their logs."

Pictures were offered during the trial to establish the old fence line and to show the changes that have since occurred. The exhibits were admitted into evidence without objection.

The question here presented is whether the chancellor erred in sustaining appellees' demurrer to the evidence. The case of *Werbe* v. *Holt*, 217 Ark. 198, 229 S. W. 2d 225 (1950), states the rule as follows:

> "What, then, is the effect of a demurrer to the evidence or a similar pleading in jurisdictions recognizing that practice? The question may arise either in equity cases, where the chancellor is the arbi-

> ter of the facts, or in cases tried at law without a jury, where also the trial judge decides all issues of fact. By the overwhelming weight of authority it is the trial court's duty, in passing upon either a demurrer to the evidence or a motion for judgment in law cases tried without a jury, to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence when so considered fails to make a *prima facie* case . . . The minority view, which permits the trial judge to weigh the evidence is well stated in *Porter* v. *Wilson*, 39 Okla. 500, 135 P. 732."

In *Werbe* this court adopted the majority view.

The chancellor erred in sustaining the demurrer. The trial court took cognizance of the weakness of appellants' prima facie case. That fact should not necessarily be fatal. In *Werbe* the court states, " . . . in many instances the plaintiff's prima facie case must necessarily be somewhat weak, for the reason that only the defendant himself may be able to supply details needed to complete the picture." Also, the chancellor stressed the fact that Wright stopped cutting timber when Jim Donnohue interrupted him. Wright said, "I'll pay for them. If they were [are] proven to be their logs." Such a statement could just as easily be interpreted to mean that he was not conceding Donnohue's claim but merely using discretion in having the question settled peaceably and judiciously.

Finally, the chancellor noted in his remarks the failure of the appellants to show identity between the tract bought and the fenced land. The complaint only alleged adverse possession, so record title was not an issue. A similar fact situation occurred in *O'Neal* v. *Ross,* 100 Ark. 555, 140 S. W. 743 (1911):

> "When lots 6 and 8 were purchased by the defendants, they were enclosed, and he claimed to the

fence between the property he purchased and that now owned by the plaintiff. He claimed to a line visible and known, and his actual possession was coextensive with that boundary. The testimony on the part of the defendant shows that he took possession of the land under the claim and belief that it was his own, and has held it by adverse possession for the statutory period of seven years."

In that case the court found the property was held to the fence line with the intention that it was the boundary rather than the description recited in the deed.

We find the appellants' evidence did establish a prima facie case for the purpose of requiring appellees to go forward with their proof.

Reversed and remanded.

LEONARD RAY INGLE *v.*
MARKED TREE EQUIPMENT CO.

5-4290 428 S. W. 2d 286

Opinion delivered June 3, 1968

Giles Dearing, for appellant.

Henry S. Wilson, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Ingle asserts that the trial judge erred in directing a verdict in favor of appellee for a deficiency judgment on a purchase money note given for a John Deere combine.

Marked Tree Equipment Company, the appellee, filed its complaint alleging the sale of a John Deere 95-B combine to appellant for $11,068.00 on October 1, 1964, and asserting that it had repossessed the implement on May 5, 1966, because of default of appellant in making payment. It was alleged that appellee made a down payment of $2,280.00 and that the time payment balance of $11,749.62 was to be made in four equal annual payments of $2,937.40, one becoming due on the first day of each succeeding December. Appellee also alleged that notice was given to appellant that the combine would be sold for $6,000.00 unless the balance of $8,812.22 was paid by May 23, 1966. It stated that it "bought" the combine for $6,000.00 on July 15, 1966, the same date it was required to repurchase appellant's time payment note from a bank to which it had been assigned. It sought judgment for $2,812.22 and interest.

Ingle answered, alleging that he purchased this combine upon the representation by the implement company that it would fix up the 95-B combine so that it would perform exactly like the R combine he actually wanted to purchase. He denied that he was obligated to pay any insurance premiums. He further alleged:

> When the combine was delivered it had larger wheels on it than usual on that type of combine and that appellant guaranteed that this combine would give him perfect satisfaction and that if he found, upon trial, that it did not perform to his satisfaction, it would not cost him anything; the failure of the combine to perform properly was reported to the implement company and that they tried to make

it work but failed to do so; he then advised appellant to come and get the implement as he could not use it and did not intend to pay for it; appellant took possession of the combine under an agreement that he would not be required to pay for it.

The defense of usury was also pleaded and recovery of a down payment of $2,280.00 was sought. By amendment, appellant sought to recover a payment of $2,937.40 and another of $936.08.

The implement company denied appellant's allegations generally and pleaded a contractual limitation of warranties in the time sale agreement.

The verdict was directed upon conclusion of the evidence on behalf of appellee.

Appellant asserts nine points for reversal, all of which relate to matters which he contends raised factual issues for the jury. Among the points upon which appellant relies are his contentions that there were questions of fact as to material changes in his contract after he had signed it, by alteration of the stated price of the combine and by charging premiums for unauthorized insurance; as to the usurious nature of the transaction; and as to the existence of a new and substituted parol contract at the time of the first payment in which appellee made a new guarantee.

Appellee contends that actions of appellant, with full knowledge of all facts, constituted a waiver of any alleged defenses and a ratification of the contract as a matter of law.

In considering the propriety of the court's action we will view the evidence in the light most favorable to appellant. Even when we do so, we find that many of the allegations of his pleadings are not sustained and that the court's action was not erroneous.

Ingle was a farmer who needed a combine for use in the harvest of 1964. Sometime prior to the harvest he met one Edwin Redd, a salesman for Marked Tree Equipment Company, on the road to Bay Village. They had a discussion in which Ingle advised Redd that he had been looking at a Case combine. Redd's company was a John Deere dealer. They discussed prices and equipment. Ingle testified that Redd said the cost of the combine would be $9,600.00 and that it had 18-inch tires. Ingle expressed his preference for Case equipment because he had "soft ground" and doubted that the tires on the John Deere equipment were wide enough to support it on his land. A few nights later, Redd came to Ingle's house about the matter and after a week or so in negotiations, Ingle signed a contract to purchase the Deere combine. Thereafter, when he went with Redd to see it, he told the manager of appellee, the shop foreman, and Redd that he could not use it because the tires were not large enough. They suggested the use of dual wheels, but Ingle was unfamiliar with them. Redd stated that they said they would guarantee this combine to go anywhere with an extra set of wheels. The shop foreman asked Ingle to bring them a set of rims, but Ingle suggested that they use a set he saw in the shop and now claims that they did so. They did not say anything about charging him for the wheels but went ahead and welded them. When the combine was delivered sometime before October 1, 1964, the wheels and rims were brought with it, but were not attached because of highway width requirements. Ingle was shown the place for bolting them on by the employee who delivered the equipment.

Sometime after the original contract was signed, Redd came out to Ingle's house and brought a new contract, claiming that a mistake had been made on the first one signed. Ingle signed the new document and tore up his copy of the first one as requested by Redd. Some of the writing on the new contract was done at the Ingle house where Ingle signed it. Appellant identified his signature on the contract introduced by appellee. The de-

scription of the equipment was written on the contract the way Ingle wanted it at the time he signed, but there were not any figures as to the money terms. No mention was made of any insurance. Ingle's copy of this contract was received by him by mail some two or three weeks later. Ingle's wife read the contract and showed it to him, after which he called appellee's place of business and told a secretary that he was overcharged. Redd later came out, that evening, and angry words were exchanged. Ingle protests that the contract called for him to pay $12,000.00 although the equipment had been priced to him at $9,600.00. Redd agreed to take the contract back to the manager of the company and promised that if there were mistakes, they would be corrected. The combine was delivered subsequently.

Ingle started using the combine for harvesting soy beans, commencing about October 1st. It worked satisfactorily during dry weather for about three days. Thereafter, there were rains and the combine would bog down so that Ingle was unable to use it for any full day thereafter. His Case equipment operated satisfactorily. After ten or twelve days and two or three rain showers, Ingle abandoned efforts to use the Deer combine and parked it on the hill near his house. However, he attempted to use it later, sometime in November, probably 15 times. He obtained other Case equipment and help in harvesting his crop.

Thereafter, he got notice of his December 1st payment by letter dated November 25, 1964. Still later, Redd came out. Ingle told him then that the combine would not work and that he would not pay $12,000.00 for it "until it cut beans." Ingle expressed the desire that appellee take the machine. The following conversation ensued:

> Redd: "We will have to make it work. We will have to find out what it takes to make it work or give you your money back."

Ingle: "If you make it work, I will pay the down payment if you promise me the combine will work."

Redd: "We will have to make it work or give you your money back."

Ingle made the payment on December 1st, relying on these statements by Redd. On December 29, 1964, he also paid $765.00, the down payment which had been charged to his account at the time the transaction was closed. Subsequently, appellee's employees came out to work on the combine several times while other combines were working. None of this work involved any attempt to correct the trouble with the wheels. Representatives of the implement company told Ingle they could not put bigger wheels on the combine and never did anything to correct the wheel trouble. In June of 1965, appellee changed the battery in the combine upon the request of appellant. An employee also came out at that time to help Ingle start the combine at Ingle's request. Frank Ingle testified that appellant attempted to use the combine in the harvest of 1965.

Insurance was not mentioned in any conversation between the parties. When Mrs. Ingle saw the contract and called the total balance to her husband's attention, she did not notice that items for insurance premiums were included in the contract.

On the face of the time sale agreement, the following items were listed:

Delivered cash price	$11,068.00
Sales tax	332.00
Total cash price	11,400.00
Total down payment	2,280.00
Balance	9,120.00
Property insurance	563.16
Life insurance	395.84
Deferred balance	10,079.00

Finance charge	1,670.62
Time balance	11,749.62

The testimony is undisputed that Ingle was credited with $1,515.00 on the down payment, so that the actual down payment charged to his account was $765.00. Thus, the actual selling price of the combine was $9,553.00.

Appellee reminded Ingle of the 1965 payment by letters dated November 15, December 7, and December 21, 1965. On the Saturday preceding the last of these letters, appellee's manager and appellant had a conversation in which appellant stated that he was unable to pay for the machine because he was not able to combine beans with it. He went to the extent of telling what parts were broken on it and his inability to get them.

When appellee's motion for directed verdict was made, appellant's counsel stated that appellant was not relying upon the first contract, but the last one (about two days before December 1, 1964) in which "they" guaranteed to appellant they would make the combine work.

A buyer may accept or reject goods which fail to conform to the contract in any respect. Ark. Stat. Ann. § 85-2-601 (Add. 1961). If the combine did not conform to the terms of the conditional sale contract, appellant was required to reject it within a reasonable time. *Hudspeth Motors, Inc.* v. *Wilkinson,* 238 Ark. 410, 382 S. W. 2d 191. By failing to take the necessary steps to reject the machine, Ingle waived any breach of warranty that might have occurred. *Hudspeth Motors, Inc.* v. *Wilkinson, supra.* Rejection must be made within a reasonable time after delivery and reasonable notice given. Ark. Stat. Ann. § 85-2-602; *Green Chevrolet Co.* v. *Kemp,* 241 Ark. 62, 406 S. W. 2d 142. Exercise of ownership by the buyer after rejection is wrongful against the seller, binds the buyer to his acceptance and constitutes a waiver of warranties. §§ 85-2-602, 85-2-

606; *Green Chevrolet Co.* v. *Kemp, supra.* Ingle was barred of any remedy unless he notified the implement company of any alleged breach within a reasonable time after discovery thereof. § 85-2-607.

There is no evidence that Ingle took any steps that could be construed as a rejection of this combine or gave notice to appellee of any rejection or of his claim of a breach until he was called upon to make his payment two months after delivery. The trial court was justified in holding that this action was not within a reasonable time after delivery or after discovery of the breach. Ingle's payment of the December 1st payment and of the down payment on December 29th were inconsistent with any rejection of the equipment.

Appellant contends, however, that his actions were justified by Redd's promise that appellee would make the combine work before the time the 1964 payment was made and it is this agreement upon which appellant relies, according to the statement by his attorney. In the first place, there is no evidence that Redd had any authority to make any such agreement. A salesman has no implied authority to modify a contract for sale of goods. *American Sales Book Co.* v. *Whitaker,* 100 Ark. 360, 140 S. W. 132. One dealing with an agent is bound to ascertain the nature and extent of his authority and cannot trust to mere presumption of authority or the assumption of it by the agent. *Dixie Life & Accident Ins. Co.* v. *Hamm,* 233 Ark. 320, 344 S. W. 2d 601.

Furthermore, appellant's actions are not consistent with a revocation of acceptance based upon these representations as allowed by § 85-2-608. *Hudspeth Motors, Inc.* v. *Wilkinson, supra.* His acceptance was not based upon these assurances that any non-conformity would be cured as required by the statute. His duties with reference to the combine were the same as in case of rejection, i.e., he could not exercise ownership over the equipment. Employees of the company did work on the

equipment thereafter having nothing to do with the condition about which Ingle complained, at Ingle's request. An employee was sent to change a battery in the combine and to help Ingle start it in June, 1965, in response to a request by Ingle. Although appellant admits that appellee's representatives told him repeatedly that they could do nothing about the wheel or the condition, he attempted to use it in the harvest of 1965. This was certainly inconsistent with any rejection or revocation of acceptance.

Actually, the evidence shows that the contract price was not raised, as it appears to have been less than $9,600.00. Appellant's making payments under the terms of the contract and exercising acts of ownership over the equipment after he had full knowledge of the contract terms are certainly inconsistent with his present contentions as to any rights arising out of any unauthorized items in the contract, either as to insurance or contract price. As such, they constituted a ratification of the contract. *Teare* v. *Dennis*, 222 Ark. 622, 262 S. W. 2d 134.

Appellant's contention as to usury depends entirely upon the inclusion of charges for insurance and his contention that the contract price was increased from $9,600.00 to $11,068.00. We have demonstrated the fallacy of both arguments. If appellant's position is incorrect as to either of the contentions, the contract would not be usurious.

Appellant also contends that there was error in allowing interest on the judgment from its date because the time sale contract included interest to December 1, 1967. This contention was not asserted in the trial court and cannot be considered on appeal. *Panich* v. *McLendon,* 241 Ark. 576, 409 S. W. 2d 497; *Old American Life Ins. Co.* v. *Williams*, 241 Ark. 250, 407 S. W. 2d 110; *Planters Lumber Co.* v. *Wilson Company*, 241 Ark. 1005, 413 S. W. 2d 55.

The judgment is affirmed.

THE AMERICAN PHYSICIANS INSURANCE CO.
v. ROBERT HRUSKA AND THEODORE MENAS

5-4583 428 S. W. 2d 622

Opinion delivered June 3, 1968

Thomas B. Tinnon and *Donald Joe Adams,* for appellant.

Roy E. Danuser, Bruce G. Heavner and *Clifford Jarrett,* Kansas City, Mo., for appellees.

JOHN A. FOGLEMAN, Justice. Appellant seeks reversal of a judgment in favor of appellees for an alleged excessive amount exacted of appellees by it in connection with a transaction which appellees had contended was a usurious loan. Appellees contend that they borrowed $65,000 from appellant to enable them to purchase certain stock of Management Investment Corporation, a Missouri corporation of which they were the president and secretary respectively, and that this corporation in turn, owned all of the stock of Liberty Reserve Life Insurance Company. Appellees contend that the loan was made on December 2, 1959, and by the terms of the loan agreement, they were required to repay $82,400 six months later which sum, they say, they borrowed from one Harold R. Smith in order to obtain release of the collateral. On the other hand, appellant contends that it purchased from appellee Hruska a negotiable note of Management Investment Corporation for $80,000 at a discount. Appellant further contends that Harold R. Smith purchased the note from it on June 2, 1960, along with collateral therefor, consisting of all of the stock of Management Investment Corporation and of Liberty Reserve Life Insurance Company, for a consideration of $82,000.

Suit was filed by appellee Hruska against appellant for the recovery of $17,400, alleged to be the interest he was required to pay in excess of the rate permitted by law. Eventually the case was tried, and upon a jury verdict on September 18, 1967, the court rendered its judgment in favor of appellees[1] for the sum of $14,800 with interest thereon from June 9, 1960.

In the interim between the filing of the complaint and trial, appellant filed a request for admissions, which

[1]Menas became a party after the filing of the original complaint.

was answered by appellees. They admitted that the note involved was for $80,000 and was executed by Management Investment Corporation and appellee Hruska; that it was not payable to appellant; and that it was the obligation of the corporation, along with appellees.

Subsequent to the filing of the response to the request for admissions, appellant filed a motion for summary judgment. This motion was based upon the pleadings and the answers to its request for admissions. Appellant contended that it was clear that it had purchased a note of Management Investment Corporation from Hruska at a discount and that the transaction did not constitute a loan and was not usurious. On the same date this motion was filed, appellees were granted leave to amend their complaint and filed a copy of the note. This copy revealed that the note bore a dateline at Baton Rouge, Louisiana, and was payable to "itself." The name of the corporation was signed by Robert J. Hruska, president. On the reverse side, endorsements of the corporation by Hruska as president and by Hruska individually appeared under a printed guaranty in favor of Fidelity National Bank of Baton Rouge, upon whose form the note was prepared and whose name as payee was stricken out. In the amended complaint, on which the case was ultimately tried, appellees alleged: that Management Investment Corporation owned all the stock of Liberty Reserve Life Insurance Company; that appellees owned a large portion of the capital stock of Management Investment and desired to purchase the balance of the outstanding stock; that on November 24, 1959, appellant obtained a Louisiana bank cashier's check for $65,000 payable to the order of appellees and one Earl Shelton; that on December 1959, in Kansas City, Missouri, appellant agreed to loan this amount to appellees on condition that they pledge all of the stock of Management Investment Corporation as security and that a note for $80,000 bearing 6 pct. interest and endorsed by this corporation and Hruska individually be executed; that appellees paid appellant $82,400 on this

note on June 1, 1960; that this amount was $14,800 in excess of the legal rate of interest. Thereafter, the cause was transferred to the Chancery Court of Baxter County, where the motion for summary judgment was denied and appellant required to plead to the amended complaint. The cause was then retransferred to Baxter Circuit Court where the motion for summary judgment was renewed and denied.

In response to interrogatories by appellees, appellant stated that on December 2, 1959, it purchased this note, which it claimed was alleged to be the property of Hruska, and paid $65,000 for it in Baton Rouge, Louisiana, with a check payable to appellees and Earl Shelton.

When the case was called for trial, appellant again renewed its motion for a summary judgment which was again denied. After the verdict, appellant moved for judgment notwithstanding the verdict, on the grounds that it was not supported by sufficient evidence.

Appellant lists four points for reversal which we will treat in the order asserted.

I.

THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

Appellant cites no authority in support of its position that it was entitled to judgment as a matter of law. We do not consider this point meritorious, however, because a trial on the merits was had after the repeated denials of the motion. It has been held that the denial of a summary judgment is not reviewable where the denial is followed by a trial on the merits. See *Bell* v. *Harmon,* 284 S. W. 2d 812 (Ky. 1955). We deem this to be an appropriate rule. We have pointed out that, in some respects at least, treatment of motions

for summary judgment should be similar to that accorded motions for directed verdicts. *Russell* v. *Rogers,* 236 Ark. 713, 368 S. W. 2d 89. See, also, 6 Moore's Federal Practice § 56.04[2] p. 2006. A motion for directed verdict at the conclusion of a plaintiff's proof will not be considered on appeal where the defendant has thereafter offered evidence. *Lytal* v. *Crank,* 240 Ark. 433, 399 S. W. 2d 670. The obvious reason for this rule is that deficiencies in the evidence at that stage of the proceedings may well be supplied by evidence. *Grooms* v. *Neff Harness Co.,* 79 Ark. 401, 407, 96 S. W. 135, 137; *Fort Smith Cotton Oil Co.* v. *Swift & Company,* 197 Ark. 594, 124 S. W. 2d 1. For the same reason, a final judgment should be tested upon the record as it exists at the time it is rendered rather than at the time the motion for summary judgment is denied.

II.

THE TRIAL COURT ERRED IN ADMISSION OF TESTIMONY WHICH WAS IRRELEVANT AND IMMATERIAL AND TENDED TO PREJUDICE THE JURY AGAINST THE APPELLANT.

Appellant contends that testimony of appellees, concerning an automobile driven by an officer of appellant and attendance of appellees at a football game as guests of officers of appellant, was irrelevant and immaterial and prejudicial in that the jury was led thereby to believe that appellant was a large, affluent company that "broke appellees' company."

Upon being asked if they were met in New Orleans by one Robert Love, prior to the transaction between the parties, Hruska replied that they were "with Mr. Moore's Continental Lincoln." He described the car as being equipped with a television. No objection was made to this testimony. Later appellant's own attorney examined Menas about the type of automobile and the outcome of the football game. After Hruska had told of being taken to a country club where they met com-

pany officials for lunch and later of being taken by them to a football game, an objection that this testimony was immaterial and irrelevant was overruled. Hruska then testified that discussions about the transaction were carried on intermittently during lunch and at the football game and thereafter at dinner at the country club. Inasmuch as the principal issue in the case was whether appellant made a loan to appellees secured by Mortgage Investment Corporation's note and the pledge of stock, or whether appellant simply bought a note of Mortgage Investment at a discount, any and all negotiations leading up to the transaction were proper subjects of inquiry. Appellant suggests that since there was a written instrument, *i. e.,* the note, this testimony was neither relevant nor material. We have long held that parol evidence is admissible for the purpose of showing the usurious nature of a transaction even though it might have a tendency to vary a written document. *Tillar* v. *Cleveland,* 47 Ark. 287, 1 S. W. 516; *Heidelberg Southern Sales Co.* v. *Tudor,* 229 Ark. 500, 316 S. W. 2d 716. This court has long taken the position that any evidence tending to show that the substance of a transaction was a scheme to evade usury laws, regardless of the form thereof, should be admitted. *Home Building & Savings Association* v. *Shotwell,* 183 Ark. 750, 38 S. W. 2d 552. In 1886, in the case of *Tillar* v. *Cleveland, supra,* this court said:

> "* * * It would be strange if, upon the trial of such an issue, a court could not hear proof of all matters which throw light upon the situation and conduct of the parties, and the motives which influenced them."

There has been no deviation from that idea since that time. We find no error here.

III.

THE VERDICT OF THE JURY IS CONTRARY TO A PREPONDERANCE OF THE EVIDENCE.

Appellant argues that there is no substantial evidence to support the theory that the transaction between the parties was actually a loan of $65,000 by appellant to appellees instead of a sale of a note by Hruska to appellant. Hruska testified substantially as follows: Menas brought Earl Shelton to discuss their need for money. Shelton claimed to be an actuary and consultant for American Physician's Insurance Company and said he was in Missouri looking for a company for reinsurance and for the purpose of getting appellant into Missouri. Shelton expressed the thought that his company would make a loan to appellees. Pursuant to a tentative agreement with Shelton, appellees flew to New Orleans where they were met by a man named Love, who claimed to be assistant secretary of appellant. Love drove them to the home offices of appellant at Baton Rouge where they were met by E. P. Moore, executive vice president, one Avery, secretary, and Shelton. The loan was discussed along with the possibility that Liberty Reserve Insurance Company could reinsure risks if Hruska controlled both it and Mortgage Investment. This would permit appellant to write business in Missouri on a coinsurance or reinsurance agreement. They discussed the fact that the money was to be used by appellees to purchase the stock of two other stockholders in order that they might control both companies. Appellees asked for a loan for a year but appellant would only allow six months. These officers agreed to loan $65,000 for six months at 6% interest. Appellees were returned to New Orleans in a company car and flew back to Kansas City on November 22, 1965. December 2 was the last day on which appellees could exercise their option to buy the stock. Shelton appeared in Kansas City on December 1st with a cashier's check for $65,000 payable to appellees and Shelton. Shelton then demanded a "lug" of $15,000 and other concessions about the operation of the company and delivered an ultimatum that the demands would be met or there would be no money. Hruska refused on that day but felt compelled to accept the terms the next day. Shelton then drew up the papers

which appellees signed and took the note and other papers and the stock of both the investment company and insurance company to Baton Rouge after delivering the check. When the note was due, appellees borrowed $83,000 from one H. R. Smith, $82,400 of which was used to repay appellant. Management Investment Company had no reason to give him a note, but the corporation authorized the execution of the note.

The testimony of Menas was largely corroborative of that of Hruska. He said that when appellees did not accept the terms communicated by Shelton, they tried unsuccessfully overnight to get the money from other sources. He also said that there was no meeting of the board of directors of Mortgage Investment Corporation on either December 1st or 2nd.

This was sufficient evidence to support a finding that the real transaction was a loan by appellant to appellees at a usurious rate of interest. This court said in *Sparks* v. *Robinson,* 66 Ark. 460, 51 S. W. 460:

> "* * * The law shells the covering and extracts the kernel. Names amount to nothing, when they fail to designate the facts. We are of the opinion that the court was justified in concluding that the papers called bill of sale and sales tickets were nothing more or less than a shift for a usurious loan of money."

A note payable to the order of the maker and endorsed by him is void for usury when the difference in the consideration for the first negotiation and the face amount is more than the legal interest for the period between the date of negotiation and the date of maturity, if the parties to the loan intended to pay and receive a greater rate of interest than the legal rate. *German Bank* v. *DeShon,* 41 Ark. 331. Whether a particular transaction constitutes a loan or a bona fide purchase and discount is a jury question where the evidence

is conflicting. *Sallee* v. *Security Bank & Trust Co.,* 119 Ark. 484, 177 S. W. 1133. The Missouri law on this point seems virtually identical to that of Arkansas. It has been held there that a bona fide sale of notes, however great the discount, is not usurious, but where there is no sale in good faith but a mere loan, the fact that the note is made to one who, acting as a conduit, endorses it over to a third person who advances the money, knowing of the facts surrounding the execution, the procedure will not be sufficient to evade the usury laws. *Anderson* v. *Curls,* 309 S. W. 2d 692 (Mo. App. 1958). See, also, *Quinn* v. *Van Raalte,* 276 Mo. 71, 205 S. W. 59 (1918).

Appellant contends that since the note bears a Baton Rouge dateline, the Louisiana law should be applied. While there was conflict in the testimony and a finding that the note was executed in Louisiana might well have had adequate evidentiary support, Louisiana law cannot be applied in this case in any event for reasons hereinafter stated.

Appellant also suggests that the testimony of Hruska is not substantial because of contradictory conclusions that may be found from his testimony and exhibits thereto. It is sufficient to say that his credibility and the weight to be given his testimony were proper matters for jury determination and have been resolved.

IV.

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO WHICH LAW APPLIED.

Appellant's attorney stated at the conclusion of all the evidence that appellant still contended that the law of Louisiana applied. Appellees then asked to be permitted to produce evidence as to the Missouri law and appellant's counsel responded that the transaction actually took place in Louisiana. The court gave instructions based on Missouri law. No objection was made by appellant to any instruction. There is no reversible er-

ror on the part of the court in this action, for two reasons. In the first place, an instruction cannot be questioned on appeal in the absence of an objection. *Ransom* v. *Weisharr,* 236 Ark. 898, 370 S. W. 2d 598. Secondly, we cannot consider this contention because the Uniform Interstate & International Procedure Act requires that a party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this state must give notice in his pleading or other reasonable written notice. Ark. Stat. Ann. § 27-2504 (Supp. 1967). No such notice was given by appellant, even though all of its pleadings except an objection to process were filed after the effective date of the act. On the other hand, appellees pleaded Missouri law in their amended complaint. Although appellant denied the allegation with reference to the Missouri statute, there is no written notice of its reliance on Louisiana law. This requirement is a very useful and wise one. It is only fair that both the adversary and the trial court be advised of a party's contention as to the applicable law where any question may arise. This should be done in a manner so that the contention is clear before the trial is undertaken and so that the appellate court can ascertain from the record that it was done.

CROSS-APPEAL

The trial court denied appellees' motion for a reasonable attorney's fee, from which appellees have taken a cross-appeal. The applicable Missouri statute provides that any person violating the act shall be subject to be sued for all sums of money paid in excess of the principal and legal rate of interest on any usurious loan "and shall be adjudged to pay the costs of the suit, including a reasonable attorney's fee to be determined by the court." It seems clear that under the language of this statute, attorney's fees are to be allowed as costs. See, also, *Bruegge* v. *State Bank of Wellston,* 74 S. W. 2d 835 (Mo. 1934). While appellees contend that in Missouri this is a matter of substantive, not procedural law,

this is a matter for determination under Arkansas law and by Arkansas courts. *St. Louis-San Francisco Ry. Co.* v. *Cox,* 171 Ark. 103, 283 S. W. 31. See Leflar, Conflict of Laws (Student's Edition, 1959) § 60, p. 110; 15A C. J. S. Conflict of Laws § 22(1), p. 527. The items of, and rights to, costs are procedural and governed by the law of the forum. *Bank* v. *Davidson,* 18 Ore. 57, 22 Pac. 517 (1889); *Security Co. of Hartford* v. *Eyer,* 36 Neb. 507, 54 N. W. 838 (1893); *Conte* v. *Flota Mercante Del Estado,* 277 F. 2d 664 (2d Cir. 1960).

The right to costs is entirely dependent on statute in a case at law. *Arkansas State Game & Fish Comm.* v. *Kizer,* 222 Ark. 673, 262 S. W. 2d 265, 38 ALR 2d 1372; *Grayson* v. *Arrington,* 225 Ark. 922, 286 S. W. 2d 501; *Arkansas State Highway Comm.* v. *Union Planters Nat'l Bank,* 231 Ark. 907, 333 S. W. 2d 904. Attorney's fees cannot be allowed as costs in suits except as provided by statutes. *American Exchange Trust Co.* v. *Truman Special School Dist.,* 183 Ark. 1041, 40 S. W. 2d 770. We have held that entitlement to attorney's fees on a suit brought in Arkansas on an insurance policy is a procedural matter and governed by Arkansas law. *New Empire Life Ins. Co.* v. *Bowling,* 241 Ark. 1051, 411 S. W. 2d 863. We find no Arkansas statute under which attorney's fees might be allowed in a case such as this.

If the statute providing for attorney's fees is not to be considered as an allowance of costs, then it is a penal statute without extraterritorial effect and unenforceable in Arkansas. *Arden Lumber Co.* v. *Henderson Iron Works & Supply Co.,* 83 Ark. 240, 103 S. W. 185; *White-Wilson-Drew Co.* v. *Egelhoff,* 96 Ark. 105, 131 S. W. 208.

The judgment is affirmed on appeal and cross-appeal.

LAWANNA SUE STEPHENS *v.* ALBERT STEPHENS

5-4592 428 S. W. 2d 246

Opinion delivered June 3, 1968

Bethell, Stocks, Calloway & King, for appellant.

Robinson & Booth, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant instituted a suit in Oklahoma to recover delinquent child support payments. Having obtained judgment, she proceeded to register it pursuant to the Uniform Enforcement of Foreign Judgments Act of Arkansas [Ark. Stat. Ann. §§ 29-801 through 29-818 (Repl. 1962)]. As all proper steps for registration appeared to have been taken, an order of the Crawford County Chancery Court requiring an immediate writ of execution was made. The writ issued, and the sheriff levied upon a 1960 Diamond T Tractor registered in the name of Hugh Stephens, the former husband of appellant. Subsequently, Albert Stephens, the father of Hugh Stephens, filed an intervention claiming ownership of the truck. At the hearing on the intervention, the chancellor found Albert Stephens to be the equitable owner of the truck, vacated the order requiring immediate execution and quashed the levy of execution. From this determination in favor of the intervenor, appellant prosecutes this appeal, asserting

several points for reversal. We find it unnecessary to discuss all of her points, as we feel that the decree of the lower court must be reversed due to our conclusion that the finding of equitable ownership in Albert Stephens is clearly against the preponderance of the evidence.

The undisputed evidence shows that the truck was purchased from the Fruehauf Trailer Division of the Fruehauf Corporation at Wichita, Kansas. In support of his contention of equitable ownership, intervenor-appellee introduced evidence showing that the loan from City National Bank of Tulsa, Oklahoma, made for the purpose of purchasing the truck, was taken out in the name of Albert Stephens. Carl Wiedemann, president of the lending bank and a witness in the proceedings below, testified that the loan was made to Albert, and not Hugh, Stephens and that, as far as he knew, the bank had never loaned any money to Hugh Stephens. The evidence further showed that the loan was repaid by checks written on the account of Mr. and Mrs. Albert Stephens, by Mrs. Albert Stephens, who was shown to be the business manager for the family.

The contention is made that Hugh Stephens was merely an employee of Albert Stephens in the latter's trucking business. There was testimony that Hugh drew a salary of $75.00 per week, and that this was paid in cash but there was no documentary evidence indicative of an employer-employee relationship. Hugh Stephens stated that on long hauls (sometimes lasting two months or longer) he had the checks from customers made out to him; that he would cash them and use the proceeds for expenses; and that he turned over the remainder, if any, to his mother.

Appellant introduced evidence proving that all documents concerning the truck in issue were in the name of defendant Hugh Stephens. The Kansas certificate of title reflected an assignment from the Fruehauf Trailer

Company to Hugh Stephens. Also in the name of Hugh, as owner, were: (1) an application for registration of the truck with the Motor Vehicle Division of the Arkansas Department of Revenues; (2) an application for certificate of title (which contained a provision for fine and/or imprisonment for false answer); (3) an application for registration under Nebraska Motor Carriers Fuel Tax Law; and (4) an Illinois reciprocity application form. All these applications were necessitated by Hugh's operation of the truck. Hugh's 1966 federal income tax return included no amount under the heading "Wages, salaries, tips, etc." Rather, it reflected that his occupation was a "trucker" and on Schedule C [Profit (or Loss) From Business or Profession] he stated his principal business activity to be "transportation." In addition to showing "gross receipts" of $18,000.00, the Schedule reflected that a deduction for depreciation on the truck was taken.

Appellant testified that the defendant, while they were still married, had told her that he had voluntarily gone into default on a truck he previously owned for the purpose of keeping his first wife from getting it. She further stated that he had financed the purchase of a 1963 GMC truck in his father's (intervenor's) name during the period of their marriage. With regard to the truck here involved, she testified that defendant told her that he had bought a new truck and that it was financed in his father's name. She said that this was not an "unusual arrangement." Her testimony was that, on one of the long hauls which the defendant had made, the checks were issued to him and that "[h]e and I used them" for expense money, to pay the rent, to buy groceries and his clothes.

In an attempt to justify or explain the fact that all the documents relating to the truck were in the name of his son, appellee-intervenor testified that, when he went to negotiate with Fruehauf, his son went with him. It became necessary for additional equipment to be

added to the truck, which required additional time, and he left his son there to drive the truck back the following day. He said that, through some error on the part of employees of Fruehauf, the assignment of title was made in favor of Hugh, rather than himself. He said that the error was perpetuated by the Arkansas Revenue Department when the truck was licensed in Arkansas for the first time. All the other documents, he claims, had to be in Hugh's name because the original papers were issued that way.

The record does not contain a certificate of title from the Arkansas Department of Revenues, although there is evidence that a certificate had been issued in Hugh's name. Appellee, attempting to show that no certificate had been issued, introduced a letter from the Department of Revenues which stated that the records did not reflect a title certificate having been issued. The record reflects, however, that this letter was in reply to a letter from appellee which contained an incorrect serial number for the truck. Moreover, appellee's own witness, Carl Wiedemann, testified that the Department of Revenues informed him that "they had issued a title on this truck to Hugh Stephens." Further evidence that a certificate had been issued is that the application for certificate of title ("pink slip") showed the title number to be 5087234.

Reversed and remanded for further proceedings not inconsistent with this opinion.

W. T. RAINWATER ET AL, DIRECTORS OF BLYTHEVILLE SCHOOL DIST. NO. 5 *v.* WILLIAM HAYNES ET AL COMMISSIONERS OF STREET IMP. DIST. NO. 4

5-4600 428 S. W. 2d 254

Opinion delivered June 3, 1968

Reid, Burge & Prevallet, for appellants.

H. G. Partlow Jr., for appellees.

JOHN A. FOGLEMAN, Justice. The sole question for decision on this appeal from a declaratory judgment is whether the property of a public school is subject to

assessment of benefits by a municipal street improvement district in which the property lies. Appellants contended in the lower court that it was not and that the assessment made in this case was invalid because the property was exempt from taxation under Article 16, § 5 of the Arkansas Constitution.

This court was first confronted with this question in 1892, when it held that this section of the constitution did not exempt a public schoolhouse from liability for such an assessment. *Board of Improvement* v. *School District of Little Rock,* 56 Ark. 354, 19 S. W. 969. The basis for this holding was that the exemption of school buildings and grounds relates only to taxes for general purposes of revenues and has no reference to special taxes or assessments for local improvements. That property was held to be exempt under the act (Mansfield's Digest, § 825 et seq.) because the court found no inference that the legislature intended to include school property in the real property to be assessed.

Subsequently, the General Assembly adopted Act 125 of 1913, § 7 of which [Ark. Stat. Ann. § 20-402 (Repl. 1956)] specifically provides that property of public school districts shall be subject to assessment for local improvements beneficial thereto and authorizes school districts to sign petitions for the making of said improvements. This act clearly supplied the legislative intent found missing in *Board of Improvement* v. *School District of Little Rock, supra.* A holding that the act was invalid would be contrary to the holding of that case for the reason that the constitutional exemption would certainly have been applied if such a statute could not supply the deficiency there pointed out. Although it seems that the point has not been passed upon directly since the adoption of the act, the liability of school property for such assessments has been recognized in the following cases:

City of Malvern v. *Nunn,* 127 Ark. 418, 192 S. W.

909, approving the action of the trial court in excluding school property not listed or valued by the tax assessor on the assessment roll from the taxable value of the property in a proposed district, where we said the act above cited subjected the property of public school districts to such assessments and that the property had a voice in the organization of the district according to its value fixed by the assessment roll.

Waterworks Imp. Dist. No. 2 of Paris v. *Logan County,* 155 Ark. 257, 244 S. W. 4, wherein the decision in *Board of Improvement* v. *School District of Little Rock, supra,* was approved, but it was said that courthouses and jails could not be assessed because there was no statutory authorization as there was then in the case of the property of public school districts.

Fry v. *Poe,* 175 Ark. 375, 1 S. W. 2d 29, wherein it is said that the right-of-way and roadbed of railroads are, along with churches and schoolhouses, subject to local assessments in municipal improvement districts.

In *Bensberg* v. *Parker,* 192 Ark. 908, 95 S. W. 2d 892, in a case involving church property, we again held that the constitutional exemption applies only to taxes for the general purposes of government and does not relieve those in whose favor the exemption exists from the obligation to pay special assessments which are charged upon property on the theory that such property is specially benefited thereby.

Appellees' argument overlooks the fact that these special assessments are not really "taxes" in the usual and ordinary meaning of the word. While both are referable to the sovereign power of taxation, the words "taxes" on the one hand and "assessment", "special assessments" or "local assessments" on the other, ordinarily have distinct legal meanings. The word "taxes" refers to exactions laid by the government for purposes of general revenue. The word "assessments" refers to

exactions laid for making local improvements for the benefit of property owners. The word "tax" does not include "assessments." *Board of Improvement Sewer Dist. No.* 2 v. *Sisters of Mercy,* 86 Ark. 109, 109 S. W. 1165, 15 Ann. Cas. 347; *Martin* v. *Reynolds,* 125 Ark. 163, 188 S. W. 4; *Missouri Pacific R. Co.* v. *Izard Co. Highway Imp. Dist. No.* 1, 143 Ark. 261, 220 S. W. 452. See, also, *Wood* v. *Henderson,* 225 Ark. 180, 280 S. W. 2d 226.

The whole foundation of our improvement district system in Arkansas is expressed by the Honorable Horace Sloan in his definition of local assessments in his scholarly treatise entitled "Improvement Districts in Arkansas." This definition appears therein as § 1 and reads:

> "A local assessment is a compulsory contribution, levied by the Legislature or pursuant to legislative delegation of authority, for the purpose of defraying all or a part of the expense of constructing or maintaining a specific local improvement of a public nature and imposed upon the property specially and peculiarly benefited by such local improvement in proportion to but not substantially in excess of the benefits so received by the property affected."

See *McGehee* v. *Mathis,* 21 Ark. 40; *Davies* v. *Gaines,* 48 Ark. 370, 3 S. W. 184; *Coleman* v. *Eight Mile Drainage Dist. No.* 2, 106 Ark. 22, 152 S. W. 1004; *Bensberg* v. *Parker,* 192 Ark. 908, 95 S. W. 2d 892; *Ragsdale* v. *Cunningham,* 201 Ark. 848, 147 S. W. 2d 20.

Such assessments are justified by the peculiar and special benefits which the improvements bestow upon the property assessed. *Kirst* v. *Street Imp. Dist. No.* 120, 86 Ark. 1, 109 S. W. 526; *St. Louis, I. M. & S. R. Co.* v. *Board of Directors of Levee Dist. No.* 2, 103 Ark. 127, 145 S. W. 892; 1 Sloan, "Improvement Districts In Arkansas," § 2, p. 2. We find that the statute does not conflict with this constitutional provision.

While the claim of exemption under Article 16, § 5, of the Arkansas Constitution is the only issue raised in the lower court, appellants argue here that an additional reason for holding this legislation invalid is conflict with Article 14, §§ 2 & 3[1]. Because of the public interest involved, we elect to consider this contention. The former section prohibits the use of money or property belonging to the state school fund for any other than the purpose to which it belongs. The latter prohibits the annual tax voted by the electors of the district from being used for any purpose other than the maintenance of schools, the erection and equipment of school buildings and the retirement of existing indebtedness. In considering these prohibitions, we recognize that it is common knowledge that the annual tax on property in a school district is only one of its many sources of revenues.

The payment of attorney's fees for recovery of school funds from solvent sureties on the bond of an insolvent depository has been held to be a legitimate expenditure not in conflict with Article 14, § 2. *Board of Education of Lonoke County* v. *Lonoke County,* 181 Ark. 1046, 29 S. W. 2d 268. The payment of professional appraisers employed to appraise all real estate in a county under Act 351 of 1949, as an aid to the tax assessor in assessing property for ad valorem taxes, is not prohibited by Article 14, § 3, as amended by Amendment 40. *Strawn* v. *Campbell,* 226 Ark. 449, 291 S. W. 2d 508. The payment of a just proportion of the salaries of the county collector and the county treasurer was held not to be an unconstitutional diversion of school funds. *County Board of Education* v. *Austin,* 169 Ark. 436, 276 S. W. 2. From these cases it seems clear that any use of those funds raised from taxation that results in benefits to those funds or property or aids in the stated purposes for which these funds may be expended would not be an unconstitutional diversion. The benefits to be derived by school districts in performing their

[1]As amended by Amendments 11 & 40.

functions by construction of streets, sewers, water systems, electrical distribution systems, drains, levees, and other improvements which may be undertaken through improvement districts seem obvious. Certainly, direct expenditures by school districts for such improvements for its own use and benefit would not be considered diversion of school funds. There is no reason why the distribution of the financial burden proportionately among a number of properties so benefited should make it so.

If the school property was not benefited in this instance, appellants could have appealed the finding of the assessors to the city council for a hearing de novo. Ark. Stat. Ann. § 20-406. It then might have had the assessment against its property corrected by applying to the chancery court within thirty days after the publication of the city ordinance confirming the assessments was published. Ark. Stat. Ann. § 20-416; *Lenon* v. *Street Imp. Dist. No.* 512, 181 Ark. 318, 26 S. W. 2d 572. In the absence of a showing that these procedures were successfully followed, it must be presumed that this school property was benefited.

The procedure for enforcing payment of the annual installments of assessed benefits is not a matter for determination on this appeal, not having been an issue in the lower court and having no bearing on the constitutional questions raised.

Appellants also contend that the act is permissive, in that it permits, but does not require the participation of the school district. This question was not in issue in the lower court, but we find it to be without merit. The act says that the property of public school districts *shall* be subject to assessment. The only part of the act which gives the school district any option is that permitting it to sign the petition seeking the creation of the district.

The decree is affirmed.

JAMES WILLIAM MOORE, JAMES THOMAS FRAZIER AND GLENN E. DAVIDSON *v.* STATE OF ARKANSAS

5321 429 S. W. 2d 122

Opinion delivered June 3, 1968

[Rehearing denied July 15, 1968.]

W. M. Herndon and *Darrell Hickman,* for appellants.

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

JOHN A. FOGLEMAN, Justice. Appellants bring this appeal from the judgment of the White Circuit Court convicting them of possession of burglary tools and possession of gambling equipment. Eight points are urged for reversal. The facts pertinent to a decision in this case will be taken up as applicable to the points for reversal, which have been renumbered for purposes of this opinion.

(1) Appellants assert error in the trial court's failure to suppress certain evidence. This contention is based upon the alleged invalidity of the search warrants due to the alleged absence of an oath or affirmation and the asserted lack of probable cause for their issuance.

The record reflects that there were three searches involved and that, with regard to the first, the Sheriff of White County obtained a search warrant to search appellants' motel rooms, the car in which they were traveling and the trailer attached to the car. The sheriff's testimony at the hearing on the motion to suppress and at the trial showed that he had information that appellants were at the motel and that they had burglary tools in their possession. He further stated that his decision to obtain a search warrant was reached after a period of surveillance of appellants' activities in and around the motel room and the car and trailer.

At the hearing on the motion to suppress, the State introduced the search warrants pursuant to which the searches were made. Although appellants subpoenaed the sheriff, several officers who had been involved in the search, and the justice of the peace who issued the warrants, only one person, appellant Glenn Davidson, was called in behalf of appellants. His testimony amounted to little more than a narration of the searches and arrests. No attempt was made to show facts indicative of the alleged lack of probable cause. While appellants contended that the warrants had been issued without oath or affirmation, the only evidence on this point was the testimony of the sheriff, who stated that an affidavit as to the facts and circumstances showing probable cause had been made.

In *Albright* v. *Karston,* 206 Ark. 307, 176 S. W. 2d 421, we held that where the search warrant is regular on its face and there is no proof that the "oath or affirmation" was not made prior to its issuance, there is a presumption that all things essential to its validity

have been done. It was therefore the duty of appellants to come forward with evidence sufficient to rebut the presumption of validity. Additionally, we note the prevailing view that the burden of proof on a motion to suppress is on the accused. *Anderson* v. *United States,* 344 F. 2d 792 (10th Cir. 1965); *People* v. *Williams,* 20 N. Y. 2d 388, 283 N. Y. S. 2d 169 (1967). In *Wilson* v. *State,* 268 P. 2d 585 (Okla. Crim. 1954), the Oklahoma court, in noting that the burden was on defendant on his motion to suppress, said:

> "The burden of proving the invalidity of a search warrant rests on the defendant, and where he files a motion to suppress evidence or objects to the introduction of evidence on the ground the search warrant is not valid, he should produce the affidavit and warrant in evidence in support of such motion or objection, or account for the failure to produce and offer other competent evidence to show invalidity."

See, also, 22A C. J. S. Criminal Law §§ 578 and 657(32) (a); Varon, *Searches and Seizures,* § 6(c). On the state of the facts in the case at bar, we feel that appellants have failed to meet the burden incumbent upon them to show that the first warrant was invalid. The evidence seized as a result of the first search was, therefore, admissible and the motion to suppress properly overruled.

With regard to the second search, appellants contended there was no probable cause therefor. After the first search, Sheriff Davis and his men withdrew from the premises but continued to keep appellants under surveillance, since the sheriff had information that another car was to make contact with appellants for the purpose of transferring burglar tools. During this period between the first and second searches, the wife of a companion of appellants came to the motel. Having been identified by the officers, she subsequently left.

Thereafter, appellants got into the car and appeared to be leaving town when they were stopped. On this occasion the appellants were arrested and taken into custody. The result of the search was that a Craftsman Drill, not discovered during the first search, was found.

On the record before us, we feel that the second search was lawful and that the trial court was correct in its ruling that the evidence seized pursuant thereto was admissible. While there are numerous cases which state that a "return" search, conducted on the basis of the warrant issued for the original search, is not permissible, these cases seem to involve situations where the officers have completely abandoned the premises for a substantial period of time. See, *e. g., State* v. *Moran,* 103 W. Va. 753, 138 S. E. 366 (1927); *Coburn* v. *State,* 78 Okla. Crim. 362, 148 P. 2d 483 (1944); *McDonald* v. *State,* 195 Tenn. 282, 259 S. W. 2d 524 (1953); *State* v. *Pina,* 94 Ariz. 243, 383 P. 2d 167 (1963). Such is not the case here. The sheriff and his men, after making the first search and on information that there was to be a subsequent contact with appellants, withdrew from the premises, but maintained constant vigil until such time as the arrests and second search were made. The second search was but a continuation and consummation of the first. There was reasonable cause to believe that other evidence, and possibly other persons, would be involved. The reasonableness of a search in any case must be decided "upon its own facts and circumstances." *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931). We cannot say that this record reflects an unconstitutional invasion at the time of the second search.

There is another ground on which we find the second search to be lawful, and that is that it constituted a search incident to a lawful arrest. The first search had been made and the objects (consisting of two pairs of vice grips, a hand drill, and a pair of rubber gloves) lawfully seized. The officers thus had probable cause to

arrest appellants for the crime of possessing burglary tools. Ark. Stat. Ann. § 41-1006 (Repl. 1964). While it might be better procedure to make an arrest immediately upon seizure of evidence, we hesitate, on the peculiar facts and circumstances of this case, to say that it was unreasonable for the officers to delay the arrests until such time as it appeared that no other parties were involved. The arrests being lawful, the officers acted within the bounds of reason in searching the immediate premises under the control of appellants. *Harris* v. *United States,* 331 U. S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947); *United States* v. *Rabinowitz,* 339 U. S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1950). Although there is sufficient justification for holding that the arrests occurred as soon as the officers stopped the car in which the appellants were traveling, this would appear to be insignificant, since, in any event, the search and the arrests were "substantially contemporaneous." *Stoner* v. *California,* 376 U. S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964); *State* v. *Hoover,* 219 Ore. 288, 347 P. 2d 69, 89 ALR 2d 695 (1959). Moreover, the fact that we are here concerned with the search of an automobile is significant. The courts, both federal and state, have long distinguished between searches of dwellings and vehicles. In the case of vehicles, the validity of the seizure is not dependent upon the right to arrest, but rather upon the reasonable cause the seizing officer has for the belief that the contents of the automobile offended against the law. *Carroll* v. *United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); *Burke* v. *State,* 235 Ark. 882, 362 S. W. 2d 695; *Mann* v. *City of Heber Springs,* 239 Ark. 969, 395 S. W. 2d 557. For the reasons herein stated, we find that the second search was valid and reasonable under the circumstances of this case.

Appellants contended also that there was impropriety in the third search which was carried out on the following day pursuant to another search warrant. Apparently, the basis for their contention is that there existed no probable cause for issuance of the warrant.

The record indicates that during the course of the previously described searches, the sheriff observed a peculiar looking table which was wired, two large batteries, and another box containing "some kind of device to operate the magnetism on the table." His suspicion that a gaming device had been uncovered was buttressed by the discovery of several pairs of dice in the suitcase of one of the appellants. The sheriff did not immediately take any action with regard to the table and the supporting apparatus, but waited until after the second search, at which time he radioed in to headquarters, instructing that a separate search warrant be obtained pursuant to Ark. Stat. Ann. § 41-2009. The sheriff testified that he subsequently made an affidavit stating the facts constituting probable cause.

As in the case of the warrant for the first search, appellants have made no attempt to show that probable cause was lacking for the issuance of the warrant. It must therefore be held that they failed to meet the requisite burden of proof. Moreover, it is clear from the facts above stated that the gaming table was observed in open view at a time when the officers were lawfully on the premises conducting the previous searches. It has been held many times that where contraband articles are identified without a trespass on the part of the officer, there is not a "search" that is prohibited by the constitution. *Russell* v. *State,* 240 Ark. 97, 398 S. W. 2d 213; *United States* v. *Lee,* 274 U. S. 559, 47 S. Ct. 746, 71 L. Ed. 1202 (1927); *Ker* v. *California,* 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). From all that appears of record, the table could have lawfully been seized at the time it was observed. The officers should not be condemned for taking the added precaution of obtaining a search warrant. The table and supporting apparatus were properly admitted into evidence.

(2) Appellants next contend that the evidence seized was not burglary tools or gambling equipment. We can quickly dispose of this contention insofar as it relates to the gambling equipment, as we feel that a clear case

for the jury was made by the State. Appellants rely on *Burnside* v. *State,* 219 Ark. 596, 243 S. W. 2d 736, in which we reversed a conviction where the evidence involved consisted of a tape recorder, a ticker or teletype machine and a radio transmitter. We there said that where the device is not a gaming device *per se,* there must be evidence that the equipment was *used* as a gambling device before there can be a conviction under Ark. Stat. Ann. § 41-2001.

We feel that appellants reliance is misplaced, as the table here involved was *per se* a gambling device. The sheriff testified that, when he entered the trailer during the course of the first search, he saw "gambling equipment." He also called it a "crap table." Further, he described the device as a "* * * large table * * * with large batteries and this remote control which mechanized the top of the table." He also referred to a "diagram" and "instructions of how to hook it up." Pictures introduced in evidence indicated that it was no ordinary table but was improvised so that a metal bar beneath the top could be magnetized at will with a control device. The top of the table was boxed in by a rim which was approximately eight inches higher than the surface of the table. While there was some evidence that the table and the supporting apparatus were not so connected as to be presently operative, we deem this insignificant. The statute prohibits the keeping of any gaming device. The fact that the device is inoperative as a "crooked" or "rigged" device has no bearing on its status as a gaming device, although the fact that a device is peculiarly wired and outfitted is evidence that it is a gaming device. Under the facts of this case, we feel that the question was properly submitted to the jury.

Appellants contended that the evidence seized as a result of the first and second searches did not constitute burglary tools. This contention has caused us much concern, as it has brought to our attention an unsettled area of our law. There are three cases, involving the

sufficiency of the evidence to sustain a conviction for possessing burglary tools, which we feel are in need of reconciliation. These cases are: *Satterfield* v. *State,* 174 Ark. 733, 296 S. W. 63; *Prather* v. *State,* 191 Ark. 903, 88 S. W. 2d 851, and *Gossett* v. *State,* 242 Ark. 593, 414 S. W. 2d 631.

In the *Satterfield* case the tools involved were: two bolt cutters, four common hoe files, one ordinary hammer, two Stilson wrenches, a flashlight and a pistol. As noted in the *Gossett* case, the conviction there was reversed. We note the statement in the opinion to the effect that the tools were not burglary tools, but we do not take this case to stand for the proposition that the set of tools there involved were incapable, as a matter of law, of being held to be burglary tools. Our interpretation is guided by the court's action in affirming the overruling of a demurrer to the indictment and in remanding the case for a new trial. In holding that the demurrer to the indictment was properly overruled, the court said, in effect, that the charge of crime was sufficient. Reversal was because of a deficiency in the proof. Therefore, the case was remanded in order to give the State a chance to show that these were tools that were "adapted, designed or commonly used" by burglars for the purposes named in the statute rather than tools that *might* be so used. The act of remanding the case for a new trial clearly indicates that the court felt that, if properly shown to be commonly used by burglars, the tools could be classified as "burglar tools."

In the *Prather* case the officers seized a sledge hammer with a shortened handle, a shortened punch, an ordinary screw driver, caps used to set off explosives, nitroglycerin, gloves or mittens, electric fuses, four pistols with extra cartridge clips, and a flashlight. While this array of tools might more easily be shown susceptible to use by burglars in their trade than one less nefarious, the court laid its emphasis on language to the effect that a fact question was involved:

> "Perhaps, no fixed rule or announcement should be made as a criterion for guilt or innocence, except *that in every instance the matter under investigation should be determined as a matter of fact,* controlled or explained by all of the conditions, circumstances, and such pertinent collateral matters as might be present." [Emphasis added]

The court noted that the fact that the tools might be capable of legal uses was not controlling. The State is entitled to establish facts tending to prove that the defendant had in his possession "such a group or selection of tools, devices, or materials as might be found to be more nearly suitable for breaking into houses, or opening locked doors and windows, or by explosive forces opening safes or strong boxes, where valuables might be stored or kept, than for any lawful purpose." In conclusion it was said that "a charge of this kind is like any other charge, one that may be or may not be susceptible of proof; in other words, it is a question of fact, which, when proved beyond a reasonable doubt, and so determined by a jury, there is little left for review on appeal."

Gosser v. *State, supra,* involved the seizure of combination of tools consisting of a tire tool, two screw drivers, a lug wrench and a bar used to remove tires from car wheels. The conviction was there reversed, the court noting that all the tools were such as were commonly used in connection with the operation of automobiles, except possibly screw drivers, which are common implements in every home or shop. There was an understandable absence of any testimony tending to show that the tools were "more nearly suitable" for use by burglars than for lawful purposes. On the facts of the case, the import of the statement that *Prather* was "not controlling or even persuasive" is clear.

A consideration of these three cases gives rise to certain general principles applicable in burglary tool

cases where the question is the sufficiency of the evidence:

1. When it is shown, or is obvious, that the particular combination or group of tools in question is such that their use in lawful occupations or for legitimate purposes is common and ordinary and that many people might well be expected to have such a combination of tools in their possession at any time in the circumstances under which they are found, their possession cannot be a violation of the statute, regardless of the fact that they might conceivably be used for breaking and entering buildings or any of the other structures named in the statute.

2. When it is shown that the particular combination of tools consists of implements commonly used for the purpose of burglarizing any of the structures named in the statute and it is not shown, and is not obvious, that the particular combination of tools is such as is commonly used in any lawful occupation or in general use for legitimate purposes, such that the tools will likely be found in the lawful possession of numerous persons, in the circumstances under which they are found, a jury question as to whether the possession of the tools is in violation of our statute arises.

In the case at bar, the sheriff, who was the only witness to testify at the trial, stated that any one of the tools found might be used in some ordinary, lawful occupation. However, he also testified that such a combination of tools was adapted to, and commonly used for, breaking and entering. Even though he stated that a safe or vault could not be entered with these tools without a hammer and punch, he stated specifically that they were sufficient to afford entry into a building and were commonly used for that purpose. There is nothing in the record to indicate that this particular combination of tools was common to any particular occupation. While there were no explosives or weapons in the combination

here, the court in *Prather* clearly pointed out that no particular item or circumstance determined whether the combination constituted the prohibited tools.

It is notable that among the items found there was a pair of rubber gloves. Gloves were also found among the tools in *Prather,* and it was there pointed out that, while gloves are used in many lawful pursuits, it was common knowledge that gloves are employed by burglars to avoid leaving finger prints. We find that a jury case was presented. The jury having determined that burglary tools were involved, there is "little left for review on appeal."

(3) Appellants' next contention is that the trial court erred in failing to discharge the jury and declare a mistrial after the prosecuting attorney mentioned the gambling device which had been in the lobby of the courthouse since the day before the trial. The record shows that the trial of this case had been scheduled for the day before, but that it had to be rescheduled due to the crowded docket. We feel that the trial court properly denied the motion for a mistrial for the reason that there is nothing to indicate that appellants were prejudiced by the presence of the table in the courthouse. There is no evidence that any of the jurors saw the table, which had to be left on the first floor of the courthouse because of its weight. Further, as the jury was later permitted to view the table, we fail to see how appellants were prejudiced, even if we assume that it had been seen prior to trial.

(4) Appellants claim prejudicial error in the trial court's failure to declare a mistrial after Sheriff Davis, in answer to the question, "You knew Mr. Frazier?", replied, "I knew him by reputation. I knew about him in Woodruff County." The basis for their contention is that the reply, in the context used, indicated that the sheriff had reference to criminal activity of appellant Frazier. We cannot agree. The innuendo urged by appellants would require a strained view of a common ex-

pression used to signify merely that a person is known only casually. We cannot say that such expression amounted to evidence of bad character or that appellants were prejudiced in any way.

(5) Appellants assert as error the giving of two instructions in terms of Ark. Stat. Ann. §§ 41-1006 (possession of burglary tools) and 41-2001 (keeping a gambling device) on the alleged grounds that the instructions amounted to comments on the evidence and that the court, by so wording the instructions, ruled as a matter of law that the appellants were guilty of the felonies charged. We do not get to the merits of this contention for the reason that the alleged error has not been properly preserved for appeal. The record reveals that appellants objected generally to the trial court's charge and specifically to the two instructions on the ground that, as a matter of law, the evidence seized was not burglary tools or gambling equipment. There was no other specification of error. As to the specific objection, we have held under point (2) that the evidence was sufficient to go the jury. The allegations of error now asserted for reversal were not embraced in the objections to the instructions, nor were they carried forward in the motion for a new trial. Under these circumstances, the matters asserted are not now subject to review by this court. *Cassell* v. *State,* 242 Ark. 149, 412 S. W. 2d 610; *Ford* v. *State,* 222 Ark. 16, 257 S. W. 2d 30.

(6) We next consider appellants' contention that statements by the prosecuting attorney in his closing argument were prejudicial in that they referred to appellants' failure to testify. This court has said in numerous cases that a defendant's election not to testify in his own behalf is a privilege which the law affords him, and that it is reversible error for the prosecutor to use words and phrases calculated to call such fact to the jury's attention. *Miller* v. *State,* 239 Ark. 836, 394 S. W. 2d 601; *Miller* v. *State,* 240 Ark. 590, 401 S. W. 2d 15. In the two cases just cited, the reference to the fact that

appellants failed to take the stand was clear. In the first case the prosecutor argued the instructions of the trial court and said: "You are instructed this is a privilege to them to either testify or not to testify." In the latter case, the statement was: "The defendant has chosen not to take the stand and that is his privilege * * *." Reversal in such instances is clearly required, as there could scarcely be a more obvious comment on the defendants' failure to testify. The statements involved in the case at bar, however, are more nearly akin to those in *Davis* v. *State,* 96 Ark. 7, 130 S. W. 547, and *Cascio* v. *State,* 213 Ark. 418, 210 S. W. 2d 897. In the former case, the prosecutor had said: "* * * it is undisputed and undenied and he cannot deny it." This court held that the statement was an expression of opinion as to the weight of the testimony, not a comment on defendant's failure to take the stand. In the *Cascio* case, the statement was: "What explanation have they made of that?" which we held not to be susceptible of the meaning urged by the appellant. In the present case, the prosecuting attorney, in the course of his closing argument, made the following statements: The case was "uncontradicted and undenied"; "I will leave that because the record is bare"; "There is nothing else in here except the testimony and proof of the sheriff"; "There has been no proof as to who [certain equipment] belonged to, the testimony was that nobody would claim it, nobody has acquired it, nobody has come here today to acquire it"; and "If I was picked up with [the equipment introduced into evidence], there would be some explanation of what it was doing in my car and what I was doing with it." We feel that the expressions are all attributable to the weight to be given to the evidence, and that in no instance was the jury's attention called to the fact that appellants failed to testify.

Under their point number IV, appellants contended that there had been no voluntary consent to the searches described in our point number (1). In view of the fact

that we have held the searches legal on other grounds, we find it unnecessary to take up that argument.

The judgment is affirmed.

BROWN, J., concurs; JONES, J., dissents in part; BYRD, J., dissents.

JAMES G. CHESSER *v.* GEORGE KING AND MEMPHIS CONCRETE SILO CO.

5-4585 428 S. W. 2d 633

Opinion delivered June 3, 1968

Pope, Pratt, Shamburger, Buffalo & Ross, for appellant.

Frierson, Walker & Snellgrove, for appellees.

J. Fred Jones, Justice. This is an appeal by James G. Chesser from a summary judgment of the Lawrence County Circuit Court in favor of George King and Memphis Concrete Silo Company. Chesser was the plaintiff in the trial court and King and the Silo Company were co-defendants.

The facts are undisputed and, as established by the pleadings, and by the affidavits and depositions in support of the motion for summary judgment, reveal that the appellee Silo Company is a Tennessee corporation engaged in the manufacture of concrete silos of different heights, widths, and capacities, which are sold through agents to various customers. The silo walls are erected by the Silo Company from four inch thick blocks, or staves, prefabricated in Memphis and the silos are erected on foundations furnished by the purchaser.

Certain of these prefabricated concrete blocks contain steel bars with right angle bends so that in the erection of the silo, or one of a group of silos, the blocks containing the steel bars are placed one over the other to form a ladder ten inches wide with rungs of 9/16 steel extending five inches from the face of the silo wall and being from fourteen to fifteen inches apart.

Although the ladder is primarily placed for the use and benefit of the Silo Company employees in erecting the silo, when the silo is completed the ladder remains on the wall available for whatever use the owner may make of it. Since these ladders appear on the wall of each silo, or on one silo in each series, they have become accepted in the trade by the purchasers of silos as simply a part of the silo.

The Arkansas Rice Growers Association purchased, through appellee King, four such tanks or silos to be erected at Tuckerman, Arkansas. The silos were erect-

ed by the Silo Company and turned over to the purchaser. The appellant, while employed by the association owner, was climbing the ladder for purposes of changing a grain spout near the top of the silo and slipped and fell from the ladder to the floor of the silo housing and was injured.

Appellant's action was based on negligence in erecting the ladder, negligence in the manufacture and supplying of a negligently designed product and on breach of implied warranty.

The portion of appellant's complaint pertinent to this appeal, as abstracted, is as follows:

> "That the defendant, Memphis Concrete Silo Company, through its agents, particularly George King, was negligent in the following respects:
>
> a. In failing to supply and erect parallel sides to said ladder as required by the Arkansas Labor Safety Code.
>
> b. In failing to extend the rungs of said ladder to a distance of at least 6½ inches from the face of said silo as required by the Arkansas Labor Safety Code.
>
> c. In failing to supply and erect a ladder with rungs measuring at least 15 inches across the front as required by the Arkansas Labor Safety Code.
>
> d. In failing to supply and erect a cage or basket guard to said ladder as required by the Arkansas Labor Safety Code.
>
> That the defendant knew, held themselves out as knowing, or by the exercise of reasonable diligence should have known that the ladder was constructed, designed and installed in a manner that violated the requirements of the Arkansas Labor Safety Code. That these acts of negligence created an imminently

dangerous, unsafe and hazardous condition to persons using said ladder. That the defendants were further negligent in manufacturing, supplying and erecting a negligently designed product. That said acts were a direct and proximate cause of the injuries sustained by the plaintiff."

On appeal, the appellant abandons his theory of negligence in the erection of the silo and he does not argue breach of warranty. Appellant's contention here is that the trial court erred in granting appellees' motion for summary judgment when the complaint was predicated upon the theory that the appellee Silo Company was negligent in manufacturing and selling negligently designed product.

The record is clear that appellee King only sold the silo and checked upon its erection for the appellee Silo Company, and had nothing to do with its manufacture or design. As to the appellee Silo Company, we do not agree with appellant that the trial court erred in directing a summary judgment for the appellees.

While the direct liability of the manufacturer to the injured consumer in products liability cases is well established in Arkansas (see *International Harvester Co.* v. *Land,* 234 Ark. 682, 354 S. W. 2d 13), we do not have the authority or inclination to extend the rules of negligence to make a manufacturer liable in a tort action for failure to meet the specifications of rules promulgated under the Arkansas Labor Safety Code. The entire statute (Ark. Stat. Ann. §§ 81-101—81-119 [Repl. 1960]) is directed to *employers and employees* in relation to working conditions, safety and enforcement of the labor laws in connection therewith, and it is not shown to us that these statutes apply, or were intended to apply, to manufacturers in the *design* of products to be sold on the open market.

In review of a summary judgment, we must view

the motion in the light most favorable to the party resisting the motion. In the case at bar, even if we should find the allegation of negligence to be as to the specific acts and not the violation of the safety code, with that violation being only evidence that the specific acts were negligent, summary judgment was proper.

The general rule in cases of this nature is stated in *Memphis Asphalt & Paving Company* v. *Fleming*, 96 Ark. 442, 132 S. W. 222, where appellant contracted with a city improvement district to construct a sidewalk alongside a street and across a branch, but did not construct a guard rail or barrier where the sidewalk crossed the branch, nor did the contract call for one. Appellee was injured by falling from the sidewalk into the branch and the negligence alleged was the failure to construct a guard rail. Appellant contended that the sidewalk was constructed in accordance with the contract and that the work was completed and accepted before the injury occurred. This court reversed the trial court and dismissed the cause of action, stating that:

> "The general rule is that after the contractor has turned the work over and it has been accepted by the proprietor, the contractor incurs no further liability to third parties by reason of the condition of the work, but the responsibility, if any, for maintaining or using it in its defective condition is shifted to the proprietor. Thompson on Negligence, 686, and cases cited; *First Presbyterian Congregation* v. *Smith,* 163 Pa. 561, 26 L. R. A. 504; *Daugherty* v. *Hergog,* 145 Ind. 255, 32 L. R. A. 837; *Salloitte* v. *King Bridge Company,* 58 C. C. A. 469.
>
> It would not come within the qualifications to the rule that the work was a nuisance *per se,* or was turned over by the contractor in a manner so negligently defective as to be eminently dangerous to third persons.
>
> 'The rule in this connection does not require a for-

mal acceptance of the contractor's work. The liability of the contractor will cease with a practical acceptance after completion of the work.' *Read* v. *East Providence Fire District,* 20 R. I. 574, 40 Atl. 760."

The above rule and exceptions have been upheld by this court in the later cases of *Canal Construction Company* v. *Clem,* 163 Ark. 416, 260 S. W. 442, 41 A. L. R. 4; and *Reynolds* v. *Manley,* 233 Ark. 314, 265 S. W. 2d 714. Under the *Canal Construction* case, supra, the contractor cannot be held liable even if it be conceded that the record shows substantial evidence of such negligence, and the contractor remains liable *only to the proprietor* for a breach of his contract; with the responsibility to others, if any, for maintaining or using the work product in its defective condition being shifted to the proprietor after acceptance.

In the case at bar, appellees have shown by affidavits and depositions, submitted in support of their motion for summary judgment, that they contracted to do the work with the Arkansas Rice Growers Association; that the work was carried out in accordance with the specifications contained in the contract; that the work was completed and turned over to the owner on July 18, 1964; that appellees inspected the silo in September 1964 and have not been on the job since; that the work was accepted by the owner and final payment made *prior* to December 22, 1964, when appellant was injured; and that the size and manner of construction of the ladder is open and visible to anyone who looks at it.

Under these facts, we cannot say that the general rule does not apply, even in the light most favorable to appellant. Neither do the recognized exceptions apply, as it cannot be said here that the ladder is a nuisance *per se,* or that it is erected by the appellee in such a manner as to be immediately and imminently dangerous

to third persons, especially where there is no showing of a latent defect in the construction.

In *Mid-South Insurance Company* v. *First National Bank of Fort Smith,* 241 Ark. 935, 410 S. W. 2d 873, this court stated:

> "In *Epps* v. *Remmel,* 237 Ark. 391, 373 S. W. 2d 141, (1963), this court approved the following statement from *United States* v. *Dollar,* 100 F. Supp. 881 (1951); 'The motion [for summary judgment] requires the opposition to remove the shielding cloak of formal allegations and demonstrate a genuine issue as to a material fact.'
>
> In the face of documentary support for summary judgment, Mid-South would force the case to trial by merely contending that an issue exists, without any showing of evidence. This would defeat the whole purpose of summary judgment procedure."

Since appellant has not disputed appellees' facts by submitting affidavits or depositions to refute the motion for summary judgment, we find no genuine issue as to a material fact and under the general rules stated, a summary judgment as a matter of law was proper. The judgment of the trial court must be affirmed.

Affirmed.

HERBERT B. VAUGHT *v.* VERNARD ROSS

5-4602 428 S. W. 2d 631

Opinion delivered June 3, 1968

Terral, Rawlings, Matthews & Purtle, for appellant.

J. Marvin Holmes, for appellee.

J. FRED JONES, Justice. Appellant, Herbert Vaught, brought suit against the appellee, Vernard Ross, to recover damages in the amount of $1,449.75 suffered in an automobile collision with appellee's fourteen year old son, Bobby, who was driving appellee's automobile. The complaint alleged that the negligence of Bobby was imputed to his father, Vernard Ross. Appellee demurred to this complaint and appellant promptly amended it and specifically pleaded that Bobby was driving the car with his father's permission and that the negligence of Bobby was imputed to his father, Vernard Ross, under the provisions of Ark. Stat. Ann. § 75-315 (Supp. 1967), as amended.

The trial court, after hearing arguments of counsel, sustained the demurrer, from which comes this appeal.

Arkansas Statute Annotated § 75-315 (Supp. 1967), is as follows:

"(a) The application of any person under the age of eighteen (18) years for an instruction permit or

operator's license shall be signed and verified before a person authorized to administer oaths by both the father and mother of the applicant, if both are living and have custody of him, or in the event neither parent is living then by the person or guardian having such custody or by an employer of such minor, or in the event there is no guardian or employer then by any other responsible person who is willing to assume the obligation imposed under this Act [§§ 75-301—75-311, 75-315—75-321, 75-324—75-348] upon a person signing the application of a minor.

(b) Any negligence or wilful misconduct of a minor under the age of eighteen (18) years when driving a motor vehicle upon a highway shall be imputed to the person who has signed the application of such minor for a permit or license, which person shall be jointly and severally liable with such minor for any damages caused by such negligence or wilful misconduct.

(c) If any person who is required or authorized by Subsection (a) of this Section to sign and verify the application of a minor in the manner therein provided, shall cause or knowingly cause or permit his child or ward or employee under the age of eighteen (18) years to drive a motor vehicle upon any highway, then any negligence or wilful misconduct of said minor shall be imputed to such person or persons and such person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence or wilful misconduct. The provisions of this Subsection shall apply regardless of the fact that a driver's license may or may not have been issued to said minor. For purposes of this Act, a minor is hereby defined to be any person who has not attained the age of eighteen (18) years.

(d) The provisions of this Section shall apply in all civil actions, including but not limited to both actions on behalf of any actions against the person or persons required or authorized by Subsection (a) of this Section to sign the application in the manner therein provided."

Appellant contends that "Subsection (c) clearly states that if the person required to sign the application for a minor under 18 failed to do so, he is liable as though he had signed the application, the only restriction being that the parent have knowledge that the minor is driving a vehicle," and that since this was all alleged, the complaint is not demurrable and thus the trial court erred.

Appellee contends that "[the statute] provides that the 'negligence or wilful misconduct' is imputed to the 'person who is required or authorized . . . to sign and verify the application.' In this case there is no allegation that an application for a driver's license has been made, therefore, there is no one to whom the 'negligence or wilful misconduct' can be imputed by virtue of a signature" and thus the trial court properly sustained the demurrer.

We are of the opinion that the appellant is correct and that the trial court erred. Both appellant and appellee cite, as the only case relied on, our decision in *Richardson* v. *Donaldson,* 220 Ark. 173, 246 S. W. 2d 551 (1952). Only subsections (a) and (b) of § 75-315 were in effect when the decision in the *Richardson* case was handed down by this court. The *Richardson* case held, and rightly so, that negligence could not be imputed under § 75-315 to the father of a sixteen year old girl involved in a collision who did not have, and never had, a driver's license, because subsection (b) imputed liability only "to the person who has signed the application of such minor for a permit or license." Thus, the statute at that time clearly did not cover persons

who had not signed an application. The *Richardson* case also stated:

> "... [T]he negligence of a child cannot be imputed to a parent merely because of the parental relationship, *in the absence of a statute so declaring.*
>
> ... [W]e have no such statute, applicable to a case like the one at bar. ..." (Emphasis supplied).

After the *Richardson* case, the legislature passed Act 278 of 1955, Section 2 of which was digested as Ark. Stat. Ann. § 75-342.1 (Repl. 1957). This statute, § 75-342.1, was effectively the same as subsection (c) of the present § 75-315, with the exception that it did not apply where no driver's license had been issued. Then in 1961, by Act 495 of 1961, the legislature repealed § 75-342.1 and re-enacted its provisions into subsection (c), also making subsection (c) applicable to a case where no driver's license had been issued, and adding a new subsection (d) giving us our current statute, § 75-315.

Subsection (c) is clear and unambiguous. As it now stands, the negligence or willful misconduct of a minor is clearly imputed to any person *required or authorized* to sign and verify the application of a minor for a driver's license or permit, whether he does so or not, if he shall cause, or knowingly cause, or permit such minor to drive a motor vehicle upon any highway.

The intention of the legislature, as well as the emergency it recognized, is clearly stated in the emergency clause to Act 278 of 1955, supra, which is now subsection (c) of § 75-315, supra, when the legislature said:

> "It is hereby determined that the present laws pertaining to the responsibility of parents for minors under the age of 18 who drive automobiles is inadequately defined and would permit a parent who

violates the law by failing to sign his child's driver's license application to thus escape liability for such child's acts while driving."

Arkansas Statute Annotated § 75-342 (Repl. 1957) makes it a misdemeanor for a person to cause or knowingly permit his child or ward to drive a motor vehicle upon any highway in violation of any provision of the Uniform Motor Vehicle Operator's and Chauffeur's License Act, Ark. Stat. Ann. § 75-301, et seq. Subsection (c) of § 75-315, supra, also fills the void indicated by the statement "in the absence of a statute so declaring" as stated in the *Richardson* case, supra.

We conclude that the trial court erred in sustaining the demurrer and that this case should be reversed and remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

PATRICIA POOLE *v.* STATE OF ARKANSAS

5345 428 S. W. 2d 628

Opinion delivered June 3, 1968

John S. Choate and *Burl C. Rotenberry,* for appellant.

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

J. Fred Jones, Justice. Appellant, Patricia Poole, was charged in Little Rock Municipal Court with the offense of failure to vacate under Ark. Stat. Ann. § 50-523 (1947). After her plea of not guilty was entered, appellant was tried and found guilty in municipal court and was assessed a fine of $15.00 and costs of $10.50. Upon appeal to the Pulaski County Circuit Court, appellant's motion to dismiss was denied and the judgment of the Little Rock Municipal Court was affirmed. On appeal to this court, appellant relies on the following point for reversal:

> "Appellant's conviction should be reversed and Ark. Stat. Ann. 50-523 declared to be unconstitutional since it constitutes an invalid and unreason-

able exercise of the police power of the state of Arkansas in that the subject matter thereof is outside the scope of the public health, safety and general welfare and interest, and consequently the enforcement of Ark. Stat. Ann. 50-523 deprives appellant of rights secured to her by the due process clause of the Fourteenth Amendment to the United States Constitution."

The facts are stipulated and not in dispute. On April 14, 1967, appellant entered into an oral agreement with Mr. Frank Seymour to rent an apartment located at 4408 West 28 Street in Little Rock on a weekly basis at the rate of $22.00 per week. On June 23, 1967, at which time appellant was one week and six days behind in her rent, she was served with a ten day notice to vacate the apartment for nonpayment of rent. On July 20, 1967, some 28 days after service of the notice to vacate, appellant had still not moved and was charged under Ark. Stat. Ann. § 50-523 (1947), which is as follows:

"Any person who shall rent any dwelling house, or other building or any land, situated in the State of Arkansas, and who shall refuse or fail to pay the rent therefor, when due, according to contract, shall at once forfeit all right to longer occupy said dwelling house or other building or land. And if, after ten [10] days notice in writing shall have been given by the landlord, his agent or attorney, to said tenant, to vacate said dwelling house or other building or land, said tenant shall wilfully refuse to vacate and surrender the possession of said premises to said landlord, his agent or attorney, said tenant shall be guilty of a misdemeanor and upon conviction thereof before any justice of the peace, or other court of competent jurisdiction, in the County where said premises are situated, shall be fined in any sum not less than one dollar [$1.00], nor more than twenty-five dollars [$25.00] for each of-

fense, and each day said tenant shall wilfully and unnecessarily hold said dwelling house or other building or land after the expiration of notice to vacate, shall constitute a separate offense."

We cannot agree with appellant that § 50-523, supra, is unconstitutional. Its provisions have been the law in this state since 1901 and its constitutionality has never been judicially questioned. The courts may not review the wisdom, discretion, or expediency of the legislature in the exercise of the powers it possesses, *Berry* v. *Gordon,* 237 Ark. 547, 376 S. W. 2d 279; *Dabbs* v. *State,* 39 Ark. 353, and a statute will not be struck down by the courts unless it is obviously unconstitutional. All reasonable doubt must be resolved in favor of such constitutionality, there being a presumption in favor of validity. *Berry* v. *Gordon,* supra; *McEachin* v. *Martin,* 193 Ark. 787, 102 S. W. 2d 864. Furthermore, a statute effective over a long period of time, with its validity being unquestioned by bench or bar, although not conclusive, is highly persuasive of the validity of such statute. *McEachin* v. *Martin,* supra; 16 C. J. S., Constitutional Law § 99, p. 443.

It seems clear to us that § 50-523, supra, was enacted as a valid exercise of the police power of this state. The right of an individual to acquire and possess and protect property is inherent and inalienable and declared higher than any constitutional sanction in Arkansas, *Young* v. *Gurdon,* 169 Ark. 399, 275 S. W. 890, and the public health, safety and welfare is always threatened when a person wrongfully trespasses upon another person's property in Arkansas. Especially is this true when the trespasser persists in the trespass and defies the owner's right to possession. Whether such trespass may become a matter of regulation through the police power depends upon the exercise of that power bearing a real and substantial relationship to an end which promotes or protects the public health, safety or welfare.

In the case at bar appellant's right to possession of

the property terminated upon the expiration of the week for which she had it rented. Appellant claims no title or right in the property and claims no right to retain its possession. She does not base her continued possession upon any claim of right whatever, except a right to force the owner to the expense of bond, attorney's fee, and irrecoverable court costs in civil litigation. The option in pursuing a civil remedy lies with the property owner and any defense available to appellant in a civil action is still available under the penal code. Section 50-523, supra, by its provisions, relates only to one who "shall refuse or fail to pay the rent therefor, when due, according to contract" *and after ten days notice to vacate, "shall wilfully refuse" to do so.* Thus limited in its scope, § 50-523 relates only to one who has become a trespasser on property as a result of giving up all legal rights to its possession and after ten days notice wilfully refusing to remove therefrom with the necessary criminal intent to deprive the rightful owner of his property.

No one can seriously argue that wrongful trespass does not come within the police power of the state, and the use of the police power to prevent such wrongful acts which disrupt the well-being, peace, happiness, and prosperity of people, surely bears a real and substantial relationship to an end which promotes the public health, safety and welfare. The use of police power in dealing with unlawful trespass is not so unreasonable as to amount to a violation of substantive due process, and ten days notice to vacate premises one holds wrongfully is more than liberal in keeping with our standards of procedural due process.

We cannot say that § 50-523 is unconstitutional as an invalid exercise of the police power of this state or that it deprives appellant of her right of due process. Therefore, the judgment of the trial court is affirmed.

WESTERN SURETY COMPANY *v.* WASHINGTON COUNTY, ARKANSAS ET AL

5-4392 429 S. W. 2d 99

Opinion delivered June 3, 1968

[Rehearing denied July 15, 1968.]

Shaw, Jones & Shaw, for appellant.

Murphy & Burch, Wade & McAllister, E. J. Ball, and *James W. Gallman,* for appellees.

CONLEY BYRD, Justice. This appeal by Western Surety Company against appellee Washington County, Arkansas, and numerous intervenors, (unpaid suppliers of materials and labor), arises out of road construction contracts between the county and the state of Arkansas in which the county acted as contractor in order to obtain federal matching funds. The complaint alleges that Western Surety made a performance bond with the state of Arkansas, agreeing to pay all claims for which the county became liable under the road projects involved.

The county, in performance of the contracts, incurred liabilities of $148,319.58 to suppliers of materials and labor, including intervenors herein. Before presentation of the claims the county ran out of funds. After

a check by the State Auditor's office it was determined that the county had a balance of $53,455.39 in its road fund and $17,854.35 in its general fund. Appellant paid or compromised the many claims filed on the projects guaranteed by it, taking in each case an assignment for the amount paid, for a total of $118,821.14. Typical of the many assignments is that of R. A. Young & Sons, Inc., as follows:

"That I, C. H. Young, President, and J. D. Griffin Secretary of R. A. Young & Sons, Inc., for and in consideration of the payment to R. A. Young & Sons, Inc. of the sum of $1,279.85 by Western Surety Company, do hereby transfer, set over and assign to the said Western Surety Company all of its right, title and interest in and to the claim which R. A. Young & Sons, Inc. has against Washington County, Arkansas, said claim against Washington County, Arkansas being more particularly described in a certain Complaint filed in the Washington County Circuit Court, same being Circuit No. 5096, Washington County Circuit Court, and as described in Order as filed on the ..... day of ....., 196..., in case No. ..... styled R. A. Young & Sons, Inc. vs. Western Surety Company, filed in the Circuit Court of Washington County, Arkansas, which Order held that such claim or claims were held to be true, correct and just claims against Washington County, Arkansas. Said claim or claims arise for materials furnished by R. A. Young & Sons, Inc. to the said Washington County, Arkansas during 1964 on Job C-7-48, Federal Aid Project S-1194(1); Job C-72-41 and C-72-50, Federal Aid Projects S-1189 and S-1189(1) and S-1189(2); C-72-47, Federal Aid Project S-1193 and S-1193(a); Job C-72-48, Federal Aid Project S-1194 and S-1194(1); Job C-72-49, Federal Aid Project S-1195(1) and S-1195(2). The payment of these claims by Washington County has been refused by Order of the Washington County Judge in ..... Payment of this sum of $1,279.85 and assignment by us acting by and through the authority granted as President and Secretary respectively of R. A. Young

& Sons, Inc. does hereby satisfy said claim as to Western Surety Company, it being understood that such payment to the said R. A. Young & Sons, Inc. in no way impairs Western Surety Company's right to pursue reimbursement of said sum paid herein as surety on Washington County surety bond against Washington County, it being the intention of this instrument, i. e., Assignment, to place Western Surety Company in the same position as R. A. Young & Sons, Inc. insofar as R. A. Young & Sons, Inc.'s claim against Washington County is concerned up to and including the sum of $1,279.85; R. A. Young & Sons, Inc. agreeing by payment of said sum by Western Surety Company to allow and grant to Western Surety Company full authority to demand and receive to Western Surety Company's own use upon payment thereof up to $1,279.85, or any part thereof, by Washington County or any other person, firm, or corporation to Western Surety Company, and to give and discharge for the same as if the same had been paid by Washington County to R. A. Young & Sons, Inc.

"R. A. Young & Sons, Inc. does hereby authorize Western Surety Company in its name but at Western Surety Company's own expense and cost to pursue the claim against Washington County, Arkansas for which it, R. A. Young & Sons, Inc., originally filed claim or claims against the said Washington County but for which, by reason of the Order of the Washington County Court, said claim or claims were disallowed requiring payment of said claim or claims by Western Surety Company as surety for Washington County, Arkansas.

"And R. A. Young & Sons, Inc. does hereby agree to acknowledge, pursue and execute all other necessary legal processes on behalf of itself against Washington County for and on behalf of said Western Surety Company against Washington County, Arkansas, up to and including the total amount of $1,279.85. Said enforcement or proceedings on behalf of Western Surety Company to be at Western Surety Company's own expense

or cost with out recourse on R. A. Young & Sons, Inc."

The allegation with respect to the assignments is as follows:

"That Western Surety Company by virtue of its performance of its surety bond and the payment of the above set forth claims and the taking of Assignments by the laborers, materialmen, and suppliers has become subrogated and substituted for these laborers, materialmen, and suppliers."

After sustaining the demurrer and dismissing appellant's complaint, the trial court directed that that portion of the intervenors' claims not assigned to appellant, totaling $29,498.44, be paid in full from the county road fund. Appellant appeals, contending that its complaint stated a valid cause of action upon the assignments and that the trial court erred in ordering payment of $29,498.44 from the county road fund to the individual claimants without making a pro rata distribution among all claimants, including appellant. The intervenors contend (1) that the demurrer was properly sustained, (2) that Western Surety is estopped to contend that Amendment 10 is inapplicable to its claim, and (3) alternatively that both the general fund and the road fund should be ordered paid out on a pro rata basis.

Our cases specifically recognize the right of assignment of a claim against a county. *McKim* v. *Highway Iron Products Co.*, 181 Ark. 1121, 29 S. W. 2d 682 (1930). The complaint certainly states a cause of action against the county for the pro rata payment of the balance in the county road fund upon the assignment of the claims against the county.

The record shows that, notwithstanding the county's alleged lack of funds, all of the materialmen and suppliers filed claims with the county which were disallowed under Amendment 10[1] in that the claims ex-

[1]Amendment 10 voids all contracts of counties in excess of current revenues.

ceeded revenues for 1964. All claimants promptly filed appeals to the circuit court, where the claims were allowed. The allowance of the claims by the circuit court was in effect a judgment in favor of claimants and against the county road funds to the extent of the 1964 revenues. *Logan County* v. *Anderson,* 202 Ark. 244, 150 S. W. 2d 197 (1941). Consequently, the alleged invalidity of the claims under Amendment 10 was there determined and became final and not subject to a collateral attack. Therefore, we hold that the trial court erred in sustaining the demurrer and in ordering the funds to be paid out to the intervenors without pro rating the same with appellant.

It has been suggested by the intervenors, as an alternative argument, that under Ark. Stat. Ann. § 17-603 (Repl. 1956), the county general fund should be combined with the county road fund for the purpose of paying claims. We question whether the statute authorizes the trial court to go this far, but do not reach the point in this instance because the intervenors took no appeal from the action of the trial court.

Reversed and remanded.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA *v.* JULES VERVACK

5-4593 429 S. W. 2d 116

Opinion delivered June 3, 1968

[Rehearing denied July 15, 1968.]

Dobbs, Pryor & Shaver, for appellant.

Warner, Warner, Ragon & Smith, for appellee.

CONLEY BYRD, Justice. Occidental Life Insurance Company of California appeals from a verdict upon its disability policy in favor of appellee Jules Vervack. The points relied upon for reversal are:

I. The plaintiff failed to establish total disability in that his doctor never said that he was totally disabled, only that he could not work full time, and the plaintiff simply concluded that he was unemployable on less than full time without supporting facts or basis of any kind.

II. Plaintiff elected to act contrary to doctor's advice that he could return to work part time, could bowl, fish, hunt, and generally carry on usual activities, refraining from strenuous work or emotional upset, and was not necessarily confined within the meaning of the policy.

III. Instruction No. 6 told the jury that certain events would not prevent a recovery, and authorized the jury to find for plaintiff, without requiring the jury to find either total disability or confinement.

IV. The court erred in giving Instruction No. 5A.

The record shows that Occidental had issued to Vervack its disability policy containing both a TOTAL DISABILITY AND NON-CONFINEMENT clause and a TOTAL DISABILITY AND CONFINEMENT clause. The non-confinement clause, referred to as section A, provides:

"A. If such sickness shall wholly, necessarily and continuously disable and prevent the Insured from performing each and every duty pertaining to his occupation, the Company shall continue to pay the monthly sickness indemnity for a period, not exceeding twelve consecutive months, the Insured shall be so disabled and necessarily under the regular care and attendance of a legally qualified physician or surgeon other than himself. No indemnity shall be payable under this Part for the first seven days of any period of disability."

The total disability and confinement clause, section B in the policy, provides:

"B. If such sickness shall continue beyond the period of twelve consecutive months specified in Section A of this Part and shall wholly, necessarily and continuously disable and prevent the Insured from performing each and every duty pertaining to his occupation, the Company shall continue to pay the monthly sickness indemnity for the period the Insured shall live and be so disabled and necessarily and continuously confined within the house and therein regularly visited and attended by a legally qualified physician or surgeon other than himself."

Vervack's first heart attack occurred on April 23, 1965. Following this he operated his taxicab until a second heart attack on November 12, 1965. Occidental paid the benefits under the TOTAL DISABILITY AND NON-CONFINEMENT clause but refused to make payments on the TOTAL DISABILITY AND CONFINE-

MENT clause because it denied that Vervack was "so disabled and necessarily and continuously confined within the house and therein regularly visited and attended by a legally qualified physician or surgeon other than himself."

I and II

Dr. Robert J. Thompson testified that Mr. Vervack had arteriosclerotic heart disease, a hardening of the arteries with coronary insufficiency, which meant that his coronary arteries were incapable of carrying an adequate amount of blood to the heart muscle to allow him to do what would be considered normal physical activity. He stated that Vervack had a serious form of heart disease and it was necessary that he see a doctor once a month for the rest of his life. Vervack also was going to the hospital every three weeks to have the clotting ability of his blood tested. When questioned about activities or exercises recommended, the doctor stated:

"A. Yes, we have recommended—this has to be more or less on a trial and error basis because there is no way of knowing from an original injury or heart attack how much exercise an individual will tolerate following a heart attack, so we have recommended that they take exercise or Mr. Vervack take exercise up to the point of tolerance, that is, to where he does not have pain. We feel that walks, up to the point of tolerance, are quite important as far as therapy for this type heart disease."

After pointing out that the patient determines the tolerance, Dr. Thompson stated that he did not believe Mr. Vervack's failure to work indicated any type of malingering. His reason was the precipitation of episodes of angina with such things as emotional upsets, taking a shower, etc.

Jules Vervack stated that he had attacks of angina if he stayed out of bed too long, that he could not stay up over three or four hours without chest pains, that if

he walked too far he would develop angina pains and have to stop and rest, that he got short of breath quickly and that he could not work ten minutes without having to quit. He tested his exertion tolerance in his walks and in playing around the yard with the dogs, and found that he had to go sit down in ten or fifteen minutes. He had been driving his car for the last ten or twelve months to the doctor's office, on his wife's errands to the beauty shop and things of that nature, but when he went shopping with his wife he avoided any exertion such as pushing a loaded basket or reaching up and getting groceries off the shelf. He went to three high school football games in 1966 and two in 1967, and sometimes to the movies.

Mrs. Vervack testified that her husband's angina attacks were very frequent, and that they were sometimes brought on by activities and other times occurred during his sleep. She stated that he sometimes got very weak in the shower and that they used a lawn chair in the shower so he could sit down and bathe.

We conclude that there was sufficient evidence to submit to the jury the question of Mr. Vervack's total disability and confinement within the meaning of the policy.

Appellant argues that Vervack acted contrary to the doctor's advice in failing to work, bowl, hunt or fish. However, as we understand the doctor's testimony, the question relative to the patient's tolerance was a fact issue.

III

Instruction No. 6 of which appellant complains reads as follows:

"Under the law, 'continuously confined within the house' as contained in this policy does not mean literally that the plaintiff must remain continuously in his house in order to recover.

"You are instructed that if you find from a preponderance of the evidence and all of the instructions of the court that the plaintiff, Jules Vervack, was advised by a reputable physician or physicians, that it was to the best interest of his health, both mental and physical, and particularly to the best interest of the treatment of the disease from which he suffered, that he take a reasonable amount of exercise, subject himself to fresh air and sunshine, and engage in non-strenuous activities on a limited and reasonable basis, and you further find that he did take exercises and engage in activities in reliance on the advice of his physician or physicians, then the court tells you that even though he may have occasionally performed said events, these events would not prevent you from finding that the plaintiff was totally disabled, necessarily and continuously confined within the house and therein regularly visited and attended by a legally qualified physician or surgeon other than himself, *and your verdict may be for the plaintiff.*" (Emphasis supplied.)

We do not agree with appellant that this instruction is inherently erroneous. The same, or a similar, instruction has been given and approved in *Mutual Benefit Health & Accident Ass'n.* v. *Murphy,* 209 Ark. 945, 193 S. W. 2d 305 (1946), and *Mutual Benefit Health & Accident Ass'n* v. *Rowell,* 236 Ark. 771, 368 S. W. 2d 272 (1963). We are therefore unwilling to say that the trial court erred in giving this instruction under the issues of this case. Appellant's argument that the instruction amounts to a comment on the evidence, while not persuasive enough to reverse our prior cases, leads us to suggest that in the future the italicized portion thereof be omitted.

When the instructions are read as a whole, we think the issues relative to total disability and confinement within the terms of the policy were adequately submitted to the jury.

IV

The Instruction No. 5A of which appellant complains reads:

"Under the law 'regularly visited therein (within the House) and attended by a legally qualified physician or surgeon other than himself' as contained in this policy does not mean literally that the doctor must visit or attend the plaintiff at his house, but only that he be under regular treatment at whatever place the doctor directs."

We find no error in this instruction. Appellant readily concedes that it was given and approved in *Colorado Life Co.* v. *Steele,* 101 F. 2d 448 (8th Cir. 1939). The text writers are in general agreement. See 15 Couch, Insurance, § 53:158 (2d ed. 1966).

This is a liberal interpretation of the house confinement clause in appellant's policy, but in this we are not alone. According to the annotation in 29 A. L. R. 2d 1408, the great majority of the courts follow the construction here given.

Affirmed.

PETE C. MERGENSCHROER ET AL *v.* GERALD ASHLEY

5-4603 429 S. W. 2d 120

Opinion delivered June 3, 1968
[Rehearing denied July 15, 1968.]

Jack Sims, for appellants.

No Brief filed for appellee.

CONLEY BYRD, Justice. Appellants Pete C. Mergenschroer et al appeal from a chancery decree refusing to enjoin appellee Gerald Ashley's operation of Jo-Jo's Bar-B-Que at 3401 Parker Street, North Little Rock, as a nuisance, and refusing to cause appellee to remove as an obstruction that portion of his barbecue pit that extended into the street right-of-way. For reversal appellant relies upon the following points:

I. The Chancellor erred in holding that the North Little Rock Board of Adjustment was empowered to allow and approve defendant's building his structure into the public right-of-way.

II. The Chancellor erred in refusing or declining to order the defendant to remove that part of the structure known as Jo-Jo's Bar-B-Q which extended into the street right-of-way.

We do not reach the alleged error of the trial court in holding that the North Little Rock Board of Adjustment was empowered to allow and approve appellee's building of the encroachments on the street, because appellants have failed to show any special damages which would entitle them to enjoin the encroachments.

The record shows that the dedicated street right-of-way is 50 feet; that the paved or traveled portion of the road comprises some 25 or 30 feet; and that appellants readily recognize that they could not drive on the 8 or 9 feet of the dedicated right-of-way obstructed by the barbecue pit.

In *Adams* v. *Merchants & Planters Bank & Trust Co.*, 226 Ark. 88, 288 S. W. 2d 35 (1956), we held that before one could abate an encroachment upon a public street he must show special damages not common to the public at large. Here the encroachment shown is not on any portion of the street which appellants propose to use and because of their failure to show any special damages from the encroachments not suffered by the public in general, we find their contentions to be without merit.

Affirmed.

MRS. DORA LOUISE PARISH AND THOMAS L. PARISH, HER HUSBAND *v.* OLLIE W. PITTS AND THE CITY OF LITTLE ROCK

5-4134 429 S. W. 2d 45

Opinion delivered June 3, 1968
[Rehearing denied July 15, 1968.]

Alonzo D. Camp, for appellants.

Joseph C. Kemp, City Attorney; *John B. Plegge*, Asst. City Attorney, for appellees.

Warner, Warner, Ragon & Smith; Henry Woods and *Dale Price*; *Terral, Rawlings, Matthews & Purtle*; *Spitzberg, Bonner, Mitchell & Hays*; *F. N. Burke Jr., Roscopf & Raff, David Solomon, John L. Anderson, Oscar Fendler, Rieves & Rieves; Frierson, Walker & Snell-*

grove; Glenn G. Zimmerman, William G. Fleming and *W. H. Dillahunty,* amici curiae.

WM. M. MOORHEAD, Special Justice. This Court is again asked to overturn the rule of law granting to municipalities immunity from liability for damages negligently inflicted on others while acting in a governmental capacity.

Appellants sued the City of Little Rock and one of its employees for damages as compensation for painful and permanent bodily injuries allegedly suffered by Mrs. Parish when her car was negligently struck by the City's garbage truck. The judgment of the lower court sustained the demurrer of the City and dismissed the complaint against it. Plaintiffs appealed.

The Court below followed the precedents of this Court which have established that a municipality when acting in its governmental capacity is not liable in damages for injuries inflicted on others by the negligent acts of its employees, servants and officers. If the activity causing the harm was "in the interest of the public generally", it is classed "governmental" and no suit will lie against the municipality. Clearly the operation of a garbage truck is governmental by this test. *Kirksey* v. *City of Fort Smith,* 227 Ark. 630, 300 S. W. 2d 257 (1957). Yet, in applying this rule the Court there voiced its criticism: "Considerations of fair play and justice suggest that those injured by the negligence of a municipality or its agents should be compensated on equal terms with those injured by individuals or private corporations." The opinion further noted that many students of law have so recommended, that the Arkansas Legislature in 1947 had authorized municipalities to purchase liability insurance with a right of direct action against the insurer and expressed the hope that the Legislature might make the purchase of such insurance by municipalities mandatory at some future time. However, the Court felt that even though it might agree that the

present rule of municipal immunity from tort actions should be replaced with a stricter, more complete rule of responsibility, it was a matter of public policy and therefore, for consideration of the Legislature, not the Court. *Kirksey* v. *City of Fort Smith, supra.* The Legislature's broad investigative powers to determine facts and its greater flexibility in dealing with complex problems indicate a preference for a solution by statutory action. Despite the Court's invitation for legislative action ten years ago there has quite understandably been no comprehensive legislative consideration, or action on this troublesome question. It could not realistically be expected that a problem of judge-made or "lawyers' law" could or would be given the necessary time and attention by the Legislature. It operates basically in a sixty-day biennial session, necessarily crowded with more pressing and immediate problems of economics, taxation, the allocation of the proceeds thereof, and the myriad other interests affecting the general welfare of the people of the State. It should also be realized that most citizens, and more particularly legislators, will normally think of themselves as being on the side of government rather than opposed to it. They are thus more likely to cling to the "pleasant and appealing advantage" of immunity from liability for injury suffered at the hands of their public servants and employees. *Leflar and Kantrowitz,* "Tort Liability of the States", 29 N.Y.U.L. Rev. 1363 (1954). Although the field of the common law is not primarily the Legislature's problem, it is the primary concern of this Court. Accordingly, the Court, not the Legislature, should extirpate those rules of decision which are admittedly unjust, for it is to the judiciary that the power of government is given to provide protection against individual hurt. Green, *Freedom of Litigation,* 38 Ill. L. Rev. 355, 382 (1944).

Considerations of public policy are not and never have been for determination by the Legislature alone. Holmes, The Common Law, 35 (1881). Especially is this so when the individual's rights are put in question by

governmental activity as here. We are now of the opinion that re-examination of the principle of governmental immunity from tort action is the duty of this Court and should be undertaken at this time.

The origin of the concept of governmental immunity to suit and how it came to relieve the municipal corporation in the United States of liability for its tortious conduct, is quite involved and the subject of conflicting accounts. Nevertheless, it is generally agreed that its application to a local unit of government is first recorded in *Russel* v. *Men of Devon*, 2 T. R. 667, 11 Eng. Rep. 359 (1788). An action for injuries caused by a defective bridge was brought against all the men of the County of Devon since they were required by statute to keep it in repair. Even the reasons given in the report for denial of the right to sue are subject to much dispute today. It was said a multiplicity of suits would be encouraged; that no such action had been authorized by statute; and that a judgment would work an injustice upon the changing population of an unincorporated county since those not residents when the tort occurred could be required to help satisfy it. In the concurring opinion is found what may well be the most fundamental reason for the concept:

> "It is better that an individual should sustain an injury than that the public should suffer an inconvenience".

The earliest Arkansas case enunciating the rule, *Granger* v. *Pulaski County*, 26 Ark. 37 (1870), cited the Massachusetts case of *Mower* v. *The Inhabitants of Leicester*, 9 Mass. 247, which in turn had cited the *Russel* case, *supra*. It is noteworthy that in applying this concept to a county the Arkansas court pointed out the distinctions between the unincorporated county and the incorporated municipality, indicating that liability might well attach to the latter. In *City of Little Rock* v. *Willis*, 27 Ark. 572 (1872), it was said that for the exercise

of judgment and discretion by the municipality for the good of the whole, no action would lie for injuries resulting therefrom, but that for the negligent performance or execution of the orders of such a public body, suit would lie. This reasoning was followed in *Mayor of Helena et al* v. *Thompson,* 29 Ark. 569 (1874), and liability was imposed upon the City for the negligent construction of an inadequate ditch and culvert which served to divert a flowing stream.

Yet, in *Trammel* v. *Town of Russellville,* 34 Ark. 105 (1897), without mentioning the *Willis* and *Thompson* cases, *supra,* this Court held that a municipality is liable in tort only if the activity engaged in was solely for financial gain or "proprietary" in nature, but if the activity causing the injury was in the interest of the public generally, it is "governmental" and the city is immune to suit and liability. In 1931, in *City of Little Rock* v. *Holland,* 184 Ark. 381, 42 S. W. 2d 383, the decisions in this field were reviewed, the oversight of the *Willis* and *Thompson* cases, *supra,* in the *Trammell* decision, *supra,* was noted. Still the Court concluded that a municipality is not liable for its nonfeasance, nor for the negligence of its officers and agents in the performance of a governmental function. Thus by implication the earlier Arkansas cases imposing liability on municipalities for negligence in the performance of ministerial acts were overruled. This rule has been followed to the present with little discussion until the opinion given in *Kirksey* v. *City of Fort Smith, supra.* In applying the governmental-proprietary test, Arkansas has held that the maintenance of city streets, *Risser* v. *City of Little Rock,* 225 Ark. 318, 281 S. W. 2d 949 (1955); law enforcement activity, *Franks* v. *Town of Holly Grove,* 93 Ark. 250, 24 S. W. 514 (1910); the operation of municipal waterworks, *Patterson* v. *City of Little Rock,* 202 Ark. 189, 149 S. W. 2d 562 (1941); operation of an electrical distribution system, *City of Little Rock* v. *Holland, supra;* and the maintenance of a municipal swimming pool, *Yoes* v. *City of Fort Smith,* 207

Ark. 694, 182 S. W. 2d 683 (1944), are governmental functions. No case of liability for personal injury by a municipality is found in the Arkansas reports. In Arkansas, the immunity of the municipality in the tort field is, in practice, complete at present.

The only mitigation of the rule of governmental immunity in Arkansas has come in the past by legislative action. In 1940 this Court determined that a rural electrical cooperative should be immune from tort liability. *Arkansas Valley Cooperative Rural Electric Company* v. *Elkins*, 200 Ark. 883, 141 S. W. 2d 538 (1940). The reasons given were those applied to the governmental activities of a municipal corporation: the cooperative was not organized for profit, but only for the benefit of its members; it has no fund provided by statute out of which to pay judgments; rather, its funds were said to be held in trust, available only for its corporate purposes. Six years later the Legislature reversed that decision of the Court by providing that such organizations should be liable for torts resulting from the negligent acts of its agents, servants and employees. Act 362 of 1947; Ark. Stat. Ann. § 64-1525 (Repl. 1966).

This same General Assembly, by Act 46 of 1947, authorized municipalities and other entities enjoying the rule of immunity to purchase liability insurance covering their tort damages. The sovereign State of Arkansas itself has submitted to a forum in which its tort liability is determined and compensation paid to the injured parties. See Ark. Stat. Ann. § 13-1401 ff. (Repl. 1956), establishing and providing a mode of proceeding before the State Claims Commission. State employees have rights similar to those given private employees by the Workmen's Compensation laws of this State. Ark. Stat. Ann. § 13-1407 ff. (Repl. 1960). Thus we see that the basic injustice of the rule of tort immunity where it has come to the attention of the Legislature has met with dissatisfaction and been curtailed in part. This same "abhorrence of wrong suffered without a forum

in which redress may be had", is reflected in similar and more far-reaching legislation of other states and of the United States Government. See Leflar and Kantrowitz, *Tort Liability of the States,* 29 N.Y.U.L. Rev. 1363 (1954); Vermont Laws 1961, Public Act No. 265, Title 12, sec. 5601-02; Washington, Rev. Code, Ch. 4192; R.C.W. 4.92.090, added 1963 Ch. 159, sec. 2; Alask. Stats. Title 9, Ch. 65, sec. 09.65-070 added to a sec. 5.13 Ch. 101 S.L.A., 1962, and the Federal Tort Claims Act, 28 U.S.C.A., 2674 (1948). We do not construe such limited legislative action as has been taken in Arkansas to soften the impact of immunity on individual rights as an expression of legislative intent to retain the rule in all other areas. Only a comprehensive legislative study and enactment encompassing the entire field would warrant such an inference.

Legal scholars for the past forty years have criticized and condemned the concept of governmental immunity. An early and thorough-going examination of the doctrine was by Borchard, *Government Liability in Tort* (Pts. 1-3), 34 Yale L. J. 1, 129, 229 (1924-25); *Government Liability in Tort* (Pts. 4-6), 36 Yale L. J. 1, 757, 1039 (1926-1927); 28 Colo. L. Rev. 577, 734.

One of the more exhaustive examinations concludes that the failure to break fully with the immunity rule and "... to do what nearly everyone agrees ought to be done..." is found in three basic factors: First, the language of sovereignty found in the early cases; second, legislative and judicial inertia, thought to be the most potent single explanation of inaction; and finally, the fear that the financial burden of liability would result in inability to perform essential governmental services. Leflar and Kantrowitz, *Tort Liability of the States,* 29 N.Y.U.L. Rev. 1363 (1954).

Tort law is intended to reconcile the policy of letting accidents lie where they fall, thereby giving reasonable freedom of action to others, and protection of

the individual from injury which the defendant had a reasonable opportunity to avoid at the time. Holmes, The Common Law, 144 (1881). The "reasonable freedom of action" here in question is that of a municipality, furnishing essential and other services to the public. The rule of immunity frees these activities of the city from liability for damages inflicted upon the individual. It is the tort-victim who bears the entire, sometimes calamitous, burden resulting from these enterprises undertaken for the benefit of the entire community. The considered conclusion of the legal commentators has been that this burden should be treated as any other cost of administration of municipal activity and thereby be spread by taxes among the public receiving the benefits. Municipal irresponsibility and the sacrifice of individual rights to public convenience are not required to forestall disaster to the municipality.

They have pointed out that although municipalities are political subdivisions, created by the State and performing some governmental functions, they are not the State and do not partake of its sovereignty; they are corporate bodies, capable of much the same acts as private corporations; they have special and local interests and relations not identified with the State at large. They engage in fields of activity as a service to the citizenry never dreamed of in 1788, when this doctrine was first set forth in the report of the *Men of Devon, supra,* nor in 1870, when it was made a part of the law of Arkansas. The assumption of new and expansion of old services by the city for the benefit of the public has so augmented the incidence of this unjust precept on individual rights that it can no longer be retained except for the most compelling reasons. It has been noted that once the doctrine was imposed and followed by the courts *stare decisis* insulated the high court from the magnitude of the wrong being wrought by its application. Furthermore, the victims being individuals, made up at random from among the public generally, have, in the nature of things, no voice in the legislative halls.

Thus neither the judicial nor the legislative processes have been brought to bear on the problem.

The supposed threat to the cities' operations posed by financial responsibility for its torts has ever been a major factor, though not always expressly set forth, upholding the immunity rule. This fear is found in the report of the decision in *Men of Devon, supra,* wherein it was expressed as "inconvenience to the entire populus", and in *Arkansas Valley Cooperative Rural Electric Company, supra,* holding later that all funds were subject to a trust for the benefit of the members and to divert them to the satisfaction of tort judgments would be a violation of that trust. However, it is the conclusion of those studies that the fear of curtailment of essential public services or the imposition of tremendous financial burdens on the public, is not founded on fact. In the private sector tort liability is a small item in the budget of any well run enterprise and should prove to be proportionately no greater for the municipality, since it will have available to it the same defenses and means of spreading the risk. 9 Law and Contemporary Problems (1942); Warp, Tort Liability Problems of Small Municipalities, 363; David, Public Tort Liability Administration; Basic Conflicts and Problems, 335; David, Tort Liability of Local Governments: Alternatives to Immunity From Liability, 6 U.C.L.A.L. Rev. 1 (1959); Green, Freedom of Litigation, 38 Ill. L. R. 355. At page 367 of this last work this judicial fear is contrasted with experience; in *Wilcox* v. *Chicago,* 107 Ill. 334, 340 (1833), it was said that to subject cities to liability for the operation of a fire department ". . . would most certainly subject property holders to as great, if not greater burdens than are suffered from the damages from fire." Yet, the Illinois Legislature in 1931 imposed liability on the cities for injuries to person and property caused by the negligence of the employees of the fire department. It was thirteen years before a case appeared in the Illinois Reports in which damages had been assessed against a city under this statute. Arkan-

sas's own limited experience with the imposition of tort liability on cooperatives apparently has not resulted in a rash of cases nor oppressive financial burdens on that type of public corporation. The excellent *amicus curiae* brief filed herein by the Arkansas Municipal League quotes at length from reports over the last several years by the New York Legislature's Joint Committee on Municipal Tort Liability. In 1929 the State of New York waived its immunity from tort liability by statute and in 1945 its courts construed this to be applicable to municipalities and counties. Yet those reports give no instance of curtailment or deprivation of essential municipal service. Quite expectedly this legislative committee is concerned with the extent of tort claims, the rising cost of liability insurance and in some instances difficulty in obtaining such insurance. New York's experience with municipal tort responsibility would rather seem to indicate that the cities can continue to function while responding in tort to those injured by their activities. No one has ever suggested that it will not add to the financial problems of the municipalities. Anything short of financial disaster, however, is insufficient reason for exempting the cities from the rule of tort liability. In any case, the solution of the financial problem by taxation or otherwise rests with the legislative branches of government, not the judicial. If the rule of liability imposes on the taxpayer either a curtailment of some municipal services or an increase in his taxes, still it will serve to assure him that the economic impact of any tortious injury he may suffer at the hands of a public employee would be shared with the other inhabitants of the city rather than, "... falling with awesome tragedy" upon him alone. *Williams* v. *City of Detroit*, 364 Mich. 231, 111 N. W. 2d 1, 25 (1961). Admittedly, this court, because of the limitations on the judicial function, is not able to conduct the careful survey, preparation and study required for an ideal solution to the problem of municipal irresponsibility, nor can it limit and moderate the imposition of liability as could the legislature. Yet, if it is not con-

clusively shown that the cities can bear the financial burden of their own torts, neither is it demonstrated that they are unable to do so. An exemption of this magnitude to the usual rule of law leading to a just result in tort can no longer be continued because of speculative fears by the Court of financial disaster to cities. The injustice wrought by the immunity rule on the individual's rights is clear and certain; its justification must be no less so.

Beginning with Florida in the year 1957, ten American jurisdictions have reviewed and rejected the doctrine of governmental immunity for political subdivisions and entities, *Hargrove* v. *Town of Cocoa Beach, Fla.*, 96 So. 2d 130 (1957); *Molitof* v. *Kaneland Community Unit District*, 18 Ill. 2d 11, 163 N. E. 2d 89 (1959); *McAndrew* v. *Mularchuk*, 33 N. J. 172, 162 Atl. 2d 820 (1960) (active wrong-doing only); *Muskopf* v. *Corning Hospital District*, 55 Cal. 2d 211, 359 Pac. 2d 457 (1961); *Williams* v. *City of Detroit*, 364 Mich. 231, 111 N. W. 2d 1 (1957); *Holytz* v. *City of Milwaukee*, 17 Wis. 2d 26, 115 N. W. 2d 618 (1962); *Spanel* v. *Mounds View School District*, 264 Minn. 279, 118 N. W. 2d 795 (1962); *Fairbanks* v. *Schiable*, Alaska, 375 Pac. 2d 201 (1962) (interpreting statute permitting suit against local government unit and refused to apply "proprietary-governmental" test); *Rice* v. *Clark County*, 79 Nev. 253, 382 Pac. 2d 605 (1963); *Haney* v. *City of Lexington, Ky.* 386 S. W. 2d 738 (1964).

Of sovereignty as a reason for holding political subdivisions immune to suit, it is generally agreed in those decisions that cities and other such entities are not the state, and it is only to the state that the high attribute of sovereign immunity should properly be attributed. Generally governmental immunity is traced to the medieval concept that "the king can do no wrong", a notion which is entirely foreign to and at variance with the basic principles of government in America. Whether the rule of governmental immunity is traceable to the medieval concept that "the king can do no wrong" or

to the *Men of Devon* case, *supra*, which does not mention today. Further, the reasons given in the *Men of* of kings to govern, political subdivisions are not in fact the sovereign state. The language of the early decisions concerning sovereignty has little bearing on the question today. Further, the reasons given in the *Men of Devon* case, *supra,* if valid when adopted, are no longer sufficient to justify the rule of immunity. Public convenience does not outweigh the right to individual compensation for injuries suffered, and the political subdivisions are corporate entities financially capable of providing for the satisfaction of such judgments. *Muskopf* v. *Corning Hospital District, supra.* In *Hargrove* v. *Town of Cocoa Beach, supra*, it is said:

"The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth century upon an Eighteenth century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice." In the *Molitor* opinion, *supra,* as in others above cited, it is noted that this doctrine of immunity was created by the courts, not the legislatures, and that the courts should correct their own errors, and so concluded that the rule was, "... unjust, unsupported by any valid reason, and has no rightful place in modern day society."

Of the fear of bankrupting the political subdivision by imposing liability these several courts note the fact that no such actual case has been pointed out, *Spanel* v. *Mounds View School District, supra*; that public liability insurance was not in common use at the time the courts of this country adopted the doctrine of governmental immunity, while today it "... serves private citizens and private corporations as a means of prepaying

and sharing this sort of unexpected burden with which we deal in this case". *Williams* v. *City of Detriot, supra.* All give weight to the growth of municipal activity.

Municipalities are not the State of Arkansas and do not partake of its constitutionally granted immunity. It does not clearly appear to us that in this day and time the municipality and those presumably benefiting from its services are unable to bear the full cost of these activities. The immunity rule imposing the entire burden of municipal torts on the individual victims is patently unjust and can no longer be retained without an equally clear showing of an even greater harm to the public.

Other courts during the past ten years have, like Arkansas in *Kirksey, supra,* refused to overturn the rule of governmental immunity, though many have criticized it. Their principal reason for continuing to adhere to an admittedly unjust rule is the doctrine of stare decisis. This policy of adhering to precedent to give predictability to the law, and to avoid unsettling things, is fundamental to the common law. So too is the power to overrule a line of decisions, even those under which property rights were acquired. *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215 (1946). Precedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable. Any rule of law not leading to the right result calls for rethinking and perhaps redoing. *Llewellyn,* Jurisprudence, 217 (1962). The proper limitations on the doctrine of *stare decisis* have ever been recognized by this Court. "Precedent, it is said, should not implicitly govern, but discretely guide . . .", *Roane* v. *Hinton,* 6 Ark. 525, 527 (1846). Having determined as we have here that a rule established by precedent no longer gives a just result it must then be determined whether the rights of those who have justifiably relied upon the established precedents are of greater weight in this case than that the rule be corrected. The test is whether it is more important that the matter remain settled than that it be

settled correctly. *Brickhouse* v. *Hill*, 167 Ark. 513, 522, 268 S. W. 865 (1925). We are not here faced with a rule of property, for the law of torts does not affect ownership or devolution of title. Contracts and wills are not drawn in reliance upon it. Ordinarily then the doctrine of *stare decisis* is of no great weight in the field of tort law. Here, however, a numerous class, the municipalities, relying on the past decisions of this Court granting them immunity, may well have neglected to investigate accidents or to insure against liability as they are permitted by statute to do. Hence, because of this Court's prior rulings, many would be unprepared to present defenses otherwise available to them, and in event of the imposition of liability, a small municipality might find itself financially unable to meet it without the possibility of disrupting its services to the public.

That possible hardship on those who have justifiably relied upon the law as announced by the Court in the past stems from the retroactive effect normally given a court decision. Legislative acts which normally operate only in the future avoid this effect. It is for this reason that many of the courts have left such problems for legislative solution. *Whittington* v. *Flint*, 43 Ark. 504 (1884). In the past we have met the problem by making our decisions operative only in the future. *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S. W. 2d 973 (1952). Other courts faced with this problem arising from elimination of past error have solved it in all three ways open to us: California in the *Muskopf* case applied the decision in the normal manner; making it retroactive as to the present case and all other actions arising within the statute of limitations. The Legislature fixed a period during which the new rule would be held in abeyance. Cal. Stat. ch. 1404. In *Williams* v. *City of Detroit, supra,* the Michigan court held that governmental immunity no longer would be recognized from the date that decision, while in *Holytz* v. *City of Milwaukee, supra,* Wisconsin allowed suit by the plaintiff before it, but

made the new rule applicable to others only in the future. This last mode of procedure seems to us to best meet the several inevitable problems created by a change in a line of precedents. We declare the rule of liability to be applicable to this case and all other causes of action arising after this decision becomes final. This serves, in keeping with our system of the private enforcement of legal rights, to reward the present plaintiff for her industry, expense and effort, and for having given to this Court the opportunity to rid the body of our law of this unjust rule. The impact of retroactive application on the present defendant is not likely to create any major crisis. Being prospective as to all other causes of action the municipalities are given time in which to procure insurance and take measures to protect themselves in suits thereafter arising. Any one of the three means of application of the law here is necessarily going to deny the benefit of this decision to some injured persons. This is always true when there is any change, judicial or legislative, in the law.

We would make plain that this decision imposes liability on municipalities only for the imperfect, negligent, unskillful execution of a thing ordained to be done. No tort action will lie against them for those acts involving judgment and discretion; which are judicial and legislative or quasi-judicial and quasi-legislative in nature. The exercise of discretion necessarily carries with it the right to be wrong. It is only for ordinary torts committed in the execution of the activities decided upon that a tort action will lie; not for the decision itself.

Nor have we at this time considered the liability of any other governmental unit or political subdivision.

Judgment reversed.

JONES, J., disqualified.

GEORGE ROSE SMITH, J., concurs.

HARRIS C. J., and FOGLEMAN, dissent.

GEORGE ROSE SMITH, Justice, concurring. I join in Special Justice Moorhead's opinion, but I should like to add a word in reply to the dissentient suggestion that our statute adopting the common law of England exempted that body of rules from judicial modification, leaving the power of repeal in the legislature alone. If that were true we would be absolutely bound to follow an English precedent announced 300 years ago, no matter how wrong we thought it to be, if no later case on the point could be found. The practical point of view, and I think the right one, is that when we adopted the English common law there was included in that heritage the fundamental common law rule that a court can and should overrule an erroneous judicial decision when it can be done without injustice to past or future litigants. That is all the court is doing today.

CARLETON HARRIS, Chief Justice, dissenting. I have no quarrel with the basic premise set out in the majority opinion, *i. e.*, that from the standpoint of right and wrong, it is just as right for a person who is hurt by the negligence of a city and its employees to obtain damages for the injury, as it is for those persons who are injured by the negligence of private individuals or corporations. But I think there are compelling reasons why the doctrine of governmental immunity should not be changed by this court.

Of course, this immunity was a part of the common law when this state was admitted to the Union. The very first section that appears in our Arkansas statutes (numbering 20 volumes), Ark. Stat. Ann. § 1-101 (Repl. 1956), provides that the common law of England, of a general nature, and not inconsistent with the constitution and laws of this nation, or this state, "shall be the rule of decision in this state *unless altered or repealed by the General Assembly of this state.* [My emphasis.]" Actually, as is pointed out in *Horsley* v. *Hilburn,* 44 Ark. 458 (1884), while Arkansas was still a part of the Missouri Territory, this statute (in

substance) was enacted (1816), and the opinion then recites:

"This statute remained to govern the subsequent formed territory of Arkansas, and was afterwards reenacted as a part of the laws of the State, with some change of phraseology and grammatical arrangements."

Throughout all the sessions of the General Assembly subsequent to our admission as a state (1836), there apparently has been no attempt to enact legislation to change the long-standing doctrine of governmental immunity to suits in tort, and I can see no urgent reason for this established policy to be changed by judicial fiat. As pointed out in the majority opinion, the only modification of the rule came by virtue of legislative action in 1940,[1] and the subject was also indirectly approached in 1947, when the Legislature authorized municipalities to purchase liability insurance covering tort damages. It is significant to me that the General Assembly has not made further exceptions to the general rule, and to me, it is somewhat persuasive that legislative intent has been expressed to retain the rule.

There are many facets connected with a change of the rule that are unanswered. For instance, the immunity is not being done away with in personal injury cases alone, but this step also relates to acts committed that damage property, or conversely, the failure to perform acts that might have prevented damage to property (or person). The failure of building inspectors to discover and eliminate certain hazardous conditions, or perhaps the failure of the city to install a traffic light at some location, which a jury might find to have been hazardous, are examples of possible liability. Actually, there are literally dozens of situations that could arise.

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[1]After this court had held that a rural electric cooperative should be immune from tort liability, the General Assembly enacted legislation providing that these organizations were liable for torts resulting from the negligent acts of agents, servants and employees.

It is pointed out by the majority that cities and towns can obtain liability insurance—but I am not convinced that this is true in every instance. Not only that, but what would be the cost of such insurance? I cannot say—but I do know that the premiums for automobile coverage are constantly increasing; in fact, a recent increase on this type of coverage was granted which will average 17% over the state. I have no doubt but that similar increases will be sought for public liability coverage. It may well be that many cities and towns will not be able to afford adequate coverage, and I know of no way for this deficiency to be corrected, except by additional taxation. Here again, it may well be necessary for the General Assembly to pass legislation affording proper authorization for the cities to act. But suppose the General Assembly does not act—where then, is the answer? The plight of the cities, though giving me concern, does not disturb me as much as the possible plight of small towns. The judgments awarded today by juries are far larger than those of past years, and, under some causes of action, the financial structure of a small town could be literally "wiped out" by one large judgment.

The needs of a city are many, and most police and fire departments are undermanned and underpaid; the demand for all types of services becomes greater each year, and I cannot bring myself to impose this additional burden.

I reiterate that this is a matter for the General Assembly. Perhaps, at the beginning, the court could have justifiably taken the step that is now being taken, but the fact that the rule of governmental immunity has been in effect in this state (and territory) for 150 years, strengthens my conviction that no change should be made, except through legislative action.

I respectfully dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I subscribe

to and join in the dissenting opinion of the Chief Justice. This court has on numerous occasions, some rather recently, said that the question presented here was one for consideration by the legislative branch of the government. I still feel that the court was right, and I cannot see that anything has changed except some of the personnel of this court. If the times and current circumstances call for a change in public policy in this field, it should be done by the General Assembly which is properly a policy-making branch of government.

In *Kirksey* v. *City of Fort Smith,* 227 Ark. 630, 300 S. W. 2d 257, this court, in addition to the quotation in the majority opinion, said:

> "If we were privileged to set the state's public policy on this issue we might readily agree that the present pattern of partial tort liability of municipalities should be replaced with a stricter or more complete rule of responsibility. * * * Able law writers have so recommended, but through legislative and not judicial action. See the splendid article on 'Municipal Tort Liability in Operation,' 54 Harvard Law Review 437. A step in this direction was taken by the Arkansas Legislature in 1947 by the enactment of Ark. Stats., § 66-517 et seq., which authorizes municipalities and other agencies immune from tort action to purchase liability insurance with the right of direct action by the injured plaintiff against the insurer. Perhaps the Legislature will make the purchase of such insurance mandatory at some future time. This decision rests with the people acting directly or through their legislature, and not with the courts."

While the doctrine of municipal tort immunity may not have been based upon the constitutional immunity of the state from suit, a city is nevertheless an agency of the state for the performance of specified essential governmental functions in a limited area. The fact that

a city can be sued at all has never seemed to me compatible with the holding that agencies of state government, such as the Arkansas Highway Department, cannot be sued. Cities do exercise some of the sovereignty of the state. If they do not, how can some of their powers, such as prosecutions for violations of ordinances, be constitutionally justified?

If the problem is approached from the point of view that our cities have become business institutions in many respects, a workable solution could be found in the liability of cities when acting in a proprietary, rather than a governmental, capacity without opening the door to a floodgate of unanswered questions for these agencies of state government which have become so important in our scheme of things that in recent years an executive department of our federal government has been created to deal with their problems at that level.

We should not assume that the General Assembly has been unaware of our decisions or the expressions in our opinions that this court thought some legislative action was appropriate. That branch of our government is usually alert in giving attention to matters when changes in our basic law is needed. No better examples can be found than in the actions eliminating tort immunity of electric cooperatives, authorizing the purchase of liability insurance by agencies to which tort immunity has been extended, and creating the State Claims Commission.

Had a study in depth of this problem by the legislative branch been felt appropriate by the General Assembly, there can be no doubt that it would have been undertaken either through the Legislative Council or by other means. The creation of the Arkansas Constitutional Revision Study Commission, the Arkansas Economic Expansion Study Commission, and the Arkansas Judiciary Commission are evidences of their alertness.

This action cannot be properly justified by any allegations of affluence on the part of municipalities. While revenues are greatly increased over those of 1870, the number and extent of the services demanded of them have multiplied at a much more rapid pace than have the revenues and sources thereof. Evidence should not be required for us to know that cities in Arkansas bring ever increasing financial problems to the General Assembly biennially and that cities all over the nation are calling upon the National Congress for aid. Strict limitations on the taxing power of municipalities, whether wise or unwise, make this new liability a greater problem than should be imposed without some compensating means which can only be provided legislatively.

There is a delicate balance of powers in our three separate and independent branches of government. None of them should be more alert to preserve that balance and recognize the independence of each of the interrelated branches in its own field than the judicial department. I deplore the growing tendency on the part of courts to take actions which might well be construed to give the impression that the judiciary may, in pointing out what it deems to be matters requiring legislative attention, be saying: "If you don't, we will." The step being taken here is one of the few actions of this court that might be so construed. We should not impose a whole new batch of problems on the legislative branch by a judicial solution of a problem that we have repeatedly said belonged to it.

I am not entirely satisfied that insurance is actually available for the various liabilities that would be imposed upon cities by today's decision or if now available, that it will continue to be. Even if it is, what are to be the limits of liability? Tort injuries to a whole family in an automobile in one of the smaller incorporated towns, such as Jerome, would justify as much money damage as they would in Little Rock. Many of these small incorporated towns will not have the reve-

nues sufficient to pay liability insurance premiums after paying for the services required of them. None of our municipal corporations can afford to pay their employees adequate salaries, even without this additional burden.

I cannot help posing unanswered questions which make me steadfast in my opinion that the matter of change should have been left to the legislature rather than to this court.

Should there be limits of liability? If so, should they be the same for all municipalities or should they bear some relationship to population or assessed valuation?

Should the rule have been applied to all municipalities, or just to cities, not incorporated towns, or just to cities of the first class?

Should the liabilities and damages be determined in the courts just as is done in the case of a private corporation? Should a procedure similar to that under the Federal Tort Claims Act be provided? Should the jurisdiction and function of the State Claims Commission be expanded to these cases to insure uniformity of treatment? Should municipalities be given the power to establish such commissions? Or should there be regional commissions? Should a new commission similar to the Workmen's Compensation Commission be given this jurisdiction?

Should a state fund be provided for payment of tort claims? If so, should it be financed by state appropriation or city contributions or by some new or additional tax? Or should each city have such a fund?

Should any and all tort damages in the ever expanding field be compensable by municipalities, or should there be a limitation to certain types or kinds of tort liability?

Out of which funds are judgments against cities to be paid? Is damage by reason of injury resulting from automobile collision caused by negligence of the operator of a waterworks vehicle to be paid from waterworks revenues or funds earmarked for those purposes or is it compensable from city funds and revenues allocated for fire or police departments?

Should there be a time limitation upon notice of claims, so that proper municipal authorities are enabled to properly investigate incidents out of which the claims arise? Or shall they be called upon to defend a claim three years after an alleged occurrence that went unreported to proper city authorities?

What is the status of city employees in regard to claims for injuries? Will there be a common law liability to them? What application will such rules as the fellow servant doctrine and assumption of risk have?

Are acts of malfeasance, misfeasance and nonfeasance all proper bases for recovery?

It is not necessary to speculate about possibilities with reference to liabilities that may be imposed upon our municipalities. A list of some liabilities that have been imposed in states where municipal tort immunity has been abolished follows:

(1) Failure to install a fire hydrant where others within a similar area were protected. *Veach* v. *City of Phoenix*, 427 P. 2d 335 (Ariz. 1967).

(2) Injuries to persons struck by suspected robber's automobile during a high speed chase by city police. *Evanoff* v. *City of St. Petersburg*, 186 So. 2d 68 (Fla. 1966).

(3) Failure to maintain streets and highways in safe condition. *Byne* v. *Americus*, 6 Ga. App. 48, 64

S. E. 285 (1909); *Jones* v. *Kane & Roach, Inc.*, 182 Misc. 37, 43 NYS 2d 140 (1943).

(4) Injury by a falling awning which extended over a sidewalk. *McHarge* v. *Newcomer & Co.*, 117 Tenn. 595, 100 S. W. 700 (1906).

(5) Injury to persons on property adjacent to municipally owned ball park by a ball hit or thrown from the park. *Robb* v. *Milwaukee*, 241 Wis. 432, 6 N. W. 2d 222 (1942).

(6) Failure to maintain proper warning barriers for protection of persons using sidewalks and highways who unintentionally deviate therefrom. *Bessemer* v. *Clowdus*, 261 Ala. 388, 74 So. 2d 259 (1954); *Gabbert* v. *Brownwood*, 176 S. W. 2d 344 (Tex. Civ. App. 1943).

(7) Child killed by injury on city property under attractive nuisance doctrine. *Peters* v. *Tampa*, 115 Fla. 666, 155 So. 854 (1934).

(8) Failure to adequately maintain drains or sewers to prevent clogging. *Tucson* v. *O'Reilly Motor Co.*, 64 Ariz. 240, 168 P. 2d 245; *Lobster Pot of Lowell* v. *Lowell*, 333 Mass. 31, 127 N. E. 2d 659 (1955).

(9) Negligence in placing, failing to remove or permitting, with constructive notice, a rope or clothes line across a sidewalk. *Albany* v. *Black*, 214 Ala. 359, 108 So. 49 (1926); *Shinnick* v. *Marshalltown*, 137 Iowa 72, 114 N. W. 542 (1908).

(10) Drowning of a child under attractive nuisance, nuisance, or negligence theories. *Peters* v. *Tampa*, 115 Fla. 666, 155 So. 854 (1954); *Doyle* v. *Chattanooga*, 128 Tenn. 433, 161 S. W. 997 (1913);

Cates v. *Bloomington,* 333 Ill. App. 189, 77 N. E. 2d 46 (1947).

(11) Explosion of butane gas stored in city's streets and alleys by a third party under a city permit. *Splinter* v. *Nampa,* 215 P. 2d 999 (Ida. 1950).

(12) Allowing fire in a city dump to spread to plaintiff's property. *Osborn* v. *Whittier,* 103 Cal. App. 2d 609, 230 P. 2d 132 (1951).

(13) Injury to child by flare placed in street to warn of recent road work under attractive nuisance doctrine. *Gilligan* v. *Butte,* 118 Mont. 350, 166 P. 2d 797 (1946).

(14) Injury to child in trying to light a warning lantern that had gone out. *Collins* v. *Chicago,* 321 Ill. App. 73, 52 N. E. 2d 473 (1943).

(15) Damage caused by operation of fire department vehicles. *Miami* v. *McCorkle,* 145 Fla. 109, 199 So. 575 (1940); *Baltimore* v. *Fire Ins. Salvage* Corp., 219 Md. 75, 148 A. 2d 444; *Cavagnaro* v. *Napa,* 86 Cal. App. 2d 517, 195 P. 2d 25 (1948); *Peerless Laundry Services* v. *Los Angeles,* 109 Cal. App. 2d 703, 241 P. 2d 269 (1952).

(16) Damages from temporary obstructions in streets. *Crow* v. *San Antonio,* 157 Tex. 250, 301 S. W. 2nd 628 (1957); *Rueter* v. *Versailles,* 213 F. 2d 233 (CA Ill. 1954); *Denver* v. *Austria,* 136 Colo. 454, 318 P. 2d 1101 (1957).

(17) Negligent operation of parks and equipment. *Kingsport* v. *Lane,* 35 Tenn. App. 183, 243 S. W. 2d 289 (1951).

(18) Injuries from acts in construction or repair of sewers or drains. *Galluzzi* v. *Beverly,* 309 Mass. 135, 34 N. E. 2d 492 (1941).

(19) Failure to erect traffic warnings against entering a street partially barred or obstructed by construction or improvement work. *Austin* v. *Schmedes*, 154 Tex. 416, 279 S. W. 2d 326 (1955).

(20) Injuries from falls on stairways. *Knoxville* v. *Bailey*, 222 F. 2d 520 (CA Tenn. 1955).

(21) Operation of street lighting facilities. *Hooton* v. *Burley*, 70 Ida. 369, 219 P. 2d 651 (1950).

(22) Injuries from overhanging tree limbs. *Montgomery* v. *Quinn*, 246 Ala. 154, 19 So. 2d 529 (1944); *Tate* v. *Greenville*, 228 S. C. 530, 91 S. E. 2d 161 (1956).

(23) Injuries because of an accumulation of water at a street intersection. *Booth* v. *Dist. of Columbia*, 100 App. D. C. 32, 241 F. 2d 437 (1956).

(24) Injuries to an unattended prisoner. *Hargrove* v. *Cocoa Beach*, 96 So. 2d 130 (Fla. 1957).

(25) Injuries due to defective condition of sidewalk. *Winchester* v. *Finchum*, 201 Tenn. 604, 301 S. W. 2d 341 (1957); *Claessens* v. *Troy*, 272 App. Div. 971, 71 NYS 2d 571 (1947).

(26) Injuries from fall in municipal parking lot. *Rhodes* v. *Palo Alto*, 100 Cal. App. 2d 336, 223 P. 2d 639 (1950).

(27) Injuries from fall by slipping on wet paint used to designate parking spaces on street. *Austin* v. *Daniels*, 160 Tex. 628, 335 S. W. 2d 753 (1960).

Is there to be liability for damages in Arkansas arising by reason of these and other things which come to mind:

Injury to an intoxicated prisoner who falls out of a bunk while unattended?

Injury to an unattended prisoner by another prisoner?

Injury to a person arrested by what a jury, after deliberation, may determine to have been an excessive use of force?

Injury from the falling of a defective bridge?

Injuries and property damage in riots a city fails to suppress?

Damages from a nuisance created by failure to collect garbage promptly or properly?

Injuries or damages by reason of inability of city to perform a usual function because of a strike of city employees?

Injuries in and about municipal swimming pools, parks, playgrounds, golf courses and other recreational facilities?

Injuries to which the malfunction of traffic lights was a contributing cause?

Injuries or damages by reason of failure of city authorities to condemn or demolish buildings of private owners in a dangerous condition?

Damages from slander by city officer or employee?

Damages for malicious prosecution upon acquittal of persons arrested or prosecuted by city officials? Or for false imprisonment?

Damages for malpractice in city hospitals?

What effect will this decision have on liability insurance rates of private citizens?

I feel that the court has not given due regard to Amendment No. 10 which had the very desirable purpose of requiring our cities and counties to operate on a cash basis. One judgment in one tort case could exhaust all the revenues of many of our cities and towns so that all governmental functions would cease. This brings to mind another question. Would a tort judgment be paid from the revenues of the year in which the tort was committed or that in which the judgment was rendered or that in which the judgment becomes final? It would seem logical that it be paid out of the revenues of the year in which the tort was committed, which would likely be exhausted before the damages could be ascertained in many cases. This is another problem that might be solved by legislative action.

I also feel that the majority has not considered the fact that many required city services are activities that might well be called inherently dangerous. At least they involve a high degree of risk. The cities have no option about whether they will perform most of these services, as a private individual or corporation would. I submit that at least these activities should involve immunity. There is at least doubt whether the constitutional power of granting immunity can be exercised by the General Assembly in view of today's decision and Article 2, § 13, of our Constitution.

While the majority seek to limit the application of today's decision to cases which do not involve judgment and discretion, I do not understand the limitation. Most of the acts of a municipal officer, servant or employee involve the exercise of some judgment or discretion.

I am also concerned about the effect of today's decision upon counties, school districts, improvement districts, and other agencies performing governmental

functions. I do not know whether we should consider them to be bound by this decision or not.

It gives me cause for concern that we unhesitantly applied the doctrine of tort immunity in *City of Fort Smith* v. *Anderson,* 241 Ark. 824, 410 S. W. 2d 597, less than one month before the submission of this case, and now permit recovery of one whose alleged damage occurred two years and nine months prior to that a jury found to have been inflicted upon the plaintiffs in that case.

The difficulty of the majority in deciding just what claimants shall be beneficiaries of today's decision emphasizes the fact that the court is acting legislatively. I do not agree that the solution is a proper one. I would prefer that we rule on the cases as they come here and without declaring whether rules are prospective or retroactive in operation.

I respectfully submit that the investigative powers of the General Assembly, not available to us, could have reached a sounder conclusion in this matter. Such an investigation would probably not have created more questions than it answered.

I fully agree with the remarks of the Chief Justice with reference to judicial change of the common law. I agree that courts have the power to overrule their *own* decisions, but not the common law adopted by this state. If Ark. Stat. Ann. § 1-101 (Repl. 1956) does not mean that this law can be altered or repealed by the General Assembly, only, then, I ask, what does it mean?

With all due respect for my brethren of the majority, whom I hold in the highest esteem, I cannot help but feel that this step is unwise, is in violation of the separation of powers prescribed by Article 4, § 2, of our Constitution and that it is being taken with only a superficial examination of the ultimate consequences. Legislative attention is more plainly indicated now than ever before.