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FRANK ROGERS, ET AL v. C. R. MASON, ET AL

5-4811 436 S.W. 2d 827

Opinion Delivered February 3, 1969

[Rehearing denied March 3, 1969.]

[redacted]

Bill J. Davis and *Brown, Compton, Prewitt & Dickens* for appellants.

Spencer & Spencer for appellees.

CARLETON HARRIS, Chief Justice. On February 17, 1968, an election was held in Calion, a second class city located in Union County, on a proposal to annex some 1500 acres to the city. One hundred and sixteen votes were cast for the proposal, and 107 votes were cast against it. Only one polling place was provided for the election, and the polls were closed at 6:30 P.M., one hour before the time provided by statute[1]. The record reflects that there were 303 qualified to vote in the election, and 78 of these did not vote[2]. The election result

[1]Ark. Stat. Ann. § 3-908 (Supp. 1967): "The polls shall be opened at eight (8) o'clock a.m., and shall remain open continuously until seven-thirty (7:30) o'clock, p.m." This provision changing the closing time from 6:30 P.M. to 7:30 P.M., was enacted by the General Assembly in 1967.

[2]It is evident that one of the figures appearing in the record is incorrect, for the total of the votes for, votes against, and persons not voting, actually totals 301.

was announced about 7:00 P.M. Appellants filed an election contest within the proper time, but, on hearing, the complaint was dismissed by the trial court. From the judgment so entered, appellants bring this appeal. For reversal, it is asserted that Ark. Stat. Ann. § 3-908 (Supp. 1967) is mandatory; that Ark. Stat. Ann. 19-1101.3 (Repl. 1968) (which requires a polling place for each ward in a city of the second class), is also mandatory, and finally it is contended that the failure of election officials to follow the directions of a mandatory statute, results in placing the burden of proof in an election contest on the contestees, instead of the contestants.

We find no merit in any of the points raised by appellants. It is argued by appellants that the failure to strictly comply with the aforementioned statutes had the effect of invalidating the election. It might first be said that such a provision is not included in the statutes under discussion, and the contention is absolutely contrary to several of our cases.

As to closing the polls one hour early, this court held such a contention to be without merit as long ago as 1880. In *Holland, as Collector,* v. *Davies,* 36 Ark. 446, the polls at a district school election were closed two and one-half hours early; the validity of the election was challenged on several grounds, including this particular averment, but this court held to the contrary, stating:

> "The provision of the statute fixing the time of closing the polls of an election is directory and not mandatory. Manifestly an election should not be set aside and the object for which it was held defeated, though the law has not been strictly complied with, *where no obstruction or impediment to a fair expression of the will of the electors is Shown*"[3].

[3]Emphasis supplied.

Here, only three witnesses testified. The County Clerk testified as to the number of persons voting, the number of qualified electors not voting, the result of the election, and the fact that only one polling place was provided. It was stipulated that the polls were closed at 6:30 P.M. Robert D. Walker testified that he was present at the polling place from 6:30 P.M. until 7:00 P.M., and no one came to vote during that period. He said that his wife announced the result of the election at approximately 7:00 P.M. Otis Williams testified that he was also present at the polling place in Calion, and that no one came there between 7:00 and 8:00 P.M.

It will be noted that not a single individual testified that he went to the polling place to vote, and found the polls closed, or that he did not go to vote because he had already learned that the polls had closed. In other words, there is no evidence that anyone who desired to vote was deprived of that right. Though appellants, in answering interrogatories (unverified and not introduced), listed 88 persons (10 more than the record reflects were eligible) as having been denied the right to vote, no such testimony was offered[4]. Surely, if the early closing resulted in denying the privilege of the vote to numerous people, some would have come forward to so testify.

Likewise, the contention that the election was invalid because there was only one polling place open is without merit. The same general rule covers this situation. In *Orr* v. *Carpenter,* 222 Ark. 716, 262 S.W. 2d 280, this court, quoting an earlier case, said:

> "To hold that all prescribed duties of election officers are mandatory, in the sense that their nonperformance shall vitiate the election, is to ingraft upon the law the very powers for mischief it was intended to prevent. If the mistake or inadvertence of the officer shall be fatal to the election, then his

[4]There was no allegation of how these people would have voted, i.e., whether they favored the proposal or were against it.

intentional wrong may so impress the ballot as to accomplish the defeat of a particular candidate or the disfranchisement of a party. And it is no answer to say that the offending officer may be punished by the criminal laws, for this punishment will not repair the injury done to those affected by his acts. It is the duty of the courts to uphold the law by sustaining elections thereunder that have resulted in full and fair expression of the public will, and, from the current of authority, the following may be stated as the approved rule: All provisions of the election law are mandatory, if enforcement is sought before election in a direct proceeding for that purpose; but after election all should be held directory only, in support of the result, *unless of a character to affect an obstruction of the free and intelligent casting of the vote or to the ascertainment of the result, or unless the provision affects an essential element of the election,*[5] or unless it is expressly declared by the statute that the particular act is essential to the validity of the election, or that its omission shall render it void."

As to proof, the discussion under Point 1 also applies here, *i.e.*, not a single person testified that he or she was deprived of voting because only one polling place was provided.

While we do not condone irregularities, it is, we think, quite evident that no voter was deprived of the constitutional right to express himself in this election. We recognize, as mentioned by appellant, that it would have been well nigh impossible for a court order to have been obtained at 6:30 P.M., requiring that the polling place remain open until 7:30 P.M. However, the italicized language in both *Holland, as Collector* v. *Davies, supra,* and *Orr* v. *Carpenter, supra,* makes clear that where the failure to observe the statute affects an essential element of the election or prevents a fair ex-

[5]Emphasis supplied.

pression of the will of the electors, the rule is different[6].

Appellants are in error in stating that the burden of proof should have been placed upon the contestees, rather than the contestants. In *Pogue* v. *Grubbs,* 230 Ark. 805, 327 S.W. 2d 4, we pointed out that, in an election contest, the official returns are *prima facie* correct, and the burden is on the contestant to show to the contrary by affirmative proof.

Affirmed.

LIN MANUFACTURING COMPANY OF ARKANSAS, INC., ET AL v. HARRY COURSON

5-4765 436 S.W. 2d 472

Opinion Delivered February 3, 1969

[6]In **Bingamin v. City of Eureka Springs,** 241 Ark. 477, 408 S.W. 2d 607, the statute relative to the manner of applying for and voting an absentee ballot, was violated. Though the suit was not filed until after the election, we invalidated the votes of six persons, finding, in effect, that the violations were such as to obstruct the free and intelligent casting of the vote, and that the challenged ballots affected the result; in other words, the violations concerned an essential element of the election. The invalidation of the six ballots changed the election result.

Arnold, Hamilton & Streetman for appellants.

Switzer & Griffin for appellee.

George Rose Smith, Justice. The plaintiff-appellee, Harry Courson, was injured when a truck owned by Lin Manufacturing Company and being driven by its employee ran a stop sign and struck Courson's car. In appealing from a verdict and judgment for $55,000 Lin and its truckdriver question four rulings by the trial court and challenge the size of the verdict.

I. It is argued that the defendants were prejudiced by Courson's unnecessary references to the matter of liability insurance. On cross-examination counsel questioned Courson at some length about earlier incidents of injury and hospitalization. Courson was asked: "How many doctors have you consulted in the last few years concerning your various ailments?" In reply, Courson named eight doctors, including Dr. Reed.

Dr. Reed was not actually one of Courson's own doctors, having examined him at the defendants' request in connection with the lawsuit. On redirect examination Courson's attorney sought to make that fact clear. The following excerpt from the record shows what happened:

Q. Now you mentioned being examined by Dr. Reed.

A. Yes.

Q. At whose instance—why did you go see Dr. Reed?

A. Well, because the insurance company or someone—

MR. STREETMAN:

We object to that and we ask the Court to declare a mistrial. There is no insurance company here as a defendant, and we ask the Court for a mistrial.

THE COURT:

Overruled.

We perceive no reversible error. Plaintiff's counsel had a valid reason for wanting the jury to know that Dr. Reed was not Courson's own physician, for otherwise the jurors might have drawn an adverse inference from the plaintiff's failure to call Dr. Reed as a witness. Thus the question was put with apparent sincerity. When, as here, the reference to insurance occurs in good faith rather than in a deliberate attempt to prejudice the jury, an admonition by the court is ordinarily sufficient to correct the error. *Ragon* v. *Day*, 228 Ark. 215, 306 S.W. 2d 687 (1957); *Adams* v. *Summers*, 222 Ark. 924, 263 S.W. 2d 711 (1954); *Beatty* v. *Pilcher*, 218 Ark. 152, 235 S.W. 2d 40 (1950). No doubt

the court would have admonished the jury in this instance, but the defendants did not request that corrective measure. Instead, they asked only for a mistrial, to which they were not entitled.

II. Counsel for the plaintiff, in developing the proof of damages, called witnesses to show that two large companies in the vicinity had a policy against employing anyone with a history of back trouble (with which Courson was afflicted as a result of the collision). When it was brought out that the first company's policy was a written policy, defense counsel objected to the witness' testimony on the ground that the writing, which the witness did not have with him, would be the best evidence. It is now insisted that the objection should have been sustained.

The court was right. The best evidence rule comes into play when the contents of a writing or its exact wording is an issue in the case. When, as in the case at bar, the existence of the writing is merely a collateral matter, the rule does not apply. *St. Louis & S.F. R.R.* v. *Kilpatrick,* 67 Ark. 47, 54 S.W. 971 (1899). Moreover, as McKelvey points out: "There is a distinction between proving a fact which has been put in writing and proving the writing itself. Because a fact has been described in writing does not exclude other proof of the fact." McKelvey, Evidence, §345 (1944). Here the company's policy, which might have been an oral directive, was the fact to be proved. That the policy had been reduced to writing certainly did not exclude other proof of the basic fact.

III. Near the beginning of his closing argument Courson's attorney said to the jury: "I think I would like to caution you and possibly use at this time—one of the purposes of a jury—the golden rule of do unto others as you would have them do unto you." Defense counsel at once objected and asked for a mistrial. The court refused to declare a mistrial but did instruct the

jury to disregard the statement of counsel. (We do not agree with the appellants' insistence that the record shows that the "golden rule" argument was renewed even after the courts ruling.)

We find no error. It is true, as pointed out in *Russell* v. *Chicago, R.I. & P. R.R.,* 249 Iowa 664, 86 N.W. 2d 843 (1957), and in the annotation to that case in 70 A.L.R. 2d 927, that it is improper for a plaintiff's attorney to urge the jury to apply the golden rule by putting itself in the plaintiff's position and awarding whatever amount the jurors would like to receive themselves for a similar injury. Here, however, counsel never reached the point of actual prejudice, because his argument was interrupted at the first reference to the golden rule, without its implications having been developed in an improper way. In the circumstances the court's prompt admonition to the jury was sufficient, the error not being so serious as to call for a mistrial.

IV. After the verdict was received, the defendants' lawyer went into the jury room and found a piece of paper on which 12 numbers totaling $649,400 had been added up and divided by 12, giving a quotient of $54,-110. It is now insisted that the verdict for $55,000 was demonstrably a quotient verdict that should be set aside under our ruling in *Williams* v. *State,* 66 Ark. 264, 50 S.W. 517 (1899). Counsel concede, however, that our more recent cases, such as *Arkansas State Highway Comm.* v. *Vandiver,* 240 Ark. 26, 397 S.W. 2d 802 (1966), uphold quotient verdicts as being distinguishable from verdicts obtained by lot. We are urged to overrule the *Vandiver* case and its predecessors to the same effect, but we decline to do so. In our judgment they correctly state the law.

V. We cannot say that the verdict is so excessive as to indicate passion or prejudice or to shock the conscience of this court. Courson suffered a severe back injury. He was in traction in hospitals for 18 or 19

days and later was in a hospital for another three days while undergoing a painful myelogram. His past and future medical bills, plus the damage to his car, exceed $3,000.

The pain resulting from the injury has been extensive and severe and will continue to be so in the future. During more than nine months between the accident and the trial Courson was almost constantly in pain. He was unable to sleep for more than three hours at a time, often being compelled to get up and walk around the house or lie down in front of the fireplace with his back to the heat. He must wear a back brace that adds materially to his discomfort. The pain will continue in the future with little likelihood that it can be relieved by surgery, which Courson is unwilling to submit to.

Courson was 44 at the time of his injury, with an expectancy of 28 years. He was employed by the Game and Fish Commission as a game warden, in an outdoor job involving much driving, hiking, and other strenuous activity. He had not served long enough to have accumulated retirement benefits.

Courson's injury resulted in a disability of 20% to his body as a whole. Although he was still employed at the time of the trial, he was not able to perform all his duties and will be in constant jeopardy of losing his job. He is not trained for anything except outdoor work involving strenuous exertion. Should he lose his present position there is much doubt about his ability to find other comparable employment. We have already mentioned the policy that some employers are shown to have against the employment of persons with a history of back injuries.

We think, without detailing all the facts in the record that bear upon the amount of the verdict, that we may conclude the discussion by observing that we are

unanimous in the belief that the award is not demonstrably excessive.

Affirmed.

HARRIS, C.J., and BYRD, J., dissent as to Point I.

WALTER LEE COOK, EMPLOYEE v. J. TURNER BROWN, ET AL

5-4788 436 S.W. 2d 482

Opinion Delivered February 3, 1969

H. Clay Robinson for appellant.

Shaw, Jones & Shaw for appellees.

LYLE BROWN, Justice. This is an appeal from an affirmance by the circuit court of a Workmens Compensation Commission order. The commission refused

to set aside its award made to appellant, Walter Lee Cook, on the basis of a joint petition filed by Cook and his employer, J. Turner Brown, and Truck Insurance Exchange. The latter two parties are the appellees. In denying Cook's application for voidance of the award, the commission held it was without jurisdiction to set aside the order of award or to reopen the case. The correctness of that holding is the single issue on appeal.

Cook was injured on August 20, 1965, while employed by Brown. On September 9, 1966, the employer, employee, and insurance carrier submitted a joint petition to the commission. A lump sum settlement was proposed, based on fifteen per cent permanent partial disability. A hearing was conducted, at which claimant testified, and an order was entered granting the petition. In conformity with that order, Truck Insurance Exchange paid over the awarded amount, being $2,329.25.

In August 1967, slightly less than one year after the award, Cook filed a petition with the commission to set aside the joint petition award. He stated that he "was incapable of understanding the legal ramifications" relevant to the joint petition and thought his claim would remain open. Finally he asserted that his disability had subsequently increased to thirty per cent. From an examination of the petition itself, the commission held it was without jurisdiction to set aside the joint petition award. That conclusion was based on Ark. Stat. Ann. § 81-1319 (1) (Repl. 1960):

> (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.

We view § 81-1319 (1) as the statutory method for effecting a compromise settlement. It of course anticipates negotiations between the parties prior to the filing of the petition. When they agree upon a figure of settlement they must come before the commission for approval. In the interest of the claimant the statute requires a hearing; testimony is taken and any necessary investigation by the commission is authorized; then it must be determined that the proposed settlement is in the best interest of the injured worker. If the commission approves the proposed settlement it then enters an order of award. That award "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." Because of the finality of the procedure, we perceive (as is evident in the record here) that the commission is careful to follow its duties under the statute, which are designed to protect the worker.

In upholding the commission's position that it had no jurisdiction of claimant's petition to set aside the award, we look to the allegations of that petition. It should be first pointed out that there is no allegation of fraud or insanity. With commendable candor, the petition states that "through no fault of anyone" claimant was incapable of understanding the legal ramifications of the petition; that because of that impediment he thought he was being paid for injuries to date; and that the claim would remain open to take care of any increase in disability subsequent to the settlement. Those as-

sertions are contrary to the express language of the joint petition, and, we might add, in direct conflict with the record made at the hearing at which claimant testified.

No statute similar to § 81-1319 (1) from any jurisdiction has been called to our attention. We do find an Illinois statute which is comparable. Smith-Hurd Ann. St. Ch. 47-48 § 156, par. (h), precludes review by the commission of any lump sum award or settlement contract approved by it. That statute has been held to estop review by the commission of such a settlement even for alleged fraud. *Michelson* v. *Industrial Commission,* 31 N.E. 2d 940 (1941). A somewhat similar statute in Oklahoma has been likewise interpreted. *Gibbins* v. *Indian Electric Cooperative,* 219 P. 2d 634 (1950); *Indian Territory Illuminating Oil Co.* v. *Ray,* 5 P. 2d 383 (1931). In both jurisdictions the claimants were referred to the courts for relief. We cite those cases only to show that other jurisdictions are extremely cautious about giving to their commissions the power to review their own joint and final awards. Their reasoning is to the effect that the statutes are so clear that to hold otherwise would be to legislate by judicial pronouncement.

Our statute is unambiguous. It is fortified by the wording of Ark. Stat. Ann. § 81-1326 (Repl. 1960). That section provides for the modification of awards generally; however, it specifically excepts from its provisions those awards made under § 81-1319 (1).

We hold that neither the statute nor any inherent powers of the commission, considering the state of claimant's pleadings, would justify its reopening of the joint settlement.

Affirmed.

RUSSELL LEE, ET AL v. ERNEST WATKINS, ET AL

5-4779 436 S.W. 2d 479

Opinion Delivered February 3, 1969

W. R. Hastings, Jr. for appellants.

Chapman & Wiley for appellees.

JOHN A. FOGLEMAN, Justice. This case requires that we determine whether the evidence was sufficient

to support a finding of liability for wilful and wanton negligence under the guest statute. It arose out of an automobile collision which occurred on November 19, 1966, at the intersection of United States Highways 67 and 67C near Judsonia. Ernest Watkins brought this action individually and as father and next friend of Eva Watkins. He charged Richard Lee, the driver of a vehicle in which his daughter was a passenger with wilful and wanton negligence and alleged that the conduct of Richard Lee was imputed to his father Russell Lee. He also charged James Edward Roberts, allegedly the driver of the other vehicle involved in the collision, with ordinary negligence. The evidence, as set out in the abstracts and briefs of the parties, shows:

Eva Watkins was the guest of Richard Lee in an automobile owned by Russell Lee. Both of them were under the age of 18 years. During the evening they had driven around in the vicinity of the intersection and had picked up another couple with whom they attended a movie in Searcy. They had traveled through the intersection at which the collision occurred at least three times that night, approaching it from different directions on different occasions. On one of these occasions they had made the approach from the same direction as that from which the Lee automobile was proceeding at the time of the collision. United States Highway 67 is the preferred highway. There are stop signs facing traffic approaching the intersection from Highway 67C on each side of Highway 67. Richard had stopped at each of these signs at least once during the evening. Immediately before the collision Richard and Eva had stopped at the home of Gary Landis, which is about 500 feet east of the intersection, to take the other couple to the automobile they had left there. Richard and Eva proceeded immediately toward the intersection talking in general about things. Eva remembers that Richard did not slow down at the intersection and remembers looking back and thinking that if a car she saw was far enough away it would not hit them. As they started

to turn she opened her mouth to scream and then "everything happened." Richard had moved to the community about a year before the accident, but there is no evidence as to how long he had lived in White County. The conclusion from the evidence that Richard proceeded into the intersection without stopping is inescapable. When he did so he collided with the Roberts vehicle. Roberts was killed and Eva seriously injured.

The case was tried without a jury. The circuit judge entered a judgment against the Lees in favor of Ernest and Eva Watkins, having found as a fact that Roberts was guilty of no negligence and that Richard Lee was wilfully and wantonly negligent in that he ran a stop sign at an intersection he knew to be dangerous and drove onto a highway which he knew to be extraordinarily heavily traveled without slowing down or exercising any caution whatsoever. We conclude that the judgment must be reversed for want of substantial evidence to support the court's finding as to Richard Lee.

Our statutes prohibit recovery by a person transported as a guest in an automobile from the owner or operator unless the vehicle is wilfully and wantonly operated in disregard of the rights of others. Ark. Stat. Ann. § 75-913 et. seq. (Repl. 1957). The terms of the statutes have been held to require wilful and wanton negligence or wilful and wanton misconduct. *Cooper* v. *Calico,* 214 Ark. 853, 218 S.W. 2d 723; *Froman* v. *J. R. Kelley Stave & Heading Co.,* 196 Ark. 808, 120 S.W. 2d 164; *Spence* v. *Vaught,* 236 Ark. 509, 367 S.W. 2d 238.

Even when we consider the testimony in the light most favorable to appellees, it is insufficient. The applicable test was set out in *Carden* v. *Evans,* 243 Ark. 233, 419 S.W. 2d 295, where we said, "In order to constitute the wilful misconduct required, there must be a conscious failure to perform a manifest duty in reckless disregard of natural or probable consequences to the life or property of another, as distinguished from gross

negligence which does not involve such reckless disregard of consequences. *Splawn* v. *Wright*, [198 Ark, 197, 128 S.W. 2d 248]. There must be a wilfulness, a wantonness and indifferent abandonment in respect of consequences, applicable alike to self and guest. *Cooper* v. *Calico*, 214 Ark. 853, 218 S.W. 2d 723." The burden of proving wilful and wanton misconduct was upon the guest, appellee herein. *Poole* v. *James*, 231 Ark. 810, 332 S.W. 2d 833; *Carden* v. *Evans*, supra.

The only evidence from which any inferences as to the conduct of young Lee could have been drawn was the testimony of Eva Watkins concerning the running of the stop sign. This occurred at about 11:30 p.m. The testimony indicates that Richard Lee did not slow down as he approached the intersection, but he had started the automobile at the Landis residence only 500 feet away. There is nothing to indicate the speed at which he was driving when he approached or entered the intersection. The question to be determined, then, is whether a finding of wilful and wanton misconduct may be predicated upon the fact that the host driver ran a stop sign.

We have never dealt with the exact question. In *Bridges* v. *Stephens*, 238 Ark. 801, 384 S.W. 2d 490, we held that a jury question as to wilful and wanton misconduct was presented when there was evidence that the host driver was intoxicated at the time of a collision resulting from his running a stop sign.

A review of authorities from other jurisdictions having a guest statute requiring wilful and wanton negligence or misconduct indicates that there must be some evidence other than the simple running of a stop sign to constitute the required reckless disregard of the probable consequences. It has been held that an admission by a driver that he had seen the stop sign together with a testimony that he ran the stop sign was sufficient to make a question of fact for the jury. This

holding was based in part upon a conflict in the evidence as to whether the driver first stopped and then started up or simply ran into the intersection without stopping. *Rench* v. *Bevard,* 29 Ill. App. 2d 174, 173 N.E. 2d 1 (1961). In *Rickner* v. *Haller,* 124 Ind. App. 369, 116 N.E. 2d 525 (1954), it was shown that the driver saw the stop sign, knew it was there, and knew that he was violating the law when he did not stop before proceeding into the intersection at a time of day when he knew the highway was heavily traveled. There was testimony that the driver of the other car involved in the collision sounded his horn three times, even though the host driver, driving with his window down, denied hearing any horn.

In *Tuttle* v. *Reid,* Ind. App., 198 N.E. 2d 610 (1964), a jury question was found in conflicting evidence as to whether the host driver had previous warning of the stop sign or of the approach of the other vehicle involved. The court said that the evidence was weak. Our cases require strong and convincing evidence. See *Carden* v. *Evans,* 243 Ark. 233, 419 S.W. 2d 295. There was also evidence in the *Tuttle* case indicating that the host driver accelerated his speed after being warned of the danger. In *Jenkins* v. *Sharp,* 140 Ohio St. 80, 23 Ohio Op. 295, 42 N.E. 2d 755 (1942), the court held that there was a jury question where the motorist's view to his right as he approached the main thoroughfare was obstructed by a dwelling house and hedge, and there was evidence that the host driver saw the stop sign but proceeded through it at a speed of from 35 to 50 m.p.h. In *Goncalves* v. *Los Banos Mining Co.* 58 Cal. 2d 916, 26 Cal. Rptr. 769, 376 P. 2d 833 (1962), there was evidence that the stop sign was plainly visible and even though the guest passenger gave warning of it 200 feet away, the driver proceeded at 60 m.p.h. without looking either to his right or to his left or applying his brakes. In *McCarty* v. *O. H. Yates & Co.,* 294 Ill. App. 474, 14 N.E. 2d 354 (1938), the driver turned east on the wrong side of the highway and veered over the entire

surface of the pavement after running the stop sign. The language of the court in *Murphy* v. *King,* 284 Ill. App. 74, 1 N.E. 2d 268 (1936) where the driver ran a stop sign and narrowly missed another vehicle only one block from the collision intersection at 30 to 40 m.p.h., and was warned by the guest of the stop sign as she approached the collision intersection is significant. The court said: "It may well be that the segregated single act of passing a street light, exceeding speed, the unobservance of a through street, taken by themselves would not show wilfulness or wantonness, but taken in the light of the situation under which the act was performed, together with the result flowing therefrom, shows such a conscious indifference as to consequences as to render defendant's act wilful and wanton."

No useful purpose would be served by reviewing other authorities in which it was held that a jury question was, or was not, presented, as the cases above reviewed seem to be typical. For cases holding that a jury question was not presented see 3 A.L.R. 3d 430.

We determine that it is the decided weight of authority that the mere showing that a host driver failed to stop at a stop sign unaccompanied by any other evidence justifying an inference that the driver acted with a conscious indifference to the consequences to himself or his guest is insufficient to support a finding of wilful and wanton misconduct. We adopt that view.

It is urged that young Lee's acquaintance with the intersection and knowledge that the superior highway was heavily traveled constitute the required additional evidence. Although we might agree if this incident had occurred at an hour of the day when traffic was known to be heavy, there is nothing to indicate the volume of traffic at 11:30 p.m. Neither is there anything to show that Richard Lee would not have been justified in thinking that the traffic would be very light at this time of the night. We are not required, in this case,

to decide whether it must be shown that a host driver was actually conscious of impending danger. Unlike many of the cited cases, there is nothing to show that the host driver in this case either was, or should have been, conscious of the presence and approach of the Roberts vehicle and proceeded into the intersection in spite of this knowledge.

The judgment is reversed and the cause dismissed.

L. R. HUDGINS AND GENE HUDGINS, D/B/A L. R. HUDGINS AND SONS V. LONNIE MAZE

5-4768 437 S.W. 2d 467

Opinion Delivered February 3, 1969

[Rehearing denied March 10, 1969.]

Pearson & Pearson for appellants.

Lewis E. Epley, Jr. for appellee.

J. Fred Jones, Justice. Lonnie Maze filed a damage suit in the Madison County Circuit Court against L. R. and Gene Hudgins, d/b/a L. R. Hudgins and Sons, for personal injuries sustained by Maze when his hand was injured between a V belt and pulley on an electric motor while he was employed by Hudgins. A jury trial resulted in a judgment for Maze in the amount of $5,000 and Hudgins has appealed.

Appellants are engaged in the egg producing business and operate several large laying houses. In three of the houses electric motors are used to operate fans, egg belts, feed conveyors and scrapers which are used to remove litter from the floors. All electric motors used in the laying houses are equipped with guards over the belts and pulleys except those motors which run the fans and the ones which operate the scrapers. Appellee Maze worked in one of these houses and as a part of his duties he cleaned litter from the laying house floor by use of electrically operated scrapers.

Each electric motor operates two scrapers attached to a single cable. The cable is wound into five grooves on the surface of two adjacent and horizontal steel drums or cylinders, referred to as a "winch." The winch is turned either direction by a reversible electric motor with a two-way or reversible switch located three or four feet above the winch and motor. The power from the electric motor is transmitted to the winch through a V belt and pulleys attached to the motor and to the gears

on the winch. As one scraper is being loaded the other one returns empty and the process is reversed by reversing the motor and the direction the cable travels around the winch.

In the usual operation a loaded scraper would occasionally hang on something or stick to the floor, and when it would break loose in the course of operation, the sudden excess slack in the cable would cause the cable to jump out of its groove on the winch drum and it would become necessary to stop the motor, pry the cable to the cylindrical surface of the winch drum and wind the cable back into its groove on the drum by manually pulling the V belt between the motor and winch, thus turning the pulleys as well as the motor and winch. The appellee was engaged in this operation when he was injured.

On the day of the injury Clarence Harshfield was working in the laying house with the appellee. Harshfield was first employed by appellants to gather up eggs in baskets, but he had been assigned to cleaning the laying house on the day appellee was injured. In operating the scraper equipment, Harshfield caused a cable to come off the winch and he sought appellee's assistance in replacing the cable. The appellee pried the cable partially back onto the winch with a screwdriver and directed Harshfield to hold the screwdriver under the cable while appellee turned the pulleys and belt. Appellee told Harshfield not to touch the switch to the motor, but while the appellee was in the process of turning the belt and pulleys, Harshfield turned the switch and started the motor. Appellee's right hand was caught between the belt and a pulley, thereby amputating a part of one finger and severely injuring another.

In his complaint the appellee alleged unsafe working conditions consisting of unguarded belts and pulleys on electric motors and also the hiring and retention of an incompetent fellow-servant, or co-employee, in the

person of Harshfield, as proximate causes of appellee's injury. The appellants answered by general denial and they affirmatively pleaded contributory negligence and assumption of risk. The appellants have designated the following points upon which they rely for reversal:

> "The trial court erred in refusing to instruct the jury to return a verdict for defendants on the issue of lack of proper guards on the machine and on the issue of plaintiff's assumption of risk of dangers because of the lack of guards.
>
> The trial court erred in refusing to instruct the jury to return a verdict for defendants on the issue of the incompetency of Clarence Harshfield and on the issue that defendants did not know that Harshfield was an incompetent employee, if, in fact incompetent.
>
> The trial court erred in refusing to instruct the jury to return a verdict for the defendants on the issue that plaintiff assumed the risks arising from the incompetence of Harshfield.
>
> The trial court erred in refusing to instruct the jury to return a verdict for the defendants, on all the issues, and to return a verdict for defendants for reason that negligence of Harshfield, as a fellow-servant, was sole cause of injury and for which negligence defendants are not liable."

It is thus seen that on all four of its designated points, the appellants allege error in the trial court's refusal to instruct the jury to return a verdict for the appellant. We conclude that there was sufficient evidence to go to the jury on all four points.

In *Hawkins* v. *Missouri Pacific Railroad Company, Thompson, Trustee,* 217 Ark. 42, 228 S.W. 2d 642, we said:

"A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men could possibly find the issues for the plaintiff. In such circumstances the trial judge must give to the plaintiff's evidence its highest probative value, taking into account all reasonable inferences that may sensibly be deduced from it, and may grant the motion only if the evidence viewed in that light would be so insubstantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury."

As to assumption of risk, Prosser, Law of Torts, 3rd ed., § 67, p. 453-54, says:

"... [A]ssumption of risk is a jury question in all but the clearest cases. Citing, *Pona* v. *Boulevard Arena,* 1955, 35 N.J. Super. 148, 113 A. 2d 529."

From the *Pona,* case, supra:

"It is well settled that a dismissal by the court on the ground of assumption of risk ... may only be entered in the clearest case where a contrary hypothesis is not fairly admissible. * * * The elements 'must be of such a prominent and decisive character as to leave no room for a difference of opinion thereof by reasonable minds.' * * * The facts must appear clearly and convincingly, or as the necessary and exclusive inferences to be drawn by all reasonable men in the exercise of a fair and impartial judgment; otherwise the question is for the jury."

Spradlin v. *Klump,* 244 Ark. 841, 427 S.W. 2d 542, relied on by the appellants is distinguished on the facts from the case at bar. In that case Spradlin stuck his hand into the moving parts of a mechanical hay baler

operated by a power take off from a farm tractor. He was manager of the whole operation and knew more about a hay baler than his employer did. Spradlin simply stuck his hand into the machinery while it was running rather than walk to the tractor and disengage the gears or turn the switch off and stop the machinery. In that case we affirmed the trial court who directed a verdict for the defendants in the first place, and in doing so, we said:

> "... [T]he 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 *Cockerham* v. *Barnes,* 230 Ark. 197, 321 S.W. 2d 385, the appellant employer directed the appellee and a fellow-employee to make some repairs on an irrigation pipe. The plan, as outlined by appellant, contemplated that the fellow-employee would close the shut-off valve through which the water passed from the main line to the lateral, while appellee went across the field to remove the plug from the end of the lateral. Prearranged signals between the employees apparently were not understood, and when the appellee removed the plug from the end of the lateral, he was severely injured due to the unexpected water pressure.

On appeal from a judgment for personal injuries, the appellant insisted that appellee's injury was due solely to the negligence of a fellow-servant for which the employer was not liable at common law, and that appellant was entitled to a directed verdict. In affirming the judgment, this court said:

> "It is settled, however, that the fellow servant rule does not relieve the master from liability if his own negligence is a contributing cause of the

injury. Shearman & Redfield on Negligence (Rev. Ed.), § 196.

> ... Even though Barnes had helped to install this system the jury was not compelled to conclude that he should have realized that to stand in front of the plugged lateral was somewhat like standing before a loaded cannon. * * * It was for the jury to say whether the defendant was guilty of negligence that was a proximate cause of the injury."

In *E. L. Bruce Company* v. *Leake,* 176 Ark. 705, 3 S.W. 2d 988, the appellee, a brakeman, was injured when the train car upon which he was standing, his feet in the stirrup, moved against a stump which he alleged had been negligently left standing close to the track. The appellant contended that the appellee had assumed the risk, but in affirming a judgment for the appellee, this court said:

> " 'When a servant enters into the employment of any one, he assumes the ordinary risks and hazards which are incident to the service and this includes all those defects and dangers which are obvious and patent. He assumes all the risks which he knows to exist and all those which are open and obvious.'
>
> The above is a correct statement of the law, but it will be observed that it refers to the ordinary risks and hazards incident to the service. And it is true that he assumes the obvious risks, but, because an obstruction is near the track and the object itself or obstruction is obvious, does not necessarily mean that the risk or hazard is obvious. The servant does not assume any risk or hazard caused by the negligence of the master, unless he knows that the risk or hazard exists.
>
> * * *
>
> This court has many times held that, while an employee assumes all the risks and hazards usually

incident to the employment he undertakes, he does not assume the risk of the negligence of the company for whom he was working, or any of its servants. He has a right to assume, not only that the master will perform its duty, but he has a right to assume that each of the other servants will perform their duty, and if, while in the exercise of ordinary care, he is injured either by the negligence of the master for whom he works or by the negligence of any other servant of the master, he has a right to recover."

There is no question that appellants knew, or by the exercise of reasonable care should have known, that the scrapers sometime hung causing the cable to jump off the winch in this case. The appellants knew, or should have known, that when this happened the appellee, or whoever replaced the cable, did so by prying it up with a screwdriver, or other instruments, and then slowly turning the cable back onto the winch by manually turning the winch through pulling on the V belt between the two pulleys by hand. As a matter of fact, appellant Hudgins testified that it would not be practical to place a guard over the belt as the guard would have to be removed in order to get to the belt. We are of the opinion that the jury could have reasonably concluded from the evidence in this case, that the belt and pulleys were purposely left unguarded for the very purpose of permitting employees to conveniently reach the belt for the purpose of manually turning the winch in reinstalling the cable when misplaced.

We are of the opinion that the jury could have reasonably found that this operation was comparatively safe when carefully done while the motor was not running, but be that as it may, it was a question for the jury as to whether appellants could have, and whether the appellants should have, placed guards over the pulleys to protect a workman whose known duty it was to re-

place the cable by pulling on the belt between the two pulleys.

We cannot say that there was no evidence from which the jury could have found that the fellow-employee Harshfield was incompetent and that the appellants knew, or should have known, of his incompetency.

At the time of appellee's injury, Harshfield's full-time job was to clean out the chicken houses and spread the litter from a truck onto the land. Harshfield's competency or incompetency in gathering eggs in baskets or driving a truck and spreading chicken house litter on the land is not in question here. The incompetency complained of in this case is in connection with the operation of the scrapers in general, and putting the cable back on the winch in particular, by pulling the V belt on the motor by hand as was required.

Harshfield was operating the scraper, he failed to loosen the scraper with a 2x4 appellee kept handy for that purpose. He caused the cable to get off the winch and he was required to put it back on if he could. He called appellee to assist him in putting the cable back onto the winch. The appellee proceeded as he had previously done when he, himself, was operating the scraper. He placed a screwdriver under the cable and told Harshfield to hold it while he, appellee, turned the belt. He told Harshfield to keep away from the switch and while appellee was pulling on the belt, Harshfield engaged the switch and started the motor.

The appellee testified that Harshfield was careless and reckless. Their supervisor, Mr. Franks, testified that Harshfield was not a good man to have working around machinery; that he didn't understand machinery very well. Juanita Evans, another fellow-employee, testified that Harshfield would "just be talking to me and just kind of absent mindedly turn off the switch that was running my belt, and sometimes I would have

to tell him to turn it back on and sometimes he would flip it up and then back on." She says that she reported this to supervisor Franks. Appellant Hudgins testified as to Harshfield's competency in operating the scrapers by pointing out that all he had to do was throw the two-way switch. It was not Harshfield's *competency* in throwing switches that was complained of in this case, it was his *incompetency in throwing switches at the wrong time.*

It is not for us to determine whether Harshfield was or was not a competent employee. The question before us is whether the trial court erred in refusing to withdraw that question from consideration by the jury by directing a verdict for the appellants. We are of the opinion that the trial court did not err on this point and we conclude that the jury could have reasonably found that the proximate cause of appellee's injury was the unguarded belt pulleys coupled with Harshfield's incompetency in throwing electric switches at the wrong time.

In Prosser, Law of Torts, 3rd ed. § 67, p. 453, in discussing assumption of risk and contributory negligence is found the following:

> "Where they have been distinguished, the traditional basis has been that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable man, however unaware, unwilling, or even protesting the plaintiff may be."

Contributory negligence is measured by the actions of any reasonably prudent person under same or similar circumstances, and assumption of risk is measured by the acts of the particular individual in the light of his own knowledge of the risk involved. So, from all the

evidence in this case, we are unable to say that reasonable minds could not differ as to the fact issues raised by the pleadings and proof, and we conclude that the judgment of the trial court should be affirmed.

Affirmed.

BROWN, FOGLEMAN and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice. I would reverse the judgment of the trial court and dismiss the complaint.

I cannot imagine a clearer case of assumption of risk by an employee, even when the evidence is given its strongest probative force in his favor and all possible inferences are drawn in his favor.

Appellee had considerable experience working around machinery. He knew that the motors, pulleys and belts in question did not have guards on them. He knew of the tendency of the scraper to hang. He well knew that the cable had a tendency to jump off the winch when the scraper was not properly broken loose. He undertook, on this occasion as he had done before, to replace the cable on the winch by prying it upward with a screwdriver and running it on with his hand while the motor was not running. He was aware of the danger inherent in attempting this operation while the motor was running and warned his fellow servant not to close the switch that would activate the motor. He continued to work around the equipment and undertook to remedy the situation which arose on the day of his injury in spite of his awareness of all the dangers involved. He admitted testifying in a discovery deposition that he knew that the machine was not safe because of lack of safety devices and guards but that he did not report this fact to anyone. He also admitted having said that he knew the situation was dangerous when he undertook the work he was doing when injured and that he might hurt his hand. He also stated on the

discovery deposition that he continued to work on this machine without objection on his part and without being led to believe that it was safe. He stated that he was willing to continue his work realizing the hazards.

I think that it is equally clear that Maze assumed the risk arising from the incompetence of his fellow servant Harshfield. He undertook to replace the cable on the winch in response to Harshfield's request for help. Appellee admitted knowing that Harshfield was a reckless and careless employee through personal knowledge and observation while working with him before the injury. He admitted that he knew he could not depend on Harshfield and had to watch him and that it was dangerous not to watch him.

It has long been settled in this state that when it appears to be clear that the servant has knowledge of and appreciates the danger incident to his work, or that the danger is so obvious or apparent that knowledge and appreciation thereof should be imputed to him, then the court should declare as a matter of law that the servant is not entitled to recover. *Brackett* v. *Queen,* 162 Ark. 525, 258 S.W. 635; *Gaster* v. *Hicks,* 181 Ark. 299, 25 S.W. 2d 760.

The same rule applies even though the danger arises from the negligence of the master. *Western Coal & Mining Co.* v. *Corkille,* 96 Ark. 387, 131 S.W. 963. If the servant continues to work after he discovers the defective conditions, he assumes the risks of his continued service. *Greenville Stone & Gravel Co.* v. *Chaney,* 129 Ark. 95, 195 S.W. 13.

If a servant voluntarily works with an appliance known to him to be defective, realizing its dangerous condition, he assumes the risk thereof and cannot recover from the master for the resulting injury. *Helena Hardwood Lumber Co.* v. *Maynard,* 99 Ark. 377, 138 S.W. 469. If the dangerous condition was apparent to

appellee and he proceeded to use the machinery without complaint, he assumed the risk of injury incident to its use. *Hall* v. *Patterson,* 205 Ark. 10, 166 S.W. 2d 667.

The employment and retention by a master of a servant who is incompetent because of his habits, or for any other reason, with actual or constructive knowledge of the servant's unfitness is equivalent, for the purpose of determining the master's liability, to furnishing a defective appliance. *Arlington Hotel Co.* v. *Tanner,* 111 Ark. 337, 164 S.W. 286. The same rules governing the fixing of liability, including those applying to assumption of the risk by a fellow employee are applicable. See *St. Louis, I.M. & S. Ry. Co.* v. *Hawkins,* 88 Ark. 548, 115 S.W. 175; 35 Am. Jur. 774, Master & Servant § 347. Reason and logic support this analogy.

There are several cases decided by this court which are strikingly similar to this one. In *Fullerton* v. *Henry Wrape Co.,* 105 Ark. 434, 151 S.W. 1005, it was held that an experienced operator of a circular saw in a lumber mill assumed the risk of fatal injury by a piece of lumber being thrown back by the saw, due to want of a guard and to the fact that a device designed to prevent "pinching" of pieces being sawed was insufficient, especially where he was shown to have realized the danger through having made complaint about the defective condition before the accident occurred. In *Pekin Stave Co.* v. *Ramey,* 108 Ark. 483, 158 S.W. 156, this court said:

> "* * * The testimony shows conclusively that he knew the manner of operation of the cut off saw which was open and obvious; that he was a grown man of reasonable intelligence, and made no complaint about the operation of it without a shield or hood, and, if the stave company was negligent in so operating it, he assumed the risk incident to its operation, and could not hold the master liable for injuries received by him on account of its being operated without a hood. * * *"

In *Ward Furniture Manufacturing Co.* v. *Weigand,* 173 Ark. 762, 293 S.W. 1002, this court reversed a judgment for error of the trial court in not directing a verdict for the employer. The reversal was based upon the uncontradicted evidence of the employee, which this court said showed that he was not entitled to recover by reason of assumption of the risk. The employee's testimony was outlined as follows:

> "* * * The substance of the proof is that appellee had been working for the appellant continuously from the 28th day of December, 1921, until the date of his injury, which was on October 22, 1925; that he was injured on one of the older dovetail machines, which he had operated at intervals from the time he began working for appellant to the date of his injury. When he first began working on this machine, it was located on the floor of the factory above, but, for approximately two years before the date of the injury, it had been located on the ground floor of the factory, and had a different instrumentality for switching the belt to the idle-pulley, but he had operated this machine on the lower floor at intervals as much as three or four hours at a time. He knew the machine did not have a guard on it to protect his hand from getting into the cog-wheels, and he knew that it never had had such a guard; he knew the location of the shifting lever relative to the cogs, that is, how close the end of the shifting lever came to the cogs; he knew that, if he got his fingers into the cogs, he would be injured, and says that, when he attempted to shift the belt at the time of his injury, he saw the shifting lever. He had never registered any complaint to appellant or to any of its officers or agents about the absence of a guard or that the machine was dangerous to operate in its then condition. He admitted that he was an experienced employee, thirty-five years of age, and represented himself to be an experienced machine man when he applied

for employment with appellant, and had been engaged in operating this and other machines for appellant for the past four years. There was a big electric light right over the machine, only a short distance above it, and was burning at the time appellee was hurt."

In *Standard Oil Co.* v. *Gray,* 175 Ark. 702, 300 S.W. 405, it was held that the trial court erred in not directing a verdict for the master. There an oil field roustabout, working on his own initiative in starting a gasoline engine, who was familiar with the method of starting the engine and necessarily knew and appreciated the danger incident thereto, was held to have assumed the risk of injury in removing a cap from the air mixer on the engine. If, in fact, Maze had complained of the lack of guards, or of Harshfield's recklessness and carelessness, he would not have been relieved from the operation of the doctrine of assumption of the risk unless he continued in his employment upon the master's promise to remedy the condition.

In view of our previous holdings, I do not see how we can say that there was any jury question in this case.

I am authorized to state that Mr. Justice BROWN and Mr. Justice BYRD join in this dissent.

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY v. FRANCIS NOGGLE, ET AL

5-4769 437 S.W. 2d 215

Opinion Delivered February 3, 1969

[Rehearing denied March 10, 1969.]

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

Lloyd Henry for appellee.

J. Fred Jones, Justice. This appeal is from a judgment of the White County Circuit Court awarding medical benefits and denying death benefits under a liability insurance policy issued by the appellant, Southern Farm Bureau Casualty Insurance Company, to Rosebud School District No. 35. The case was submitted to the trial court upon stipulation of facts, and was tried before the judge sitting as a jury. Southern Farm has appealed from that portion of the judgment awarding medical benefits, and the claimant for death benefits has cross-appealed from that portion of the judgment denying her claim.

The appellant has designated one point it relies on for reversal, as follows:

> "An automobile used in lieu of an insured vehicle at a time when an insured vehicle is available for use is not a substitute automobile."

The cross-appellant has designated one point, as follows:

> "The trial court erred in holding the policy did not cover the owner and driver of the substituted automobile, Forrest F. Noggle, as an insured."

The entire case concerns the interpretation of the coverage provisions of an insurance contract and the facts are not in dispute.

On July 1, 1964, Southern Farm issued its standard form automobile liability insurance policy to Rosebud School District No. 35, Rosebud, Arkansas, covering ten separately designated school busses belonging to the district. The contract was evidenced by printed form together with an additional endorsement or rider. The printed form portion of the contract was designed for individually owned vehicles with limited family, guest and authorized user coverage. The policy was made applicable to the school district by an attached "School Bus Endorsement," and the difficulty arises in the printed form provisions of the policy rather than the endorsement. The contract provided for the payment of limited medical and death benefits under certain conditions, the pertinent provisions of the policy being as follows:

"MEDICAL PAYMENTS—COVERAGE C

To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical and dental services, including prosethetic devices, and necessary ambulance, hospital, professional nursing and funeral services to or for:

DIVISION 1

(a) the named insured and, while residents of the same household, his spouse, and any relative of either, who sustains bodily injury, caused by accident, while in or upon, entering or alighting from, or through being struck by any automobile.

(b) in the event of death of the first individual named as insured by automobile accident, di-

rectly and independently of any other cause, while in or upon, entering or alighting from, or through being struck by any automobile, the sum of $5,000 less any payments otherwise made hereunder on account of injury.

DIVISION 2

(a) any other person who sustains bodily injury, caused by accident while in or upon, entering or alighting from the automobile while being used by or with the permission of the named insured or spouse.

VIII. TEMPORARY USE OF SUBSTITUTED AUTOMOBILES

While the described automobile is withdrawn from use, such insurance as is afforded by this policy applies to another automobile not owned by the named insured or spouse while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner."

The School Bus Endorsement provides, inter alia, as follows:

"1. PURPOSES OF USE ARE:

(1) Transportation for school children, students (except adult students), teachers, school officials, board members, nurses, and doctors to and from school, games and outings in connection with school activities.

(2) Occasional use for transporting special groups, such as 4-H Club, Future Farmers, Scouts, and Farm Bureau groups, parents or guardians of

school children, or organized groups, except when used as a public or livery conveyance.

(3) Family, personal, business and pleasure use."

The declarations attached to the policy with the School Bus Endorsement provide:

"C. MEDICAL PAYMENTS

1. a $2,000 each person

1. b $5,000

2. $2,000 each person."

On February 27, 1965, while the policy was in force, Forrest Noggle, a teacher, coach and employee of the Rosebud School District, was using his personally owned automobile for transporting Rosebud School basketball players to and from a basketball tournament which was an officially approved athletic event of the insured. Any one of the school buses designated in the insurance policy was available for the trip, but with the permission of the school officials and at district expense, Mr. Noggle used and drove his own vehicle in lieu of a school bus listed under the policy endorsement. Lanny Noggle and Darlene Noggle were both students of the Rosebud School and were participants in the basketball tournament. They were passengers in the Noggle automobile and were returning from the tournament when the Noggle vehicle was involved in a collision which injured Lanny and Darlene Noggle and took the life of Forrest Noggle.

The original suit forming the basis for this appeal, was brought against the appellant by Francis Noggle, as the surviving spouse of Forrest Noggle for death benefits, and as the mother and next friend of Lanny Noggle for medical benefits. L. H. Noggle joined in

the suit as father and next friend of Darlene Noggle for medical benefits. The complaint alleged that the personally owned vehicle of Forrest Noggle was a substitute automobile within the coverage of the policy of insurance issued by the appellant to the Rosebud School District and that appellees were entitled to recover under the medical pay and death benefit provisions of the policy. It is from this allegation that the difficulty arises.

The amounts sued for are within the policy limits and there seems to be no contention that if one of the insured's school buses had been involved, instead of the privately owned automobile, there would have been no question as to coverage. The point relied upon by the appellant presents the specific question of whether the personally owned vehicle being driven by Forrest Noggle at the time of the accident, was a temporary substitute vehicle within the meaning of the insurance policy. The exact language of the policy provision, as related to this specific question, appears in paragraph VIII of the policy, restated here with emphasis for distinction, as follows:

> "*While the described automobile is withdrawn from use, such insurance as is afforded by this policy applies to another automobile not owned by the named insured* or spouse *while temporarily used as the substitute for such automobile. This insuring agreement does not cover as an insured the owner of the substitute automobile* or any employee of such owner."

The above provision attaches no conditions at all as to *why* the insured vehicle must be withdrawn from use in order for the insurance to attach to a substituted vehicle. It is also noted that while this provision makes such insurance as is afforded by the policy (which includes medical benefits) applicable to a substitute automobile, it clearly eliminates the death benefits as to the *owner* of the substitute automobile.

Our decision in *Webb* v. *State Farm Mut. Ins. Co.*, 241 Ark. 363, 407 S.W. 2d 740, is of no assistance to the cross-appellant in the case at bar because the coverage on the substitute automobile in the *Webb* case applied when the described automobile was withdrawn from normal use because of specifically enumerated reasons. That is not the situation in the case at bar. In the *Webb* case the policy provided:

> "Temporary substitute automobile—means an automobile . . . temporarily used as a substitute for the described automobile *when withdrawn from normal use because of its breakdown, repair, serving, loss or destruction.*" (Emphasis supplied.)

And this court in commenting on the language of the policy in the *Webb* case, said:

> "The quoted section of the policy provides a specifically limited coverage as to a non-owned temporary substitute automobile when the automobile described in the policy is withdrawn from normal use by the insured because of its breakdown, repair, servicing, loss or destruction. This language is clear and emphatic."

The language of the policy provision in the case at bar does not provide such a "specifically limited coverage," which is so "clear and emphatic." The language of the policy provision in the case before us simply provides that such substitution may be effective "while the described automobile is withdrawn from use." If the appellant insurance company had intended to limit the conditions under which the insured vehicles were to be withdrawn from use before the insurance coverage would attach to substituted vehicles, it would have been a simple matter to have included such limitations in the contract it prepared.

The substitution of the automobile for a bus in this case could well have been prompted by the fact that the

small number of passengers attending the basketball tournament could be transported more economically in the automobile than in a school bus. But for whatever reason the substitution may have been made, the provision providing for the withdrawal and substitution is unlimited by purpose otherwise defined.

In *Washington Fire & Marine Ins. Co.* v. *Ryburn*, 228 Ark. 930, 311 S.W. 2d 302, this court said:

> "It is a settled rule in this state (and appears to be the general rule elsewhere) that policies of insurance will be interpreted and construed liberally in favor of the insured and strictly against the insurer, who wrote the insurance contract, and any doubt as to the meaning of language used, should be resolved in favor of the insured."

See also *Webb* v. *State Farm Mut. Ins. Co., supra.*

As to the point designated on the cross-appeal, we are of the opinion that the clear language of the policy provision, as emphasized supra, so clearly eliminates the owner of the substitute automobile as an assured under the contract, we would accomplish nothing in the way of additional clarity by adding more words to this opinion.

We conclude that the trial court was correct in the interpretation placed on the provisions of the insurance contract and that the judgment should be affirmed both on appeal and cross-appeal.

Affirmed.

FOGLEMAN, J., disqualified and not participating.

LLOYD E. MCFALL v. UNITED STATES TOBACCO CO., ET AL

5-4783 436 S.W. 2d 838

Opinion Delivered February 3, 1969

Daily & *Woods* for appellant.

Warner, Warner, Ragon & *Smith* for appellees.

J. FRED JONES, Justice. This is a workmen's compensation case and involves the question of whether the statute of limitations had run on a claim at the time it was filed with the Commission. A referee and the Commission held that it had. The matter is before us on appeal by the claimant from a judgment of the Sebastian County Circuit Court affirming the order of the Commission.

We examine the usual compensation case for a determination of whether there is any substantial evidence to support the order or award of the Commission, but in this case we have examined the record for matters that would toll the statute, or estop the appellees from pleading it, and we have found none.

We consider the facts to be clear, that the appellant sustained an injury to his right knee while in the course of his employment as a salesman for United States Tobacco Company. The injury was sustained on April 9, 1963, in a collision between the employer's automobile, insured by Continental Casualty Company, and an automobile driven by Lawrence Edwards, insured by State Farm Mutual Insurance Company. Continental Casualty also carried the workmen's compensation insurance for the claimant's employer, and is an appellee, along with the employer, in this case. An independent adjustment company investigated the accident on behalf of Continental Casualty under the automobile liability policy, and rendered its report to Continental Casualty on May 16, 1963, stating: "The assured driver, Lloyd McFall, sustained a sore right knee and right ankle, however, has not required any medical treatment."

The claimant reported his injury to his employer and the employer's first report of industrial injury (A-8) was made out by the employer under date of May 13, 1963, showing that appellant had sustained a knee injury; that the probable length of disability was not known; that the appellant had returned to work and that the name of his physician was Dr. Wideman.

On September 30, 1963, Dr. John W. Wideman rendered final surgeon's report and bill on printed form to Continental Casualty showing two visits by the claimant on May 13 and June 17, 1963. Dr. Wideman's reported diagnosis is blurred on the form he filled out, but it appears to be "possible tear of the medial meniscue and strain of its attachment to the ligament." Dr. Wide-

man reported that he recommended conservative treatment; that appellant was told not to squat or run; that appellant was improved and pronounced as able to return to work; that no time was lost from work as far as Dr. Wideman knew and he anticipated no permanent injury. Dr. Wideman stated his bill for services as $22.50.

Continental Casualty paid Dr. Wideman's bill and filed final report with the Commission on noncompensable injury form A-10, which was stamped "received on October 15, 1963." The record does not reveal whether the appellant received a copy of this form, A-10, but at the bottom of the form is printed the following paragraph:

> "Note to Injured Employee: This is a copy of a report furnished us by your employer or his insurance carrier relating the above information regarding your injury. As your disability extended for a period of less than seven days, you are entitled to no compensation. The above medical benefits have been provided for you and paid for by your employer, however, in accordance with the provisions of the Arkansas Workmen's Compensation Law. If there is any substantial error in this report, please notify the undersigned."

Doctor Wideman was recommended to the appellant by a claims representative for State Farm Mutual Insurance Company, Mr. Edwards' liability insurance carrier, and the appellant went to Dr. Wideman on his own initiative. The appellant returned to Dr. Wideman on March 9, 1964, and a report of this visit was sent by Dr. Wideman to State Farm Mutual Insurance Co. The appellees received no copy of this report and received no request for payment for this examination. On August 28, 1964, the appellant went to Dr. Hathcock of the Holt-Krock Clinic on his own initiative and made return visits on January 8, January 23, and May 12.

1965. The appellant terminated his employment with the appellee tobacco company on November 12, 1965. He was again seen by Dr. Hathcock on February 17 and June 29, 1966, and a torn cartilage was surgically removed from appellant's knee by Dr. Hathcock on July 7, 1966. Claim was filed with the Workmen's Compensation Commission for medical expenses, as well as temporary and permanent partial disability on October 21, 1966.

The crux of appellant's contention is set out in his points relied on for reversal, as follows:

> "No period of longer than one year intervened between visits to and treatment by Drs. Wideman or Hathcock, and said treatment amounted to 'compensation' within the meaning of the Workmen's Compensation Act.
>
> The employer's payment of the claimant's salary while he was disabled as a result of his occupational injury was in lieu of compensation or constituted 'compensation' within the meaning of the Workmen's Compensation Act.
>
> By their conduct, the respondents have waived the filing of a claim, within the statutory period, or they are estopped to assert such Statute of Limitations."

In effect, the appellant earnestly contends that this court should go further than it has heretofore gone in considering medical treatment and the payment of wages as payment of compensation for the purpose of extending the time, or tolling the statute of limitations, for filing claims with the Commission in workmen's compensation cases. The appellant cites numerous cases, of respectable authority, in support of his contention, but they are distinguishable on the facts from the case at bar.

The appellant is correct in his statement that we are committed to the rule under *Reynolds Metal Co.* v. *Brunley,* 226 Ark. 388, 290 S.W. 2d 211, "that where an employer furnishes an injured employee medical services, this constitutes a payment of compensation or a waiver which suspends the running of the time for filing a claim for compensation." The keystone to this rule is the two words "*employer furnishes.*" We have never held that medical services furnished by anyone *other* than the employer or his compensation insurance carrier, constitute payment of compensation or a waiver which suspends the running of the time for filing a claim for compensation. We are unable to see how an employer could *furnish* medical treatment without knowing, and without reason to know, that he is doing so.

The appellant testified as follows:

"Q. Now then, did you see Dr. Wideman after June of 1963?

A. I'm not sure about that. I know I did see Dr. Wideman on three occasions.

Q. As a matter of fact, in March of 1964 at the request of Jack Chancey didn't you go back and see him and he submitted a report to Jack Chancey on the State Farm Mutual Insurance Company?

A. Jack Chancey was the one that had recommended Dr. Wideman to start with.

Q. Jack Chancey is the claims representative for the insurance carrier of the adverse vehicle, the one you had the collision with, was he not?

A. I believe that's correct.

* * *

Q. Now then, you say you went to Dr. Wideman on those three occasions and then it was in August or September of 1964, before you went to Dr. Hathcock. Is that correct?

A. Yes.

Q. Who told you to go to Dr. Hathcock?

A. Well, I don't recall anybody—

Q. Mr. McGowan or United States Tobacco or Continental Casualty did not tell you to go to Dr. Hathcock, did they?

A. No.

* * *

Q. Well, why did you go to Dr. Hathcock?

A. I wasn't satisfied with the finding of Dr. Wideman. I was still having trouble with my knee, it was getting worse, and I felt that I should see another doctor.

Q. Now are you still under the care of Dr. Hathcock?

A. Yes.

Q. Have you been under the care of Dr. Hathcock continuously since you went to him on the first occasion up to the present time?

A. Yes.

* * *

Q. At the time you terminated from United States Tobacco in November, 1965, was anything said about any workmen's compensation benefits or the medical bills of Dr. Wideman? Did you make any demand upon United States Tobacco, Mr. McGowan or Continental Casualty Company for payment of any compensation benefits or medical bills that had been incurred?

A. No, I hadn't."

Mr. J. R. McGowan, appellant's supervisor while he was employed by the appellee tobacco company, testified, in part, as follows:

"Q. Did he [appellant] ever complain to you about his knee?

A. On making of daily reports I'm sure that he may have referred to the reason for losing time was due to that but I couldn't say exactly. I knew that he lost time, but for what reason I wasn't positive.

Q. Were you aware of the fact that he was still going to a doctor for his knee?

A. Not necessarily for a knee. I knew that he was going to a doctor. I didn't know for what, our reports indicated that that's what he had done.

* * *

Q. Mr. McGowan, were you aware that Mr. McFall was still having difficulty with his knee when he left United States Tobacco Company in November, 1965?

A. No.

Q. He was not saying anything to you about it at that time?

A. It wasn't mentioned.

Q. I'm not talking about a claim against United States Tobacco Company.

MR. SMITH: He understands the question.

Q. Were you aware of the fact that he was still having difficulty with his knee?

A. No."

The appellant, as well as appellant's former supervisor, testified that the appellant lost about thirty days from his work between the date of his injury on April 9, 1963, and his termination on November 12, 1965; that a part of this loss was occasioned by the knee injury and a part for other reasons and purposes. On this point, a part of the appellant's testimony is as follows:

"Q. Now then, during that period of time you continued to work for the United States Tobacco Company up until your separation in November of '65. Is that correct?

A. Yes.

Q. You say you missed thirty-three days. Can you tell us what thirty-three days you missed?

A. No, I couldn't off hand.

Q. You have no way of determining it?

A. I have no way of determining it.

Q. That's just a guess, isn't it?

A. It would be a rough estimate, yes.

Q. You missed work for several reasons during that period of time, did you not?

A. Well, yes, I missed work for several reasons.

Q. Prior to this accident you missed work for several reasons, did you not?

A. Yes.

Q. Illness, death in the family?

A. Yes.

* * *

Q. And you made no demands for any compensation benefits or weekly compensation benefits

at any time while you worked for United States Tobacco Company?

A. No.

Q. And you have no way—it could have been twenty days you missed, it could have been forty days you missed?

A. I have no record of the days.

Q. Did you miss any days by reason of—I believe you have testified you missed days for other reasons. Matter of fact, your Father was killed during this period of time?

A. Yes.

Q. Did you have any other illnesses?

A. I had come down with the 'Flu on occasions and I'd had Pneumonia once and had a relapse on that.

Q. During these times they continued to pay your salary?

A. Yes.

Q. It was in the nature of sick leave then?

A. You could say that, yes."

Arkansas Statutes Annotated § 81-1318 (a) (b) (Repl. 1960) provides in part as follows:

"(a) (1) 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. * * *

(b) 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, which ever is greater."

The appellant filed suit in the Sebastian County Circuit Court, apparently in 1966, for personal injuries against the third party tort feasor, and the employer joined as party plaintiff in that suit, not for subrogation under Ark. Stat. Ann. § 81-1340 (b) (Repl. 1960), but for the property damage to its automobile the appellant was driving at the time of his injury.

The appellant did absolutely nothing of an affirmative nature toward claiming compensation benefits as a result of his injury between the date of his injury on April 9, 1963, and the filing of the claim by his attorney on October 21, 1966. There is no evidence that he ever consulted an attorney until the suit was filed in circuit court. The claimant selected his own doctor, recommended to him not by his employer or its compensation insurance carrier, but by the claims representative of the insurance company for the third party tort feasor. When the appellant became dissatisfied with this doctor's diagnosis and service, he obtained other medical advice, treatment and surgery, without the advice, or recommendation, and so far as the record shows, without the knowledge or consent of anyone other than himself. He had worked as salesman for the Sunshine Buscuit Co. about three and one-half months prior to his surgery.

Doctor Wideman submitted his final report and bill for services on September 30, 1963, stating that he had not seen the appellant since June 17, 1963 (a period of more than three months), and that so far as he knew the appellant had lost no time from work. Appellant's subsequent visit to Dr. Wideman on March 6, 1964, was nine months after the last visit and over five months after Dr. Wideman's final report and bill. On March 9, three days after this last examination, Dr. Wideman

reported to State Farm Mutual Automobile Insurance Company (whose representative had recommended Dr. Wideman to the appellant in the first place) that he had re-examined the appellant on March 6, 1964, and this report was closed with the statement "I hope that this information fulfills your needs. If I can be of any further help, please do not hesitate to call on me." This report itself would indicate that appellees did not furnish Dr. Wideman's services on March 6, 1964.

The subsequent medical treatment and surgery at the Holt-Krock Clinic was further from being furnished by appellees than was Dr. Wideman's examination of March 6, 1964, and could in no sense be considered payment of compensation.

Appellees voluntarily paid Dr. Wideman for the medical service rendered the appellant on May 13 and June 17, 1963, and thereby created the unrefuted presumption that they "furnished" the medical treatment on those dates. We adhere to our former rule that the treatments thus furnished constituted the payment of compensation, and we hold that the statutory period of limitation for filing a claim with the Commission for additional compensation started running from June 17 1963. *Reynolds Metal Co.* v. *Brumley, supra,* and *Heflin* v. *Pepsi Cola Bottling Co., et al,* 244 Ark. 195, 424 S.W. 2d 365.

As to appellant's lost time and the payment of wages following his injury and prior to termination, the evidence is vague and indefinite as to the dates appellant lost time from his work and as to the total amount of time he lost because of his injury. The appellant was paid full time for the days he was off work for any reason at all and he was supposed to make the lost time up if he could. It was a company policy. There is no evidence in the record that the appellant or the appellees considered such payment as compensation or as payments in lieu of compensation, all the evidence is to the

contrary. We adopt the majority view as announced by Larson, Workmen's Compensation Law, Vol. 2, Voluntary Payment of Compensation, § 78.43 (c), pages 272, 273, where it is said:

> ". . . [T]he majority view apparently is that payment of wages to a disabled worker does not toll the statute unless the employer is aware or should be aware that it constitutes payment of compensation for the injury. * * *
>
> When the employee actually earns his wages by performing his regular duties after the injury, the presumption is that the wages are being paid for value received, and not in lieu of compensation."

The appellant recognized his need for medical treatment and procured the advice and services of two doctors. Unfortunately he did not recognize his need for legal advice and failed to consult a lawyer until after the statute of limitations had run on his claim. We recognize this case as a good example of why workmen's compensation acts are, and should be, liberally construed in favor of claimants, but we can find nothing in the facts of this case to toll the statute beyond June 17, 1963, and there simply is nothing in the law that permits us to extend the statute of limitations beyond the period fixed by statute. The judgment of the trial court is therefore affirmed.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION v.
MARLIN HAWKINS, ET AL

5-4648 437 S.W. 2d 218

Opinion Delivered February 3, 1969

[Rehearing denied March 10, 1969.]

Thomas B. Keys and *James K. Biddle* for appellant.

Gordon, Gordon & Eddy for appellees.

CONLEY BYRD, Justice. In this eminent domain action appellant Arkansas State Highway Commission ap-

proaches the controversy between it and appellees, Marlin Hawkins, et al, as the taking of 11.01 acres out of a tract of 16.82 acres. Upon this basis it produced as expert witnesses Mr. W. E. Hayes and Mr. Robert E. Hamilton. Mr. Hayes placed the before value at $34,-500, and the after value at $31,250, thus arriving at a damage figure of $3,250. Mr. Hamilton gave a before valuation of $27,000 and an after valuation of $81,000 arriving at a $54,000 benefit to the lands.

Mr. Hawkins approaches the controversy on the basis that the 11.01 acre acquisition is out of an 84.66 acre tract partially developed as a subdivision. He testified to damages of $77,500 based upon a before and after valuation of $237,000 and $159,500. Mr. C. V. Barnes and Mr. Lloyd Pearce, expert witnesses on behalf of Hawkins, arrived at damages of $45,500 and $44,500 respectively. Mr. Barnes gave a before and after valuation of $203,000 and $157,500. Mr. Pearce gave a before and after valuation of $212,000 and $167,-500.

The jury's verdict was for $55,000. The Highway Commission for reversal relies upon the following points:

I. The trial court committed reversible error in refusing to strike the value testimony of Marlin Hawkins as to the value of 165 lots before the taking and refusing to strike the value testimony of the damages sustained by Mr. Hawkins and the value testimony after the taking and in permitting testimony as to what it would cost to put water and sewer lines to the property.

II. The trial court committed reversible error in refusing to strike the opinion of Mr. Lloyd Pearce as to the value of the land before the taking.

III. The trial court erred in not striking the testimony of Mr. C. V. Barnes as to his value before and after the taking.

IV. There was no substantial evidence to support the verdict and the appellant is entitled to have the judgment modified and the trial court directed to enter judgment in the sum of $3,250 in favor of Hawkins, et al.

FACTS

The record shows that the property owners in 1960 acquired a 117 acre tract described as the NW¼ of SE¼ and S½ of SE¼ less three acres in the southwest corner. This was a family purchase for $13,000. In 1963 they donated and sold 31 acres to the Petit Jean Vocational Trade School. After the acquisition of the trade school site, the offsite utilities, including sewer and water, were brought to the property for the use and benefit of the trade school without cost to the property owners.

In 1964 a new high school was built within a half a mile of the Hawkins property. In 1966 a 20 acre site adjacent to the southeast corner of the property was acquired for construction of a new hospital.

The property owners first platted the property in 1960. A replat was filed and accepted by the City of Morrilton in 1964.

When replatted, the property was divided into 165 residential lots and three tracts of commercial property totalling 18 acres. The property was brought into the city and zoned at the time it was replatted.

The property condemned takes all of 11 and part of 15 platted lots and 5.57 acres zoned as commercial. There is also a construction easement affecting 0.56 of an acre

of the commercially zoned property. As a result of the taking 26.19 acres, all residential property, lies north of the interstate highway. The balance, including the remainder of the commercially zoned property, lies south of the interstate. The northeastern corner of the property south of the interstate is bordered on the west by State Highway No. 9 and on the north by the off ramp of the freeway interchange at the intersection of Highway No. 9.

Mr. Hawkins testified that in 1939 and 1940 he was Deputy Sheriff and Collector for Conway County; that from 1941 through 1946, except for two years and five months leave, while in service during World War II, he was the Circuit Clerk and Ex-officio Recorder; and that for the last 17 years he had been Sheriff and Collector.

Because of his duties in such official capacities and his general observation of land transactions in the City of Morrilton and surrounding area, he considered that he knew what property was selling for, prior to the taking. His testimony was that the property was located two and a quarter miles from the county court house, and that the City of Morrilton had a 1960 population of 5,997 but that by 1967 the population had increased to 6,955; that there were 2,100 vehicles on Highway No. 9 in 1965 but that it had increased to 3,050 vehicles by 1967. He showed that the North Hills Addition which lies between his property and the high school was selling improved lots for $25.00 per front foot.

Based upon his knowledge Mr. Hawkins testified that his land immediately before the taking had a fair market value of $237,000; that immediately after it had a fair market value of $159,500 and that his damages would be $77,500. On cross examination he testified that he arrived at the $237,000 figure by calculating the 165 lots at about $1,000 per lot and the 18 acres of commercial at $4,000 per acre. On re-direct Mr. Hawkins

stated that the $1,000 per lot was based on what the whole subdivision as a unit would sell for to one person. At one point in the record Mr. Hawkins said he based the $1,000 per lot upon what he had been offered, but when objection was made, he stated that it was also based upon his knowledge of real estate in the City of Morrilton.

In arriving at the after value of $159,000, Mr. Hawkins considered the taking of 21 lots at $21,000; five partial lots at $500 per lot or $2,500; six acres of commercial property at $4,000 per acre which would be $24,000; and the $30,000 extra cost for the laying of the water and sewer lines. The $159,500 is the difference between what he was damaged and what he valued it originally.

Mr. C. V. Barnes testified that the highest and best use for the property both before and after the taking was for residential and commercial purposes. He described how the construction of the interstate would increase the cost of sewering the property because of the interruption of the gravity flow. He also showed that there would be extra cost in running the water lines under the interstate to the lots lying to the north. In his opinion the fair market value before the taking was $203,000 and the value afterwards was $157,500.

On cross examination Mr. Barnes showed that he arrived at the before value on the basis that the residential lands had a value of $2,000 per acre and that he arrived at the same overall value by assigning a front foot value of $7.50 for lots with no improvements, $9.50 for lots with gravel streets and some improvements, and $10.50 a front foot for lots on the blacktop roads. In arriving at the value of the lands taken, Mr. Barnes used the same front foot value on the theory that the property taken had the higher set of improvements.

Mr. Lloyd Pearce was of the opinion that the highest and best use of the property both before and after

the taking was for the dual purpose of residential building sites and commercial frontage on Highway No. 9. In his opinion the fair market value of the property before was $212,000 and after was $167,500. He placed $39,-785 value on the lands taken, $17,865 damages to the remainder of the lands not taken and a betterment of $13,-150 because of the location with reference to the interchange. On cross examination Mr. Pearce stated that he arrived at a front foot basis per lot by deducting the costs of developing the lots and the profit a developer would expect. He also testified that he calculated the value on an acreage basis and arrived at a valuation of $2,050 per acre for the residential.

Mr. W. E. Hayes, on behalf of the Highway Commission arrived at a value of $34,500. In arriving at his before value he used a per acre value ranging from $1,250 up to $5,000. On cross examination he testified that he considered only the lots or commercial area actually taken or touched. He gave a total enhancement to the remaining lands of $14,605 because of the location of the interchange.

Mr. Robert E. Hamilton testified, on behalf of the Highway Commission, that he considered only the lots or commercial area actually taken or touched by the taking. In his opinion that area had a before value of $27,000 and the remainder after the taking had a valuation of $81,000. The latter figure was on the basis that the interchange enhanced the value of the remainder for a service station site.

I. In contending that all of the valuation testimony of Mr. Hawkins should have been stricken, the Highway Commission relies upon *Ark. State Highway Commission* v. *Watkins,* 229 Ark. 27, 313 S.W. 2d 86 (1958) and *Ark. State Highway Commission* v. *Taylor,* 238 Ark. 278, 381 S.W. 2d 438 (1964).

In the *Watkins* case we quoted Nichols, Eminent Domain, 3rd Ed. as follows:

"'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. The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use.'"

In the *Taylor* case we held that where each lot in a subdivision constitutes a separate and distinct use, that only those lots taken or touched are to be considered in arriving at the compensation to be paid the landowner unless it can be shown that the landowner has suffered special damages to lots not taken. In so holding we quoted from *Wellington* v. *Boston & M. R.R. Co.,* 164 Mass. 380, 41 N.E. 652, as follows:

"'Upon the evidence, all the other lands of the petitioners had been made separate and distinct parcels by transforming the locality into a village with wrought and travelled streets, and making all the land not included in the streets into exactly defined house lots, some of which had been sold to other persons, and each of which then owned by the petitioners was held for the distinct purpose of independent sale. Whether a particular lot of land constitutes an independent parcel is a question which cannot be determined in the affirmative by the mere fact that it is separated from other land by a highway or street, or by paper lines, or by

> ences; nor can it be determined in the negative by the mere fact that it is all in one ownership, and is not divided by streets or by paper lines. But when, as in the present case, the evidence shows that there is an actual division by streets, wrought and in use for travel, and by recorded paper lines, and there is no evidence that any two of the lots are used together, or are held for sale as one parcel, and the only use shown is a separate and distinct use and holding of each lot by itself, we think each lot is a separate and distinct parcel.' "

Here the subdivision had developed to the point that the utility mains had been brought to the property but no laterals or service lines has been installed, some improvements were in place and the paper lines had been recorded but the developer was obligated to install all of the improvements to a lot before he could launch a sales promotion. Thus the subdivision had reached the stage where it had been divided into recorded paper lines but no parcel could be considered for a separate and distinct use for lack of the installation of utility service lines.

Some of the difficulties involved in classifying the property as developed or undeveloped for purposes of permitting a per lot valuation or the assessment of damages to lots not taken or touched can best be demonstrated by the Highway Commission's different positions. The Highway Commission not only described the property taken according to the paper lot lines, but contended that it was error to consider damages to the lots not taken or touched by the condemnation order. Of course this position could only be taken if the individual parcels constituted separate and distinct units. In making the contention that it was error for Mr. Hawkins to value the property on a per lot basis, the Highway Commission, in relying upon the *Watkins* case, supra, must take the position that the property involved is not a subdivision consisting of separate and distinct parcels.

Under the proof here, the per lot valuation given by Mr. Hawkins was upon the basis of what all of the lots could be sold for to one buyer upon an "as is" basis. While the lines of the residential lots were only a paper division, they constituted a unit of measure that was before the jury, and so long as the testimony is based on what a willing buyer would pay for the total of the units in their present status (as distinguished from that which would accrue if sold at a developed retail price), we are unable to see the vice or speculative value condemned in the Watkins case. After all, any other unit valuation on an "as is" basis would reach the same result for any prudent buyer of property suitable for development would have to do some calculation of the number of lots that could be carved out of the property in its present state. Consequently we find no error in permitting the per lot unit of valuation under the circumstances here involved.

In *Ark. State Highway Commission* v. *O. & B. Inc.*, 227 Ark. 739, 301 S.W. 2d 5 (1957), all of the witnesses agreed that the highest and best use of the two unplatted lots was for residential purposes. In holding that it was permissible to show the number of lots into which the property could be divided and their value after deduction of improvement costs, we said:

> "Nor do we agree with the further contention that the court erred in admitting testimony relative to the division of the two plots into residential lots and its net value for such purposes after deduction of improvement costs. The established rule in this state in cases like this is that the owner may be allowed to show every advantage that his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for upon the market. *Little Rock Junction R. Co. Woodruff,* 49 Ark. 381, 5 S.W. 792, 5 Am. St. Rep. 51; *Kansas City Southern R. Co.* v. *Boles,* 88 Ark. 533, 115 S.W. 375.

> "Appellant concedes that potential use of land for subdivision purposes may be considered in establishing market value but says it is error to show the number and value of lots into which a certain tract may be divided. Cases from other jurisdictions supporting this argument involve facts quite different from those in issue here. This is not a case where use for subdivision purposes is merely speculative and too remote to influence present market value. As previously indicated, it is undisputed that the land of appellees was adjacent to and surrounded by well developed residential sections of the fast growing City of Jacksonville and that its best and most logical use was for residential lot development. In these circumstances we have held the testimony objected to by appellant to be admissible to establish market value."

Neither can we find any error in permitting the property owner to show the extra cost involved in installing the sewer and water after the taking. Even under our holding in the *Taylor* case, this cost would classify as special damages not suffered by the public in general, for Mr. Hawkins was obligated under the subdivision regulations of the City of Morrilton to install the utilities before the different parcels could be put to a residential use.

II. Appellant's argument with references to Lloyd Pearce's testimony is that his valuation was upon a lot basis—i.e., that it was too speculative. As we read his testimony, he arrived at his valuations both on an acreage basis and a front foot basis. The front foot basis was calculated by deducting the cost of improvements not yet made and the profit a developer would require from the selling price of lots similarly situated. Since he demonstrated that he arrived at the same total valuation under both methods, we are not in a position to say his testimony was so speculative that it should have been stricken.

III. The objection to Mr. Barnes' testimony is identical to that of Mr. Pearce's. The record also shows that Mr. Barnes calculated the total valuations both on the per acre unit basis and by the front foot method. He says that the latter method was a check against the acreage valuation. When we consider the fact that the property involved in the taking had some of the higher improvements, we are not in a position to say that Mr. Barnes' testimony should have been stricken.

In finding no error here, we must point out that the situation in the *Watkins* case was much clearer cut than is the stage of the development here.

IV. Under this point appellant argues that there was no substantial evidence to go to the jury. As we have amply demonstrated above, the evidence of Mr. Hawkins, alone, is sufficient to sustain the verdict. It has been suggested that Mr. Hawkin's valuation of $4,000 per acre on his commercial property has no relation to any fact. However the record shows that Mr. Hawkins was as familiar with the comparable sales in the area as any other witness. Even Mr. Hayes, a witness for the Highway Commission, after making a study of the market, found valuations ranging from $1,250 to $5,000 per acre.

Affirmed.

George Rose Smith and Brown JJ., dissent.

Justice Jones would grant remittitur of $9,500.00.

George Rose Smith, J., dissenting. The jury's verdict in this case awarded the landowners $55,000 for 11.01 acres of land, or about $5,000 an acre. If we leave the realm of opinion and look only to actual facts established by uncontradicted evidence in the record, it is an inescapable conclusion that the highway department is being compelled to pay an unconscionable price for

the land. Hawkins bought 117 acres in 1960 for $13,000, thereby paying $111.11 an acre for property that is now valued at $5,000 an acre. At the time of the trial the 211 lots were assessed on the tax books at a total of $5,275, or exactly $25 a lot. If the assessment represented 20% of the fair market value, as the law contemplates, the property was valued by the assessor at $125 a lot, or $600 an acre, there being about 4 lots to the acre.

Hence the verdict can be sustained only on the basis of opinion. More specifically, it can be sustained only on the basis of Hawkins's own opinion, for not even his own expert witnesses fixed his just compensation at a figure as high as the amount of the verdict. Thus the pivotal issue on appeal is the admissibility of the landowner's opinion about the value of the property being taken and about the damage to the rest of his lands.

Hawkins's figures were arrived at solely by assigning a value to each lot in his addition and multiplying that value by the number of lots. He valued 165 residential lots at $1,000 each and 18 commercial acres at $4,000 an acre, making a total value of $237,000 immediately before the taking. He calculated his damages at $21,000 for 21 lots taken, $2,500 for 5 lots partly taken, $24,000 for six commercial acres taken, and $30,000 for the increased cost of laying water and sewer lines (a figure not supported by any fact in the record), making a total of $77,500.

Under our prior cases Hawkins's opinion evidence was plainly inadmissible. His residential addition existed on paper only. It was first platted in 1960, when it seems to have been known that the interstate highway was to be located somewhere in the vicinity. It was replatted in 1964, when more exact information about the location of the highway was available. But by the date of trial nothing had been done toward the development of the addition except a negligible amount

of clearing with a bulldozer. Neither streets nor utilities had yet been provided. The tract was still raw land.

Our cases uniformly hold that in such a situation it is not permissible to arrive at a valuation on the basis of individual lot values. As it happens, most of our cases have dealt with unrecorded plats, but it goes without saying that the basic rule is not changed by the mere filing of a plat with the circuit clerk. *Union Elec. Power Co.* v. *Sauget,* 1 Ill. 2d 125, 115 N.E. 2d 246 (1953); *Pickett* v. *Kolb,* 237 N.E. 2d 105 (Ind., 1968). The issue is one of substance, not of mere form.

We reviewed our earlier decisions in this language in *Housing Authority of the City of Camden* v. *Reeves,* 244 Ark. 783, 427 S.W. 2d 196 (1968):

> 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.

Even more precisely in point in the case at bar is *Arkansas State Highway Commn.* v. *Watkins,* 229 Ark. 27, 313 S.W. 2d 86 (1958), because there the plat was not introduced; so, as here, we were considering the admissibility of opinion evidence about the value of lots in an addition existing only on paper. Excerpts from the opinion:

> 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. The measure of compensation is the market value of the land as a whole, taking into consideration its value for building purposes if that is its most available use.
>
> * * * *
>
> "It is proper to show that the property is suitable for division into village lots, and that it is valuable for that purpose, but it is not proper to show the number and value of such lots." Lewis, Eminent Domain, Vol. 2 (2nd Ed.) P. 1058.

The majority opinion in this case cannot be reconciled with our prior holdings. Two efforts are made to distinguish the law as we have previously stated it, but neither effort can stand scrutiny. First, it is said that the highway department itself recognized "the paper lot lines" (an apt description!) by describing the property

by lot numbers in its pleadings. That procedure was unquestionably right, for when an addition has been platted a description by reference to the plat is valid. Indeed, that is ordinarily the only legal way to describe the lots. Secondly, it is said that a prudent buyer would have to do some calculation of the number of lots that could be carved out of the property in its present (undeveloped) state. Of course that is true, but exactly the same thing could have been said in the *Watkins* case and in our other decisions rejecting such testimony. The point is not what a prudent buyer might consider in pricing the property; it is what kind of opinion evidence is sufficiently reliable to be submitted to a jury of laymen. Our prior cases have unequivocally ruled out testimony such as Hawkins's opinion in this case.

In truth, Hawkins's testimony is also vulnerable to the rule that an opinion not supported by any fair or reasonable basis is not substantial evidence. *Arkansas State Highway Commn.* v. *Stanley,* 234 Ark. 428, 353 S.W. 2d 173, 4 A.L.R. 2d 749 (1962). Hawkins's evaluation of his property at $4,000 an acre had, as we said in the *Stanley* case, no relation to any fact in the record. On cross-examination he conceded the purchase prices involved in many sales of comparable or even more desirable property in the same vicinity as his lands. For instance, the St. Anthony's Hospital property sold for $1,200 an acre; the R. W. Morgan, Jr., property for $1,000 an acre; the Carl Long property for $1,143 an acre; the Rex Jones property for $1,365 an acre; the Dr. Englehoven property for $600 an acre, and the Hodge property for $600 an acre. In the teeth of all those actual sales at arm's length Hawkins still insisted that in his opinion his property was worth $4,000 an acre. Just as in the *Stanley* case, that figure "seems to have been plucked from the air and might equally well have been ten thousand dollars or a hundred million dollars." Such fanciful figures are not substantial evidence.

I would reverse the judgment and remand the cause for a new trial.

BROWN, J., joins in this dissent.

BILL SHOPFNER, ET AL v. MRS. WILLIE CLARK

5-4782 436 S.W. 2d 475

Opinion Delivered February 3, 1969

Garner & Parker for appellants.

Franklin Wilder for appellee.

FRANK HOLT, Justice. Appellee brought suit against appellants alleging that she had sustained damages from the unauthorized use of her property by appellants.

Appellee owned a store building and rented a part of it as a meat market at $56 per week. Shortly thereafter, on June 11, 1967, the tenant quit business and surrendered possession, neglecting to remove several meat boxes and other fixtures. The appellants, as creditors of the lessee, secured a default judgment against the

lessee and on September 11, 1967 levied upon the equipment. The deputy sheriff, following appellants' instructions, posted a copy of the levy upon the front door of appellee's building.

Thereafter, appellee communicated to appellants her request that the fixtures be removed from her building. Appellants failed to comply with this request. In January 1968, appellee served upon appellants a three-day "notice to quit," pursuant to Ark. Stat. Ann. § 34-1503 (Repl. 1962). Upon appellants' continued failure to remove the equipment, the appellee then sued for immediate possession, $900 in damages for the current loss of use of her building, $200 for each additional month of alleged misuse, and "any other damage which this plaintiff might sustain by reason of the unlawful detainer of these defendants, and for all other proper relief." Before trial, appellants removed the equipment. Thus, the only issue at the trial was the question of damages. The court, sitting as a jury, found for appellee and assessed her damages in the amount of $400. The court credited, or allowed the appellants sixty days for "action" from the date of the levy of execution in September. Damages were then awarded for a period of four months, *i.e.*, from November 1967 to March 1968, the month appellants removed the fixtures. From that judgment the appellants have appealed.

For reversal appellants contend that an unlawful detainer action is based upon a contract and will not lie except where the relation of landlord and tenant exists between the parties, and further, that damages are not recoverable in an unlawful detainer action.

This court has consistently held that an action of unlawful detainer presupposes the relation of landlord and tenant, and such action will not lie except where that relationship exists. *Hilliard* v. *Yim,* 207 Ark. 161, 179 S.W. 2d 456 (1944); *Miller* v. *Plummer,* 105 Ark. 630, 152 S.W. 288 (1912). However, damages for un-

lawful detainer can be recovered. Ark. Stat. Ann. § 34-1516 (Repl. 1962) permits a court or jury to assess damages in a forcible entry or an unlawful detainer suit.

The fact that appellee used the words "unlawful detainer" in her complaint is not controlling as to that type of action and we do not construe her pleading as being an unlawful detainer action. We have stated many times that courts must look to the substances of a pleading and it will be interpreted according to its substance rather than its form. Under our civil code, pleadings are liberally construed and every reasonable intendment is indulged favorable to the pleader. *Myers* v. *Majors,* 242 Ark. 326, 413 S.W. 2d 661; *Stroud* v. *M. M. Barksdale Lbr. Co.,* 229 Ark. 111, 313 S.W. 2d 376; *Craft* v. *Armstrong,* 200 Ark. 681, 141 S.W. 2d 39. Consequently, appellee's complaint could properly be considered by the trial court as merely a suit for damages.

Appellants further assert that: "A judgment creditor upon the levy of the goods of his debtor acquires no interest in said goods." It is argued that an officer who levies execution on personal property is not only held to be entitled to possession thereof as against the judgment debtor, but is generally presumed to be rightfully in possession of the goods taken in execution, citing 30 Am. Jur. 2d § 267. Therefore, it is contended that since a judgment creditor does not acquire the ownership of goods upon a mere levy of execution, without doing more, then if anyone is responsible for the loss of use of appellee's building, it is the sheriff. We think appellants' argument is without merit in the case at bar since their actions involved more than the mere levy of an execution.

To support their contention that the execution officer is the party responsible for damages, appellants cite *Frizzell* v. *Duffer,* 58 Ark. 612, 24 S.W. 1111 (1894). There plaintiff had rented his house with the under-

standing that the tenant agreed to vacate upon one day's notice. A deputy constable, under a writ of attachment issued against the tenant, levied upon certain chattels situated in the house. The deputy obtained the keys by an agreement with the tenant and retained possession for some weeks after he had received notice to surrender the house to plaintiff. We said that the holding of the house after receiving notice to vacate was a trespass and that the constable, being responsible for his deputy's misconduct, was liable for damages to the owner of the house in an amount which would equal the fair rental value of the house "during the time of the unlawful detention." We think the reasoning in this case can fairly be applied to the case at bar. An execution creditor has large control in the management of the levy of an execution and the levying official is, sometimes, regarded as an agent. 30 Am. Jur. 2d § 223.

In the instant case it appears that the levying official was at all times acting at the direction of appellants. The appellants had the execution issued and levied; the sheriff served it on the judgment debtor and then proceeded to post a copy on the front door of appellee's building as instructed by appellants. Subsequently, there were "calls" received by the levying official about "selling" the fixtures and "a call about rental property." These calls were referred to appellants. According to this official, he looked to appellants for his instructions before taking any action. About four months after the idle levy upon the fixtures, it was discovered that the papers had not been filed in the circuit clerk's office because the sheriff's fee had inadvertently not been paid. This was corrected immediately.

Appellee testified that she felt she could not touch or remove the property in her building since a copy of the execution papers, itemizing the fixtures levied upon, was posted on the front door. Therefore, she could not rent her building and rental was "turned down twice

because of it." There was evidence that appellee made demands upon appellants for payment of rent and removal of the equipment from her building. She was told that the fixtures would be removed several months before the actual removal by appellants. One explanation was that they had "no place to move it." Appellee rented her building for $500 per month when the appellants moved the equipment in March.

There being substantial evidence to support the trial court's action, as a trier of the facts, the judgment is affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice. I disagree with that part of the majority opinion dealing with appellants' liability for the action of the levying officer's acts. Certainly it is beyond dispute that an execution creditor acquires no interest in the property upon which the execution is levied. The basis of the action of the majority on this facet of the case is not clear to me, but it seems to rest in part upon a suggestion that the levying officer was the agent of the execution creditor. I do not feel that such a holding is justified. I do feel that this results in a dangerous and unwarranted precedent. The evidence upon which this holding is premised is the deputy sheriff's testimony that appellants' attorney directed him to post the notice of levy upon the front door of appellee's building, appellee's statement that she told appellants' attorney to "do something about it," that he promised to do something several months before any action was taken, that appellants failed to remove the property levied upon from her building, that appellants failed to remove the property after she caused a "3-day notice to quit" to be served upon appellants, one of appellants was admitted to the premises by appellee when he came out and wanted to take inventory of the property upon which the levy had been made, and the first levy was not returned by the sheriff to the clerk

because the sheriff's fee had not been paid. These circumstances combined are insufficient to evidence an agency, in my opinion.

There is no evidence that appellants or their attorney took any action to control the manner of the levy of the execution or the disposition of the property after the levy. There was nothing in the notice of levy posted upon appellee's building that purported to do anything other than to give notice that the particular personal property had been levied upon and was in the custody of the sheriff. Until the sale the property was in the custody of the sheriff and it was his obligation and duty to take care of it. 30 Am. Jur. 2d 601, Executions, § 266. The execution creditor had no right to its possession. 30 Am. Jur. 2d 602, Executions, § 267. The most that can be said is that the execution creditor knew that the property was in appellee's building and failed to instruct the sheriff to remove it. I cannot see how liability of an execution creditor can be premised on this.

I would reverse the judgment and dismiss the case.

CARSON STEEL, RONALD STEEL AND MRS. RONALD STEEL v. STATE OF ARKANSAS

5-5386 436 S.W. 2d 800

Opinion Delivered February 10, 1969

[redacted]

John B. Haimen for appellants.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

CARLETON HARRIS, Chief Justice. This appeal concerns a bank robbery. On the morning of September 27, 1967, a little after 10:00 o'clock, the Bank of Lockesburg, Lockesburg, Arkansas, was robbed by a lone gunman. As he entered the bank, this man pulled a ladies' stocking over his face, directed bank employees and customers to lie down on the floor, and told R. C. Norwood, president of the bank, to open the safe. Mrs. R. C. Norwood, also a bank employee, asked if she would be permitted, rather than her husband, to open the safe, and upon receiving a reply in the affirmative, opened it, and, together with the robber, took money, which he placed in a sack having the appearance of a large pillow case. The amount taken was $12,814.00. Thereupon, the gunman ran out of the bank, and drove off in a 1966 blue Ford sedan in a northerly direction. Officers in the area were alerted, and road blocks and other measures were effected in an effort to secure the capture of the robber. In less than an hour, Ronald Steel, his wife, Doris Steel, brother, Carson Steel, Jr., and Doyce McCary were arrested in connection with the holdup. All were subsequently charged with robbery[1], and on trial appellants were found guilty by a jury. The two brothers were given 15 years imprisonment, and Doris Steel was given 5 years imprisonment. From the judgment so entered, appellants bring this appeal. Several points are urged for reversal, and we proceed to discuss these contentions, though not necessarily in the order listed.

[1]McCary is not involved in the present appeal, nor does the record reflect what disposition, if any, has been made of the case against him.

First, the sufficiency of the evidence to sustain the convictions is questioned. In chronological order, the facts developed were as follows:

Bobby Friday operated an Esso service station at Lockesburg, the station being located across the street from the bank. Mrs. Bessie Dowdle, who had apparently left her automobile at the station while she went to the bank, returned and told Friday that the bank was being robbed[2]. As she was telling Friday of the occurence, he heard the squeal of tires, looked up, and saw a 1965 or 1966 light blue Ford being driven away. Friday endeavored to get the license number, and testified that the car sped away heading north on Highway 71[3]. The witness only observed that someone was driving the car, and he saw no one else standing around the bank.

Louis Hilton, Sheriff of Sevier County, on September 26 received a report that a 1966 Ford with Sevier County tag No. 56-2321 had been stolen from the rubber plant in DeQueen. About 10:15 or 10:20 A.M. on the 27th he received the report of the bank robbery, and also information about the blue 1966 Ford. The sheriff started for Lockesburg in his automobile, and Carroll Page of the Arkansas State Police left at the same time as the sheriff in a separate automobile. While traveling Highway 71, between DeQueen and Lockesburg, Hilton observed a tan 1965 Pontiac automobile parked on a crossroad on the west side of 71, about 100 yards from the highway. The sheriff drove over to the car, stopped, and inquired of the occupant, a young woman, if she needed help. She said that she did not, and when asked what she was doing there, replied that she was waiting on her husband. The woman gave her name as Doris Steel, and stated that her husband had told her to wait there and he would be back in a few minutes;

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[2]According to other witnesses, Mrs. Dowdle had started into the bank, saw what was going on, and backed out.

[3]He missed the year, and took the number as 56-2322, whereas the number actually was 56-2321.

she did not know where he had gone, but said he was in a pickup truck, and would be back shortly. According to the sheriff, Mrs. Steel was dressed in blue jean shorts, a blue jacket with the word, "Alaska," written on it, and was barefooted.

Louis Graves, publisher and editor of the newspaper at Nashville, Arkansas, drove up to where the sheriff and Mrs. Steel were talking. It developed that Page also, while traveling on the highway, had observed the Pontiac parked on the side road, and the state officer had requested Graves (upon meeting the latter on the highway), to "check it out" for him. While talking, they heard a vehicle approaching. From the sheriff's testimony:

> "* * * As I was talking to Mrs. Steel, there was a pickup truck started down this same road, and I heard the pickup truck's brakes, when he applied his brakes. There was some loose gravel on this part of the pavement. I heard that and I looked up and saw the pickup was headed in the direction of where we were at, and it immediately backed up and turned around and headed north."

He said that he could tell that three people were in the pickup, and he immediately started in pursuit, asking Graves if he would remain there with Mrs. Steel until he returned. Describing events, the sheriff continued:

> "Well, I was in pursuit. The car went on north on 71 until it came to a dead-end road, which goes up to Mr. Bradshaw's residence. The pickup turned up that road. * * *
>
> "After I got on to 71, I saw the pickup, and then the pickup dropped out of sight for, oh, I'd say a few seconds. * * *

> " * * * After I got to the point where I had seen the pickup last, I could see on this straight stretch for possibly a mile or a mile and a half, and it wasn't there. I knew about this road, and as I got to this road I felt it had turned up that way, and when I looked up the road, I saw the pickup on the Bradshaw road."

When the officer turned up the road, the pickup "took off real fast." The sheriff continued behind, blowing his horn, endeavoring to persuade the driver of the truck to stop, and then held his rifle out the window and fired into the air. The truck then stopped, approximately 150 yards from a private drive leading to the home of William Henry Bradshaw. The sheriff directed the occupants of the pickup to get out of the truck with their hands up, and further directed them to lie on the ground face down. About that time, Bradshaw, having heard the shot, came to the scene, and the sheriff had Bradshaw hold the gun while he (the sheriff) searched the three occupants of the truck. No comprehensive search of the vehicle was made at that time, though Hilton testified that he looked in the bed of the pickup, saw two pistols lying in a cardboard box, reached in and got the weapons, and found that they were loaded. He subsequently obtained a search warrant for the pickup, and also a search warrant for the Pontiac automobile occupied by Mrs. Steel. The three men in the pickup were appellants, Ronald and Carson Steel, Jr., and Doyce McCary. When the sheriff walked a short distance down the road, looking over the area in furtherance of his investigation, Bradshaw heard Ronald Steel say, "Now that they've got us, what are we going to do?" McCary told Steel to keep his mouth shut. The three were driven back to Lockesburg by Bradshaw in the pickup, with the sheriff following. Upon arriving there, they were taken to the bank. In the meantime, Graves had brought Mrs. Steel to the bank.

There, Mrs. Norwood, and some others who were

in the bank at the time of the robbery, were present. Mrs. Norwood testified that she was not asked to make an identification, and she did not volunteer an identification. No one identified the man who had held them at gunpoint when the robbery took place[4]. Statements were taken from the two Steel brothers about 11:15 A.M. after they had signed waivers and acknowledged that they had been advised of their constitutional rights. Both steadfastly maintained that they were not guilty of robbing the bank. Later on in the day, Ralph Rawlings, a special agent with the F.B.I., interviewed Ronald and Carson Steel at the County Jail in Nashville, and talked with Mrs. Steel at the sheriff's office in DeQueen. The officer testified that he explained to each appellant his or her rights, and further presented each with a written statement of rights, and a waiver form, which he also explained. The special agent tesified that all voluntarily signed the waiver. Rawlings said that all stated they could read, and, before signing, they were advised that they were being investigated for the robbery of the bank. None of the appellants signed any statement as to his or her activities, and none asked for the services of a lawyer, but they did orally answer questions. Ronald Steel related that he and his wife, on September 26, were at his mother's home near Broken Bow, Oklahoma; that they went to the home of Doyce McCary at Wright City, Oklahoma, finding Carson Steel, McCary's wife, and another woman there. After staying a while, Ronald and his wife returned to Broken Bow, remaining at the mother's during the night; the next morning, Carson Steel and McCary came to the home in McCary's pickup truck. All four then left in two vehicles, Ronald and Doris being together in the Pontiac, and McCary and Carson Steel traveling in the Ford pickup. Ronald said that the reason for the trip was to go deer hunting. The officer called attention to the fact that it was not deer season, and that appellant did not have a rifle or shotgun, but Ronald replied that

[4]Carroll Page testified that he "probably" asked if the bank bandit could be identified by anyone present.

he was going to shoot deer with his pistol (a snub-nose). According to this appellant, the purpose in turning down the road (where the appellants were apprehended by the sheriff) was to ask a man about purchasing a dog.

Carson Steel related that he had spent the night of September 26 at the home of McCary and Mrs. McCary, but said (contrary to Ronald) that they had no visitors. He stated that he and McCary drove the next morning to Broken Bow, stopped at his mother's home, and there joined Ronald and Doris. According to this brother, he and Doyce left first in the pickup truck; the purpose in going to Lockesburg was to find some coon dogs. They met Ronald and his wife about 9:30 A.M., and the brother got into the truck with them, leaving the wife where they had parked the automobile. He was unable to name anyone that they contacted about dogs.

Doris Steel related that she and her husband had visited McCary and his wife on the night of the 26th and had returned to the mother's home at Broken Bow, where they spent the night. She said that Ronald had told her she could go deer hunting with them the next day, and she and her husband left home and were joined by McCary and Carson in Lockesburg. She told the officer that the men would not let her go deer hunting with them because she had forgotten her shoes.

As previously stated, search warrants were obtained, and both the pickup truck and Pontiac automobile were searched. The only items found in the pickup truck (outside of the two pistols) that could have any bearing on the robbery were a white homemade pillow case and a new handkerchief which was knotted. The only item found in the Pontiac that could be considered relevant to the crime was one ladies' stocking.

The 1966 blue Ford automobile with the license No. 56-2321 was found about six miles west of Lockesburg, 160 paces north of Highway 24, but appellants were

never connected with this automobile. A light blue 1963 Chevrolet automobile was found in the Tower Road vicinity the morning of the robbery, which bore a fictitious Oklahoma license[5]. This car was apparently found about six miles from Lockesburg, but appellants were never connected with this vehicle. About a mile and a half from where this car was found, the officers located a spot where the road had been washed out and traffic could not go farther. From impressions, it was obvious that two motor vehicles had been parked close together, one having road grip tires used on automobiles, and the other bearing a type usually used on pickups; the area had the appearance of several people having stood between these vehicles. Richard O'Connell of the F.B.I. picked up a paper tag which has been torn off a piece of material. The tag read, "100% Cotton RN 14240." The officer placed this in an envelope, and it was subsequently sent to the F.B.I. laboratory in Washington. Cigarette butts were found and also a bare heel print.

William S. Oberg, a document examiner employed at the F.B.I. laboratory in Washington, testified that he made an examination of the label found by Officer O'Connell, and the handkerchief found in the pickup truck. After explaining in detail how the examination was conducted, Oberg testified that the label had originally been attached to the handkerchief taken from the truck. A small part of the paper tag had remained on the handkerchief. From the testimony:

> "The outline portion of State's Exhibit No. 3 [label] matches the torn outline of the paper on State's Exhibit No. 10 [handkerchief], and as a result, I concluded that State's Exhibit No. 3 was derived from State's Exhibit No. 10, that at one time

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[5]One of the officers mentioned a Chevrolet automobile with a Texas license, but it is not clear whether he was speaking of the same Chevrolet.

they were part and parcel of the same thing''[6].

On cross-examination, Oberg repeated his conclusions rather emphatically.

Lawrence Dinger, who lives a few miles from DeQueen, was formerly a resident of Bartlesville, Oklahoma. He testified that he saw Ronald Steel in November, 1967, at a tavern near Broken Bow, Oklahoma, and which was owned by an uncle of the Steel boys. Dinger said that Ronald Steel was talking to an acquaintance of Dinger named William Allen, and that, as he (Dinger) walked up to the two men, he heard Ronald Steel say to Allen, ''The money is buried and we haven't touched a dime of it.''

It is true that most of the evidence was circumstantial, but we think the circumstances, when taken together, constitute sufficient evidence to sustain the convictions. No evidence was offered on behalf of appellants of why they made the trip from Oklahoma to Lockesburg—what they did after arriving at Lockesburg—why the men fled from the sheriff, and would not stop the pickup—why Doris Steel was sitting alone in the Pontiac—or why only one stocking was in the car. Of course, the jury probably did not consider the explanation given to the officers as credible. Deer hunting—out of season—without dogs—and with pistols—could hardly be called a plausible or reasonable explanation of appellants' actions prior to their arrest. The testimony of William Henry Bradshaw stood uncontradicted, and though no positive identification was made, Mrs. Norwood, at the trial, pointed out Ronald Steel as the man, in her opinion, who robbed the bank, stating, ''Well, in my own mind I think so.''

It is contended that the constitutional rights of these appellants were violated, and several federal cases

[6]A new handkerchief was taken from both Ronald and Carson Steel, and the similarity of those handkerchiefs to Exhibit No. 10 prompted the officers to send in Exhibits 3 and 10.

are cited in support of this contention. It is asserted that a line-up occurred at the bank when appellants were taken there after the robbery. The United States Supreme Court has held several times that a suspect is entitled to counsel, unless waived, when he is confronted by witnesses for an out of court identification. *United States* v. *Wade,* 388 U. S. 218, *Stovall* v. *Denno,* 388 U.S. 293, *Gilbert* v. *California,* 388 U.S. 263. We find no violation of the rule set down in those cases. Mrs. Norwood stated that she was not asked to identify any of the appellants as the robber, and no out of court identification was made. Actually, the evidence of the confrontation was elicited by appellants during cross-examination of Mrs. Norwood as a matter of testing her credibility relative to her remarks made on the witness stand as to identification of Ronald Steel.

It is argued that the testimony of Bradshaw constituted error. We do not agree. The statement of Ronald Steel was a spontaneous and voluntary statement, and was made at a time when he was not being interrogated. We have held such statements admissible. *Turney* v. *State,* 239 Ark. 851, 395 S.W. 2d 1.

It is urged that the search of the pickup truck by the sheriff at the time of apprehending the appellants was illegal. We find no merit in this contention. The sheriff, of course, was entitled to search the truck, if the arrest were lawful. Under the circumstances, it clearly appears that the officer had reasonable grounds to believe that the appellants had committed a felony, and the search was therefore incident to a lawful arrest. The bank had just been robbed, and the occupants of the pickup truck were very clearly fleeing, and endeavoring to get away from the sheriff. Not only that, but, according to his testimony, the two pistols in the pickup were in clear view.

Appellants also question the validity of the search warrants, but no objection on this basis was made at

the time of the introduction into evidence of the property taken from the vehicles, nor was any motion made to suppress this evidence. In *Moore, Frazier, Davidson* v. *State,* 244 Ark. 1197, 429 S.W. 2d 122, we held that the burden of proving the invalidity of a search warrant rests on the defendant, and if it is contended that the warrant is not valid, the affidavit and warrant in support of a motion to suppress should be produced. Objection was made to the introduction of articles found in the vehicles as being immaterial and irrelevant, but we have already pointed out that some articles were relevant, and certainly there was no prejudice in the presentation of articles (mostly clothing) which failed to connect appellants with the crime.

It is asserted that the holding in *Gideon* v. *Wainwright,* 372 U.S. 335, was violated, but this assertion is erroneous, as an attorney was appointed by the court to represent these appellants. The argument itself is really directed to a contention that the appointed counsel did not furnish adequate representation. From the brief:

> "An additional problem on the appointment of counsel simply cannot be avoided. The appointment of counsel of experience is important. This Court has judicial knowledge of the experience of the Court appointed lawyer who had not been long in practice, never appealed a case."

The record does not reflect whether this attorney had appealed a criminal case, but appellate practice would hardly seem to be as important as experience in trial practice. This phase of his practice is not shown, but the experience or ability of appointed counsel is not so important in this case as it might be in others, since appellants were also represented by an Oklahoma attorney. When defendants are represented by counsel of their own choice, they are hardly in a position to complain that court appointed counsel was inadequate. Pres-

ent counsel intimates that the Oklahoma attorney was not qualified to represent these appellants because he was not a member of the Arkansas Bar. We very quickly disagree—but of course, an accused person is entitled to retain whomever he desires to represent him.

It is argued that the requirements of the rule established in *Miranda* v. *Arizona,* 384 U.S. 436, were not complied with. We find no merit in this allegation. While none of the appellants testified before the jury, all three testified before the court in chambers relative to the statements. Ronald said that he was not advised of constitutional rights, though he admitted reading the waivers. Carson said that he had already made some statement before signing the waiver. Doris said that she was nervous and couldn't comprehend the meaning of the waiver. The court held that the statements were voluntarily made after appellants were advised of their constitutional rights and this finding is supported by the weight of the evidence.

As heretofore pointed out, the state's proof reflected that each appellant was handed a waiver which set out the constitutional rights enumerated in *Miranda;* each read the instrument, and each voluntarily signed the waiver. No complaint is made about the federal waiver, other than it is not in harmony with the one given by the state, and counsel argues that appellants were given conflicting advice. We find no conflicts. The state waiver reads as follows:

> "Before we ask you any question, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. You have the right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will*

be appointed for you, if you wish, if and when you go to court[7]. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop at any time until you talk with a lawyer.

WAIVER

"I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me."

This waiver is practically identical with the one used by federal officers, except for the italicized sentence[8].

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[7]Emphasis supplied.

[8]The federal waiver provides:

"Before we ask you any questions, you must understand your rights.

"You have the right to remain silent.

"Anything you say can be used against you in court.

"You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

"If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

"If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

"I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

It is apparently appellants' contention that this sentence precluded the warning from being valid. It will be noted, however, that appellants were advised that they could remain silent; that anything they said could be used against them in court; that they had the right to talk to a lawyer *before being asked any questions,* and the right to have that lawyer with them during questioning. They could not have been more clearly told that they had the right to refuse to make any statements whatsoever.

It is asserted that error was committed by using a witness whose name had not been listed as one who would testify for the state. This allegation has reference to the testimony of Lawrence Dinger. On January 24, the court had directed the prosecuting attorney to advise appellants of witnesses that he planned to use, but according to the state, it was not known at that time that Dinger would be a witness, and the prosecuting attorney subsequently stated (at a hearing on a motion for new trial) that counsel were notified of any new witnesses as soon as they were known, or subpoenaed by the state. Ark. Stat. Ann. § 43-1004 (Repl. 1964) requires that the names of all witnesses, who were examined prior to the finding of an indictment, should be written on the indictment. In *Baker* v. *State,* 215 Ark. 851, 223 S.W. 2d 809, we held that, assuming, though without deciding, that this provision is applicable to informations, the requirement is merely directory. It might be pointed out that, though a continuance was asked for on other grounds (not argued as reversible error), no statement of surprise was made by defense counsel, nor any motion made for a continuance, when Dinger was called to the witness stand. It is also argued that defendants' counsel was unable to obtain any information from the federal officers with regard to the testimony they would present at the trial. On the day of trial, an oral motion was made to strike all witnesses who were not listed in the bill of particulars, and to exclude all F.B.I. and state reports. The court overruled

the motion, but stated that it would give counsel all the time required to talk to any and all witnesses prior to their testifying. The prosecuting attorney was also directed to furnish counsel with a copy of any reports that he planned to introduce. It is argued that the Jencks Act, 18 U.S.C.A., Section 3500, was violated. In the first place, that act only applies to criminal prosecutions brought by the United States, and in the next place, there is no requirement that the statement of any witness called by the government be given counsel for defense until after that witness has testified on direct examination.

It is asserted that the trial court did not admonish the jury that the statements of Bradshaw could not be considered as against Doris Steel, and did not grant a severance, and these omissions constituted error. The simple answer to these assertions is that no request for either action was made by the defense.

It is argued that the court erred in not granting a motion which was made for a change of venue. The basis for this motion was three newspaper articles, relative to the robbery, two appearing in the DeQueen Bee, a weekly paper published in Sevier County, and the other being published in the DeQueen Daily Citizen. The first story complained about was published on Thursday, September 28, 1967, and is an account of the bank robbery. There is also a picture taken at the bank of the suspects, just prior to their interrogation by officers. The article is simply a news item, and recites that appellants were being questioned in connection with the robbery. It will be noted that this issue was published some seven months before the trial. The Thursday, October 5, 1967, issue of the paper merely recited that these three appellants had entered pleas of not guilty, and that each had been released on a $5,000.00 bond. None of the evidence was recited except the fact that the stolen Ford had been found abandoned. The third newspaper offered in evidence was the April

24, 1968, copy of the Daily Citizen, which was published five days before the trial. The article itself was very brief, reciting that appellants would be tried on Monday, and listed the names of the jurors for the adjourned February term of court. However, one sentence read as follows:

"All four had entered guilty pleas and were free on $5,000.00 bond each."

Obviously a typographical error had been made, and the sentence should have read, "All four had entered *not* guilty pleas." This is the only statement that could at all have had any adverse effect, and certainly any member of the jury learned at the very outset of the case, that no plea of guilty had been entered. Neither affidavits nor testimony was offered that appellants could not receive a fair trial, nor does the record reflect that members of the jury panel were questioned with regard to whether the newspaper articles had influenced them in any manner. In other words, there is absolutely no showing of any possible prejudice.

In June, 1968, a hearing was held on an amended motion for a new trial, wherein it was asserted that new evidence had been discovered that would impeach the evidence offered by Lawrence Dinger on behalf of the state; William Allen testified on behalf of the appellants, the substance of his testimony being that Steel did not make any statement to him about buried money, nor the Lockesburg bank. Allen said that there was a conversation about money, but it concerned a shotgun. In *Gross* v. *State*, 242 Ark. 142, 412 S.W. 2d 279, this court mentioned that newly discovered evidence is one of the least favored grounds of a motion for new trial, and that such motion is addressed to the sound legal discretion of the trial judge. It was further pointed out that the mere fact that the evidence is contrary to that offered at the trial by the state is insufficient, and that it must be shown that, because of this evidence, a different

result upon a new trial is probable. We said that in order to justify the granting of the motion, the evidence in support thereof should be clear and satisfactory, and the trial court's action should not be disturbed unless it is manifest that an injustice has been done. After studying this testimony carefully, we are not persuaded that the trial court abused its discretion, and this feeling is strengthened by the fact that no request for a continuance was made when Dinger was called to testify.

Other alleged errors during the trial are mentioned, including some alleged errors that do not appear in the record. We, of course, have given no consideration to the last mentioned, but every alleged error which appears in the transcript has been examined, and found to be without merit.

Affirmed.

SIDNEY DYER v. E. E. PAYNE, ET AL

5-4812 436 S.W. 2d 818

Opinion Delivered February 10, 1969

Chowning, Mitchell, Hamilton & Burrow for appellant.

George J. Cambiano for appellees.

GEORGE ROSE SMITH, Justice. This is an action for personal injuries sustained by James Payne, who was an eighteen-year-old truckdriver at the time of the accident. As James was about to meet the appellant's truck on a highway a large rock fell from the appellant's truck, bounced through James's windshield, and struck him in the mouth, causing the injuries complained of. The jury awarded $30,000 to James and $5,000 to his father for past medical expenses, but the trial court reduced the latter to $650, which was the greatest amount sustained by the proof. Here Dyer's sole contention is that the $30,000 award to James is excessive.

We have said more than once that precedents are of scant value in appeals of this kind. In each case we must study the proof, viewing it most favorably to the appellee, and decide the difficult question whether the verdict is so great as to shock our conscience or to demonstrate passion or prejudice on the part of the jurors.

Among the immediate results of the accident were a loss by James Payne of about a month's time from work, during which he frequently suffered severe pain, and eventually a loss of ten pounds in weight. Several upper teeth and part of the bone in James's upper jaw were destroyed. By dental surgery James was fitted with what is described as a ten-unit bridge, but the surgeon testified that he was not happy with the result. Owing to the loss of bone the bridge cannot be made to fit satisfactorily and will cause discomfort as long as the bridge lasts. James was still suffering pain at the time of the trial, more than seven months after the accident.

The ill-fitting bridge has affected James's ability to speak clearly—to an extent that was doubtless clear to the jury but of course is not equally clear to us. James's mother testified that for months after his injury he was too embarrassed to go to church, to go out with girls, or even to go out with other young men as often as he used to. The jury could have concluded from the testimony that the mortifying speech difficulties will continue indefinitely.

What must have impressed the jury, as it does the members of this court, is the permanent consequences of the injury. James's teeth were already subject to some decay, owing to faulty dental hygiene. It is expected that by the time this young man reaches twenty-five the bridge will have weakened the anchoring teeth to such an extent that James will have lost all the teeth in his upper jaw. A complete upper plate will be required, but the dental surgeon expected that it would be a source of pain, discomfort, and expense for the rest of the patient's life.

We have suffered much anxiety in the study of the case, for the award is unquestionably liberal. Nevertheless, when we take into account the fact that this youth will suffer pain and discomfort and perhaps speech difficulties for each waking hour over a period of forty or fifty years, we are unable to say that the amount of the award—especially in view of the constantly decreasing purchasing power of the dollar—is so great that it shocks the conscience of the court. Nor are we convinced that the jury's award of excessive damages to James's father for medical expenses necessarily shows that the personal injury award was motivated by passion or prejudice. In our best judgment the decision of the trial court must be upheld.

Affirmed.

WALCOTT & STEELE, INC. v. ROSAMOND CARPENTER

5-4818 436 S.W. 2d 820

Opinion Delivered February 10, 1969

David F. Gillison Jr. for appellant.

Drew & Holloway for appellees.

LYLE BROWN, Justice. The plaintiffs below (appellees here) were Rosamond and Hillman Carpenter, brothers who as partners farmed lands belonging to the other plaintiff, Nelson W. Bunker III. Plaintiffs sued Walcott & Steele, Inc., seed dealers, alleging loss of a

substantial portion of their cotton crop produced from certified cottonseed sold Carpenter Brothers by Walcott & Steele. Judgment was awarded on the theory of violation of express warranty of the seed. Walcott & Steele appeals.

Carpenter Brothers have a farming operation adjacent to the town of Lake Village. They rent several acres from Bunker Farms, paying the landlord one-fourth of the crops, mostly cotton and soybeans. In February 1966, Carpenter Brothers purchased cottonseed from Walcott & Steele, Inc., of Greenville, Mississippi. The order was for sixty bags, fifty pounds each, of Stoneville 213 seed. Evidence for the brothers was to the effect that the seed was delivered by truck and placed in dry quarters in a storage barn; that the seed was planted under normal conditions; that much of it failed to germinate; and that replanting failed to produce the desired results. Thereupon agents of the State Plant Board were called upon to test seed gathered from one of four sacks left over. The analysis showed germination to be 27.75%. To each of the sixty bags delivered was attached a tag showing germination to be eighty per cent. The State Plant Board regulations required the percentage of germination to be placed on the tags.

The local agent for the Agricultural Stabilization and Conservation Service produced the acreage records covering Carpented Brothers' 1966 operations. Those records showed a total of 176.2 planted acres which failed to produce. Evidence from the gin records showed that in 1965 the Carpenters ginned 1231 pounds per acre, whereas in 1966 the ginning dropped to 662 pounds average per acre.

The jury awarded damages of $5,718, to be divided between Carpenter Brothers and Bunker Farms, the landlord. A credit of $176.25 was allowed Walcott & Steele for balance owed on account.

The facts to be evaluated in determining the nature of the warranty are important. Rosamond Carpenter testified that Walcott & Steele's salesman came by Rosamond's home. They had transacted business the year previous. Rosamond said he placed an order for sixty bags of Stoneville 213 cottonseed. (The meaning of "Stoneville 213" is not explained.) That was the sum total of the conversation gleaned from the record. Now as to the origin of this shipment of Stoneville 213. The seeds were grown by H. K. Hammett & Sons of Greenville, Mississippi. Hammett operates under the supervision and inspection of the Mississippi Seed Improvement Association, the official certifying agency for that State. Hammett gins the cotton, cleans and otherwise processes its seed. Each lot of seed is given a number and they are said to be kept separated, one lot from the other. Field men for Mississippi Seed Improvement Association inspect each lot. If it is approved then that agency issues a green certification tag for each fifty pounds in the approved lot. The tag shows the date tested, percentages of germination, hard seed, purity, crop seed, inert, weed seed, and noxious weeds.

Walcott & Steele picks up seed from Hammett in Walcott's trucks and in bulk. Before bagging in its own trade bags, Walcott puts the seed through another processing. That includes removing any lint, by neutralizing the lint with a soda solution, cleaning out any trash, removing immature seed, and disinfecting the seed. Thereupon, a processing report is sent to Mississippi Seed Improvement Association. On the basis of both the reports from Hammett and Walcott, the green certification tags are released to Walcott and one is by Walcott affixed to each bag. The tag has a certification over the printed signature of Mississippi Seed Improvement Association.

Walcott invoiced the seed to Carpenter Brothers under the following description: "60, 50# bags Hi-Vigor Stoneville 213, Demosan treatment." At the bottom of the invoice was this wording:

> NON-WARRANTY: WALCOTT & STEELE, Inc. Give no Warranty, Express or Implied. As To Description, Productiveness, or Any Other Matter of Any Seeds That We Sell and We Will Not in any Way Be Responsible for the Crop. Our liability in all Instances Is Limited to the Purchase Price of the Seed.
>
> NOTICE: All claims for credit must be made within 10 days or will not be allowed.

Excepting those words shown in caps, the print can be easily classified as fine print. Mr. Carpenter said the deliveryman gave him a copy of the invoice which he signed and returned. He said he did not read it.

Each bag is tri-colored, red and black on white. Among other things we find this wording from viewing a color print of one of the bags: "Mississippi Certified. HI-VIGOR SEED; GRADED; TREATED; SOLD BY WALCOTT & STEELE, INC."

Hillman Carpenter testified that it is generally understood in that farming community that seed has to have eighty per cent germination. He said he would not have kept the seed if the tags, which he examined, had not shown the desired eighty per cent. Rosemond Carpenter testified they had purchased the same type seed from Walcott the year before and had a very good experience.

Based on the enumerated evidence, was the trial court warranted in telling the jury that as a matter of law Walcott sold the seed under an *express* warranty? The court took the position that the germination certification on the green tag constituted the warranty and so informed the jury. For resolution of the question we look to Ark. Stat. Ann. §85-2-313 (Add. 1961). That section defines express warranties and there we find this definition: "(b) Any description of the goods

which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description."

Walcott & Steele knew it could not sell cottonseed for planting in the State of Arkansas unless each bag contained a label showing the true percentage of germination. See Regulations on the Sale of Planting Seed in Arkansas, Sec. 2 (B), which was introduced in evidence without objection. In other words, that provision was certainly a part of the law with which Walcott was expected to comply when it took the order. It would be absurd to say that the Carpenters were required to expressly state to Walcott that the germination percentage "must be truly and correctly given on the permit tag" in order to make it a part of the basis of the bargain. The law itself made it a part of the bargain. We find only one precedent which may be said to be in point. *Mallery* v. *Northfield Seed Co.,* 264 N.W. 573 (Minn. 1936). Mallery ordered alfalfa seed for sowing on his farm. The crop failed allegedly because of seed impurity. The warranty relied on for damages was the tags on the bags of seed which were placed there in conformity with statutory requirement. The Court there held that the representation on the label constituted an express warranty.

We hold as a matter of law that the certification warrants the contents of the bag to be as stated thereon, within reasonable and recognized tolerances, and that it is a warranty made by that vendor who causes the certification to be attached. That warranty is of course subject to the time limit expressed by the regulations. We are not unmindful of the fact that *Smith* v. *Tatum,* 198 Ark. 802, 131 S.W. 2d 619 (1939), gave scant significance to what the Court called a "mistake" on the part of the plant board. Since that decision the plant board regulations of 1956, from which we have quoted, became effective. Also the UCC was adopted in 1961.

The court struck from defendant's pleading the defense of non-warranty based on the non-warranty clause appearing at the bottom of the invoice. The court was correct. There was an express warranty and Walcott was attempting to modify it by "unbargained language of disclaimer" which was inconsistent with the express warranty. To that extent it was unreasonable. Ark. Stat. Ann. § 85-2-316(1) (Add. 1961).

Now to the next point. At the beginning of the trial all witnesses were excluded from the courtroom at the request of both parties. In the afternoon of the first day of trial, a rebuttal witness for the plaintiffs came into the courtroom and stayed over an hour. It appears that he left when Mr. Bunker told him he was not supposed to be in the courtroom. It is not shown that this witness, Alvin Ford, heard any testimony touching on the subject matter of his rebuttal. Trial courts have considerable discretion "in managing and controlling the proceedings at the trial," and that includes control over the witnesses. *Arkansas Motor Coaches* v. *Williams,* 196 Ark. 48, 116 S.W. 2d 585 (1938). The court's action created no prejudicial error and we cannot say he abused his discretion.

Appellant next challenges the court's instruction seven:

> You are instructed that if you find from a preponderance of the evidence that the cottonseed sold by the Defendant, Walcott and Steele, Inc., did not substantially conform to the certification tag and certification of germination thereon, and you find that the failure of these seeds to substantially germinate was the proximate cause of damage to the Plaintiffs, Carpenter Brothers and Bunker Farms, Inc., then you will find for the Plaintiffs, Rosamond Carpenter and Hillman Carpenter, d/b/a Carpenter Brothers, and against the Defendant, Walcott and Steele, Inc., and fix the Plaintiffs'

damages in a sum hereinafter as instructed by the Court.

Walcott contends the instruction is erroneous because it did not direct the jury that it must first find the cottonseed was actually sold by appellants. The court was entitled to have that specific objection called to its attention before the instruction was given, which was not done. Nor do we consider it inherently erroneous because it was admitted Walcott shipped sixty bags of Stoneville 213 and the jury certainly knew it was that particular shipment which was the basis of the lawsuit. The particular lot of seed from which the shipment originated was secondary.

Appellant challenges the court's instruction eight wherein the jury was told the certification tags constituted a warranty. What we have already said disposes of that point. The same statement applies to the court's refusal to give defendant's instructions A and B.

Affirmed.

MACK TRUCKS OF ARKANSAS, INC. AND MACK TRUCKS, INC. v. JET ASPHALT AND ROCK CO., ET AL

5-4761 437 S.W. 2d 459

Opinion Delivered February 10, 1969

[Rehearing denied March 17, 1969.]

Brown, Compton, Prewett & Dickens for appellants.

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

JOHN A. FOGLEMAN, Justice. Appellants seek relief from a judgment against them for $5,000 as damages for breach of implied warranty of fitness of two diesel truck engines. Appellant Mack Trucks, Inc., is a manufacturer of trucks and diesel engines. Appellant Mack Trucks of Arkansas, Inc. is a Mack truck dealer.

On or about September 13, 1965, a partnership of Haynie & Williams purchased two Mack diesel trucks from the dealer. The purchase was made on special

order, after the partners had specified the work on which the trucks would be used and certain requirements necessary in the prosecution of their business of operating a gravel plant and an asphalt plant. Diesel engines were specifically required by the purchaser. The trucks were built by the manufacturer after the order for them had been given by the purchasers. They were delivered in January 1966. No warranty was mentioned in the purchase order signed by the dealer and the purchasers.

Haynie & Williams operated the trucks until February 1, 1966, when one of them was sold to Edwin B. Alderson, Jr. and Mary Jane Alderson and the other to Edwin B. Alderson, Jr. and Alan K. Alderson, the sons and daughter-in-law of Boyd Alderson, a stockholder of appellee Jet Asphalt & Rock Co., a domestic corporation. Subsequently, but during the same month, the other assets and business of the partnership were sold to Jet. One of the partners in Haynie & Williams is a stockholder in Jet and was retained at the time of the sale to operate the corporation. He became president about three months after the sale. The Aldersons leased the trucks to Jet after their purchase.

Minor trouble with power steering and rocker arms which developed while the trucks were operated by the partnership was readily corrected by the dealer. After the lease of the equipment, Jet complained to the dealer of oil leakage and excessive oil consumption by both units. Jet claimed that clutch trouble resulted making the trucks difficult to operate. Despite numerous repairs by the dealer, Jet remained unsatisfied. Most of the invoices for repairs were to Haynie & Williams, but at least two were to Jet. Each invoice showed allocation of the major part of the cost to "Warranty" and the remainder to "Customer." Efforts of representatives of Jet, the dealer, and the manufacturer to agree on a satisfactory course of action resulted in failure. Over the protest of appellants, Jet purchased diesel

units for both of the trucks from another manufacturer and caused the Mack units to be delivered to the Mack dealer. After appellants refused the demand of Jet for reimbursement of its cost of replacing the diesel units, Jet brought this action in Union County against both the manufacturer and dealer.

In its complaint, Jet alleged that Mack Trucks, Inc. is a foreign corporation authorized to do business in Arkansas and that Mack Trucks of Arkansas, Inc. is a domestic corporation with its principal office and place of business in Pulaski County. The cause of action was based upon alleged breach of an express warranty exhibited with the complaint and of an implied warranty of fitness for the purpose for which the trucks were sold. Jet sought recovery of $6,500, the cost of replacement of the engines, alleging that the value of each truck was $4,325 less at time of delivery than it would have been if they had been in good working order when delivered.

Summons was served upon both appellants in Pulaski County. They questioned jurisdiction of the person[1] and of the subject matter by a demurrer which was overruled. Thereafter, appellants filed an answer and supplemental answer. The Aldersons intervened before trial, adopting and ratifying Jet Asphalt's pleadings.

Just prior to the beginning of the trial appellants renewed their demurrer to jurisdiction and venue, which was again overruled. No evidence was ever offered by either party on this question.

Appellants first contend that there was error in permitting this suit to be maintained in Union County, claiming that neither of them had its principal office or place of business in Union County and that the chief officer of neither resided in that county.

[1]While this was the expression used in the demurrer, the appellants actually challenged venue.

Ark. Stat. Ann. § 27-605 (Repl. 1962) provides that an action may be brought against a corporation created by the laws of this state in the county in which it is situated or has its principal office or place of business or where its chief officer resides. Ark. Stat. Ann. § 27-608 permits an action to be brought against a foreign corporation in any county where there may be property or debts owing to it. Ark. Stat. Ann. § 27-613 permits the bringing of actions for which the venue is not otherwise specified in any county in which one of several defendants resides or is summoned. Corporations come within the terms of these sections as defendants or persons. *Harger* v. *Oklahoma Gas & Electric Co.,* 195 Ark. 107, 111 S.W. 2d 485. There is nothing to indicate where the domestic corporation is situated, nor is there anything to indicate where its chief officer resides. This corporation, for all that appears in the record might have been sued in any one of three counties. *Spratley* v. *Louisiana & Arkansas Ry. Co.,* 77 Ark. 412, 95 S.W. 776 (on rehearing); *Duncan Lumber Co.* v. *Blalock,* 171 Ark. 397, 284 S.W. 15. The foreign corporation could properly be sued in Union County if it had any property there or if there were debts in Union County owing to it. Nothing in the record indicates whether or not this is the case. Generally, where venue is questioned, there must be a determination on the facts. *Belford* v. *Taylor,* 241 Ark. 220, 406 S.W. 2d 868. Unless the pleadings on their face show that an action was commenced in the wrong county, a defendant objecting to the venue has the burden of proving the essential facts. 92 C.J.S. 772, § 74; *Tribune Company* v. *Approved Personnel, Inc.,* 115 S. 2d 170 (Fla. 1959); *Cohen* v. *Commodity Credit Corp.,* 172 F. Supp. 803 (W.D. Ark. 1959); *Werner* v. *Braunstein,* 20 Misc. Rep. 341, 45 N.Y.S. 757. Since appellants failed to offer any evidence on these critical points, and the record is silent otherwise, we find no merit in this contention. In this connection, it is significant that appellant Mack Trucks, Inc. failed to answer interrogatories propounded by Jet which pertain to some of these facts.

Furthermore, appellants jointly filed an answer and supplemental answer in neither of which were their special appearances or objections to venue preserved in any way. This constituted a waiver of the objections to venue. *Williams* v. *Montgomery,* 179 Ark. 611, 17 S.W. 2d 875; *Chicago R.I. & P. Ry. Co.* v. *Jaber,* 85 Ark. 232, 107 S.W. 1170.

Appellants' next contention is that the circuit court should have granted their motions for directed verdict because of lack of privity. They contend that appellees are barred from recovery for breach of warranty because neither the Aldersons nor Jet was in privity of contract with either of the appellants.

Act 35 of 1965 [Ark. Stat. Ann. § 85-2-318.1 (Supp. 1967)] eliminated lack of privity as a defense in *any* action brought against the manufacturer or seller of goods for breach of warranty, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods. Appellant argues that this act has no application in cases which do not involve injury or damage to persons or property. Unlike appellant, we are unable to find any language in the act or its title suggesting such a restrictive application of the act. The identical act has been adopted in Virginia. Va. Code Ann. § 8.2-318 (Additional Vol. 1965). We know of no decision under any such statute relating to its application to economic or commercial losses. The only cases arising under a similar act of which we know are cases involving personal injuries or property damage (see e.g. *Brockett* v. *Harrell Bros., Inc.,* 206 Va. 457, 143 S.E. 2d 897). Yet, we know of no suggestion by any court that the effect of the statute is limited to these cases. We do not know of any logical reason why the effect should be so limited. If any such reason had occurred to the General Assembly, no doubt there would be limiting language in the act. In the absence of such language, we must, and do, presume that our legislative branch

meant literally what it said. In so saying, it was following the present trend to shift the emphasis in breach of warranty cases from privity, or lack of it, to foreseeability. The Virginia court said that the obvious purpose of the statute was to insure the implied warranty of fitness by the manufacturer to the consumer despite the lack of privity between the two. (*Brockett* v. *Harrell,* supra.) The statutory purpose is the same as to anyone who it might reasonably be foreseen would be a user of goods manufactured or sold. The intention to permit a second purchaser or even a lessee from a purchaser to recover for breach of warranty seems implicit in the language providing that lack of privity should not be a defense "although the plaintiff did not purchase the goods from the defendant." This is not to say that every remote purchaser or user could recover for a breach of implied warranty of fitness for the purpose. Whether it was reasonably foreseeable that such a one would use the product would usually become a question of fact. Here, however, the sale and lease took place approximately one month after the original sale. Repairs were made over a period of months upon the complaints of Jet. Under these circumstances the trial court's holding, as a matter of law, that lack of privity was not a defense, was correct.

Appellants also argue that the circuit court erred in instructing the jury not to consider the express warranties exhibited with appellees' complaint and later introduced in evidence by them. As a part of this contention they allege error by the court in refusing to give their requested instructions which incorporated limitations expressed in those warranties. The first such instruction would have told the jury that they could consider only the express warranty. The other would have required the jury to disregard any warranty if they found the trucks were operated at a speed in excess of the factory rated speed.

Actually, appellants could not be prejudiced by the elimination of their potential liability on an express

warranty, except for the limitations thereby imposed. Exclusions or modifications of the implied warranty of fitness existing by virtue of Ark. Stat. Ann. § 85-2-315, which appear in the body of a warranty are not effective unless they are conspicuous. Ark. Stat. Ann. § 85-2-316 (2). The trial court had previously instructed appellants not to refer to certain of the limitations involved at the close of appellees' case because of their lack of conspicuity. We do not understand appellants' argument that these disclaimers are conspicuous. They are the same size type as the express warranty. The only part of either warranty which can be said to be conspicuous is the title—"Vehicle Warranty" and "Supplement to Mack Standard Warranty applicable to Mack Diesel Engines." Nothing in either of these titles suggests the content of exclusions or modifications of the implied warranty. According to Ark. Stat. Ann. § 85-1-201, a term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. See Comment to Uniform Commercial Code; *Minikes* v. *Admiral Corp.,* 266 N.Y.S. 2d 461 (1966). While Haynie testified that he was sure that he went over the warranties at the time the trucks were bought, he failed to respond to an inquiry as to whether he familiarized himself with the terms and conditions of the warranty and he could not recall definitely that the warranty was to repair defective parts. It was stipulated that the written warranties were delivered when the trucks were delivered.

The requirement that an exclusion or modification of implied warranties be conspicuous is to insure that attention of the buyer can reasonably be expected to be brought to it. Comment to UCC, Ark. Stat. Ann. § 85-1-201. Such an attempted disclaimer is ineffective, as a matter of law, and fails of its purpose when it is in the body of an instrument and in type of the same size and color as other provisions. *Boeing Airplane Company* v. *O'Malley,* 329 F. 2d 585 (8th Cir. 1964); *SFC Acceptance Corp.* v. *Ferree,* 39 Pa. D. & C. 2d 225. We have

indicated that a similar attempted limitation is ineffectual as a matter of law. *Sawyer* v. *Pioneer Leasing Corp.*, 244 Ark. 943, 428 S.W. 2d 46, 5 UCC 453.

This attempted disclaimer or limitation is ineffective for another reason. The very purpose of the statutory requirement is that any limitation be brought to the attention of the buyer at the time the contract is made. An attempted limitation at the time of delivery long after a contract of purchase is signed does not accomplish this purpose, being a unilateral attempt of a party to limit its obligations. *Zabriskie Chevrolet, Inc.* v. *Smith,* 99 N.J. Super. 441, 240 A. 2d 195, 5 UCC Rep. Svc. 30 (1968); *Admiral Oasis Hotel Corp.* v. *Home Gas Industries, Inc.,* 68 Ill. App. 2d 297, 216 N.E. 2d 282, 3 UCC Rep. Svc. 531. See also *Hunt* v. *Perkins Machinery Co.,* 352 Mass. 535, 226 N.E. 2d 228 (1967).

The circuit judge's holding that there was an implied warranty of fitness for the purpose for which the trucks were bought under the circumstances existing here was not erroneous.

The judgment is affirmed.

LAFAYETTE COUNTY INDUSTRIAL DEVELOPMENT CORPORATION v. FIRST NATIONAL BANK OF MAGNOLIA

5-4785 436 S.W. 2d 814

Opinion Delivered February 10, 1969

[redacted]

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

Gaughan, Laney, Barnes & Roberts and *Keith, Clegg & Eckert* for appellee.

J. Fred Jones, Justice. Lafayette County Industrial Development Corporation filed suit in the Columbia County Chancery Court against the First National Bank of Magnolia seeking restitution of funds deposited in the bank to the account of Magnolia Steel Corporation, and for a declaration of a constructive trust upon the funds so deposited. The bank challenged the sufficiency of the evidence by motion, amounting to a demurrer, under Ark. Stat. Ann. § 27-1729 (Repl. 1962). The chancellor granted the motion and the Development Corporation has appealed relying upon a single point for reversal, designated as follows:

> "The Chancellor erred in dismissing the complaint of the appellant for the reason that as a matter of law the appellant's proof entitled it to the relief prayed."

The primary factual background for this litigation appears as follows: Mr. W. H. Hoster was a resident of Oklahoma and was engaged in the steel mill business in Oklahoma City under the corporate or trade name of Oklahoma Steel Company. Hoster was interested in an Arkansas location for the establishment of a small roll-

ing mill for processing scrap steel. Mr. W. C. Blewster was the president of the First National Bank of Magnolia in Columbia County, Arkansas, and was an active member of the Magnolia Chamber of Commerce. Mr. Blewster was interested in obtaining new industry for the Magnolia area, so he, and other members of the Magnolia Chamber of Commerce prevailed upon Mr. Hoster to locate and build a rolling mill near Magnolia in Columbia County. As a first step in regard to the Magnolia program, on February 28, 1963, Mr. Hoster formed an Arkansas corporation named "Columbia Steel Corporation," and with the exception of two qualifying shares, he was the sole owner of the stock issued.

Lafayette County had been designated by the Area Redevelopment Administration (A.R.A.) as an area of substantial unemployment and eligible for financial assistance under federal laws; and Mr. Blewster owned an interest in an organization which has procured leases on iron ore deposits in Lafayette and Nevada Counties.

Some leading citizens of Lafayette County were invited by Mr. Blewster to attend a Chamber of Commerce meeting in Magnolia where Mr. Hoster was introduced and his plans for the rolling mill at Magnolia were explained. The citizens of Lafayette County were urged to attempt the procurement of a steel mill in their area under the A.R.A. program. The Lafayette County citizens proceeded to organize the appellant corporation for the purpose of sponsoring a steel mill and blast furnace project near Stamps under the A.R.A. program. On December 10, 1962, Mr. Hoster formed a domestic corporation named "Magnolia Steel Corporation" for the purpose of erecting a steel mill at Stamps for the processing of the iron ore in Lafayette and Nevada Counties. With the exception of two qualifying shares, Hoster was the owner of all the stock issued in this corporation. On April 5, 1963, Magnolia Steel applied for an A.R.A. loan and on August 9, 1963, a government loan was authorized for the project at Stamps in the

amount of $977,763.00. The loan was to be secured by a mortgage subordinate only to the security for a loan to be made by the appellant bank and its correspondent banks in the amount of not more than $300,850.00. The appellant was required under the authorization to make available to Magnolia Steel not less than $150,425.00 in the form of equity capital or as a loan covered by a standby agreement. Under the terms of the authorization it was necessary for Magnolia Steel to have available, from sources other than the A.R.A. loan, not less than $375,212.00 in the form of equity capital. No less than $75,212.00 of this amount was to be spent solely on account of the cost of the project and no less than $300,000.00 was to be made available for working capital.

As a part of the procedure in procuring the government loan, on November 20, 1963, the appellant agreed to loan to Magnolia Steel $150,425.00 to be secured by a third mortgage lien subordinate to a first mortgage lien securing a proposed loan by the appellee bank, and the lien of a second mortgage to be given to A.R.A. The appellant agreed to make the proceeds of its loan available to Magnolia Steel on or about December 20, 1963. This agreed loan was to be evidenced by a note temporarily secured by a mortgage on land to be acquired for the project.

In carrying out its agreement, the appellant caused to be issued and sold, Lafayette County Industrial Development bonds in the amount of $150,425.00, and the appellee, First National Bank of Magnolia, was made paying agent. These bonds were sold to citizens of Lafayette County and by December 23, 1963, the appellant had raised the net amount of $146,425.00.

In the meantime, Columbia Steel was engaged in financing its own operation in connection with the construction and operation of its plant in Columbia County near Magnolia. In February and March, 1963, the ap-

pellee bank made two loans totaling its loan limit of $110,000.00 to Columbia Steel. The appellee made various loans to Mr. Hoster and on November 26, 1963, made loans, apparently carried on the books as cash items, in the amount of $75,000.00 to Hoster and $50,000.00 to Oklahoma Steel. On the same date, November 26, 1963, the appellee made an unsecured loan of $100,000.00 to Magnolia Steel. No part of this loan was ever deposited to the account of Magnolia Steel, but on November 27, 1963, the day following the loans to Hoster, Oklahoma Steel and Magnolia Steel, the sum of $225,000.00 was deposited to the account of Columbia Steel. There were several withdrawals from the Columbia Steel account, including $75,000.00 in repayment of the loan to Hoster, and $50,000.00 in repayment of the loan to Oklahoma Steel..

The appellant knew nothing of the appellee's loan of $100,000.00 to Magnolia Steel, when on December 23, 1963, the appellant delivered its check to Magnolia Steel in the amount of $146,425.00. The check was endorsed by Hoster who then handed it to Blewster, and on the following day, December 24, 1963, the check was deposited in the appellee bank to the account of Magnolia Steel. On December 27, the next banking day following Christmas, $100,000.00 was withdrawn from the account of Magnolia Steel and used to purchase a cashier's check made payable in the amount of $100,000.00 to the appellee bank as security for the $100,000.00 loan made on November 26 to Magnolia Steel and deposited to the account of Columbia Steel.

Subsequent to the above transactions, Mr. Blewster resigned as president of the Magnolia bank; the cashier's check was cashed and the proceeds applied in satisfaction of the bank loan to Magnolia Steel; Magnolia Steel canceled its loan application with A.R.A. and Magnolia Steel was merged with Columbia Steel. The appellee bank purchased the assets of Columbia Steel in Columbia County under mortgage foreclosure and

appellant purchased at foreclosure the only assets of Magnolia Steel, consisting of eighty acres of land for plant site in Lafayette County, which had been purchased for $24,000.00 and paid for, at appellant's insistence, out of the proceeds of the bond sale deposited to the account of Magnolia Steel.

We now come to the point of law on which this case turns. The appellee challenged the sufficiency of the evidence by motion filed under authority of Ark. Stat. Ann. § 27-1729 (Repl. 1963), which provides that in any chancery case the defendant may, at the close of plaintiff's case, file a written motion challenging the sufficiency of the evidence to warrant the relief prayed. If the trial court grants the motion and we reverse his action on appeal, we are required by the statute to remand the cause for the development of the defendant's proof. In arguing the insufficiency of appellant's evidence, the appellee says:

> "[I]t offers no evidence that the First National Bank or any of its officers knew, or had reason to know, that W. H. Hoster was not spending these funds on behalf of Appellant.
>
> * * *
>
> Proof from Appellant's own officers shows that they, *like the Bank president,* all understood and believed that W. H. Hoster was using funds to plan for, purchase, and construct equipment for the Magnolia Steel Corporation." (Emphasis supplied.)

Appellee concludes its argument with this statement:

> "The Chancellor heard the testimony; he observed and heard the evasiveness of Appellant's officers much of which is obscured in the abstract of testimony. The Chancellor knew the quantum

of proof required, and his duty to dismiss upon motion properly presented."

We agree with the appellant that this case is controlled by our decision in *Werbe* v. *Holt,* 217 Ark. 198, 229 S.W. 2d 225, and although the trial court mentioned "preponderance of the evidence" in the *Werbe* case and the chancellor did not do so in the case at bar, we are of the opinion that in hearing the testimony and observing the evasivenesss of appellant's officers, as argued by the appellee, the chancellor also considered what he observed and heard, and that he weighed the evidence in arriving at his conclusion to grant appellee's motion in this case. In so doing we conclude, that the chancellor erred.

Werbe v. *Holt, supra,* was a case of first impression under Ark. Stat. Ann. § 27-1729, supra, and as to the questions raised by the statute and answered in *Werbe,* we said:

> "When the defendant in an equity or probate case asks for judgment at the close of the plaintiff's testimony, should the trial judge view the evidence in the light most favorable to the plaintiff to determine whether a *prima facie* case has been made, or should he weigh the testimony to decide whether the plaintiff has proved his case by a preponderance of the evidence? In short, does a motion filed under Act 470 present an issue of law or of fact?
>
> * * *
>
> After a painstaking study of this matter we are unanimously of the opinion that the motion presents a question of law and not of fact. The General Assembly evidently chose its language with care, and what the motion challenges is 'the sufficiency of the evidence' to warrant the relief prayed. The quoted phrase has a familiar legal meaning—a meaning that does not involve the weighing of evi-

dence. For instance, it is often said that the defendant's motion for a directed verdict in suits at law challenges 'the sufficiency of the evidency' to take the case to the jury. Here the legislature has used a phrase of well known legal signification, and it is presumed to have used the language in that sense. *Fernwood Mining Co.* v. *Pluma,* 138 Ark. 459, 213 S.W. 397.

* * *

The question may arise either in equity cases, where the chancellor is the arbiter 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."

In *Neely* v. *Jones,* 232 Ark. 411, 337 S.W. 2d 872, the correctness of sustaining a demurrer to evidence was again raised, and in that case we said:

"The only question is whether the demurrer to the evidence was properly sustained. This depends, under our holding in *Werbe* v. *Holt,* 217 Ark. 198, 229 S.W. 2d 225, upon whether the proof, viewed in its most favorable light, would have presented a question of fact for the jury if the case had been tried at law."

In reversing the chancellor's decree sustaining the demurrer in *Neely* v. *Jones,* this court said:

"Here the trial court's action in sustaining a demurrer to the evidence can be affirmed only if the plaintiffs offered no substantial testimony upon the controlling question of fact. We are unable

to say that their proof falls completely short of establishing a *prima facie* case."

What the chancellor did in the case at bar was tantamount to directing a verdict for the defendant at the close of the plaintiff's evidence in a law case. In *Hawkins* v. *Missouri Pacific Railroad Co., Thompson Trustee,* 217 Ark. 42, 228 S.W. 2d 642, this court said:

> "A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men could possibly find the issues for the plaintiff. In such circumstances the trial judge must give to the plaintiff's evidence its highest probative value, taking into account all reasonable inferences that may sensibly be deduced from it, and may grant the motion only if the evidence viewed in that light would be so insubstantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury."

And again in *St. Louis, I.M. & S. Ry. Co.* v. *Fuqua,* 114 Ark. 112, 169 S.W. 786, we said:

> "The rule is that where fair-minded men might honestly differ as to the conclusion to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury."

We conclude that the appellant offered some substantial evidence in support of its allegations in this case and that the chancellor erred in granting appellee's motion before the appellee offered additional evidence or rested its case.

The decree of the chancellor is reversed and this cause remanded for a complete trial on the merits.

Reversed and remanded.

COMMERCIAL CREDIT CORPORATION v. ASSOCIATES DISCOUNT CORPORATION, ET AL

5-4791 436 S.W. 2d 809

Opinion Delivered February 10, 1969

Patten & Brown for appellant.

Martin, Dodds, Kidd, Hendricks & Ryan for appellees.

CONLEY BYRD, Justice. The issue on this appeal is whether a "buyer in the ordinary course of business" of an automobile from a dealer takes title superior to that

of the repossessin lien creditor who had stored the automobile with the dealer.

The record shows that:

1. Cox Brothers Co. Inc., an automobile dealer, on June 21, 1965, sold a 1965 Pontiac to William White.

2. William White, through Cox Brothers, financed the automobile with appellant Commercial Credit Corp., with Cox Brothers being an indorser with recourse. The certificate of title issued by the Motor Vehicle Division of the Revenue Department of the State of Arkansas was issued on July 12, 1965. The certificate of title, properly showing Commercial's lien, was forwarded by the Motor Vehicle Division to Commercial where it has remained until trial of this suit.

3. In March of 1966, William White traded the Pontiac to Cox Brothers in exchange for another automobile. Thereafter Cox Brothers transferred the car to Bobby Reagan, who with Commercial's acquiescence, assumed White's obligation to Commercial.

4. October 14, 1966, Commercial, through its Memphis office and for reasons not shown by the record, took possession of the car from Reagan.

5. Under date of October 16, 1966, the certificate of title in possession of Commercial was endorsed by someone in the Memphis office to show that Commercial's lien on the car had been released.

6. October 20, 1966, Commercial stored the Pontiac with Cox Brothers and returned its file to its Little Rock office. Cox Brothers upon receipt of the automobile executed a storage agreement acknowledging that it had no authority to sell the automobile.

7. From October 10, 1966 to February 28, 1967, Commercial, from an unknown source, received five

monthly payments on the financing agreement held by it.

8. On December 5, 1966 someone forged the names of William White and John Bailey, one of Commercial's agents, to an application to the Motor Vehicle Division for a duplicate title. The Motor Vehicle Division issued the duplicate title, as authorized by Ark. Stat. Ann. § 75-145 (Repl. 1957), and forwarded the same to Cox Brothers in accordance with the directions contained on the application.

9. Under date of December 7, 1966, Commercial's lien, on the duplicate title, was shown as being released through the forgery of the name of John Bailey as an agent of Commercial.

10. During December 1966, Appellee, Associates Discount Corporation came into possession of the duplicate title, in its forged condition, through a floor plan financing arrangement with Cox Brothers.

11. February 16, 1967, Don Chaney and his wife Joy purchased the Pontiac from Cox Brothers by giving a $400 post dated check and financing $2,000 with Associates Discount. The post dated check was picked up March 5, 1967.

12. March 7, 1967, Associates Discount and Commercial discovered that they held duplicate liens on the Pontiac and other vehicles.

13. Associates Discount filed its lien with the Revenue Department on March 29, 1967.

14. Commercial brought this action on May 8, 1967.

15. Mr. George Fell, Jr., Commercial's district manager, assumed that Cox Brothers kept a number of repossessed automobiles on its premises and stated that

Commercial checked vehicles stored by it with Cox at least every 30 days. Commercial's policy was that it preferred that the cars on which Cox was an endorser, be paid for when delivered, but if Cox didn't pay off when the car was delivered, a signed storage agreement was accepted. His testimony with reference to Commercial's practice was as follows:

Q. Mr. Fell, your company actually had physical possession of this car before turning it over to Cox, didn't you?

A. That's right.

Q. Now regardless of what that storage agreement says, you do admit, do you not, that if Cox sold his automobile and gave you this money you would have accepted it, and the only thing you are griping about is the fact that he did not give you the money?

A. As I stated, if Cox had brought the money to pay the account off, I would have accepted it, but I still have the certificate of title.

Q. You wouldn't have turned over the certificate of title until you got the money, but you wouldn't stand in the way of his selling the car?

A. Normally, a man has to check with our office first, but if a man has already sold it, I would have accepted it.

Q. As a matter of fact, wouldn't there be a chance the only way he could get the money, the dealer, is to sell that automobile if he was otherwise broke?

A. He couldn't pay me.

Q. Unless he sold it?

A. Yes Sir.

16. Mr. Chaney testified that Cox Brothers bought the license for him—that he left the registration of the car up to Cox Brothers. He had never received title to any car that he purchased and financed until it was paid off. He understood that Cox Brothers was going to take care of the title details, —that he was relying on them to do so.

17. John L. Bowen, a new and used car salesman with seven years experience, testified that it was common practice for a dealer to make the filings of title with the Revenue Department as a customer service. Vaughan-Hicks, his employer, employed two women just to handle the certificates. He also stated that there was nothing unusual about a dealer selling a used automobile prior to receiving the certificate of title.

The trial court found that "Don Chaney and Joy Chaney purchased said automobile from an authorized dealer and were bona fide purchasers for value," and awarded possession of the automobile to Associates. For reversal Commercial relies upon the following points:

I. That the court erred in finding Don Chaney et ux were purchasers in good faith.

II. The court erred in finding that Associates was a holder through a purchaser in good faith; and

III. That Associates is estopped to claim a prior lien by its own neglect and by its failure to perfect its lien prior to acquiring actual knowledge of Commercial's lien.

For affirmance Associates takes the position that Commercial was an "ENTRUSTER" within the meaning of the Uniform Commercial Code, Ark. Stat. Ann. § 85-2-403 (2) and (3) (Add. 1961), and that since it entrusted the repossessed automobile with Cox Brothers, a recognized dealer, the Chaneys are protected as buyers in the ordinary course of business.

Commercial's basic arguments are premised upon the theory that it is a lien holder pursuant to Ark. Stat. Ann. § 75-161 (Repl. 1956); that Cox Brothers was Chaneys' agent in securing the title; and that subsections (2) and (3) of Ark. Stat. Ann. § 85-2-403 (Add. 1961) are not applicable to the transactions here involved.

The registration of motor vehicles and issuance of certification of titles thereto are governed by Acts 1949, No. 142 (Ark. Stat. Ann. §§ 75-101 thru 75-191 [Repl. 1957 and Supp. 1967]) as amended. Section 75-149 requires a purchaser or transferee, before operating a vehicle, to obtain the registration within five days and requires the transferee to obtain a new certificate of title. Section 75-150 requires the dealer to execute and acknowledge the assignment of title upon the certificate and to deliver it to the purchaser. Section 75-151 recognizes that the owner's title or interest may pass without a voluntary transfer by operation of law, as in the case of a repossessing lien holder, and recognizes the transfer of a vehicle without the certificates of title upon "... such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of title or interest in or to chattels in such case ...."

Section 75-160 in part provides:

> "No conditional sale contract, 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.

Section 75-161 provides:

(A) Such filing and issuance of a new certificate of title as provided in this article (75-160, 161) shall constitute constructive notice of liens and encumbrances against the vehicle described therein to creditors of the owner, *to subsequent purchasers and encumbrancers,* except such liens as may be authorized by law dependent upon possession. In the event the documents referred to in Section 62 (75-162) are received and filed in the Central Office of the department within 10 days after the date said documents were executed, the constructive notice shall date from the time of the execution of said documents. Otherwise *constructive notice shall date from the time of receipt and filing of such documents by the department as shown by its endorsement thereon.* (Emphasis supplied.)

(B) The method provided in this article 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 the 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 *House* v. *Hodges,* 227 Ark. 458, 299 S.W. 2d 201 (1957), we held that a certificate of title is not title itself but only evidence of title. In so doing we pointed out that the motor vehicle act only makes it a misde-

meanor for a purchaser not to promptly obtain a title —i.e., the failure to obtain a new certificate of title does not affect a transfer between parties.

Commercial's repossession of the vehicle here in question, of course, was authorized by the Uniform Commercial Code, Ark. Stat. Ann. § 85-9-503 (Add. 1961) and furthermore Commercial was authorized and expected to sell the same at either public or private sale by terms of Ark. Stat. Ann. § 85-9-504 (Add 1961). Thus the trial court could find that, under the state of this record, Commercial was lawfully in possession of the automobile, Ark. Stat. Ann. § 85-9-503, with right to sell the same at private sale, Ark. Stat. Ann. § 85-9-504, without the necessity of a certificate of title, upon "... such instruments or documents of authority or certified copies thereof as may be sufficient or required by law to evidence or effect a transfer of title or interest in or to chattels in such case ...."

The Uniform Commercial Code, Ark. Stat. Ann. § 85-2-403 provides in part as follows:

> "(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business.
>
> "(3) 'Entrusting' includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.
>
> "(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9, [§§ 85-9-101-85-9-507]) ...."

Section 85-9-307 provides:

> "(1) A buyer in ordinary course of business ... takes free of a security interest (created by his seller) even though the security interest is perfected and even though the buyer knows of its existence."

Section 85-1-201 (9) provides:

> " 'Buyer in ordinary course of business' means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind...."

Commercial contends that the terms "entrustment" and "entruster" apply only to inventory financing, and that its rights here as a "lien creditor" were specifically removed from subsections (2) and (3) of § 85-2-403 by subsection (4) which in turn places lien creditors under § 85-9-307. Commercial then contends that the Chaneys cannot take free of its lien under § 85-9-307 (1) because its lien was not created by the Chaneys' seller.

We do not agree with Commercial's theory that its rights as a lien creditor with respect to repossessed property have been removed from subsection (2) and (3) of § 85-2-403. It clearly had possession with the right to transfer title without a certificate of title, and as pointed out by the committee comment, has no right to complain, whether it be considered as a consignor or a lender with a security interest, for the very purpose of placing goods in inventory is to turn them into cash by sale. Therefore, we think that the entrustment of possession is most applicable to a repossessing lien holder with right of sale.

Commercial also contends that the Chaneys made Cox Brothers their agent for purpose of acquiring title

and that the Chaneys are therefore charged with the knowledge that Cox had of the forgeries. The record does not support Commercial's premise on this assertion.

While, as pointed out above, Act 142 of 1949 originally contemplated that the purchaser would be responsible for securing the certificate, it has become apparent in practical application that dealers who assign conditional sales contracts with recourse have a financial interest in seeing that the conditional sales contract is promptly filed and noted on the certificate of title—for instance, *In re Shiflet,* 240 F. Supp. 183 (Ark. 1965), where the conditional sales contract lien was lost because the purchaser neglected to apply for his title before becoming bankrupt. Therefore when the dealer's interest in prompt filing is considered in connection with the evidence of Cox's conduct in obtaining the registration and certificate of title, we are unable to say that there was no substantial evidence to sustain the trial court's finding on the issue.

Under point two Commercial argues that Cox's knowledge of the defective title should be imputed to Associates since the latter was furnishing Cox the necessary forms, advice, relying upon Cox to acquire credit information and was actually making Cox's sales possible by financing sales. This contention is not supported by the record. The only thing shown by the record is that the Chaneys' financial arrangements with Associates was made on a form furnished by Associates.

Commercial next contends that since Associates did not perfect its lien within ten days after its execution nor before it had actual knowledge of Commercial's claim, Associates is not now in a position to contend that its lien has priority. The record shows that Associates' lien was perfected before suit was filed and under such circumstances its priority must stand or fall upon the validity of the Chaney's purchase. Since we

have found that the purchase by Chaneys is protected under the law, we find this contention to be without merit.

It has been suggested that the entrustment doctrine should not be applied to used automobiles because a buyer in the ordinary course of business should know that a certificate of title is outstanding. This was suggested, by way of dictum in *Sterling Acceptance Co.* v. *Grimes,* 168 A. 2d 600 (Penn. 1961). However, we need not decide the issue at this time because here Commercial fits into one of the few categories under our law where a transfer is authorized without a certificate of title.

Affirmed.

ROYAL CROWN BOTTLING CO., INC. v.
JAMES A. TERRY, III

5-4774 437 S.W. 2d 474

Opinion Delivered February 10, 1969

[Rehearing denied March 17, 1969.]

Wright, Lindsey & Jennings for appellant.

McMath, Leatherman, Woods & Youngdahl for appellee.

FRANK HOLT, Justice. This is an exploding bottle case. The appellee suffered injury to an eye which resulted in its removal. The injury occurred while appellee, an employee of a grocery store, was handling a six-pack carton of Royal Crown Cola bottles.

Appellee filed a complaint alleging specific acts of negligence and, alternately, negligence on the theory of res ipsa loquitur. In a separate complaint appellee alleged breach of warranty. Appellant's answers raised the defenses of contributory negligence and assumption of risk and specified that it had been notified of the subrogation rights of an insurance carrier as provided by the workmen's compensation laws where compensation is paid to an injured employee.

Upon trial the two complaints were consolidated by agreement of the parties. Appellant struck from its answers the defenses of contributory negligence and assumption of risk. Appellant introduced no testimony. The court denied appellant's motion for a directed verdict on each complaint. The jury returned a verdict favorable to the appellee and this appeal comes from the judgment on that verdict.

Appellant argues that appellee's allegations of specific acts of negligence and, alternately, negligence on the theory of res ipsa loquitur are inconsistent and,

therefore, impermissible. However, in a recent opinion this court said that allegations of specific acts of negligence and res ipsa loquitur are compatible and may be relied upon in the same proceeding. *Moon Distributors, Inc.* v. *White,* 245 Ark. 627, 434 S.W. 2d 56 (1968).

Appellant contends that the court erred in denying its motion for a directed verdict on each complaint. Appellee ably states that crucial to appellant's cause is its contention that res ipsa loquitur does not apply. We are of the view that res ipsa is not applicable in the case at bar.

The basic components of the doctrine of res ipsa loquitur are found in AMI 610 which was the instruction given in this case. They are: (1) exclusive control; (2) no opportunity for condition of bottle to have changed; and (3) in normal course of events, no injury would have occurred if the bottler had used ordinary care while the bottle was under its exclusive control.

The element of exclusive control is flexible and has not been applied literally in exploding bottle cases. *Coca-Cola Bottling Co. of Ft. Smith* v. *Hicks,* 215 Ark. 803, 223 S.W. 2d 762 (1949); *Coca-Cola Bottling Co. of Helena* v. *Mattice,* 219 Ark. 428, 243 S.W. 2d 15 (1951); *Coca-Cola Bottling Co.* v. *Jones,* 226 Ark. 953, 295 S.W. 2d 321 (1956); *Dr. Pepper Bottling Co. of Newport* v. *Whidden,* 227 Ark. 13, 296 S.W. 2d 432 (1956).

In the *Hicks* case we said that the requirement of exclusive control is satisfied when the plaintiff shows that there was practically "no opportunity for the content or character of the charged bottle to have been changed from the time it left defendant's hands until it exploded."

In the above cited cases we adopted the view that the doctrine of res ipsa loquitur was applicable to the facts in each case, even though at the time of the alleged

injury the bottle was not strictly under the exclusive control of the defendant bottler. There was evidence presented in these cases that, after delivery by the defendant bottler and while in the retailer's possession, no one had disturbed or mishandled the offending bottle.

In the case at bar, the appellee, while attempting to dust some cans on the top shelf of a soft drink self-service display counter, owned and serviced by the appellant and other bottlers, removed a six-pack of Royal Crown Cola from the bottom shelf and placed it on the floor. He accidentally tipped it over on the floor on its side as he stepped upon the shelf. No bottle fell from the carton. After cleaning the upper shelf, appellee attempted to raise the carton to an upright position by grasping the top of one of the bottles in the carton and pulling up on it. At that instant the bottle exploded, injuring appellee's eye. The bottle fragments were reassembled later and introduced in evidence as proof that the explosion resulted from a crack in the neck of the bottle caused by a blow from a hard, round object. The bottle in question was transported from Little Rock to Bryant on an open truck stocked with cartons or cases of soft drinks. The offending bottle was on the premises for at least three full business days before the accident, and possibly longer since deliveries were made each week. Customers would serve themselves and handle soft drinks individually and in cartons. Sometimes six-bottle cartons would contain a mixture or variety of soft drinks. The carton in question contained only Royal Crown Cola bottles. Appellant and other soft drink companies restocked the shelves of the display counter as needed.

Appellee testified that before his injury he had at no time handled the bottle nor worked in the soft drink section. He had started to work there a few days previously. His employer, who was the store owner, and his wife were present when the incident occurred. They

testified that from the time of the delivery until the accident they had done nothing to disturb or damage the bottle in any manner.

An expert in analysis of bottle failures testified that he found three factors which contributed to the explosion. First, there was an initial blow by a hard, round object, causing a partial cracking through the neck of the bottle. The object could have been another bottle, but could not have been the metal base of a grocery cart nor the base of a can. The examination revealed that the hardness of the object which struck the bottle would have to be equivalent to the hardness of glass. The impact could not have occurred when appellee upset the bottles. Second, there was internal pressure due to agitation of the contents, and third, there was the stress of the leverage which was applied when appellee attempted to set the carton upright. This was "the straw that broke the camel's back."

Appellant points to the fact that there was ample opportunity for the character of the bottle to have been changed after leaving the appellant's possession, especially since customers were allowed to handle and mix soft drinks as desired. However, in the case at bar there was evidence of more than the mere possibility of customer mishandling and abuse. There was undisputed evidence that bottles were abused by the customers. The store owner's wife (appellee's witness), on cross-examination, testified:

"Q. Was that the first noise you heard, the thump and the glass?

A. Yes, sir.

Q. When you heard that, did you know what had happened?

A. Yes.

Q. From the sound of it?

A. From the sound of it. You get used to those things in the grocery store.

Q. That had happened on previous occasions, people knocking drinks off shelves?

A. I have heard them explode before. Some has been dropped. Some has been dropped off the bottom of the shopping carts."

In view of this uncontradicted evidence, we cannot say that in the case at bar the doctrine of res ipsa loquitur is applicable.

Appellant relies upon *Weggeman* v. *Seven-Up Bottling Co. of Watertown,* 5 Wis, 2d 503, 93 N.W. 2d 467 (1958); *Ferrell* v. *Royal Crown Bottling Co. of Charleston,* 144 W. Va. 465, 109 S.E. 2d 489 (1959); and *Escola* v. *Coca-Cola Bottling Co. of Fresno,* 24 Cal. 2d 453, 150 P. 2d 436 (1944), where the possibility of "customer mishandling" was satisfactorily answered.

In *Weggeman* the court said:

"* * * It is not essential that the possibility of other causes of the accident be altogether eliminated, but only that their likelihood be so reduced that the greater probability lies at defendant's door. The evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it."

In *Escola* the court said:

"* * * It is not necessary, of course, that plaintiff eliminate every remote possibility of injury to the bottle after defendant lost control, and the requirement is satisfied if there is evidence permit-

ting a reasonable inference that it was not accessible to extraneous harmful forces and that it was carefully handled by plaintiff or any third person who may have moved or touched it."

Also, see Prosser, Law of Torts (2d ed. p. 205), where he states:

"* * * Again, however, the evidence need not be conclusive, and only enough is required to permit a finding as to the greater probability."

In the case at bar there is undisputed evidence of customer abuse. Therefore, in view of this, we cannot say that the possibilities of the cause of this accident are so reduced that the greater probability of the cause lies at the defendant's door.

Further, we are of the view that the appellee's evidence is insufficient to establish a submissible issue based upon the allegation of warranty.

Appellee urges that we also consider that he should prevail on the issue of strict liability. This issue was first raised on appeal and, therefore, we do not reach it in this case.

Reversed and dismissed.

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

CARLETON HARRIS, Chief Justice. In the case of *Moon Distributors, Inc.* v. *White,* 245 Ark. 627, 434 S.W. 2d 56, I dissented because of the fact that I considered the presentation of a case based on specific acts of negligence, and also negligence on the theory of *res ipsa loquitur,* to be inconsistent, and, to some extent, confusing to a jury. However, the court held to the contrary, and I am, of course, bound by that opinion. Here, a similar situation exists, *i.e.,* specific evidence is offered relative

to the cause of the explosion—but *res ipsa loquitur* is also relied upon.

I know of no type of case wherein the doctrine of *res ipsa* can more properly be applied than in an exploding bottle incident, and I consider it noteworthy that the requirement of exclusive control is rather flexible in this type of case, and has not been literally applied. This is obvious from reading our own cases, which are cited in the majority opinion, the majority itself conceding this particular fact. Time does not permit a detailed discussion of all of these cases, but I should like to point out some language, which, to me, is entirely applicable to the facts in the instant case. In *Dr. Pepper Bottling Company of Newport* v. *Whidden,* 227 Ark. 13, 296 S.W. 2d 432, in discussing *res ipsa loquitur,* this court stated:

> "Appellant says: 'The evidence is insufficient to establish an explosion for application of *res ipsa loquitur doctrine.*' What we have said in disposing of appellant's first point applies here also. It must be borne in mind that there was evidence (1) that there had been no moving or handling of the bottles or crates from the time and place where Dr. Pepper's delivery man placed them a few days earlier; and (2) that the bottle was still in the same case when it exploded and injured the plaintiff. *The evidence offered by the plaintiff placed the burden on the defendant of proving itself free from negligence under the res ipsa loquitur doctrine*[1]."

In the case before us, there is not one iota of evidence that there had been any moving or handling, by any person, of the carton containing the bottle that caused the injury;[2] in fact, the evidence is to the contrary. Some other cartons were filled with different

[1]Emphasis supplied.

[2]Of course, the carton was kicked over by appellee, but the expert testified that this would not have caused the crack in the bottle.

drinks, but this particular carton consisted entirely of bottles of Royal Crown Cola, which certainly was a definite indication that this carton had not been handled by the public. I fail to attach any significance to the evidence cited by the majority in support of the finding that the evidence showed that bottles were abused by the customers. I have no doubt that that happens at times, but in my view, the dropping of bottles by an individual, or cartons falling from the bottom of the shopping carts, is not pertinent to the claim before us, there being no evidence that this had happened to the bottle in question. If bottles exploded[3] simply because they were dropped, this in itself, to me, is evidence of negligence, for a bottling company knows that this may well happen, and it should take this probability into consideration when filling the bottles with the carbonated water.

Of course, it was not possible to round up every person who had been in the store shopping in order to ascertain whether they had mishandled the bottles. My feelings on this point are expressed in the Wisconsin case of *Weggeman* v. *Seven-Up Bottling Company,* 93 N.W. 2d 467. There, the Supreme Court said:

> "* * * Defendant argues that plaintiffs failed to make a case for *res ipsa loquitur* and that a verdict should have been directed for defendant; but we are satisfied that a sufficient foundation for *res ipsa* was established. *To be sure plaintiffs did not prove conclusively that the condition of the bottle had not changed after it left the defendant's possession,*[4A] or that Gregory handled it carefully or that the injury was not due to any voluntary act on plaintiffs' part. *Absolute or even clear proof of such matters is not necessary to warrant submission of res ipsa loquitur. It is not essential that the possibility, of other causes of the accident be*

[3]There is a distinct difference between a bottle's exploding, and breaking because of contact with a hard surface.

[4A]Italicized language denotes my emphasis.

altogether eliminated,[4B] but only that their likelihood to be so reduced that the greatest probability lies at defendant's door. The evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it. [Citing authority.]

"In the instant case we think the evidence afforded sufficient basis for a reasonable inference that after its delivery by defendant the bottle encountered only such usage as is normal in the course of retail distribution and consumer handling, and that much the greater probability was that it was defective when it left defendant's possession. *The bottler may be held to knowledge that exposure to hazards of damage from jolting, jarring and rough handling by retailers, customers and consumers is usual for his product and that nicks and abrasions thereby sustained may make it dangerous; and if he negligently fails to put out a product that will stand up under treatment which if not normal is not unusual, he must assume the risk of resulting injuries.*[4C]

My principal complaint of the reversal in this case is that the court is holding that no jury question was made by appellee's proof, and that the bottling company was entitled to a directed verdict. If appellant had offered evidence that the bottling process, including inspection of the bottles, had been carried out by the company without negligence; that the cartons had been delivered to the store by the company driver without any mishap or unusual circumstance, or offered other proof, pertinent to a defense of no negligence, I would certainly find nothing objectionable to affirming a jury verdict for the company. However, the company did not choose to offer one line of evidence, which seems a little odd to me.

[4B & 4C]Italicized language denotes my emphasis.

I strongly feel that sufficient evidence was offered by appellee to require appellant to go forward with its own proof, and, of course, that is the holding where the doctrine of *res ipsa loquitur* is considered applicable. *Dr. Pepper Bottling Company of Newport* v. *Whidden, supra; Coca-Cola Bottling Company of Southeast Arkansas* v. *Jones,* 226 Ark. 953, 295 S.W. 2d 321; *Coca-Cola Bottling Company of Helena* v. *Mattice,* 219 Ark. 428, 243 S.W. 2d 15. But, the majority says that *res ipsa loquitur* is not applicable, and this holding can only relate back to the fact that customers had had the opportunity to mishandle the drinks, and the further fact that appellee endeavored to show specifically the defect in the exploding bottle. I have already commented on the customer angle, and, despite the holding in *Moon,* it appears to me that appellee is being penalized for endeavoring to show that there was a definite defect in the bottle.

I would affirm the judgment.

JONES, J., joins in this dissent.

MILFORD FULLER v. STATE OF ARKANSAS

5-5382 437 S.W. 2d 780

Opinion Delivered February 17, 1969

Moore & Brockman for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty Gen. for appellee.

CARLETON HARRIS, Chief Justice. Milford Fuller was convicted in Boone Circuit Court of the crime of receiving stolen property. A jury found appellant guilty, and the court entered judgment, assessing punishment of not less than 16, nor more than 48, months in the Arkansas Department of Corrections. From the judgment so entered, comes this appeal. Six points are raised in urging a reversal, and we proceed to discuss these contentions.

On September 7, 1967, Mickey Owen, Sheriff of Greene County, Missouri, together with several deputies, went to the office of the Municipal Judge at Harrison, and Owen executed an affidavit for a search warrant, based solely on information obtained from an unnamed confidential informant. A warrant was issued to search a certain dwelling house and outbuildings located on a farm northwest of Harrison. These officers, accompanied by Arkansas officers, went to that location, made a search, and seized a quantity of clothing allegedly stolen from a men's apparel store in Springfield, Missouri. The officers then returned to the Municipal Judge, reported the results of the first search, and, based up this and the same information used in obtaining the first warrant, executed another affidavit, and obtained another search warrant to search a warehouse owned by the Golden Rich Distributing Company, located in Harrison. There, too, a quantity of merchandise consisting of television sets, tires, and other merchandise was seized; the president of the company, Leo Walton, who resided in an apartment in the upper story

of the building, mentioned that Fuller had some connection with the merchandise, and appellant was asked to come to the warehouse. Fuller and Walton later requested to go to the office of the Prosecuting Attorney for the purpose of making statements concerning the alleged stolen property. Walton gave a statement on September 7, and Fuller made a statement on the morning of September 8, 1967. Thereafter, a number of charges were filed against Walton and appellant, both for receiving, and for possessing, stolen property. In *Walton and Fuller* v. *State,* 245 Ark. 84, 431 S.W. 2d 462, this court reversed a conviction of both men on a charge of possessing a Zenith color television set and a Zenith stereo record player, alleged to have been stolen from Chuck Carter, proprietor of an appliance company of Seymour, Missouri. The present charge against Fuller relates to suits of clothing that were allegedly stolen from a clothing store in Springfield.

The first point for reversal is the same that was raised in *Walton and Fuller* v. *State, Supra, i.e.,* that the affidavit for the search warrant was defective, and the warrant issued thereon was therefore invalid. This point controlled our decision in that case.

The alleged stolen goods which Fuller is accused of knowingly receiving, were found following the issuance of the first search warrant, while the principal warrant discussed in *Walton and Fuller* was the second warrant; however, we there held both search warrants invalid. We did hold that the television set and record player (the property involved in the earlier appeal) could be offered in evidence, and testimony taken relative thereto, because these items were voluntarily mentioned by Walton, and were not included in the property discovered under the authority of the search warrants.

The state argues that Fuller had no standing to object to the search of the farmhouse, because he had no proprietary interest, and since that property was owned

by Golden Rich, Walton, and one Ed Willis, Fuller could make no complaint that the search was invalid. This is an erroneous argument. The record reflects that Fuller had permission to be on the premises, had bird hunted there frequently, had brought bones and food to feed Willis' dog on several occasions, and had been there frequently with permission, when Willis was not there. Willis arrived on an occasion when clothes were being stored, and the witness said that the clothes were brought there by two men that he did not know; that Fuller arrived as these men were leaving. He did not see Fuller converse with the two, and he said that the only reference Fuller made to the clothes was telling Willis that the men would get them out in a few days. The witness said that he was "raised" with the Fuller family, and had been told that he was Fuller's godfather. Under *Jones* v. *United States,* 362 U.S. 257, Fuller had a sufficient interest in the property to move to suppress the evidence. In *Jones,* the United States Supreme Court held that the testimony reflected a sufficient interest in the premises to establish that appellant was a person aggrieved by the search. Quoting from the opinion:

> "That testimony established that at the time of the search petitioner was present in the apartment with the permission of Evans, whose apartment it was. The Government asserts that such an interest is insufficient to give standing. The Government does not contend that only ownership of the premises may confer standing. It would draw distinctions among various classes of possessors, deeming some, such as 'guests' and 'invitees' with only the 'use' of the premises, to have too 'tenuous' an interest although concededly having 'some measure of control' through their 'temporary presence,' while conceding that others, who in a 'realistic sense, have dominion of the apartment' or who are 'domiciled' there, have standing. Petitioner, it is insisted, by his own testimony falls in the former class."

The court then said:

> "Distinctions such as those between 'Lessee,' 'Licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards.
>
> "* * * A fortiori we ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime. No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their wrongful presence, cannot invoke the privacy of the premises searched. As petitioner's testimony established Evans' consent to his presence in the apartment, he was entitled to have the merits of his motion to suppress adjudicated."

See also *Simmons* v. *United States,* 390 U. S. 377.

The state attempts to make a distinction between the crimes of "possessing" stolen merchandise, and "receiving" stolen merchandise. We find no merit in this argument. One of the essential elements of the crime here charged is the "receiving," *i.e.,* a defendant must have possession or control over the alleged stolen goods, of which he has knowingly taken charge. As stated in 76 C.J.S. *Receiving Stolen Goods,* § 6(b), physical possession is not necessary, but constructive possession or control is sufficient. In charging Fuller with the offense, the state was certainly charging that he had control or dominion over the stolen goods. The position

of the state, as pointed out in appellant's reply brief, is a little inconsistent. Appellant states:

> "* * * Thus it can be readily seen that the Appellee is both 'trying to have its cake and eat it too' in that it is attempting to establish a vital element of the crime of receiving stolen goods by showing the possession and control of the appellant of the goods at the farmhouse, the scene of the first search and seizure, and at the same time attempting to deny the Appellant having any possession or control of the same in an attempt to establish a lack of standing to object to the illegal search and seizure."

We hold that appellant was entitled to move to suppress the evidence obtained by the first search warrant, and since we have already held in *Walton and Fuller* v. *State, supra,* that that search warrant was invalid, it follows that error was committed in permitting testimony to be offered concerning the merchandise found at the farm house. In *Walton and Fuller* this court commented:

> "However, neither the items discovered as a result of the two searches (except for those items not the object of the search, about which Walton voluntarily informed the officers) nor testimony relating thereto was admissible in evidence. Thus, identification of property which was inadmissible should have been excluded by the trial court as 'fruit of the poisonous tree,' even though it was offered only for the purpose of showing intent and a course of conduct."

It follows that the conviction must be reversed.

It is next asserted that the court erred in admitting Fuller's statement of February 8, 1967. In *Walton and Fuller* we found that the evidence supported the trial judge's finding that the warnings required by *Miranda*

v. *Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, had been given, and that statements by Fuller and Walton were voluntary and made under waiver of the rights enumerated in *Miranda.* However, that holding (statements were voluntary) does not permit the introduction of the statement in the case before us, for we said:

> "* * * Furthermore, statements of both Walton and Fuller made in the prosecuting attorney's office, except for those portions relating particularly to property not listed in the second search warrant about which Walton volunteered information, were inadmissible as 'fruit of the poisonous tree.' "

The charge in the older case related to property located without the use of a search warrant—but here, the property which Fuller is accused of receiving, with knowledge that it had been stolen and with the intent to deprive the true owner thereof, is property which was recovered by the use of the invalid search warrant.

It follows, therefore, that the statement, as it relates to the suits of clothes, cannot be used in a trial of this appellant.

Appellant asserts that error was committed in denying his motion for production of the name of the informant, but since we are holding that any testimony relative to goods found under the search, or any statements made by appellant with regard to the property found during the search, cannot be used, there is no necessity to discuss this contention.

It is asserted that error was committed in permitting three men's suits to be introduced into evidence, and since these suits were found during the illegal search, the point is well taken.

A color television set, alleged to have been stolen, and received by Fuller, was exhibited to the jury by the

state, the purpose being to show that appellant was receiving other stolen property from the same people, and it is asserted that this was error. Of course, appellant being charged in this case only with receiving stolen clothing, it was not proper to introduce other allegedly stolen items. However, the court subsequently held this inadmissible, and so advised the jury.

Complaint is made that the Prosecuting Attorney commented during his closing argument on the fact that appellant did not take the witness stand, and it is alleged that this comment constituted prejudicial error. It is no longer necessary to discuss this assertion at length, because of the other errors, but we hold that the contention is without merit. *Hammond and Evans* v. *State,* 244 Ark. 1113, 428 S.W. 2d 639.

Because of the errors, heretofore set out, the judgment is reversed.

It is so ordered.

H. W. ROHRSCHEIB v. BARTON-LEXA WATER ASS'N. ET AL

5-4916 437 S.W. 2d 230

Opinion Delivered February 17, 1969

Ralph C. Murray for appellant.

W. G. Dinning, Jr. and *James P. Baker Jr.* and *Rose, Meek, House, Barron, Nash & Williamson* for appellees.

CARLETON HARRIS, Chief Justice. Appellee, Barton-Lexa Water Association, is a non-profit corporation, incorporated under the provisions of Ark. Stat. Ann. § 64-1901—1919 (Repl. 1966). Section 64-1904 sets out the purposes for which these corporations may be created. Section 64-1905 prescribes the procedure to be followed by any "association of persons" desiring to be incorporated under the act. Appellee association was formed for the purpose of constructing a water distribution system to serve a particular rural area in Phillips County. Under the articles of incorporation, appellee's objective is to associate its members together for their mutual benefit, to construct, maintain, and operate a private water system for the supplying of water to members, and to engage in any activity related to this purpose. Under the by-laws, the corporation will admit as members water users who are in need of water supplied from the water system maintained and operated by Barton-Lexa; however, the association is not required to admit members if the capacity of the water system is already exhausted by the needs of the present membership. The proposed user is required to have reasonable access to the source of the water, and such water may be obtained for domestic, commercial, industrial, or agricultural purposes. Section 3 of the by-laws provides, *Inter alia,* that words importing persons shall include partnerships, associations, and corporations organized or authorized to do business in this state.

Appellee, C. C. Warfield is a resident of Phillips County who is engaged in the ginning business under

the name of Lexa Gin Company. Appellee, A. T. & G. Company, Inc., is a Michigan corporation authorized to do business in this state. Both Warfield and A. T. & G. are members of the association. H. W. Rohrscheib, appellant herein, is likewise a member of the association, and on December 31, 1968, he instituted suit in the Phillips County Chancery Court against appellees, asserting that the association proposed to construct a water distribution system for the purpose of providing water to members of the association, and had already received a commitment from the Farmers Home Administration, United States Department of Agriculture, to receive a loan sufficient to construct this system. Further, it was alleged that Barton-Lexa proposed to sell water to Warfield and A. T. & G. for their use in commercial and industrial enterprises, which appellant alleged was not authorized by law. It was asserted that only natural persons may be members of non-profit corporations of the type herein involved, and it was alleged that the Chancellor erred in holding that business corporations, and persons engaged in commercial ventures, might be members of a non-profit corporation. After the filing of an answer, the case was submitted to the court on the pleadings and an agreed stipulation of facts. From a decree dismissing appellant's complaint comes this appeal.

We do not agree with appellant that only natural persons can become members of the non-profit corporations provided for in this statute. Ark. Stat. Ann. § 1-202 (Repl. 1956), which has been a part of our law since 1837, provides:

> "When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons and females as well as males, and *bodies corporate as well as individuals,* [our

emphasis] shall be deemed to be included.'"[1]

In *State ex rel Attorney General* v. *Gus Blass Company,* 193 Ark. 1159, 105 S.W. 2d 853, we pointed out that in a statute using the word "person," the statutory rule is that it includes corporations as well as individuals. As stated by appellee, if the General Assembly had intended that only natural persons be permitted to become members of non-profit corporations, it could easily have inserted this language. That the Legislature was aware of this normal statutory meaning of the word "persons" is made clear in § 64-1907. There, in setting out the powers of non-profit corporations, Subsection (g) provides that each corporation shall have power to do any and all things necessary or incidental to the attainment of its purposes as fully and to the same extent as *natural persons* lawfully might do consistent with the provisions of the act. We agree with the Chancellor's finding that membership in the Barton-Lexa Water Association is not restricted to natural persons.

Appellant also contends that business corporations and persons engaged in commercial ventures cannot become members of a non-profit corporation. This argument is contrary to the language of the statute (64-1904) which provides that these non-profit corporations may be organized under the act for *any lawful purpose or purposes.* We would expect agricultural or horticultural associations (authorized by the statute) to be composed of individuals or business corporations engaged in a particular line of activity and having as a motive a business profit. The italicized language is controlling

[1]In **Boone County v. Keck,** 31 Ark. 387, it was held that, though the word "person" includes corporations as well as natural persons, this is only true of such provisions as will allow signification to be given without violating the evident sense and meaning. The court said that when such a construction would render the code, which must be taken as a whole, ineffective, a departure must be made from the letter to give effect to the manifest intention of the Legislature.

and there is certainly nothing illegal about the formation of a private corporation to construct a water system. The system will provide benefits to its members only, these members being composed of farm families and business enterprises located in the area to be served. To say that benefits are unavailable to those members engaged in profit making ventures would defeat the purpose of the act itself. In fact, this is not the first instance where the General Assembly has used non-profit corporations as an instrument for assistance to industrial and commercial development. A very good example is Act 404 of 1955 (Ark. Stat. Ann. § 9-504—540 (Repl. 1956), which provides for the organization of local corporations, having for their purpose the rendering of assistance to businesses locating in the area.

We agree with the trial court that corporations or individuals engaging in commercial or industrial ventures for profit are not precluded from membership in these non-profit corporations.

Affirmed.

ALMA JEAN DOTY, JUSTICE OF THE PEACE v. CHARLES GOODWIN

5-4840 437 S.W. 2d 233

Opinion Delivered February 17, 1969

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellant.

Camp & Lingle for appellee.

George Rose Smith, Justice. On June 7, 1968, a state police officer issued a traffic ticket to the appellee Goodwin, charging him with reckless driving and directing him to appear in a justice of the peace court for trial. In the justice court Goodwin moved for a dismissal of the charge, on the ground that in misdemeanor cases a justice of the peace receives his fees and costs only when the accused is convicted. Such a provision of law is a denial of due process. *Tumey* v. *Ohio,* 273 U. S. 510 (1927). The justice denied the motion to dismiss, but on certiorari the circuit court sustained Goodwin's contention and prohibited the justice from proceeding further. The State, at the prosecuting Attorney's request, has taken an appeal to set the question at rest. Ark. Stat. Ann. § 43-2720 (Repl. 1964).

The circuit court was right. Under the *Tumey* case the presiding judge in a criminal case must not have a pecuniary interest in convicting the accused. There the court set aside a conviction in a mayor's court, because the mayor was entitled to recover costs only if the trial resulted in a conviction. The opinion pointed out that the practice existed in several states, including Arkansas.

We still have on the statute books a remnant of the condemned procedure. A justice of the peace receives certain fees and costs in criminal cases. Ark. Stat.

Ann. § 12-1731 (Repl. 1956). The fees must be paid by the defendant if he is convicted. Ark. Stat. Ann. § 43-2405. The statute is silent as to the defendant's liability when he is acquitted, which is construed to mean that he is not liable in that eventuality. *Land* v. *Jolley,* 175 Ga. 788, 166 S.E. 217 (1932); *Childers* v. *Commonwealth,* 171 Va. 456, 198 S.E. 487 (1938); *State* v. *Faulkner,* 75 Wyo. 104, 292 P. 2d 1045 (1956). In misdemeanor cases—and reckless driving is a misdemeanor; Ark. Stat. Ann. § 75-1003 and 1004 (Repl. 1957)—the county is not liable for the justice's fees. Section 43-2405. Thus the situation falls within the ban of the *Tumey* case.

The State argues that the justice of the peace can recover fees and costs in any event, because the statutes require the prosecutor in misdemeanor cases to give bond for the payment of all costs. Section 44-301. We have held, however, that the bond requirement does not apply when the prosecutor is a law enforcement officer acting in the performance of his duties. *Coger* v. *City of Fayetteville,* 239 Ark. 688, 393 S.W. 2d 622 (1965); *Thebo* v. *State,* 161 Ark. 619, 256 S.W. 381 (1923). We adhere to that view, because obviously a police officer ought not to be required to give a bond for costs as a result of having issued a traffic ticket. Hence the cost-bond statute does not render inapplicable the principle of the *Tumey* case.

Of course the fact that a justice of the peace would have a pecuniary interest in a judgment of conviction, under § 43-2405, does not prevent him from exercising the jurisdiction in misdemeanor cases given to him by § 43-1405 if he elects to serve without compensation either upon a conviction or upon an acquittal. It is appropriate for us to point out that additional legislation on the subject seems to be needed.

Affirmed.

MARION POWER SHOVEL CO. v. HAROLD HUNTSMAN

5-4749 437 S.W. 2d 784

Opinion Delivered February 17, 1969

[Rehearing denied March 24, 1969.]

Bennett & Purtle for appellant.

Lightle & Tedder for appellee.

LYLE BROWN, Justice. Marion Power Shovel Co. was the plaintiff in the trial court. Harold Huntsman, appellee and cross-appellant, was the defendant and counterclaimant below. Marion sued for parts supplied to Huntsman which were used to repair a power shovel with a dragline attachment. Huntsman countered with a complaint for breach of warranty concerning the original construction equipment, it having been manufactured by Marion. Huntsman obtained judgment (the trial court sitting as a jury) under his counterclaim and

Marion appeals. Huntsman cross-appeals, alleging insufficiency of damages. The numerous points on appeal will subsequently be enumerated and discussed.

Harold Huntsman, a large-scale farmer in the Bald Knob area, was interested in purchasing a machine and attachments to be used in ditching and draining 1000 acres of lowland preparatory to cultivation. The land had previously been cleared by the use of a cutting blade attached to a tractor, by means of which trees were cut level with the ground. Huntsman contacted T. F. Shamel, who operated Standard Equipment and Supply Co. in North Little Rock. Shamel handled Marion Power Shovel products. According to Huntsman, Shamel subsequently brought to Bald Knob the district representative of Marion Power Shovel Co., one R. A. Strickland; Huntsman and Strickland made a complete tour of the acreage to be developed; details of the proposed improvements were explained to Strickland; and Strickland compiled the specifications for the type of equipment needed to put the land in shape.

There are three written instruments in the record pertaining to the sale. The first is a purchase order from Standard Equipment to Marion Power Shovel Co., itemizing the components of the machine and directing shipment to Huntsman. Marion then sent to Standard Equipment an invoice sheet. A few days later, Standard invoiced Huntsman and Huntsman paid Marion in full for the equipment. It is noted that none of those three instruments made any mention of warranty. The equipment arrived in April and Marion sent a man to perform the assembling necessary to compose an operating machine. Along with the machine there was a booklet entitled Operation and Maintenance Manual. Seven subjects are treated on page one of section 1, among which is this statement of warranty:

> STANDARD WARRANTY. Marion Power Shovel Company guarantees the parts manufac-

> tured by it to be free from defects in material and workmanship under normal use and service, its obligation under this warranty being limited to making good at its factory any part or parts thereof manufactured by it which shall, within six (6) months after delivery of said machine to the original purchaser, be returned to it with transportation charges prepaid, and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and of all other obligations or liabilities on Marion Power Shovel Company's part.

Huntsman further testified that he put the machines to work immediately in order to plant a soybean crop in that year. He claimed that breakdowns immediately set in; that the swing clutches would become hot and crystalize; then the ground drive chains began breaking; that next came trouble with the transmission which in two months caused the breakage of four drive shafts; and that fifteen working days were lost because the machine's rotating shaft broke. Those breakdowns, asserted Huntsman, made it impossible to plant a crop that year, and resulted in consequential damages of $25,000. That figure was based on an estimated land rental value of $25 per acre. Huntsman also sought to recover the difference between the cost of the machine and its actual market value, that difference being in his estimation in the neighborhood of $40,000.

Marion Power Shovel produced two principal witnesses. R. A. Strickland denied having gone to the Huntsman farm prior to the sale. Conversely, he contended he met Huntsman at the office of Standard Equipment in North Little Rock, that they inspected specification sheets for various machines; that Strickland was not informed of the details of the proposed operation, other than the fact that Huntsman wanted to drain some land and build some levees; and that

Huntsman decided for himself on the final specifications. Huntsman ordered an eighty-foot boom when, according to Strickland, the standard would have been a boom of forty feet for the particular machine. Strickland conceded that the machine was not designed to operate on an eighty-foot boom with a dragline carrying a bucket of one and one-half yards capacity. Another witness was an engineer from the factory. He had inspected the broken parts which were returned to the factory and he had watched the machine operate on the ground. He concluded that the breakdowns were due to overloading and otherwise abusing the machine in operation and maintenance.

We have not attempted to relate all the voluminous evidence in the case. Much of it is not pertinent to our decision. Other evidence which requires comment will be treated in the discussion of the points for reversal.

1. *There Is No Privity of Contract Between Marion Power Shovel and Harold Huntsman.* That is Marion's first point for reversal.

It is appellant's theory that Huntsman purchased the equipment from Standard Equipment & Supply Company and not from Marion Power Shovel. Marion further asserts Huntsman cannot claim the benefit of Ark. Stat. Ann. § 85-2-318.1 (Supp. 1967) because Marion's suit was filed prior to the effective date of that Act. Section 85-2-318.1 eliminates the defense of lack of privity under certain conditions. In examining the overall negotiations, we agree with the trial court's conclusion that the transaction was actually between Huntsman and Marion Power Shovel. In view of that conclusion, § 85-2-318.1 is not controlling.

Standard Equipment played a minimal part in the entire proceedings. Huntsman did first contact Standard and told their Mr. Shamel of his interest in purchasing equipment for draining his property. According to

Huntsman, Shamel thereafter brought Marion's Mr. Strickland to Bald Knob. Shamel had business elsewhere in the area, according to Huntsman, and left Huntsman and Strickland alone to work out the project. Strickland concedes that he made out the specifications which were transposed on Standard's order blank. Huntsman testified that Strickland authored the specifications on the latter's judgment after a tour of the farm. The check for $40,000, being the balance of the purchase price after trade-in, was apparently made to Marion Power Shovel. The equipment was shipped direct from the factory in Marion, Ohio, to Huntsman in Bald Knob. Marion Power Shovel sent to Bald Knob a Mr. Revis to oversee the assembly of the machine.

It has been held that in the case of a suit between the manufacturer and the consumer the question of whether there is privity of contract is a question of fact. See *Hewitt-Robins* v. *Lea County,* 371 P. 2d 795 (N.M. 1962), where the court held such under a similar fact situation. *U.S. Pipe* v. *City of Waco,* 108 S.W. 2d 432 (Tex. 1937), says that the court will look through the form to the substance of such a situation. In the *Waco* case, the manufacturer made certain representations as to the quality of certain pipe, inducing the city to specify such pipe in a contract with a general contractor. "By indirection it [the manufacturer] thus secured for itself a sale as certainly, and presumably as profitably, as if a direct contract of sale had been made with the city. Having secured the benefits, it may not now avoid the burdens of the transaction." See also *Ruberoid* v. *Briscoe,* 293 F. 2d 712 (Tex. 1961).

The trial court made no specific written finding as to privity or non-privity; however, it is clear that it did find privity because the court gave as its only reason for not allowing damages based on the market values, before and after, of the machine, the lack of proof as to difference in value. Privity necessarily had to be de-

termined to exist before the court reached that question of value.

2. *The Standard Warranty Covered the Agreement Between the Parties; the Express Warranty Was in Lieu of all Others; it States the Exclusive Measure of Damages.* The warranty before us, which is really in the nature of a disclaimer, violates the UCC in at least two respects. It does not mention *merchantability* nor can it be considered *conspicuous,* both of which are required by Ark. Stat. Ann. § 85-2-316 (Add. 1961). Whether it was conspicuous is for decision by the court. Ark. Stat. Ann. § 85-1-201(10) (Add. 1961). All the documents concerned with the transaction are before us and we are in a position equal to that of the trial judge to determine the question. *Hunt* v. *Perkins Machinery Co.,* 226 N.E. 2d 228 (Mass. 1967). None of the three written instruments executed to initiate and consummate the sale, including an invoice executed by Marion Power Shovel, contained mention of warranty. As we have previously mentioned, the warranty first appeared on the inside of an operation and maintenance manual. That document was not supplied Huntsman until delivery of the machine, for which Marion had already received the purchase price. The *location* of the warranty was considered significant in *Hunt, supra.* Also, see *Dailey* v *Holiday Distributing Corp.,* 151 N.W. 2d 477 (Iowa 1967). We conclude that the written warranty was defective.

3. *All Questions of Warranty Aside the Court Awarded an Improper Measure of Damages.* The sole damages awarded by the trial court were "$9,000 as consequential damages for loss of crops."

Consequential damages are treated in Ark. Stat. Ann. § 85-2-715 (Add. 1961). They may be allowable if the contractor, at the time of the sale, had reason to know of a general or particular requirement of the buyer, and if the failure of the merchandise to produce

those requirements could not reasonably be prevented by cover or otherwise. Applying that law to the recovery here, Marion would have had to have reason to know that Huntsman was depending on this machine to shape his land for production of a 1965 soybean crop and that a substitute machine was not available in case of breakdown. Huntsman's evidence on both these requirements is entirely lacking. Furthermore, the machine was not delivered and assembled until around May 1, 1965. At that time Huntsman had not yet procured an operator. Under those facts it is not reasonable to believe that Marion Power Shovel intended to assure Huntsman at that late date of a 1965 soybean crop. We therefore hold the court erred in allowing consequential damages.

4. *The Testimony Affirmatively Shows Harold Huntsman Caused the Damages He Incurred, if any, Through Abuse of the Machine.* We do not treat the point because we are remanding the case and the question will be again before the court de novo.

Huntsman contends on cross-appeal that the court erred in not awarding damages for the difference in the value of the machine as provided in Ark. Stat. Ann. § 85-2-714(2) (Add. 1961). The court held the evidence "is insufficient to award damages by such breach of warranty based upon the difference in the price paid for said machine and its market value, if any, in the condition in which the same was delivered." We cannot say the court erred in that respect. Huntsman hedged considerably about giving an opinion of the value of the machine in its delivered condition. He finally said: "Oh, about $20,000." It is not unreasonable to believe that the evidence could be supplied on retrial.

One additional comment should be made for the guidance of the trial court and counsel in the event the case is again tried. Huntsman gave considerable testimony about the loss of several hundred hours of work-

ing time due to breakdowns. He then multiplied those hours by what he alleged to be the fair rental value of the machine and asked for considerable damages for "down-time." The trial court made no award for those claims and the validity of the charges is not briefed on appeal. Statutory damages for breach of warranty are treated in Ark. Stat. Ann. §§ 85-2-714 and 715.

The reason for remand is that law cases generally are remanded unless it is clear that the case has been fully developed. Another reason here for remand is that we perceive the trial court gave credence to the written warranty which is more in the nature of a disclaimer. That warranty should have been voided for the reasons we have stated and the case tried under the doctrine of implied warranty.

Reversed and remanded.

J. R. SHEPHERD v. STATE OF ARKANSAS

5-5392 439 S.W. 2d 627

Opinion Delivered February 17, 1969
[Substituted Opinion on denial of Rehearing April 21, 1969, p. 744.]

Harry C. Robinson and *Harold L. Hall* for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellant.

JOHN A. FOGLEMAN, Justice. Appellant was convicted of selling an unregistered security in violation of Ark. Stat. Ann. § 67-1241 (Repl. 1966) and of operating as a broker-dealer without being registered in violation of Ark. Stat. Ann. § 67-1237 (Repl. 1966). Appellant challenges the sufficiency of the evidence to support the judgment of conviction entered by the circuit judge, who sat without a jury, by agreement.

Specifically, Shepherd was charged with having sold a security to one U. S. Hedden. The instrument evidencing the transaction was introduced into evidence and was entitled "Assignment of Oil and Gas Lease." By it an undivided one sixty-fourth interest of the right, title and interest of H. W. McMillan, trustee, the original lessee in a certain oil lease, was conveyed to Hedden together with all personal property used or obtained in connection therewith and not retained in said lease. The instrument recites that J. R. Shepherd, trustee, was the owner of the lease and all rights thereunder.

It was not shown that Shepherd had engaged in any other such transaction at any time. It is not denied that the sale was made without registration of the lease,

or any interest therein, and without Shepherd having previously registered as a broker-dealer.

The word "security" as used in the Arkansas Securities Act includes a certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such title or lease. This statute is penal in nature and must be strictly construed. Under such construction, nothing will be taken as intended which is not clearly expressed and all doubts must be resolved in favor of the defendant. *Stuart* v. *State,* 222 Ark. 102, 257 S.W. 2d 372.

This instrument does not constitute a security as defined in this statute. An oil and gas lease conveys an interest in land. *Osborn* v. *Arkansas Ter. Oil & Gas Co.,* 103 Ark. 175, 146 S.W. 122; *Watts* v. *England,* 168 Ark. 213, 269 S.W. 585; *Shreveport-El Dorado Pipe Line Co.* v. *Bennett,* 172 Ark. 804, 290 S.W. 929. When a strict construction is given the act and the nature of the property is considered, the sale or assignment of oil, gas or mining leases, or interests therein, is not included in the term "certificate of interest or participation in an oil, gas or mining title or lease." See *State* v. *Allen,* 216 N. C. 621, 5 S.E. 2d 844. This language under a strict construction must be taken to mean a certificate of interest or participation in the oil or gas produced and severed from the land or in payments out of production thereof or a certificate representing an interest or participation in a lease held in the name of another. As the North Carolina court pointed out, whether the definition of securities should be amended to include a transaction such as this is a matter for the law-making body and not for the court.

The judgment is reversed and the cause dismissed.

DELMAR F. COURTNEY, ADMINISTRATOR v. MURPHY DUANE BIRDSONG AND SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY

5-4796 437 S.W. 2d 238

Opinion Delivered February 17, 1969

Timer & Henry for appellant.

Hodges, Hodges & Hodges for appellee.

J. FRED JONES, Justice. Farm Bureau Casualty Insurance Company advanced medical expenses to James Franklin Courtney during the pendency of a suit for personal injuries Courtney filed in the Poinsett County Circuit Court. Courtney settled his suit by compromise and Farm Bureau sought reimbursement, out of the proceeds of the settlement, for the full amount it had advanced under a subrogation agreement it entered into with Courtney. Courtney contended that Farm Bureau

was not entitled to full reimbursement for the amount it had advanced, but was liable to Courtney in half that amount as its proportionate share of Courtney's attorney's fee. The trial court awarded Farm Bureau the full amount of its advancement and Courtney has appealed.

James Franklin Courtney is now deceased and this appeal is prosecuted in the name of his personal representative. For the sake of clarity, as well as brevity, the word "appellant," and the name "Courtney," as used herein, refer to James Franklin Courtney who was plaintiff in the trial court. Since the facts of this case are so germane to the problem on appeal, we set them out in some detail.

Courtney sustained personal injuries while riding as a guest in a pickup truck owned and driven by his brother-in-law, Duane Birdsong. Courtney employed an attorney to represent him in a suit for damages for personal injuries, including medical expenses, against Birdsong and agreed to pay his attorney fifty per cent of the amount recovered. The attorney filed suit for Courtney in the Poinsett County Circuit Court on September 19, 1967. Courtney had incurred medical expenses in the amount of $1,797.90 as a result of his injuries and he was covered for medical expenses under an insurance policy issued to his father by Southern Farm Bureau Casualty Insurance Company. On October 30, 1967, Courtney obtained payment of the medical expenses from Southern Farm and signed a "loan receipt" agreeing to pay, or reimburse, Southern Farm the sum of $1,797.90 out of the net amount he would recover from Birdsong. Courtney further agreed, that he would not settle his claim against Birdsong without Southern Farm's knowledge and approval. Courtney's attorney knew that Courtney had obtained payment for medical expenses from Southern Farm but did not know of the agreement he had signed.

On or about November 28, 1967, Courtney's attorney settled the lawsuit by telephone with the attorney for Birdsong's insurance carrier, for the sum of $5,000.00. During the course of the telephone conversation, Courtney's attorney was advised that Southern Farm claimed a subrogation interest in the recovery against Birdsong to the extent of the $1,797.90. Upon receipt of this information, Courtney's attorney requested that the $5,000.00 be paid in two separate drafts; one payable to Courtney, his attorney and Southern Farm in the amount of $1,797.90, and the other payable to Courtney and his attorney for the remainder of the $5,000.00 settlement. The two drafts, drawn as directed, were received by Courtney's attorney and on November 30, 1967, by an approved order of the circuit court, the suit against Birdsong was dismissed with prejudice.

Upon receipt of the drafts, Courtney's attorney advised Southern Farm of the receipt of the draft for $1,797.90 and sought to secure a proper endorsement in order that the draft could be cashed and the proceeds divided. Shortly thereafter, Courtney's attorney was contacted by an attorney representing Southern Farm, who demanded that Courtney and his attorney endorse the draft and deliver it to Southern Farm's attorney. Courtney and his attorney refused to comply with this request and on December 7, 1967, Southern Farm filed a motion to set aside the order of dismissal with prejudice and to permit it to intervene. This motion was taken up by the court on March 6, 1968, at which time the original motion to set aside the order of dismissal was abandoned and the hearing proceeded on the disposition to be made of the $1,797.90 which had been paid into the registry of the court by agreement. Southern Farm contended that it was entitled to all of the $1,797.90 and Courtney contended that one-half of this amount should be applied to his attorney's fee under the fifty per cent contingent fee contract he had with his attorney. The trial court awarded the entire sum of $1,797.90 to Southern Farm and Courtney has designated the following point he relies on for reversal:

> "The trial court erred in refusing to allow an attorney's fee for the collection of appellee's (intervenor's) subrogation claim."

We do not quite agree with the appellant as to the point at issue on this appeal. The appellant says:

> "The only point at issue in this appeal is whether or not the trial court erred in refusing to allow decedent an attorney's fee for collecting the full amount appellee had expended for medical expenses under its insurance policy."

The actual point at issue, as we see it, does not involve the allowance of appellant's attorney's fee, but does involve who is to pay appellant's attorney's fee. The point at issue involves the question of whether the appellant is required to pay all of his attorney's fee or whether he can require the appellee to pay a part of it under the facts and circumstances of this case.

The appellant relies heavily on our decision in the case of *Washington Fire and Marine Ins. Co.* v. *Hammett,* 237 Ark. 954, 377 S.W. 2d 811. In the *Hammett* case the insurance company issued a $50.00 deductible policy of collision insurance to Hammett. Hammett was involved in a collision with Purcell. The insurance company paid Hammett his property damage and took subrogation in Hammett's cause of action against Purcell. After notifying Purcell of its claim and rights under its subrogation agreement, the insurance company threatened suit against Purcell but did nothing more. Hammett, through his own attorney, sued Purcell for the full amount of the damages and upon compromise, the insurance company was required to contribute its proportionate share of Hammett's attorney's fee as a part of the cost of collection under equitable principles of subrogation, citing *Webster* v. *Horton,* 188 Ark. 610, 67 S.W. 2d 200.

In 50 Am. Jur., Subrogation, §3, page 679, is found the following:

> "There are known to the law two kinds of subrogation, one of which is termed 'conventional,' and the other, in contradistinction, 'legal,' or, by reason of its origin and basis, 'equitable.' Some authorities have regarded assignments as a third type. Ordinarily, when the term is used without qualification legal subrogation is meant... Legal subrogation is a creature of equity not depending upon contract, but upon the equities of the parties. In its most usual aspect, it arises by operation of law where one having a liability or a right or a fiduciary relation in the premises pays a debt owing by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid. Conventional subrogation, as the term implies, is founded upon some understanding or agreement, express or implied, and without which there is no 'convention.' It occurs where one having no interest or any relation to the matter pays the debt of another, and by agreement is entitled to the rights and securities of the creditor so paid. The contract right of subrogation is somewhat broader than legal subrogation, for the right is granted irrespective of whether the payment was necessary for the protection of the person seeking subrogation."

In the case at bar the appellant entered into two separate contracts, first with his attorney and secondly with the appellee. His contract with the appellee amounted to more than a mere legal subrogation right to be enforced on equitable principles. He agreed to pay the appellee $1,797.90 out of the net amount he would recover in a lawsuit he had already filed. The appellant, in effect, now seeks to charge the appellee with a part of appellant's attorney's fee incurred in collecting the amount he agreed to pay the appellee.

While this agreement, signed by the decedent, conflicted to some extent with the agreement he made with his attorney in that it purported to give the appellee power of attorney with "irrevocable power, to collect any such claim or claims, and to begin, prosecute, compromise or withdraw in . . . its . . . name . . . any and all legal proceedings . . . ;" this agreement was entitled "Loan Receipt" and provided as follows:

> "Received From the SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY (hereinafter referred to as 'Company') THE SUM OF Seventeen Hundred Ninety Seven & 19/100 [sic] Dollars ($1797.90) as a loan, without interest repayable only in the event and to the extent of any net recovery the undersigned may make from any person, persons, corporation or corporations, or other parties, causing or liable for injury to James F. Courtney and as security for such repayment the undersigned hereby pledges to the said 'Company' all his, its or their claim or claims against said person, persons, corporation or corporations or other parties, and any recovery thereon, in the above amount.
>
> The undersigned covenants that no settlement has been made by the undersigned with any person, persons, corporation or corporations, or other parties against whom a claim may lie, and no release has been given to anyone responsible for such loss and that no such settlement will be made, nor release given without the written consent of the said company; and the undersigned covenants and agrees to cooperate fully with the said company, to promptly present claim and, if necessary, to commence, enter and prosecute suit against such person or persons, corporation or corporations, or other parties, through whose negligence or other fault the aforesaid loss was caused, or who may otherwise be responsible therefor, with all due diligence, in his, its or their own name."

The appellant had already filed his lawsuit before the agreement was entered into with the appellee. The appellant's attorney was entitled to his fee and the appellee was entitled to repayment, to the extent of appellant's net recovery against Birdsong, the full amount of $1,797.90 the appellee had advanced to the appellant. The appellant's attorney knew of the advancement but did not know of the contents of the agreement his client had entered into with appellee until the suit against Birdsong was compromised by telephone with Birdsong's insurance carrier. Upon being advised of appellee's claim, the appellant's attorney directed that the $1,797.90 claimed by the appellee be paid by separate draft drawn payable to his client, himself and the appellee in that amount. This was done and the suit against Birdsong was dismissed with prejudice.

The appellant, in effect, argues that the $1,797.90 represents a part of the *gross* recovery and only half of this amount would represent the *net* recovery out of which he agreed to repay appellee. The appellee argues, in effect, that the $1,797.90 is a part of the *net* recovery and that if the appellant did not pay his attorney out of the remaining $3,202.10 of the gross settlement, that his failure to do so was not the fault of the appellee, and that in no event should appellee be now required to pay any part of appellant's attorney's fee. The trial court agreed with the appellee and we agree with the trial court.

The appellant made two separate agreements in this case. He agreed to pay his attorney fifty per cent of the amount collected in the suit against Birdsong. The appellee paid appellant's medical expenses under a policy it had issued to appellant's father, and the appellant agreed to repay this amount to the appellee out of such net amount he might recover from Birdsong. In the agreement between the appellant and the appellee, the appellant did not require appellee to pay or to contribute to the payment of appellant's attorney's fee and appellee did not agree to do so.

There is no evidence in the record as to what the appellant did with the other draft, presumably in the amount of $3,202.10. The only reference to its disposition is contained in the "Response of Plaintiff to Motion to Set Aside and to Intervene," as follows:

> "After receiving the two checks as alleged above, plaintiff paid his attorney all sums which he owed him except his fee of fifty per cent (50%) for the collection of the sum represented by the draft for ONE THOUSAND SEVEN HUNDRED NINETY SEVEN AND 90/100 DOLLARS ($1,797.90). Accordingly, plaintiff's attorney advised Southern Farm Bureau Casualty Company that Franklin Courtney had indorsed said draft; that plaintiff's attorney was in possession of said draft; that he had indorsed said draft; that he was entitled to fifty per cent (50%) of the amount of such draft; that he stood ready, willing and able to pay Southern Farm Bureau Casualty Company said sum after deducting his fee...
>
> Plaintiff's attorney has made demands upon the plaintiff for fifty per cent (50%) of the amount of said draft payable upon his contract of employment with the plaintiff. Plaintiff says that he is legally obligated to pay his attorney fifty per cent (50%) of the amount of said draft in accordance with the terms of his contract by which he employed said attorney."

The appellant's attorney is not a party to this lawsuit. If the appellant still owes his attorney any amount on his fee, he should pay it and there is nothing in this case that would prevent him from doing so. The appellant agreed to pay to the appellee $1,797.90 out of the amount he collected from Birdsong, but the appellee did not agree to pay any part of appellant's attorney fee and we find no equitable reason why it should be required to do so now.

When appellant's attorney learned of appellant's agreement with the appellee, he simply directed that a separate draft be drawn for the amount covered by that agreement and the trial court correctly held that this amount should be paid over to the appellee and that the appellant is not entitled to contribution from this amount to apply on appellant's attorney's fee.

Judgement affirmed.

BELL TRANSPORTATION COMPANY v. ORVILLE MOREHEAD.

5-4775 437 S.W. 2d 234

Opinion Delivered February 17, 1969

William H. Drew and *Wright, Lindsey & Jennings* for appellant.

Sam Robinson and *McMath, Leatherman, Woods & Youngdahl* for appellee.

CONLEY BYRD, Justice. Appellee Orville Morehead was awarded a $165,000 judgment upon a jury verdict against appellant Bell Transportation Company for injuries sustained in connection with the use of Bell's tandem truck and lowboy. Since the asserted liability against Bell must rest upon the doctrine of respondeat superior, Bell contends that it was entitled to a directed verdict on the ground that its regular driver Sebastian Carrior and its supervisor J. C. Melton were borrowed servants in the employ of Houston Contracting Co. at the time of Morehead's injury.

The record shows that Houston Contracting Co. was involved in a "change out" of engines at Tennessee Gas Transmission Co. compressor stations. The engines had been removed from their foundations, sent back to the factory to be reworked and then brought back to be reinstalled in the compressor stations. The engines were moved in halves. Each half weighed about 80 tons. Bell is engaged in heavy hauling in Louisiana and 21 other states. It operates under an Interstate Commerce Commission permit. For deliveries, Bell charges the regular tariff prescribed by ICC regulations. The bill of lading signed by Houston called for Bell to, "furnish one tandem truck and one 16 wheel lowboy and one supervisor to work as instructed". The truck and lowboy was driven by one Sebastian Carrior to a railroad siding, accompanied by J. C. Melton, Bell's supervisor, in another vehicle. There, the Houston Contracting Co. moved the half motor from a flat car to the lowboy, which Sebastian Carrior drove to the compressor station. In the course of attempting to back the lowboy up a ramp to the platform at the compressor station onto which the half motor was to be unloaded, the drive shaft on Bell's truck broke, making it impossible to move the rig under its own power. A cable from a winch truck was tied to the lowboy through a block

and tackle arrangement and the lowboy was winched to within a few feet of the platform. The winch truck was operated by Danny Williams, an employee of Houston, and signals were given him by J. E. Morehead, Houston's assistant superintendent. Signals and orders to the truck driver, Carrior, were relayed by J. C. Melton, Bell's supervisor. When the truck had been winched to within 4 or 5 feet of the platform, it was discovered that the cable was fouling against the platform causing a loss of power. In order to accomplish a higher hitch on the lowboy it was necessary to secure slack on the cable. The winch truck operator begin to roll off cable from his drum and appellee Morehead was instructed to pick up the cable to gather up the slack. While appellee Morehead was so engaged, Sebastian Carrior permitted the truck to roll forward. The cable in Morehead's hands was immediately stretched taut, flinging him against the platform and inflicting the injuries complained of.

Sebastian Carrior had been Bell's employee for 15 years. He testified that during the winching operation, he sat under the wheel of the truck to steer and brake when necessary, that the flagman who signaled him to put on his brakes was Mr. Melton, Bell's supervisor and his immediate superior. He said that when he left Bell's office on the morning of the accident, he knew where he was going. They told him to go to Port Sulphur and pick up the engine at the railroad siding and move it to the building where it could be unloaded into the building. Mr. Melton went along as his supervisor to see that he hauled it in the proper manner.

Mr. J. C. Melton testified that after the truck would not operate under its own power, Mr. Edwards, Houston's job superintendent, Mr. J. E. Morehead, Houston's assistant job superintendent and appellee's brother, Houston's millwright foreman and he were all talking and trying to figure out some means of winching the lowboy back into the building. The winch truck and a

D8 tractor were hooked up to the trailer. He was standing at the left front door of the truck flagging it. Mr. J. E. Morehead was standing on the platform where he could see him for purposes of signalling. He was taking orders from Mr. Jesse Morehead. Appellee Morehead was hurt when they let the truck roll ahead approximately 3 or 4 feet on a signal from Jesse Morehead. He said that at all times after the driveshaft broke he was taking orders from Jesse Morehead. On cross examination Mr. Melton stated that the tandem truck and lowboy could cost as much as $50,000 and that he was sent along as supervisor to help protect that equipment. They couldn't turn special equipment like that over to just anybody to use as they might see fit. He actually supervised the transporting of the equipment from the railroad track to the pumping station. That was his and Bell's business there and he hadn't worked for anybody but Bell Transportation Company. Mr. Bill Edwards was superintendent for Houston Contractors and J. E. Morehead was assistant superintendent. He was taking his orders from Mr. J. E. Morehead.

Mr. William R. Edwards, a witness for Bell, testified that J. E. Morehead was directing the movement of the trucks and the entire operation from the platform outside the building; that the Bell truck was under the direction of Houston Contracting Co. from the time it arrived until it left and that he represented Houston and directed the truck in its use. That Mr. Melton who was with Bell was under his supervision and control and Houston was responsible for moving the engines and installing them. Later, however, Mr. Edwards testified that he told the truck driver and supervisor where to go with the truck to get the machinery and where to take the machinery. That Bell had the people, experience and equipment to do the job and that Mr. Melton was in charge of the truck—he was there to see that the truck was operated in the proper manner. The charge for the use of the truck was on an hourly

basis in accordance with the ICC tariff. He didn't attempt to give the truck driver or Mr. Melton, the supervisor, any orders or tell them anything about the details of the work. Mr. J. E. Morehead was supervising the operation, but he didn't attempt to give these fellows any orders. They were hired to come down there and move that engine from the rail point to the compressor station. They never did get it back to the platform where it could be unloaded before appellee Morehead was injured.

Since this accident occurred in Louisiana, we must apply our procedural law and the substantive law of Louisiana. Of course under our procedural law, we need only look to see if there was sufficient evidence to go to the jury. The substantive law of Louisiana on the borrowed servant doctrine is extensively set forth in *Benoit* v. *Hunt Tool Co.*, 219 La. 380, 53 So. 2d 137 (1951).

The Supreme Court of Louisiana in the Benoit case discussed the usual tests for determining the borrowed servant doctrine—i.e., "whose business" test and the "control" test. In applying these tests the court there recognized that if there was a division of control between the employer lending the servant and the employer borrowing the servant, the borrowed servant doctrine could not apply. From the testimony of Bell's witnesses set out above, we find that there was substantial evidence from which the jury could have found that Bell's employees were conducting themselves in pursuance of their master's business and under their master's control—more particularly that control as to the protective custody of their master's equipment. Bell takes the position that the only way the winching operation could be done properly was for someone to direct and control all phases of the operation and that the evidence conclusively shows that this control was under the supervision of Houston Contracting Co. This argument fails to take into consideration the distinction between

the authoritative direction and control involved in the master-servant relationship and that direction with which one necessarily cooperates in executing a common plan for a larger undertaking. To the same effect see *The Standard Oil Co.* v. *Anderson* 212 U.S. 215, 29 S. Ct. 252, 53 L. Ed. 480 (1909).

Bell's second point for reversal is that the trial court erred in giving its instruction No. 11 (AMI 702). This instruction reads as follows:

> "I have used the term 'scope of employment' in these instructions.
>
> "An employee is acting within the scope of his employment if he is engaged in the transaction of business which has been assigned to him by his employer or if he is doing anything which may reasonably be said to have been contemplated as a part of his employment and is in furtherance of his employer's interests".

Bell's third point for reversal is that the court erred in giving its instruction No. 12 (AMI 703). This instruction reads:

> "The vehicle driven by Sebastian Carrior was owned by Bell Transportation Company, and Sebastian Carrior was a regular employee of Bell Transportation Company. You may consider these facts along with any other evidence in the case in deciding whether Sebastian Carrior was acting as an employee of Bell Transportation Company and within the scope of his employment at the time of the occurrence".

In its brief Bell argues these two instructions together. It contends that each was abstract, improper and highly prejudicial and that taken together the two instructions prevented Bell from having the borrowed

servant defense considered fairly by the jury. To fortify its position Bell points out that the trial court upon Bell's request instructed the jury as follows:

> "As the general employer of J. C. Melton and Sebastian Carrior, Bell Transportation Company has the burden of proving by a preponderance of the evidence that, as to the particular work in question, the relationship of master and servant between Bell Transportation Company and its employees had been suspended and that a new relationship of master and servant had been created between them and Houston Contracting Company, which gave Houston Contracting Company the right to control them, with right of control being relinquished by Bell Transportation Company."

We find Bell's position to be without merit. Appellee Morehead's theory of the lawsuit at all times was that J. C. Melton and Sebastian Carrior were employees of Bell and at all times acting within the scope of their employment for Bell. Thus, even under Bell's defense on borrowed servant, Morehead was still entitled to have his theory of the lawsuit explained to the jury together with the indicia or guides by which the jury could determine whether Melton and Carrior were acting within the scope of their employment for Bell or had suspended the same for a new relationship with Houston. We find nothing in the instructions that is abstract or conflicting with the borrowed servant doctrine.

Bell's last argument is that the verdict is excessive. The record shows that Morehead had an annual earning capacity in excess of $14,000 per year with a life expectancy of 24.41 years from date of trial. Some 17 months had elapsed from injury to the date of trial. He was in the hospital a total of 34 days, was bedfast for more than 60 days and in addition to a permanent back injury, suffered a hernia, for which he underwent an operation. His medical expenses to the date of trial

were $2,742. There was testimony that Morehead in the future would have to undergo a back operation resulting in additional medical expenses of $2,400. Bell's doctor, who examined Morehead for purposes of trial, gave Morehead a 35% disability to the body as a whole and in addition theorized that in terms of occupational disability, Morehead could well be described as totally disabled.

We believe that there was substantial evidence from which the jury could find that appellee Morehead was totally and permanently disabled from an injury which would cause him additional pain in the future. Upon the record we are unwilling to say that the verdict in the amount of $165,000 was excessive.

Affirmed.

CARRIE TUCKER, ET AL v. EDYTH L. WALKER

5-4801 437 S.W. 2d 788

Opinion Delivered February 17, 1969

[Rehearing denied March 24, 1969.]

Murphy & Arnold for appellants.

Sullivan & Causbie for appellee.

CONLEY BYRD, Justice. The trial court held that a 1905 deed from Samuel J. and Molly Walker to Samuel J. Walker Jr. created a fee tail estate— i.e., a life estate in Samuel J. Walker Jr., with a contingent remainder to the heirs of his body. Based upon such finding, it awarded possession of the lands here involved to appellee, Edyth L. Walker; awarded betterments to appellants Carrie Tucker, Iris Heasley and Jim Fuhr in the amount of $2500, and betterments to A. W. Hill, W. A. Hill, Mrs. Gus Lewis, Charles Walter Hill, Mary Jo Hill Christensen, Barbara Hill Carter, and Linda Sue Hill McDuffey in the amount of $2200; and denied damages

for breach of covenant against appellee, Etna Walker, the wife of Samuel J. Walker Jr., Helen Walker Blaney and Edyth L. Walker as a guardian of Merle E. Walker. The appellants, Carrie Tucker, et al, and A. W. Hill, et al, appeal. For reversal they relied upon the following points:

I. If appellants be dispossessed in this case then damages should be allowed for breach of warranty.

II. The deed from Samuel J. Walker, Sr., et ux, to Samuel J. Walker, Jr., considered with the "attendant" circumstances, should be interpreted as creating a fee simple and not a fee tail; or, alternatively, the deed should be reformed to create a fee simple which was obviously intended by all parties.

III. Applying the rule of the destructibility of contingent remainders, Walker, Jr., had a fee simple.

Appellee Edyth L. Walker cross appeals contending that the improvements placed on both tracts of land were not in good faith and that the court erred in its valuation of improvements.

The record shows the deed dated June 5, 1905, recites, "that we, Samuel J. Walker and Molly I. Walker, his wife, for and in consideration of $1,000 into our hands this date paid, do hereby grant, bargain, sell and convey unto the said Samuel J. Walker Jr. and unto his bodily heirs and assigns forever, the following lands lying in the County of Sharp and State of Arkansas, to-wit: . . ."

The habendum clause reads, "To have and to hold the same unto the said Samuel J. Walker Jr. and unto his heirs and assigns forever, with all appurtenances thereunto belonging". This deed was prepared by

James Davie, a newly appointed Justice of the Peace. The record shows he used a form and filled in the blanks by hand. Mr. Davie was a farmer and carpenter in the area.

In 1912, Walker Jr. and Etna Walker, his wife, conveyed the lands here involved to S. B. Turner by a general warranty deed. Walker thereafter moved to Oklahoma where he died in 1961. At the time of his death he owned, as an estate by the entirety with his wife, real estate valued at $4500. He was survived by Etna and two children, Helen Walker Blaney and Merle E. Walker. Before this suit was filed Helen sold her interest to Merle. Merle was incompetent and his wife Edyth was appointed his guardian.

Under the third point, appellants suggest that we should limit or curtail fee tail estates by applying the rule of destructibility of contingent remainders. We find no merit in this argument as applied to the facts here. By Ark. Stat. Ann. § 50-405 (1947) and §§ 50-405.1—50-405.3 (Supp. 1967), the Legislature has undertaken not only to regulate the fee tail estate but also to provide a method for its dissolution. We see no reason why the court should go beyond established public policy.

Under point II, appellants argue that the 1905 deed to Samuel J. Walker Jr. created a fee simple title in Walker. In the case of *Weatherly* v. *Purcell,* 217 Ark. 908, 234 S.W. 2d 32 (1950), we had before us a conveyance to "John E. Purcell and his bodily heirs". The habendum clause there read, "To have and to hold the aforegranted premises to the said John E. Purcell and his heirs aforesaid in fee simple forever." We held that the deed created a fee tail estate. We think this decision is controlling of the issue involved here.

Under the second point appellants also argue that if the deed created a fee tail then it should be reformed

to create a fee simple which was obviously intended by all the parties. The only proof offered with reference to reformation of the deed was that the Justice of the Peace who drew the deed was a farmer and carpenter by trade; not admitted to practice law; and newly appointed as a Justice of the Peace. The only other evidence was that neither Samuel J. Walker Jr. nor his father were lawyers. We find this evidence insufficient to reform a deed executed by the parties. Furthermore the testimony of Cleo Chaplin, a nephew of Samuel J. Walker Jr., shows that his grandfather gave properties to all three of his children including Samuel Walker Jr., so that they couldn't sell their dowry.

Appellants' cross complaint against Etna Walker, the wife of Samuel J. Walker., is upon the theory that she covenanted with S. P. Turner to warrant and defend the title against all claims whatsoever. Their action against Helen Walker Blaney and Edyth L. Walker as guardian of Merle E. Walker is on the theory that as heirs of Samuel J. Walker Jr. and Etna Walker they have received property of their parents which could be used to satisfy the damages caused by the breach of their ancestors' covenant of warranty, see *Jones* v. *Franklin,* 30 Ark. 631 (1875).

The trial court was correct in holding that Helen and Merle Walker were not liable to the appellants for either one of two reasons. In the first place the record fails to show that either has received by inheritance any property either from Samuel J. Walker Jr. or their mother Etna Walker. The record only shows that Etna Walker died after the institution of these proceedings; that at the time of her death she owned property inventoried at a value of $4,500; and that she, by will, left the property to Helen. Of course until such time as the Oklahoma statute of non-claims has run, there is no way to determine whether Helen will receive any property from her mother. There is no showing that Merle Walker received any property from either his father or mother.

Etna Walker, the wife of Samuel Walker Jr., argues that she is not liable on the warranty because she only purported to waive her dowry in the deed and that under the existing law of 1905 such a contract by a married woman was void. The latter contention is made upon the authority of *Benton County* v. *Rutherford,* 33 Ark. 640 (1878). As we read our cases *Sparks* v. *Moore,* 66 Ark. 437, 56 S.W. 1064 (1908) and *Longino* v. *Smith,* 158 Ark. 162, 249 S.W. 557 (1923), married women became liable upon their contracts, including covenants of warranty, by the passage of Act 47 of 1895. This act is now codified as Ark. Stat. Ann. § 55-405 (1947). Furthermore our cases hold that a married woman joined as a grantor with her husband in a deed is liable on the covenant of warranty contained therein, *Spann* v. *Langston-Williams Lumber Co.* 184 Ark. 99, 40 S.W. 2d 791 (1931).

Recovery in such cases is limited to the purchase price, interest from the date of eviction, attorney's fees and court costs, *Wade* v. *Texarkana Building & Loan Association,* 150 Ark. 99, 233 S.W. 937 (1921); *Fox* v. *Pinson,* 182 Ark. 936, 34 S.W. 2d 459 (1930). Also where the land to which the covenant runs has been divided among other grantees, the damages suffered by each subsequent grantee is to be prorated according to value, *Lane* v. *Stitt,* 143 Ark. 27, 219 S.W. 340 (1920). Therefore we hold that the trial court erred in not awarding damages against Etna Walker's estate since there was ample testimony showing the value of each of the two parcels carved out of the original covenanted land.

Appellees' contention on a cross appeal that the betterments to the lands were not made in good faith is not sustained by the record. The only evidence to indicate any lack of good faith is that the original deed from Samuel Walker and his wife Molly Walker to Samuel Walker Jr. was at all times in the possession of Carrie Tucker. There is ample other evidence to the

effect that Carrie Tucker had no actual knowledge of the provision in the deed until sometime in the 1950's.

Neither do we find any merit in the contentions that the court erred in its valuation of the improvements. Eugene Street valued the improvements on the Tucker farm at $2500 to $3000, on the Hill farm $3000 to $3500. Witness Boyd Carpenter valued the Tucker farm improvements at $3000 and the Hill farm improvements at $3000. We hold this testimony amply sufficient to sustain the trial court's assessment of betterments, after deductions for rents, in the amount of $2500 to the Tucker farm and $2200 to the Hill farm.

Here the damages suffered by the appellants greatly exceed the $8,000 purchase price stated in the warranty deed from Walker Jr. and his wife Etna. We remand the case as against the estate of Etna Walker, only, to the trial court for purpose of prorating the $8,000 limit on Etna's liability between appellants Carrie Tucker, et al, and A. W. Hill, et al, together with court costs, reasonable attorney's fee and interest from date of eviction.

Affirmed in part and reversed in part.

Justice FOGLEMAN concurs.

JOHN A. FOGLEMAN, Justice. I concur in the majority opinion. Yet there is one important portion treated therein about which I am uncertain. That is the basis for disposition of point three, having to do with the doctrine of destructibility of contingent remainders. I cannot tell whether the majority is rejecting or approving the doctrine. The opinion does not relate the particular facts which make the doctrine inapplicable.

Samuel P. Walker had one son and two daughters, one of whom died without issue. After his conveyance to Samuel P. Walker, Jr., but before the latter's deed to Turner, the senior Walker died and no administration was had upon his estate. It seems that the reversion in

the property in question would have then vested in his surviving children. We do not know when the daughter having no issue died, so it is possible that the reversion in an undivided one-half passed to the grantees in the deed from Walker, Jr. under the after-acquired title statute. To the extent that the reversion passed to Turner, there was a merger which would have destroyed any contingent remainder pro tanto, under the rule.

I agree that the conveyance by Samuel J. Walker, Jr., the life tenant, could not operate to effect a destruction of the contingent remainder. A conveyance by a life tenant to a third party is not a surrender of the life estate. See *Le Sieur* v. *Spikes,* 117 Ark. 366, 175 S.W. 413, *Pierce* v. *Lowe,* 221 Ark. 796, 256 S.W. 2d 43; *Weatherly* v. *Purcell,* 217 Ark. 908, 234 S.W. 2d 32. Furthermore, the surrender by a life tenant necessary for a destruction of the contingent remainder must be made to the owner of the next vested estate rather than to a stranger to the title. *Rogers* v. *Ogburn,* 116 Ark. 233, 172 S.W. 867; *Hayes* v. *Goldman,* 71 Ark. 251, 72 S.W. 563; *Gray* v. *Shinn,* 293 Ill. 573, 127 N.E. 755, (1920); 31 C.J.S. Estate § 93.

Under the rule a contingent remainder must vest, if at all, at the termination of its supporting freehold estate. Simes & Smith, *Law of Future Interest,* 2d Ed. § 193 (p. 216); *Gray* v. *Shinn, supra;* Moynihan, *Survey of Real Property,* § 7; 31 C.J.S. Estates § 91. This termination may be accomplished by merger of separate vested interests in one owner. Simes and Smith, *Law of Future Interest,* supra; *Rogers* v. *Ogburn,* supra. A life estate is a vested interest. Ark. Stat. Ann. § 50-405 (1947); *Black* v. *Webb,* 72 Ark. 336, 80 S.W. 367. The reversion is also a vested interest. See *Wilson* v. *Pharris,* 203 Ark. 614, 158 S.W. 2d 274, *Davis* v. *Davis,* 219 Ark. 623, 243 S.W. 2d 739. The merger of the life estate and the reversion would destroy the contingent remainder. *Bennett* v. *Morris,* 5 Rawl. 8 (Pa. 1835); *Blocker* v. *Blocker,* 103 Fla. 285, 137 So. 249 (1931);

Simes and Smith, *Law of Future Interest,* 2d Ed. § 197 (p. 216); *Gray* v. *Shinn,* supra.

The doctrine and its applicability in Arkansas have been treated in an extensive *Law Review* article by Professor Samuel F. Fetters, 21 Ark. L. R. 145. While he takes the position that this court has never expressly held the doctrine applicable or inapplicable, yet he calls attention to the decisions in a number of cases in which the result would not have been possible if the doctrine had been applied. *Lathrop* v. *Sandlin,* 223 Ark. 774, 268 S.W. 2d 606; *Dyer* v. *Lane,* 202 Ark. 571, 151 S.W. 2d 678; *Davis* v. *Davis,* 219 Ark. 623, 243 S.W. 2d 739. While the issue may not have been raised in these cases, it seems that the court might well have applied the doctrine in some of them if it were the rule in Arkansas.

Although the common law was adopted by Ark. Stat. Ann. § 1-101 (Repl. 1956), a provision was made for alteration of common law rules by the General Assembly. As suggested by Professor Fetters, Act 163 of 1957, Ark. Stat. Ann. § 50-405.1, et. seq. (Supp. 1967) is wholly inconsistent with the existence of the common law rule of destructibility of contingent remainders. This act provides for the dissolution of an estate existing by reason of a conveyance to a grantee and the heirs of his body. The method of dissolution prescribed is a conveyance of the fee by the creator of the life estate, all life tenants and all living persons who might be remaindermen in event of the death of the life tenant. If the doctrine of destructibility were applied, with its provision for destruction by merger, there would be no necessity for the statute. The grantor might dissolve the estates created simply by conveying his reversion to the holder of the life estate under the doctrine of merger. We should certainly presume that the General Assembly did not perform a vain, futile or fruitless act. 2 Horack's Sutherland, Statutory Construction, 327 § 4510; 50 Am. Jur. 358, § 357; 82 C.J.S. Statutes. § 316. See *Henderson* v. *Gladish,* 198 Ark. 217, 128 S.W.

2d 257. Since the estates might also be dissolved by conveyance by the holder of the reversion and the holder of the life estate to a third person, under the doctrine of merger, the passage of Act 163 would be a wholly useless act, if the common law doctrine of destructibility remains effective. Consequently, if the doctrine did exist in Arkansas prior to the adoption of Act 163, Act 163 is sufficiently inconsistent therewith to constitute an implied repeal.

RESERVE LIFE INS. CO. v. CHARLES F. HALL, ET AL.

5-4792 437 S.W. 2d 226

Opinion Delivered February 17, 1969

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

Smith, Williams, Friday & Bowen, by *William H. Sutton* for appellees.

FRANK HOLT, Justice. This case relates to an employee's scope of employment during a lunch hour. Appellant appeals from a judgment based upon a verdict of the jury holding it liable to the appellees for the negligence of appellant's employee in an intersection accident. The jury found that at the time of the accident the employee, Mrs. Helen Christner, was acting within the scope of her employment.

For reversal appellant contends that there is no substantial evidence that at the time of the accident its employee was acting within the scope of her employment. We think appellant is correct.

On appeal we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee and affirm the judgment of the trial court if there is any substantial evidence to support the verdict. *St. Louis Southwestern Railway Co.* v. *Holwerk,* 204 Ark. 587, 163 S.W. 2d 175.

When an employee is engaged in performing services for his employer, the employer is liable for his actions until the servant turns aside from the master's business. In *Lindley* v. *McKay,* 201 Ark. 675, 146 S.W. 2d 545 (1941), we reaffirmed this well settled rule as stated in *Sweeden* v. *Atkinson Imp. Co.,* 93 Ark. 397, 125 S.W. 439 (1910):

> "* * * And if the servant steps aside from the master's business to do an independent act of his own and not connected with his master's business, then the relation of master and servant is for such time, however short, suspended; * * *."

To the same effect, see *Healey* v. *Cockrill,* 133 Ark. 327, 202 S.W. 229 (1918), and *Van Dalsen* v. *Inman,* 238 Ark. 237, 379 S.W. 2d 261 (1964). With this principle in

mind, we review the evidence with particular reference to *Van Dalsen,* which we consider controlling in the case at bar.

The employee was in charge of the bookkeeping for appellant's Little Rock office at 1515 West Seventh Street. She signed the checks, made the payroll and was in charge of the office when her supervisor was out of the office. One of her duties was to make deposits in the appellant's bank account which was in her name. Most of the time she made the deposit by mail. However, with her employer's knowledge, she would sometimes drive downtown in her own car and make the deposit. She kept the deposit slips in the office until the end of the month when she mailed them to the home office. She took her lunch hour whenever she desired. Her employment did not require her to travel. She provided her own means of transportation, and did not receive any form of reimbursement when she used her car in making bank deposits for the company. She was paid on a monthly basis.

On the day of the accident, appellant's employee left the office about 11:30 a.m. in her own automobile. She drove downtown to her bank where she deposited her salary check. From there she went to another bank where she made a deposit in appellant's account and received a copy of the deposit slip. The employee testified that from this bank she intended to proceed to Mitchell School at Roosevelt and Battery Streets, take her son home, and then return to work. Her child, being in the first grade, was dismissed at 12 o'clock, and since it was raining, she did not want him to walk home. According to Mrs. Christner, as she approached the intersection of Cumberland and Capitol Avenue, she debated whether to turn there but decided instead to continue south on Cumberland to Eighth Street, turn west on Eighth and proceed to Broadway, then out Broadway to Roosevelt and on to Battery where Mitchell School is located, thence to her home which was nearby at Roose-

velt and Marshall. However, her plan was interrupted when she collided with a taxicab at the intersection of Cumberland and East Capitol.

Her immediate supervisor, who was out of the office on the day of the mishap, testified that the only deposits Mrs. Christner was required to make were by mail and that for this purpose she was furnished with envelopes and mail deposit slips. He was aware that on occasion she deposited company funds while on her lunch hour. However, she was not required to do so.

On cross-examination Mrs. Christner stated that she left the office in her car to make her own deposit and to pick up her son at school, and since she was going to be downtown, she decided to make the company's deposit also. Further, she testified:

"Q. So that you had been to Union Bank and deposited your check, dropped by Worthen and made the company's deposit and was there anything else to do for the company at all?

A. No, sir.

Q. Then you had completed whatever you had done for the company, whatever you had to do for the company was done?

A. That is right.

Q. And you were on your way then to Mitchell School?

A. Yes, sir."

The burden of proof was upon appellees to offer some substantial evidence that at the time of the accident appellant's employee was acting within the scope of her employment. When the evidence is viewed most favorably to the appellees, we are of the view that at the time of the accident the appellant's employee, dur-

ing her lunch hour, had turned her attention to and was solely engaged in her own personal affairs—not those of her master's. During this period of time the relationship of master and servant was suspended and the appellant cannot be responsible for her actions.

Reversed and dismissed.

GEORGE ROSE SMITH, J., concurs.

HARRIS, C.J., dissents.

GEORGE ROSE SMITH, Justice, concurring. To me the main problem here is that of deciding which of two diverging precedents we should follow. The majority opinion cites one of those two cases: *Van Dalsen* v. *Inman,* 238 Ark. 237, 379 S.W. 2d 261 (1964). The dissenting opinion discusses the other: *Conway* v. *Hudspeth,* 229 Ark. 735, 318 S.W. 2d 137 (1958).

In my best judgment the *Van Dalsen* case should be controlling. The pivotal point is that there, as here, the entire mission was basically a personal excursion. In *Van Dalsen* the employee left Stuttgart for the purpose of visiting his wife in a Little Rock hospital and then returning to his home in Stuttgart. On the way back, in the court's words, "he digressed from the said personal and private mission long enough to leave a note" under his employer's door in Pine Bluff. Pine Bluff was not on the direct route from Little Rock back to Stuttgart. The accident happened outside the city limits of Pine Bluff, still off the direct route. But the court found that the employee had "resumed his private and personal mission to return to Stuttgart."

In principle that case cannot be distinguished from this one. Here Mrs. Christner was on her lunch hour—a personal excursion, according to the undisputed proof. She digressed to go by the Worthen Bank to make a deposit for her employer, but, just as in the *Van Dalsen*

case, she had resumed her private and personal mission when the accident happened. Moreover, just as in the *Van Dalsen* case, she was at a place where she would not have been except for the business-motivated digression. It is immaterial that, in the language of the dissent, "the route that she was traveling led both to the object of her personal mission [her son's school] and to her employer's place of business," because even if she had testified that she intended to return at once to her office she was still on her lunch hour and therefore not within the course of her employment.

It will be seen that the other precedent, *Conway* v. *Hudspeth*, is distinguishable, because the employee was not upon a mission that was primarily personal. All the pertinent incidents took place during business hours; so there the employee was presumptively engaged in his employer's business from start to finish, unless a personal digression was shown. Thus the reasoning of that case cannot govern this one.

Carleton Harris, Chief Justice. I disagree with the conclusion reached by the majority, as it is my opinion that the question of whether Mrs. Christner was acting within the scope of her employment at the time of the accident was a jury question, and there was substantial evidence to support the jury's finding. This, in my opinion, is not a case where the employee left the office entirely for personal business, and only incidentally transacted some business in behalf of her employer. To the contrary, before Mrs. Christner left the company office, she prepared deposit slips for both her personal account at Union National Bank, and the company account at Worthen Bank, this account also being carried in her name. Accordingly, it appears to me that, when leaving the office, she definitely had a dual purpose in mind. After making her personal deposit she proceeded to the east side of Main Street to make the company deposit at the Worthen Bank. Thereafter, she testified that she intended to proceed to Mitchell

School at Roosevelt and Battery Streets for the purpose of taking her son home, and then to return to work. The company office was located at 1515 West 7th Street. The accident took place at the intersection of Cumberland and East Capitol. Thus, Mrs. Christner had not reached the place where she would, in furtherance of her personal mission, deviate from the route that would take her back to appellant's offices. She was still two blocks north of that point.

I wish to specifically call attention to the fact that Mrs. Christner would *not have been on the east side of Main Street except for the fact that she made the company deposit in the Worthen Bank, i.e.,* the collision would not have occurred had she proceeded from the Union Bank (where she made her personal deposit) to the school to pick up her son.

The importance of the fact that she had not reached the location where the requirements of personal business would require a deviation from the office route, is pointed out in the case of *Conway* v. *Hudspeth,* 229 Ark. 735, 318 S.W. 2d 137. In that case, Conway had asked the trial court for a directed verdict, contending that it had not been established that Conway's employee, Smith, was acting within the scope of his employment when the collision occurred. Smith was employed from time to time to wash cars, and do odd jobs at Conway's place of business. A man named Karns became ill there, and Conway and Smith drove Karns to a hospital, where he obtained medicine. After leaving the hospital, Conway alighted from the car, and instructed Smith to take Karns home, "and come right back." When testifying, Smith said that he drove Karns to his home, and then "I started out to see about my granddad." According to the witness, he was on his way to the grandfather's house when the accident happened. This court said that the trial court was correct in holding that the evidence made an issue for the jury's determination. We said:

"We are unable to say that the undisputed proof required the jury to find that Smith had left the course of his employment. In the first place, the geographical setting is not clearly disclosed by the proof. Conway's used car lot, to which Smith was to return, is in the downtown business district of Marshall, and the collision took place within the city limits, near the western edge of town. We are not told, however, where the Karns house is, except that it is in the north part of town, north of Highway 65. If the house were due north of the point of the accident Smith's deviation from the most direct return route might have been so slight as to support a finding that there had been no departure from the master's business. *Cahill* v. *Bradford,* 172 Ark. 69, 287 S.W. 595."

There is another interesting, and important, fact mentioned in the *Conway* opinion. This court stated:

"* * * Since both Conway and Smith were interested parties, the jury was not required to accept Conway's uncorroborated statement that he instructed Smith to come right back or to accept Smith's unsupported testimony that he had started to see about his grandfather. *Bullock* v. *Miner,* 225 Ark. 897, 286 S.W. 2d 328. Inasmuch as the route that Smith was traveling led both to the object of his personal mission and to his employer's second place of business, it was for the jury to say which destination Smith had in mind when he began the trip."

The above statement is particularly *apropos* to the present case. After all, the only evidence that Mrs. Christner had concluded her employer's business, and had started out on her own mission (to pick up her son), was given by Mrs. Christner herhelf, and the jury was not required to accept her uncorroborated statement as to her intentions. Likewise, as already pointed out, the

route that she was traveling led both to the object of her personal mission and to her employer's place of business, and it was therefore for the jury to say which destination Mrs. Christner had in mind when she began the trip.

I respectfully, but earnestly, dissent.

JANIE LOREAN EDWARDS, ADM'X v. T. H. EPPERSON & SON HOUSE MOVING CO., INC.

5-4759 437 S.W. 2d 480

Opinion Delivered February 24, 1969

Fred A. Newth, Jr. and *Billy B. Bowe* for appellant.

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

CARLETON HARRIS, Chief Justice. Janie Lorean Edwards, appellant, widow of Charlie Howard Edwards, and administratrix of his estate, instituted suit for his wrongful death against T. H. Epperson & Son House Moving Company, Inc., appellee herein, and Arkansas Power & Light Company. Prior to trial, a non-suit was taken against the power company, and the case proceeded to trial against the Epperson Company. When appellant completed her case, appellee moved for a directed verdict. The motion was overruled, and the cause was submitted to the jury. A verdict was returned in the amount of $96,250.00 for appellant, and a motion was then made by appellee for a judgment *non obstante veredicto*. The court granted the motion, and entered a judgment for appellee, dismissing appellant's complaint with prejudice. From this judgment, appellant brings this appeal.

The complaint alleged that Edwards was killed while engaged in moving a house on U.S. Highway 67. It was asserted that Edwards, who was riding on top of the house, was struck by a guy wire, which had been placed across the highway by the power and light company. Further allegations were to the effect that the truck was being driven by Ed Epperson, an agent and employee of the Epperson Company, and that the death of Edwards was the result of the negligence of the driver, who was traveling at an excessive rate of speed, failed to keep a proper lookout, failed to use proper control, and did not heed a warning to stop. Appellee's position is that it was established at the time of the accident that Epperson was employed and acting on behalf of D. F. Arey, who was also engaged in the business of hauling houses. After the jury verdict, the court concluded that, though there was sufficient evidence as to negligence and proximate cause to justify submission of the case to the jury, there was not sufficient evidence

that Epperson was acting for and in behalf of Epperson & Son House Moving Company to make a jury question. On this basis alone, the n.o.v. judgment was rendered.

For reversal of the court's judgment, it is first argued that the court had no authority to enter a judgment notwithstanding the verdict, and it is contended that this would have been proper only if the pleadings had shown conclusively that one of the parties was entitled to a judgment as a matter of law. It is asserted that the court could do no more than set aside the jury verdict, and this action would, of course, permit another trial. Appellant is in error. In *Stanton* v. *Arkansas Democrat Company,* 194 Ark. 135, 106 S.W. 2d 584, this court was presented the same argument, but we disagreed, pointing out that there is a distinction between a case where a final judgment has been rendered and entered of record, and where only a jury verdict has been received, and we held that in the last instance, a judgment *non obstante veredicto* could be entered. The court said.

> "The question there reserved[1] is now decided, and we hold that after a verdict has been returned, but before the entry of judgment thereon, the court has the jurisdiction to determine whether judgment shall be entered, and, if so, what judgment, and if it be found by the court before the entry of judgment that no testimony has been offered to sustain the verdict, and that no cause of action has been shown to exist, the court has the jurisdiction to so declare and to direct the judgment which shall be entered. If it is thought that the court has acted erroneously a bill of exceptions should be filed, which would afford us on the appeal the opportunity to pass upon the question whether, under the testimony, a verdict should have been directed in

[1]This had reference to the case of **Scharff Distilling Company v. Dennis,** 113 Ark. 221, 168 S.W. 141.

favor of the party for whom judgment was rendered."

In a much more recent case, *Spink* v. *Mourton,* 235 Ark. 919, 362 S.W. 2d 665 (1962), the *Stanton* holding was reiterated. We stated:

> "The verdict was in favor of Mourton. Now it is true that the trial judge might have granted a new trial if he found the verdict to be against the preponderance of the evidence. *Bockman* v. *World Ins. Co.,* 222 Ark. 877, 263 S.W. 2d 486. But this case does not involve a motion for a new trial; instead, the request was for a judgment notwithstanding the verdict. *Such a motion may be granted if there is no substantial evidence to support the verdict.*"[2]

Accordingly, the only question before us is whether there was sufficient proof that Ed Epperson, the driver of the truck, was an agent or employee of appellee company at the time of the accident. The evidence in support of this allegation is as follows:

1. Ed Epperson, the driver of the truck, is a vice-president of T. H. Epperson & Son House Moving Company, Inc.

2. Two other regular Epperson employees (Charlie Edwards and Obie Horn) were also on this particular job.

3. Raymond Edwards, son of the deceased, testified that he worked for Epperson "off and on" for two years prior to the date of the accident, and he said that, though Arey owned the tractor that was being used, the trailer was owned by Epperson. This witness stated that he and his father had "built" the trailer, though his subsequent testimony indicated that he meant they

[2]Emphasis supplied.

had lengthened it by three feet. He also said that he could itdentify it by a welding mark, this repair having been occasioned by a ripped place near the second wheel.

4. A permit had been obtained by Epperson from the Highway Commission to move a house from Malvern to a destination 14 miles north of Malvern, the job to be performed between May 12 and May 16. This permit was numbered 22018. Arey had also been issued a permit by the Highway Department to move a house from Malvern to a destination 14 miles north of Malvern, the job to be performed between May 12 and May 16. This permit was numbered 22019.

The evidence offered by appellee relative to these facts, in the order listed, was as follows:

1. Ed Epperson testified that Arey contacted him requesting that he (Epperson) help him in moving the building, because Arey's wife was in the hospital, and Arey wanted to take her home. Epperson said that he was paid $25.00 by Arey, which he spent; no money was paid to the Epperson corporation. Arey testified as follows:

> "On the day of the accident I called Mr. Epperson the night before and asked him if he wasn't too busy would he go down the next day and drive my truck while I come in and got my wife out of the hospital and I would be right back down there to take over."

2. Epperson testified that Edwards was working for Arey on the day in question, and was paid by Arey. Arey testified that he hired Edwards for this particular job at a rate of $20.00 per day, and he also said that he hired Horn on this job. The witness stated that he received all of the money for moving the house, and that the Epperson corporation received nothing.

3. Raymond Edwards testified that his father had worked on Arey jobs previously, and that he (Raymond) had also, on one occasion, worked on an Arey job.

On cross-examination, the witness admitted that he did not know who the trailer belonged to on the date of the accident, and he also conceded that another trailer could have been welded in the same place. Epperson testified that Edwards had nothing to do with building the trailer, and said that it was bought in Pine Bluff about 15 years ago.

4. This was the strongest circumstance offered by appellant, for it does seem unusual that these two permits were issued on the same date, consecutively numbered, permitting the moving of houses during the same period of time, approximately the same distance and in the same direction, from Malvern. Though this was the strongest evidence offered, strangely enough, appellee's evidence with regard to these facts, is probably the most convincing that it offered. An examination of the record reveals that different vehicles were undoubtedly involved. The Epperson application and permit reflect a truck license number of D402, and a trailer license number of ST6673, while the Arey application and permit show a truck license number of C838 and a trailer license, ST6455. The width of the load in the Epperson permit is shown as 20 feet, while the width of the load in the Arey application is 22 feet. Epperson testified that the job that occasioned his application involved moving a construction shack belonging to an asphalt plant, and Arey testified that his contract was to move a house for a Mrs. Moody.

We agree with the trial court that the evidence was insufficient to make a jury question. The testimony by Epperson and Arey that Epperson and Edwards were working for Arey on this occasion is undisputed. There is also some significance in the fact that Edwards,

though an employee of appellee, had, on other occasions, worked for Arey.

The testimony of Raymond Edwards is of no value, because he was unable to dispute the ownership of the trailer, *i.e.*, he admittedly did not know who owned the trailer on the day of the accident. While the information shown in the applications and permits would perhaps, at first blush, indicate the same moving job, this conclusion is shown to be erroneous when the applications and permits are more clearly examined. Very definitely, the permits show, not only that applications were made by two different persons, but more important, that two different trucks and trailers were to be used. We see no reason for appellee to have obtained two permits for the same haul. These permits were granted *five days before the accident,* and there would certainly have been no point at that time in endeavoring to create confusion as to which company had the job. In addition, a picture of the truck and trailer with the house upon it is in the transcript. This picture was taken by Don's Studio of Malvern after the accident, and very clearly shows the license numbers of both the truck and trailer belonging to Arey. Of course, we suppose it is possible that Epperson could own both trucks and trailers, but there is not a line of testimony to support such a supposition, nor does appellant make this suggestion or contention.

Complaint is made that the court erroneously refused to permit the sheriff to testify that Epperson, at the scene of the accident, presented a card, which would have identified him in his capacity with the appellee corporation. Objection was sustained when counsel asked what appeared on the card. We do not agree that error was committed. There was no effort to offer the card itself, which would, of course, have been the best evidence, and there was no evidence that the card had been lost. It may be that the officer simply looked at the card, rather than taking it, but this is not shown

Before the sheriff could have testified, it would have been necessary to make proof of why the card could not be presented. *Town and Country Trailer Sales, Inc.* v. *Godwin,* 233 Ark. 307, 344 S.W. 2d 338. Not only that, but no offer of proof was ever made showing what the sheriff's answer would have been had he been permitted to answer the question. It was necessary that this tender of proof be made.[3] *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S.W. 2d 30.

The court's action in granting the judgment *non obstante veredicto* was not error.

Affirmed.

KIRBY C. SEAY ET UX v. E. T. DAVIS ET AL

5-4793 438 S.W. 2d 479

Opinion Delivered February 24, 1969

[Supplemental Opinion on denial of Rehearing April 7, 1969, p. 627.]

[3]Even if the card identified Epperson as a vice-president of appellee company, it would not appear that this would have added very much to appellant's evidence, for Epperson, normally being associated with appellee company, might well have carried personal cards reflecting that fact.

Don Gillespie for appellants.

Spencer & Spencer for appellees.

GEORGE ROSE SMITH, Justice. The question is whether the chancellor was right in holding that the plaintiff-appellants were not entitled to accelerate the maturity of a note and mortgage because of the debtors' 48-hour delay in tendering the amount of the third monthly installment. We hold that the chancellor was right.

On April 8, 1968, Seay and his wife sold the Rose Haven Motel in El Dorado to the appellees, E. T. Davis and his son, T. G. Davis, for $185,000. The Davises made a down payment of $30,000 and gave a note and mortgage for the remainder, payable in monthly installments of $1,682.21. The first two payments were made within the one-month grace period allowed by the contract, but the check for the next payment given on July 29 by T. G. Davis was returned for insufficient funds on July 31—the last day of the grace period.

Seay at once exercised his option to accelerate the maturity of the note and without advance notice to the Davises filed this foreclosure suit on August 2. The court appointed a receiver, who operated the motel at a profit until he was discharged. The Davises' answer tendered the amount of the delinquency, plus court costs and an attorney's fee, and asked that the acceleration of the debt be set aside and that the receivership be terminated. After a hearing the court entered a decree which in effect granted the debtors the relief they sought but retained jurisdiction to renew the receivership if the debtors should again become delinquent.

It was formerly our rule that equity would grant relief against an attempted acceleration only for acci-

dent, mistake, fraud, or other inequitable conduct. *Johnson* v. *Guaranty Bk. & Tr. Co.*, 177 Ark. 770, 9 S.W. 2d 3 (1928). That rule has been changed by the Uniform Commercial Code, which reads:

> A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised. Ark. Stat. Ann. § 85-1-208 (Add. 1961).

The note in this case falls within the intent of the code, its language being that in the event of default the note may be accelerated "at the option of the holder."

Thus under the Code the issue centers upon Seay's good faith. In our opinion the weight of the evidence supports the view that Seay did not in good faith believe that "the prospect of payment or performance" had been substantially impaired. Before the default occurred Seay had complained to the elder Davis that his son was not capable of managing the motel properly. In our judgment that grievance was effectually answered by Davis's assurance that if a delinquency in the installment payments should occur Davis would, on being notified, make it good within three hours. According to Mr. Davis's testimony, which the chancellor evidently accepted, Seay promised to give Davis notice (and, inferentially, an opportunity to pay the arrearage) before filing a foreclosure suit. No such notice was actually given.

Moreover, on the issue of good faith it is important to remember that the sellers had received a $30,000 down payment and two monthly installments totaling more

than $3,000. That the receivership proved to be profitable confirms the conclusion that the property itself could be expected to liquidate the indebtedness against it within the time and manner provided by the note and mortgage. On the record as a whole we cannot say that the chancellor was wrong in concluding from the Davises' testimony that the sellers were motivated by a desire to turn the down payment into a quick profit rather than by a good faith conviction that the purchasers could not perform their contract.

Affirmed.

ARKANSAS STATE HIGHWAY COMM'N v. MARTHA P. DARR

5-4845 437 S.W. 2d 463

Opinion Delivered February 24, 1969

Thomas B. Keys and *Kenneth R. Brock* for appellant.

Lawes & Schulze and *Phil H. Loh* for appellee.

LYLE BROWN, Justice. This is an eminent domain case wherein appellee, Martha P. Darr, was awarded $50,000 for lands taken by the Arkansas State Highway Commission. The Commission appeals on the single ground that there is no substantial evidence to support the verdict.

Mrs. Darr, a widow, owns a farm in Conway County consisting of 280 acres. Interstate 40 right-of-way traverses the southwest corner of her property at an angle. The taking of 9.55 acres left a strip of 6.6 acres in the extreme southwest corner isolated from the remainder of the lands. The taking cut off Mrs. Darr's only means of public access. Prior to the taking a public road led from Highway 64 to the farm and connected with it at the southwest corner. After the taking she has access by that route only to the 6.6 acres and can go no farther upon her lands because of Interstate 40. The remaining unit of 264 acres is completely surrounded by the right-of-way and other landowners. Future access to the large tract would have to be by permission of neighboring landowners or by condemnation

proceedings brought by Mrs. Darr to establish a public road across her neighbors' property.

Two expert witnesses testified on behalf of Mrs. Darr. It was C. V. Barnes' opinion that appellee had been damaged $38,500. Lloyd Pearce fixed her damages at $43,250. The only other landowner testimony considered on damages was that of Mrs. Darr. She fixed her damages at $98,500. So a verdict of $50,000 must stand or fall on the strength of Mrs. Darr's testimony.

We are committed to the majority rule that a landowner is permitted to testify because of his status as an owner. *Arkansas State Highway Comm'n.* v. *Fowler,* 240 Ark. 595, 401 S.W. 2d 1 (1966); reaffirmed in *Arkansas State HighWay Comm'n.* v. *Drennen,* 241 Ark. 94, 406 S.W. 2d 327 (1966). But as pointed out in *Fowler,* the weight of the landowner's value testimony is affected by his knowledge of values. Before Mrs. Darr's conclusion on damages can pass the substantial evidence test, her testimony must be examined to see if she gave a satisfactory explanation for her conclusion. *Arkansas State Highway Comm'n.* v. *Byars,* 221 Ark. 845, 256 S.W. 2d 738 (1953). We also said in *Byars* that the determination of substantial evidence is a question of law and not of fact.

Mrs. Darr's testimony on her damages is clearly not substantial. Her husband owned this property when they were married in 1941. She has been a registered nurse since 1933 and presently resides and works in Russellville, some twenty miles distant. It is not disclosed when she resided on this land, if ever. She showed no reasonable knowledge of market values of lands in the community. She was never asked if she had an opinion as to the fair market value of her lands; she was merely asked the worth of the lands without any restriction on the meaning of "worth." It is apparent that she had a sentimental attachment for the

farm. She frankly stated that she would not sell it for any price "because my husband told me to keep it." She reduced the value of the remainder from $400 to $50, whereas her expert witness, C. V. Barnes, placed a value of $220 per acre on the remainder. It was her theory that her lands were hopelessly locked off from any possible access. She forecasted no reasonable cooperation from her neighbors. That attitude was in the face of the fact that one neighbor had offered her access if she would contribute to the cost of construction. Another neighbor was permitting Mrs. Darr's present tenant to use that neighbor's private road for ingress and egress.

Having concluded that Mrs. Darr's testimony was not substantial, we must hold the verdict to be excessive.

We have on many occasions offered the landowner in eminent domain cases the opportunity to enter a remittitur. The allowance of remittiturs by our Court is almost as old as our jurisprudence; however, the rule is not the same in all cases. We think it would be helpful to the bench and bar if the two general rules governing remittiturs were here stated in the hope that such a statement will contribute to clarity.

1. There are those cases in which no error is committed in the trial court which might affect the verdict. Yet it is sometimes shown by the record before us that a verdict clearly goes beyond the limit of just compensation. That may be caused, for example, wherein a jury misconceives the proper standard of measuring damages; or the jury may be "prompted by sympathy for the plaintiff or prejudices against the defendant." That situation was before the Court in *St. Louis, I.M.&S. Ry.* v. *Snell,* 82 Ark. 61, 100 S.W. 67 (1907). There we find the general rule:

> In this case there is no error of the court to cure, and we require the plaintiff to remit down to

> an amount that we would be willing to approve if the jury had returned a verdict for that amount.

The *Snell* case was cited with approval in *Missouri Pac. R.R.* v. *Newton,* 205 Ark. 353, 168 S.W. 2d 812 (1943); and in *Louisiana & Ark. Ry.* v. *Rider,* 103 Ark. 558, 146 S.W. 849 (1912). Since 1907 the same general rule enunciated in *Snell* has been applied in a multitude of cases.

2. A second and different rule applies where there is error in the trial court which enhances the award. The rule in such a case is exhaustively treated in *St. Louis, I.M.&S. Ry.* v. *Adams,* 74 Ark. 326, 86 S.W. 287 (1905). Succinctly stated, the holding in that case is that if the injured party is entitled to recover this Court may, in its discretion, fix an amount which it can see is *clearly not excessive.* This guideline and reasoning is recited:

> The court must be certain not to put the amount too high; for, as before stated, the defendant has no option in the matter, and must submit to the judgment allowed by the court, while the plaintiff has the right to reject the offer if he chooses to do so. There is, then, little danger in putting the amount low, and the court should always go down to a sum which it can feel certain that the defendant should pay, and which under the evidence the plaintiff is clearly entitled to recover. If it should be less than the plaintiff is entitled to under the evidence, the defendant is not injured; for, if the plaintiff accepts it, defendant then gets off with less than he was liable to pay. On the other hand, as plaintiff is not compelled to accept the amount offered, he has no ground for complaint that the court, instead of reversing the case outright on account of an error for which he is partly to blame, and forcing him to undergo a new trial, gives him the privilege of taking the sum named, and by doing so of

getting some substantial compensation without the trouble and expense of further litigation.

Adams goes on to state that the Court "will be less inclined to grant this privilege [remittitur] where the errors at the trial have been gross, or where improper conduct on the part of plaintiff or his counsel has been such as to excite the prejudices of the jury."

The Adams case was cited with approval as late as the case of *Ark. State Highway Comm'n.* v. *Watkins,* 229 Ark. 27, 313 S.W. 2d 86 (1958). It was cited to support "established procedure."

The case before us falls within the second rule. That is because Mrs. Darr was not qualified to give value testimony and it is clear that her award was enhanced as a result of her opinion. The verdict was in excess of her highest value witness by $6750. This brings us to the most difficult problem of the case and one which has given us no little concern. Can we fix an amount which (1) we are certain is not too high and (2) fix it at a figure which under the evidence the defendant should pay and the landowner is clearly entitled to recover? When we speak of being certain we are in the realm of being unmistakably correct, free from doubt, infallible. It is our conclusion that we cannot so arrive at such a figure.

First, we consider the value testimony of four expert witnesses, two for each side. Mrs. Darr's witnesses fixed damages at $43,250 and $38,500; the Commission's witnesses fixed just compensation at $23,500 and $22,750. The testimony of her highest value witness, Lloyd Pearce, is subject to some doubt and uncertainty because he was not sure about the actual acreage in woodland; further, he did not calculate the possibility of Mrs. Darr gaining access over a ramp being built by one of Mrs. Darr's neighbors. The testimony of her other witness, C. V. Barnes, is more impressive and

particularly so because no serious attack is made on his evidence on appeal. Yet, to accept his figure with the certainty and clarity required by law, we would have to shut our eyes to the testimony of witnesses Mashburn and McMurrough for the Commission. Their qualifications are impressive and their evidence reflects a professional study of the involved lands and surrounding farms; and they fortified their conclusions by what appeared to be fairly comparable sales.

Summarizing, the testimony of Barnes, Mashburn, and McMurrough can all be classed as substantial; yet they arrived at different conclusions. For that reason and additionally because we did not have the advantage of hearing the witnesses, we would have to speculate to fix a remittitur.

Reversed and remanded.

STATE OF ARKANSAS, EX REL JOE PURCELL, ATTORNEY GENERAL, ARKANSAS STATE HIGHWAY COMMISSION v. G. D. NELSON, BERRY PETROLEUM COMPANY, ET AL

5-4653 438 S.W. 2d 33

Opinion Delivered February 24, 1969

[Rehearing denied April 1, 1969.]

Joe Purcell, Atty. Gen.; *Les Evitts,* Ch. Dep. Atty. Gen. and *Shaver & Shaver* and *Glassie, Pewett, Beebe & Shanks* for appellants.

Catlett & Henderson and *Keith, Clegg & Eckert* and *Mahony & Yocum* and *Smith, Williams, Friday & Bowen* by *Emon A. Mahony, Jr.* for appellees.

JOHN A. FOGLEMAN, Justice. This appeal was taken from an order in an action originally brought by G. D. Nelson, a citizen and taxpayer, against Berry Petroleum Company, Arkansas Bitumuls Company, Lion Oil, Inc., MacMillan Ring-Free Oil Company, Inc. and Bitucote Products Company. We held that Nelson had stated a cause of action against the above-named parties. *Nelson* v. *Berry Petroleum Co.,* 242 Ark. 273, 413 S.W. 2d 46. After remand each of the defendants answered, denying the allegations of Nelson's complaint and pleading the statute of limitations. The plaintiff taxpayer then filed a motion asking that he be permitted to proceed without cost to him or any other taxpayer and that the State of Arkansas be required to bear the cost of the proceedings. Thereafter, the state and its Highway Commission sought permission to intervene, alleging that this action was necessary in order to protect the

interests of the state and its citizens and taxpayers. In response to Nelson's motion, the state, through its Attorney General and the Highway Commission, expressed willingness to assume the prosecution of the cause, which, they said, would obviate the necessity of further cost being borne by Nelson. Permission to intervene was granted.

The intervenors, before filing any other pleading but within the time allowed them for filing their intervention, filed a motion for stay of the proceedings. In this motion, it was alleged that intervenors had filed suits in the United States District Court for Eastern District of Arkansas against the defendants seeking recovery under the Sherman and Clayton Acts for alleged price fixing and allocation of territory by them.[1] As a basis for the stay, the state asserted that, although the causes of action arose out of the same course of conduct by the defendants, recovery of treble damages, attorneys' fees and costs and expenses permitted under the federal laws could not be had in the state action. The court was asked to stay all proceedings by any party until disposition has been made of the cases pending in the federal district court, and to relieve the intervenors of further pleading until they were ordered to do so. The trial court denied the motion, but continued the matter and granted intervenors an additional week for filing their intervention.

This intervention sought recovery from the defendants for an alleged conspiracy to fix prices for asphaltic materials sold to the Arkansas State Highway Department. Answers were filed by the defendants. The complaint of intervenors reasserted the grounds of their motion for stay and added an allegation that the United States District Court had greater familiarity with trials of the issues presented so that the issues could be de-

[1]These suits were filed November 23, 1966, which was subsequent to the filing of this action by Nelson, but before the original appeal was submitted in this court.

termined in that court in a more orderly and less expensive manner than would obtain in the state court. The motion for stay was renewed. After pretrial conferences, the chancery court entered an order on December 5, 1968, denying the motion for stay, appointing a Special Master and requiring the deposit of $5,000 ($2,500 by intervenors and $2,500 by defendants), from which the fees and expenses of the master would be paid as they accrued. Intervenors then filed another motion for a stay of proceedings and a reconsideration of the court's action.

At a subsequent pretrial conference, the chancellor denied the motion for reconsideration. He specifically denied intervenors' request for a stay of proceedings either until disposition of the case in federal district court or until November 1968. Appeal was taken by intervenors from both orders.

The plaintiff Nelson and all defendants joined in a motion to dismiss the appeal on the ground that the orders were not appealable. Appellants then filed a petition for mandamus, or, in the alternative, for prohibition or certiorari, seeking the vacation of the chancery court's orders, and asserting that the court had acted in excess of its jurisdiction and had abused its discretion. We agree that the appointment of a Special Master and the requirement of advance deposit by appellants for costs and expenses of the proceeding were in excess of the court's jurisdiction.

We have recently had occasion to review the situations in which an order of a trial court is appealable. See *Johnson* v. *Johnson,* 243 Ark. 656, 421 S.W. 2d 605; *Wright* v. *City of Little Rock,* 245 Ark. 355, 432 S.W. 2d 488; and *Allred* v. *National Old Line Ins. Co.,* 245 Ark. 893, 435 S.W. 2d 104. We find no such finality as would permit an appeal of the chancery court's orders under the standards repeated in those cases.

Appellants rely upon the rule that an appeal lies when a distinct and severable branch of a case is finally determined. We do not think that it can be said that any action by the court relates to a distinct or severable branch of this case. It seems, on the other hand, that each such action is an integral part of the entire proceeding. We recently held that denial of trial by jury and a limitation of the scope of a hearing before a circuit court were not such determinations as would permit review by appeal before final disposition of the case. See *Wright* v. *City of Little Rock, supra.* Each action of the chancery court here is no more a final determination of a severable branch of the case than was the action of the circuit court there.

This does not mean, however, that the actions of trial courts are not subject to review by this court under its its supervisory jurisdiction. Article 7, §4, Constitution of Arkansas. Writs of mandamus, prohibition and certiorari are designed for the appropriate exercise of this jurisdiction, where appellate remedy is unavailable or inadequate.

The primary function of the writ of mandamus is to require an inferior court or tribunal to act when it has improperly failed or declined to do so. *Satterfield* v. *Fewell,* 202 Ark. 67, 149 S.W. 2d 949; *Thompson* v. *Foote,* 199 Ark. 474, 134 S.W. 2d 11; *Hammond* v. *Kirby,* 233 Ark. 560, 345 S.W. 2d 910. It is never applied to control the discretion of a trial court or tribunal. *Smith* v. *Sullivan,* 190 Ark. 859, 81 S.W. 2d 922; *Jackson* v. *Collins,* 193 Ark. 737, 102 S.W. 2d 548; *Hardin* v. *Cassinelli,* 204 Ark. 1016, 166 S.W. 2d 258; *State ex rel Pilkinton* v. *Bush,* 211 Ark. 28, 198 S.W. 2d 1004; *Village Creek Drainage District* v. *Ivie,* 168 Ark. 523, 271 S.W. 4. Nor can it be used to correct an erroneous exercise of discretion. *Jackson* v. *Collins,* supra; *Mance* v. *Mundt,* 199 Ark. 729, 135 S.W. 2d 848, *Mobley* v. *Scott,* 236 Ark. 163, 365 S.W. 2d 122; *Dotson* v. *Ritchie,* 211 Ark. 789, 202 S.W. 2d 603; *State ex rel* v. *City of Marianna,* 183 Ark.

927, 39 S.W. 2d 301; *Jones* v. *Adkins,* 170 Ark. 298, 316, 280 S.W. 389.

Edmondson v. *Bourland,* 179 Ark. 975, 188 S.W. 2d 1020, relied upon by appellants, where mandamus was granted, is not applicable here. There we said that a refusal by a trial court to permit a defendant to file a motion to set aside the appointment of a guardian ad litem for her, together with the striking of an answer and cross complaint filed for her by attorneys of her own choice, amounted to an arbitrary refusal to proceed with the case. Mandamus has always been an appropriate remedy in such cases. The utilization of the writ of mandamus in *La Buy* v. *Howes Leather Co.,* 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290, wherein the reference of an antitrust case to a master was corrected, is not authority for such action here. There the federal appellate courts were enforcing the application of their own procedural rules—a factor not involved here. Even so, four members of that court thought the remedy was not appropriate.

The fundamental purpose of the writ of prohibition is to prevent a court from exercising jurisdiction not possessed by it or a power not authorized by law, when there is no other adequate remedy by appeal or otherwise. *Robinson* v. *Merritt,* 229 Ark. 204, 314 S.W. 2d 214; *Harkey* v. *Matthews,* 243 Ark. 775, 422 S.W. 2d 410. It is not available otherwise to correct erroneous action of a trial court. *Bassett* v. *Bourland,* 175 Ark. 271, 299 S.W. 13; *St. Paul-Mercury Indemnity Co.* v. *Taylor,* 229 Ark. 187, 313 S.W. 2d 799; *Wilson* v. *Williams,* 215 Ark. 576, 221 S.W. 2d 773; *Lowery* v. *Steel,* 215 Ark. 240, 219 S.W. 2d 932. It cannot be used as a substitute for appeal or certiorari and is not available to bar proceedings pending in a court if the court has jurisdiction. *Schirmer* v. *Cockrill,* 223 Ark. 817, 269 S.W. 2d 300.

Certiorari lies to correct proceedings erroneous upon the face of the record when there is no other adequate remedy. *North Little Rock Transportation Co.*

v. *Sangster,* 210 Ark. 294, 195 S.W. 2d 549; *Burgett* v. *Apperson,* 52 Ark. 213, 12 S.W. 559; *Martin* v. *Hargrove,* 149 Ark. 383, 232 S.W. 596. It is available in the exercise of superintending control over a tribunal which is proceeding illegally where no other mode of review has been provided. *McCain* v. *Collins,* 204 Ark. 521, 164 S.W. 2d 448; *Merchants & Planters Bank* v. *Fitzgerald,* 61 Ark. 605, 33 S.W. 1064; see also *Baxter* v. *Brooks,* 29 Ark. 173. Certiorari lies where there is a want of jurisdiction or an act in excess of jurisdiction which is apparent on the face of the record. *City of Fayetteville* v. *Baker,* 176 Ark. 1030, 5 S.W. 2d 302; *Hardin* v. *Norsworthy,* 204 Ark. 943, 165 S.W. 2d 609; *Martin* v. *Hargrove,* supra. It is not available to look beyond the face of the record to ascertain the actual merits of a controversy, to control discretion, to review a finding upon facts or review the exercise of a court's discretionary authority. *Hardin* v. *Norsworthy,* supra; *Arkansas State Highway Comm.* v. *Light,* 235 Ark. 808, 363 S.W. 2d 134; *Hendricks* v. *Parker,* 237 Ark. 656, 375 S.W. 2d 811.

When there is a remedy by appeal, a writ of certiorari will not be granted unless there was a want of jurisdiction, or an excess in its exercise, by the court below. *Baxter* v. *Brooks,* 29 Ark. 173.[2]

The first ground asserted as a basis for this appeal is that the position of the taxpayer in this lawsuit is not in the best interest of the state in light of the litigation pending in the federal courts. In the absence of charges of wrongdoing by state officials, it does seem odd that parties whose positions are as adverse as those of Nelson and the defendants sued by him would make virtually identical contentions on the matters which were before the trial court. Yet, a determination that the taxpaying plaintiff's action was not in the best interest of the state, on the face of the record only, would

[2]For a discussion of the use of the writ in Arkansas, see Bryant, "Certiorari in Arkansas" 17 Ark. L. R. 163.

be premature. There is no statute governing taxpayer's actions, so this question can only be determined on a trial of the case on its merits. It cannot be reviewed by us at this time in the exercise of any supervisory jurisdiction.

The next point relied upon by appellant is the assertion that the chancellor erred in denying appellant's motion for a stay. The granting or denial of a stay or continuance is a matter lying within the sound judicial discretion of the trial court. *Phillips* v. *Nowlin,* 238 Ark. 480, 382 S.W. 2d 588. It has never been held that the pendency of an action in the federal courts is a ground for a continuance or abatement of an action in our state courts. See *Boynton* v. *Brown,* 103 Ark. 513, 145 S.W. 242. If the chancery court was in error through manifest abuse of discretion in refusing the stay, that error is correctable on appeal from a judgment adverse to appellants, at the proper time. *Keenan* v. *Strait,* 221 Ark. 83, 252 S.W. 2d 76; *Burriss* v. *Wise & Hind,* 2 Ark. 33; *Great American Ins. Co.* v. *Stevens,* 178 Ark. 84, 10 S.W. 2d 356.

Since the trial court exercised its discretion in a matter clearly within its jurisdiction, its action is not subject to review at this time. It is not clear to us why appellee-plaintiff Nelson prefers a trial in the state court in view of the possible recovery of treble damages in the federal courts. There is no allegation that the duly designated state officials are not pursuing the matter aggressively and in good faith. Yet the courts cannot control the taxpayer's actions in this matter in the absence of statutory guidlines in this field, and we cannot review the trial court's action in this regard at this stage of the proceeding.

In his first pretrial order, the chancellor appointed a Special Master, and instructed him to prescribe rules for the expeditious and orderly progress of the tasks with which he was charged, and to proceed with hear-

ing of evidence and ruling upon all matters of fact and law incident thereto. The master was directed, upon completion of the presentation of evidence, to prepare and file his recommended findings of fact and conclusions of law and a proposed decree. In this respect, the trial court was proceeding illegally. Before a master is appointed, the main issue establishing the rights of the parties should be determined so that definite directions can be given to the master for his guidance. *Hicks* v. *Hogan,* 36 Ark. 298; *Fullenwider* v. *Bank of Waldo,* 101 Ark. 259, 142 S.W. 149. It was pointed out, in *Hicks* v. *Hogan,* that the chancellor should hear the cause upon the pleadings and such evidence as may enable him to determine the principles to be applied in adjusting the equities of the parties and then make a reference to a master for such special inquiries or statements of accounts as may aid the court in making a definite decree. The decision in *La Buy* v. *Howes Leather Co.* 352 U.S. 249, 77 Sup. Ct. 309, 1 L. Ed. 2d 290 (1957) involved the application of the very same principle to an antitrust case which included charges of monopoly and price fixing under the Sherman Act. In that opinion, the United States Supreme Court stated that the use of masters was to aid judges in the performance of specific judicial duties as they arise and not to displace the court. They held that the appointment of a master and a reference at the inception of the case to take evidence and to report the same to the court with his findings of fact and conclusions of law was an action beyond the court's powers. There, as here, an effort was made to support the reference by reason of anticipation of a lengthy trial, complexity of the issues and congestion of the court's calendar. We agree with the Supreme Court of the United States that these reasons do not constitute sufficient grounds for the virtual displacement of the court by a Special Master. While we can conceive of situations in which a reference of particular matters may be made to a master during the course of litigation, a reference as broad as the one involved here is clearly in excess of the court's jurisdiction and

in that respect the court proceeded without authority of law. *Jones* v. *Adkins,* 170 Ark. 298, 280 S.W. 389, relied upon by appellees, is not contrary to this view. The only issue there was an accounting, for which purpose we have always recognized the power of the court to appoint a master. If this case should reach the point where the only issue remaining is a matter of accounting, the appointment of a master would be appropriate.

We have not overlooked the argument of appellees that there was an agreement to the appointment of a master. The record does disclose a colloquy among the court and counsel for the respective parties at a pretrial conference on October 16, 1968, at which all seem to have agreed that a master should be appointed in the case. At that time appellants' complaint had not been filed. There was no suggestion, until the order of December 5 was entered, that the reference to the master would be as extensive as set out in the court's order. An objection to the appointment was made by appellants at a pretrial conference on November 17. It was repeated in their motion for reconsideration.

Appellees also argue that the chancellor's statements after the entry of the order appointing the master indicate that he did not intend to refer the whole case, but would maintain control over the activities of the master. We can only regard the content of the court's order in reviewing the matter on certiorari. We agree with the chancellor's statement on hearing the motion for reconsideration that the work of the master can be postponed until such times as the issues are developed to a point where a reference is proper and desirable.

We have previously recognized the state's immunity from costs when acting in a governmental capacity in an action not brought by it. *McCastlain* v. *Oklahoma Gas & Electric,* 243 Ark. 506, 420 S.W. 2d 893. We did recognize that the rule is altered when there is specific statutory authority for payment of costs by the state;

however, Ark. Stat. Ann. § 27-2307 provides that the state shall not be required to give security for costs. Master's fees and expenses are costs in the sense in which the word is used in this statute. See *Jones* v. *Adkins,* 170 Ark. 298, 280 S.W. 389.

The chancery court's order in this respect was unauthorized and in excess of its jurisdiction.[3]

In the respects in which we have found that the trial court was proceeding illegally and in excess of its jurisdiction, treating the proceedings here to be upon the application for certiorari, the portions of the court's order relating to these matters are quashed. Petitions for mandamus and prohibition are denied. As to all other matters the appeal is dismissed as premature.

SHANON D. BRIDGES, ET AL v. UNITED SAVINGS ASSOCIATION

5-4732 438 S.W. 2d 303

Opinion Delivered February 24, 1969

[Rehearing denied April 7, 1969.]

[3]Although this court has been very liberal in construing and applying Article XVI, §13, of our constitution permitting taxpayers' action, we cannot approve any requirement that the state be called upon to bear the expense of preparation and trial of these actions.

Bethell, Stocks, Callaway & King for appellant.

Bill B. Wiggins for cross-appellant.

Warner, Warner, Ragon & Smith for appellee.

J. Fred Jones, Justice. This is an appeal by Shanon D. Bridges and a cross-appeal by Sam Sexton, Jr. from a decree of the Sebastian County Chancery Court in which a joint and several deficiency judgment was awarded in favor of United Savings Association in a mortgage foreclosure against Bridges and Sexton. Bridges satisfied the judgment and was awarded judgment over against Sexton on a cross-complaint. The facts of record appear as follows:

On October 1, 1964, Bridges and a Mr. Wilson, together with their wives, borrowed $12,600.00 from United Savings Association of Fort Smith. The loan was evidenced by a promissory note bearing interest at six per cent and payable in equal monthly installments of $81.19 each. The note was secured by a mortgage on a new house and lot with an appraised value of $14,000.00. Bridges and Wilson placed $1,400.00 of the amount borrowed into savings accounts with United and pledged these accounts to United as collateral security for the loan until such time as the principal loan balance should be reduced to $10,500.00. This collateral secur

ity enabled Bridges and Wilson to borrow 90% of the appraised value of the house and lot rather than the customary 80% of appraised value.

On December 25, 1964, Sam Sexton, Jr. signed an offer to purchase the property for a purchase price of $12,900.00; $300.00 to be paid in cash and the loan to be assumed for the balance of $12,600.00. On January 8, 1965, Sam Sexton, Jr. did purchase the property from Bridges and Wilson. He paid $300.00 in cash and took title by warranty deed containing the following provisions:

> "This conveyance made subject to a Mortgage in favor of United Savings Association of Fort Smith, Arkansas as recorded in Record Book 83, Page 519, filed October 9, 1964, for an original sum of $12,600.00, which there is an unpaid balance of $12,563.53, which the grantee herein assumes and agrees to pay."

Also on January 8, 1965, Sexton signed a separate "assumption of indebtedness" form, agreeing to make the payments on the mortgage indebtedness to United. After a few months Sexton defaulted in the payments to United resulting in the foreclosure action against Bridges, Wilson and Sexton. Bridges cross-complained seeking judgment over against Sexton for any judgment which United might recover against him and Sexton cross-complained against Bridges alleging that the sale to him was induced by fraud and that the collateral pledge should be applied first to any deficiency.

Wilson assigned his interest in the savings accounts to Bridges and the chancellor rendered a decree of foreclosure in favor of United for the full amount of the indebtedness and decreed that the real property be first sold and the proceeds applied on payment of the mortgage indebtedness; that the savings accounts pledged as security be next applied on the mortgage indebtedness

with joint and several judgment against Bridges and Sexton for any deficiency. The chancellor also decreed judgment over in favor of Bridges against Sexton for any amount Bridges should be required to pay in excess of the proceeds from the sale of the real property and after application of the savings accounts under the collateral pledge.

Bridges purchased the property at foreclosure sale for $11,000.00 and after crediting this amount, together with the pledged savings accounts, to the mortgage indebtedness, attorney's fee and court costs, a deficiency judgment was decreed against Bridges and Sexton in the amount of $2,078.41. The final decree for deficiency judgment then recites:

> "It further appearing to the court that the defendants, Shanon D. Bridges and Helen L. Bridges, have paid in full the above set out deficiency amount of $2,078.41 and are entitled to a judgment over against the defendant, Sam Sexton, Jr., for said amount, all in accordance with the foreclosure decree heretofore filed herein.
>
> * * *
>
> IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that defendants, Shanon D. Bridges and Helen L. Bridges, do have and recover of and from the defendant, Sam Sexton, Jr., the sum of $2,078.41, with interest thereon at the rate of 6% per annum from December 27, 1967."

On direct appeal Bridges relies on the following points for reversal:

> "The chancellor erred as a matter of law in failing to grant Shanon D. Bridges, et ux, judgment against Sam Sexton, Jr., for the amount of the Bridges savings deposits utilized to satisfy the obligation assumed by Mr. Sexton.

The findings of fact of the chancellor are sustained by the overwhelming weight of the evidence."

On cross-appeal Sexton relies on the following points:

"The device employed by Bridges and United Savings to accomplish the sale of the property constituted 'constructive fraud.'

The remedy in a fraud action of this type is to off-set damages against a claim for purchase price."

We are forced to the conclusion that the appellant is correct in his contention. There were actually two separate transactions involved in this case. The first transaction was between the Bridges and the Wilsons on one side and the United Savings on the other. The second transaction was between the Bridges and the Wilsons on one side and Sexton on the other. In the first transaction the Bridges and Wilsons gave a mortgage on their real property to secure the payment of a loan made to them by United. In addition to the mortgage on their real estate, they pledged their savings accounts to United as additional security for the loan.

In the second transaction Sexton purchased the mortgaged property from the Bridges and the Wilsons for the sum of $12,900.00. He paid $300.00 in cash and agreed to pay the balance of $12,600.00 by assumption of the mortgage indebtedness, payable in monthly installments of $81.19 each. Sexton only purchased the real property from the Bridges and the Wilsons. He did not purchase, nor does he claim any interest in, the savings accounts which the Bridges and the Wilsons pledged as additional security for their loan. Sexton gave no collateral security when he purchased the property, but only paid $300.00 cash and purchased the property subject to the real estate mortgage indebtedness of

$12,600.00 which he agreed to pay. Assuming that the Bridges and the Wilsons had mortgaged their automobiles and furniture and their children had pledged their separate savings accounts as collateral security for their loan, such additional mortgages and pledges would not secure Sexton against a deficiency judgment on his own obligation under his separate contract, especially in the absence of fraud in its inducement.

We now come to Sexton's cross-appeal. We are of the opinion that the chancellor's finding, that the sale of the property to Sexton was not induced by fraud, is not against the preponderance of the evidence. It was candidly admitted by Bridges and United that the savings accounts in the amount of $1,400.00, pledged as collateral security by the Bridges and the Wilsons, came out of the $12,600.00 they borrowed from United and that United never did part with the possession of $1,400.00 of this loan at all. The question naturally arises as to whether the Bridges and the Wilsons actually borrowed $12,600.00 for which the note and mortgage were given, or whether the loan was actually for $12,600.00 less the $1,400.00 retained by United and placed in savings accounts in the name of Bridges and Wilson as additional security, but which remained in the possession and under the control of United at all times. Bridges and United contend that this procedure was followed for the benefit of a prospective purchaser of the mortgaged property, as well as for the benefit of the owner and original borrower. They contend that this procedure would enable the owner to sell the property with practically no down payment and with a built-in loan already financed. Sexton argues, with convincing logic, that this procedure is a built-in device which enables the original mortgagor owner to sell property to an unsuspecting purchaser for its full market value, while leaving the impression with the purchaser that he is purchasing the property at a distress sale for a mere pittance of its actual value, for only the balance due on the original purchase price, and for much less than was originally paid for the property.

Assuming that either, or both, arguments are correct, the question remains as to whether fraud was practiced on Sexton in this case. The question of usury is not raised in this case nor does Sexton seek cancellation of his contract because of fraud. The question is whether Sexton is somehow entitled to the benefit of Bridges' collateral security because of constructive or legal fraud perpetrated on Sexton. In *Arkansas Valley Compress & Warehouse Co.* v. *Morgan,* 217 Ark. 161, 229 S.W. 2d 133, we said:

> "... [C]onstructive fraud ... has been stated to consist of certain elements. In *Levinson* v. *Treadway,* 190 Ark. 201, 78 S.W. 2d 59, Mr. Justice Mehaffy said:
>
> 'Persons, in order to be guilty of legal or constructive fraud, or, as it is sometimes called, fraud at law, do not necessarily have to be guilty of moral wrong, but a constructive fraud is a breach of either legal or equitable duty which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or injure public interests. Neither actual dishonesty of purpose nor intent to deceive, is an essential element of constructive fraud. 26 C.J. 1016 and cases cited.'
>
> Bouvier's Law Dictionary says: 'Legal or constructive fraud includes such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law.'
>
> In *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S.W. 524, Mr. Justice Hart pointed out that in determining the question of fraud, all the surrounding circumstances are to be considered."

In 37 C.J.S., Fraud, §§ 15 and 16, p. 242, is found the following:

> "The concealment of a material fact may be equivalent to a false representation and be sufficient upon which to predicate a charge of fraud; (citing *National Life & Accident Ins. Co.* v. *Hitt,* 194 Ark. 691, 109 S.W. 2d 426) however, mere silence is not representation and in the absence of a duty to speak . . . silence as to a material fact does not of itself constitute fraud, although one who, instead of merely remaining silent, misrepresents or takes steps to conceal material facts, or who says or does something to avert inquiry, is guilty of fraudulent concealment . . .
>
> Where the parties deal at arm's length, there is no duty of disclosure where the facts are equally within the means of knowledge of both parties. If a fact is peculiarly within the knowledge of one party and of such a nature that the other party is justified in assuming its nonexistence, there is a duty of disclosure."

In *National Life & Accident Ins. Co.* v. *Hitt,* 194 Ark. 691, 109 S.W. 2d 426, is found the following:

> "As was said in *Sanders* v. *Berry,* 139 Ark. 447, 214 S.W. 58, 'The law requires good faith in every business transaction, and does not allow one party to intentionally deceive another by making false representations or by concealment.' In *Lone Rock Bank* v. *Pipkin,* 169 Ark. 491, 276 S.W. 588, we said: 'If the means of information as to the matters represented is equally accessible to both parties, they will be presumed to have informed themselves; and, if they have not done so, they must abide the consequences of their own carelessness."

In *Lane* v. *Rachel,* 239 Ark. 400, 389 S.W. 2d 621, is found the following:

"It is well settled that representations are construed to be fraudulent when made by one who either knows the assurances to be false or else not knowing the verity asserts them to be true. *Fausett & Co.* v. *Bullard,* 217 Ark. 176, 229 S.W. 2d 490; *Maurice* v. *Chaffin,* 219 Ark. 273, 241 S.W. 2d 257. In C.J.S., Fraud, § 2, p. 211, constructive fraud is succinctly defined as 'breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others * * * *Neither actual dishonesty of purpose nor intent to deceive* is an essential element of constructive fraud.' "

Fraud is never presumed but must be affirmatively proven by the one who alleges it and by testimony which is clear and convincing. *Green* v. *Bush,* 203 Ark. 883, 159 S.W. 2d 458; *Ellis* v. *Ellis,* 220 Ark. 636, 246 S.W. 2d 302;*First National Bank* v. *Peoples National Bank,* 97 Ark. 15, 132 S.W. 1008; *Sledge and Norfleet Co.* v. *Mann,* 193 Ark. 884, 103 S.W. 2d 630.

The chancellor found that the circumstances surrounding the loan transactions in this case did not amount to constructive or legal fraud. We cannot say that his findings are against the preponderance of the evidence. There is nothing in the record before us that would indicate that the property was over appraised at $14,000.00 when the original loan was made, and there is no evidence that anyone even suggested to Sexton that the property was worth more than that amount or more than the amount he agreed to pay for it. There is no contention here that the property was over appraised; the contention of Sexton is that it was over financed. The property was financed at 90% of its appraised value rather than 80% and this could have been to Sexton's advantage as well as to his detriment.

Sexton was chairman of the board of a loan association, and was generally familiar with loan transac-

tions in the Fort Smith area. He knew from his personal knowledge and experience that the standard real estate loan did not exceed 80% of the appraised value of the property. The evidence clearly suggests that Sexton thought he was purchasing at least a 20% of $1,400.00 equity value in a new house and lot for a cash payment of $300.00, when as a matter of fact he only purchased a 10% or $700.00 equity value for $300.00. The record is clear that Sexton acted on his own knowledge and experience, rather than on representations, statements or inducements made by United or Bridges, or their agent.

The decree of the chancellor is reversed and this cause is remanded for the entry of a decree in favor of Bridges against Sexton for the full balance due on Sexton's obligation after crediting the amount received for the property at the foreclosure sale.

Reversed and remanded.

C. E. LAWRENCE, ET AL v. DUANE LAWRENCE, ADMR.

5-4808 437 S.W. 2d 457

Opinion Delivered February 24, 1969

Curtis L. Ridgeway, Jr. for appellants.

Fitton, Meadows & Adams for appellee.

CONLEY BYRD, Justice. The issues here with reference to ownership of the joint and survivorship bank accounts arose under our law as it existed prior to the effective date of Act No. 78 of Acts of 1965. See *Park* v. *McClemens,* 231 Ark. 983, 334 S.W. 2d 709 (1960). In holding that the joint and survivorship accounts belong to the estate of H. S. Lawrence, deceased, the trial court found that there was no intention on the part of H. S. Lawrence to create a survivorship account or a gift to appellants C. E. Lawrence and L. M. Lawrence.

The record shows that H. S. Lawrence, a long time resident of Searcy County, died at the age of 89 leaving surviving him 13 children. Two of the children, appellants C. E. Lawrence and L. M. Lawrence, lived near their father and for the last 5 or 6 years alternated in caring for him—i.e., they would see that his meals were cooked, his fires were built and necessary wood was available to keep the fires burning. Following the death of his wife, H. S. Lawrence on Nov. 8, 1962, caused his checking account in the Leslie State Bank, Leslie, Arkansas, to be placed in a joint and survivorship account with his son, L. M. Lawrence. On the same date he also caused a savings account of $8,600, to be established under the same arrangement. On April 18, 1963, H. S. Lawrence opened a joint and survivorship checking account in the Citizens Bank of Marshall, Arkansas, with his son L. M. Lawrence. Thereafter on Sept. 21, 1964, H. S. Lawrence obtained a $10,000 certificate of deposit payable to H. S. Lawrence or C. E. Lawrence, either or the survivor. H. S. Lawrence kept the certificate of deposit and saving account book in his possession until his death.

C. E. Lawrence was asked on what basis he claimed ownership of $10,000 certificate of deposit. His answer was, "My dad put it in there in mine and his name and said, 'I would like for you to see that I am took care of' ". When asked what he meant by saying that he would be taken care of with this $10,000, C. E. Lawrence

again said, "Well, he figured on getting sick, figured on big doctor bills, I guess, of course," and at another time upon being asked, "Well you said your dad, when he put in the money in there, said he was putting it in there so that you could take care of him?" Whereupon C. E. Lawrence again answered, "Well, yes." L. M. Lawrence was asked, whether he had advised the heirs that he would divide the money with them, his answer was, "Well in a round about way I imagine I might have after everything was said and done." At another time he testified as follows:

"Q. Did your Father have any instructions concerning this $8,600.00 in the Bank of Leslie, when he set it up in a joint account?

A. What do your mean?

Q. Well, your brother has told us that the father told him that he was putting it in so that you could use it to take care of him.

A. Yeah, he said he didn't know how long he was going to live and we didn't either, so he wanted us to be paid for our services when he passed away.

Q. He put this money in so that you could take care of him during his lifetime and help with his funeral expense?

A. I guess you might say that, yes."

On another occasion Mr. C. E. Lawrence was asked, "I take it, from your earlier testimony, Mr. Lawrence, that you are not now willing to divide the money that was in the Marshall bank with the other children?" His answer was, "This thing will have to clear up pretty well, then I will make my decision on that." When asked if this was not inconsistent with his father's statement to him, he answered, "I don't think so. Anyway, how did I know but what I was going to have to spend

everything else I had to see that he was taken care of, that was my promise and that is what I would have done, that is what I had to do." Letters written by C. E. Lawrence and L. M. Lawrence to members of the family subsequent to the father's death acknowledge that they were holding or had control of the monies involved, but there was no outright assertion that the funds belong to them.

As pointed out in *Park* v. *McClemens,* 231 Ark. 983, 334 S.W. 2d 709 (1960), the ownership of the accounts here must turn on whether H. S. Lawrence intended to create or vest title in the survivor. There is testimony in the record from which the trial judge could have found the issues either way. The chancellor observed the witnesses as they testified. We are not in a position to say that his finding on this issue is contrary to the preponderance of the evidence.

Affirmed.

WILLIAM KITTLER v. B. W. PHILLIPS

5-4806 437 S.W. 2d 455

Opinion Delivered February 24, 1969

Odell C. Carter for appellant.

Gill & Clayton for appellee.

FRANK HOLT, Justice. This is a boundary line dispute between adjoining land owners involving a 16- to 17-foot strip of land. The appellant owns a 40-acre tract on the west and appellee owns 16½ acres lying east of the disputed line. When appellant attempted to relocate an old fence line by the construction of a new fence along what he contends to be the true boundary line, the appellee filed this suit for an injunction. In deciding the issue for the appellee, the court found:

> "The old fence row and fence has been along the common boundary of the two tracts of land now owned by the parties for more than a half a century. The parties and their predecessors in title by their actions in relation to said old fence row and fence caused the same to be 'silently acquiesced' as the boundary between the two tracts of land."

For reversal the appellant contends that the findings of the chancellor are against the preponderance of the evidence.

The appellant purchased his 40-acre tract of land, which adjoins appellee's 16½ acres, in 1956. He presented evidence that when he purchased his lands, the fence went up through some woods; that the seller told him the fence was not the true boundary line; that he did not know appellee or his predecessors in title claimed any interest in the disputed land until 1967; that there never

was any mutual understanding or agreement that the old fence constituted the true boundary; that in 1957 or 1958 he relocated and reconstructed the fence along and "fairly close" to the old fence line to contain cattle and cleared the land on both sides of the fence; that he had no intention of this or the old fence being any recognition of the true boundary line; that no one had "farmed" the land within 100 feet east of the old fence until appellee began using this strip of land as a turnrow when he started farming about 1962; that appellee had tried to buy the disputed strip from appellant; that in conversations with appellee, they both understood the old fence was not the true line and that he, appellant, did not learn the exact location until 1967 when a survey was made just before this action.

The appellee purchased his lands in 1961. He testified that the old fence line, between his 16½ acres and appellant's 40 acres, was there when he bought his property, and that he had personally observed its existence for more than 25 years. He has owned other property in the community since 1943. According to appellee, he had never offered to buy the disputed strip of land from appellant; appellant had never communicated to him any non-recognition of the fence line as being the accepted boundary; appellant had never cleaned up any land on his [appellee's] side of the fence, it had been "cleaned up for 25 years;" his 16½ acres "had been farmed up to the fence" for that length of time; the area was not wooded: "There was no timber there and there haven't been any. Since I been going out there." Further, according to appellee's evidence, both he and his predecessors in title had occupied the lands east of the fence for at least 25 years and had recognized the old fence row and line as the visible boundary for a period of approximately 50 years; neither the appellant nor his predecessors in title had at any time occupied, used or controlled the disputed land east of the old fence line and that the first attempt by appellant to use this disputed strip was in 1967, which action resulted in this lawsuit.

A surveyor testified that in 1967, while conducting a survey in that vicinity, the appellant was present and expressed no knowledge as to where the true line was; acknowledged the old fence line had been used as a boundary; and that appellant made no objection to his using the old fence line as a boundary.

According to appellee, the appellant repaired and "re-posted" the old fence about 10 years before this controversy and there was no "change in the location of this old fence line." This lawsuit resulted when the appellant, or someone, relocated this "old fence" about "eighteen" feet to the east "at night."

The location of a disputed boundary line, being an issue of fact, is determined by a preponderance of the evidence and on appeal we affirm unless the finding of the chancellor is against the preponderance of the evidence. *Mason* v. *Peck,* 239 Ark. 208, 388 S.W. 2d 84 (1965).

The appellant ably argues that to establish a boundary line by acquiescence there must be a mutual or express agreement of the dividing line. However, in *Stewart* v. *Bittle,* 236 Ark. 716, 370 S.W. 2d 132 (1963), we said:

> "It may be conceded, as claimed by appellant, that there never was any express agreement to treat the fence as the dividing line between the two parcels of land. Such an agreement, however, may be inferred by the actions of the parties."

To the same effect, see *Deidrich* v. *Simmons,* 75 Ark. 400, 87 S.W. 649 (1905); *Gregory* v. *Jones,* 212 Ark. 443, 206 S.W. 2d 18 (1947); *Tull* v. *Ashcraft,* 231 Ark. 928, 333 S.W. 2d 490 (1960); *Weston* v. *Hilliard,* 232 Ark. 535, 338 2d 926 (1960); and *Barnes* v. *Young,* 238 Ark. 484, 382 S.W. 2d 580 (1964).

A boundary line by acquiescence may well exist without the necessity of a prior dispute. *Gregory* v. *Jones, supra.* Nor is there any requirement of adverse usage up to a boundary fence to establish a boundary by acquiescence. *Morton* v. *Hall,* 239 Ark. 1094, 396 S.W. 2d 830 (1965).

The chancellor has the advantage of seeing and hearing the witnesses in evaluating conflicting evidence. We see only the printed material and exhibits. Therefore, when the evidence is in close dispute as to where the preponderance lies, we cannot say the chancellor was in error. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S.W. 2d 517 (1947).

In the case at bar, we cannot say that the chancellor's finding that a boundary line is now established by acquiescence is against the preponderance of the evidence.

Affirmed.

W. F. ALLEN, ADM'R v. LAKE CATHERINE FOOTWEAR CORP.

5-4827 437 S.W. 2d 803

Opinion Delivered March 3, 1969

Jim C. Cole for appellant.

Wright, Lindsey & Jennings for appellee.

CARLETON HARRIS, Chief Justice. Appellant, as administrator of the estate of Elwood Allen, deceased, brought a wrongful death action against appellee, Lake Catherine Footwear Corporation, in the Circuit Court of Hot Spring County. Appellee operates a shoe manufacturing plant in Garland County, and J. R. Stanage held a contract with appellee to haul off waste and trash from its plant. Stanage, stipulated to be an independent contractor, hauled this waste and trash six days per week. It is also stipulated that Lake Catherine Footwear had no control over the means or methods of his operation in disposing of the waste material. The waste consisted of scrap leather, cloth, rubber, outsole and insole material, and other similar remnants. Included was a flammable, combustible, and volatile naphtha base liquid cleaning material.[1] The pattern for disposition of the trash was for Stanage to park his truck at the plant, and the company's employees would load it with all of the scrap material except the naphtha base liquid. This was placed in barrels or drums on the dock, and picked up last by Stanage. These drums were ordinarily marked with a red or yellow label with the word "caution" in large letters and "inflammable material, volatile solvent" painted thereon. No witness was able to say whether the drums loaded on February 18, 1966, were so marked.

Stanage had known Elwood Allen for approximately twelve years, and Allen had worked for him, off and on, during that period; also, Allen had worked inter-

[1]According to Donald Munro, plant manager for the appellee, the liquid is used to wash the "upper of the shoe," if the leather is particularly dirty. Operators use the solvent until it becomes so dirty that it is unusable. It is then discarded.

mittently for Stanage during the six or seven years that he had been disposing of the trash. The witness said that Allen, who could not read nor write, and perhaps was to some extent mentally retarded, could only be used for ordinary labor, though he was able to operate a Ford tractor. He (Stanage) said that he had been advised by company employees that the solvent should not be thrown in when the trash was burned—that it might be explosive.

On February 18, after picking up the trash and solvent, the trash was dumped in a ravine selected by Stanage, and the solvent was poured over it. Subsequent events are then described by Stanage:

> "Well, when I got that on there, I got on this machine I had there and shoved it over in the pit with it, and started driving it away. I asked if anyone had matches. No one had any. I said there are usually some in the truck. I said, 'get the matches.' Doug got the matches and started back with them. So, Elwood said, 'Let me have them.' He gave them to him. As I was watching there he started down in this ravine. There is a kind of little pathway like deal going down in there. I said, 'Judge, don't go down in there and light that stuff off, you are liable to get blown up.' So, I am moving out on the machine at the time I said that. So I went over and parked it and come back over there. He was still down in there attempting to strike the matches, little book type matches. One of my boys, I believe Dave said, 'He is not going to get that lit down there.' I said, 'Come out of there, Judge and let's light the thing from up here.' I don't really remember whether he said anything or not. Usually he didn't whenever I would talk to him like that, so I stood there another instant. I said, 'Come on up here, Judge and give Doug those matches and let him light a piece of paper and throw over there and we will do it from

> up here,' and I said, 'Everything will be all right' or something to that effect. That is all I said. About the time I completed that statement he was still in the operation of striking the match and so I guess this thing must have sparked. I don't think he threw the match in the fire. When he made the arc, the air was full enough of these vapors coming off this stuff, it exploded."

Allen was severely burned, and subsequently died. Suit was then instituted, appellant asserting that the company, its agents and employees, were negligent and careless in placing the solvent in unmarked or inadequately marked drums; in failing to adequately warn the deceased and others of the high and unusual danger involved; and in placing the dangerous liquid waste in the possession and control of persons without educating those persons as to the danger involved in the use and disposition thereof. On trial, at the conclusion of appellant's evidence, the company moved for a directed verdict; after argument of counsel, the motion was granted, and the jury was instructed to return a verdict for appellee. From the judgment dismissing appellant's complaint, comes this appeal.

Appellant has submitted an able brief, relating to liability of persons supplying chattels which are known to be dangerous for the use of others. It is also argued that the manner in which the solvent was disposed of involved an unreasonable risk of bodily harm to the decedent, and that the company knew, or should have known, that Elwood Allen was mentally retarded, and that he would probably use the solvent in a manner involving unreasonable risk of bodily harm to himself or others. Though Allen's mental condition is mentioned by appellant several times, the evidence of any mental deficiency is meager indeed. In fact, the only evidence relating thereto was given by the witness, Stanage. He was asked, "Was Mr. Allen to some extent mentally retarded, or mentally slow?" The answer was, "Well

my impression of it was yes. I am not an authority. My impression was yes." Since apparently Allen had practically no education, and could not read nor write, he could well have appeared retarded without that actually being the case. The brother of the deceased, W. F. Allen, also testified, but he only said that his brother was unmarried, and unable to read or write; there was not the slightest reference to a lack of mental competency. It might also be pointed out that there is no showing that any company employee had any reason to believe that Allen was mentally retarded; for that matter, it is not shown that any of the company employees ever saw Allen. The testimony is even conflicting that Allen was ever present at the plant site when the solvent was picked up. The only witness to testify about this matter was Stanage who first stated that Allen had accompanied him on some occasion or occasions when the trash was picked up at the plant site; subsequently, however, Stanage stated that he couldn't really remember whether Allen had been with the crew when this was done. Apparently, most of the time, Allen would go to the dump where the trash was disposed of.[2] The Contractor was definite in stating that Allen was not with him when he picked up the drums on February 18.

However, under the facts of this case, we see no necessity to enter into a discussion of appellee's possible duty to Allen, or whether warnings to the independent contractor satisfied any legal obligation, for the failure

[2]Stanage testified that Allen was not a regular employee: "He just worked for me whenever I had some labor type work which he was qualified to do, and he did work of that nature and he would also work for other people in the neighborhood doing gardening work and yard work for women around there or anyone that could use him or brush cutting and what not. Never worked for me steady, never had him on any payroll." He said that Allen lived close to the dump where he burned the trash, and that "if he happened to be around he would come down. He lived right in the area." According to the witness, Allen's primary reason for going to the dump would be "to get things of value he could sell to the shoe shop in town maybe or buckets, five gallon buckets on there, he could sell and soda pop bottles."

of appellee to give any warning to Allen was not the proximate cause of the accident and injuries sustained.

In *United States* v. *Bowers,* 202 F. 2d 139, the United States Court of Appeals for the Fifth Circuit, in reversing a judgment under the Federal Tort Claims Act, said:

> "Assuming without deciding that the negligence found by the court is within the terms of the Federal Tort Claims Act, we are of the opinion that under the evidence the finding of negligence proximately causing the plaintiff's injuries was clearly erroneous. The plaintiff admitted that he had used the road dozens of times, was thoroughly familiar with it, that he knew there were no guard rails on it, and that he knew where the edge of the road was. Failure to warn the plaintiff could not have been negligence proximately causing his injuries when he was already so familiar with the road as to appreciate the peril."

In *Arkansas Portland Cement Company* v. *Taylor,* 179 Ark. 915, 18 S.W. 2d 904, we said that there is no duty to warn, when the danger should be obvious. See also *A. A. Electrical Company* v. *Ray,* 202 Ark. 85, 149 S.W. 2d 38; *Parker* v. *Heasler Plumbing and Heating Company* (Wyo.), 388 P. 2d 516. We have held in numerous railroad cases that the failure to sound a whistle or bell, when approaching a crossing for the purpose of warning a motorist of the approach of the train, ceased to be a factor, and no recovery could be had for failure to give these signals, when the presence of the train was plainly discoverable by other means. *Missouri-Pacific Railroad Company, Thompson, Trustee* v. *Doyle,* 203 Ark. 1111, 160 S.W. 2d 856; *Missouri-Pacific Railroad Company, Thompson, Trustee* v. *Carruthers,* 204 Ark. 419, 162 S.W. 2d 912; *Chicago, Rock Island and Pacific Railway Company* v. *Sullivan,* 193 Ark. 491, 101 S.W. 2d 175; *Kansas City Southern Railway Company* v. *Baker,* 233 Ark. 610, 346 S.W. 2d 215.

What, then, is the evidence with regard to Allen's knowledge that the solvent was dangerous, and should be handled with extreme care? The testimony reflects that Allen had received one of the clearest warnings possible—far more impressive than merely being told that the liquid was dangerous; he had observed an explosion resulting from the liquid's being thrown on a smoldering fire. Stanage testified to this occurrence as follows:

> "* * * Whenever we were down at this original dump I had been using, he had been there. The reason I remember particularly was that the smallest boy, Dave [Stanage's son], was using some of that stuff in an open container and throwing it on the fire. I wasn't aware he did it. He threw it on a fire that was smoldering in order to get it to burn more. The fact is the material had been rained on laying there the earlier part of the week. It had been rained on and it tended to smolder on. On Saturday we kept the stuff burned. That was the day we cleaned and burned it up. He threw this stuff on there and it exploded out there and almost burned him. If he hadn't been as fast as an actor as he was, it probably would have. Me and Elwood was standing over by a little shop I have there and I said, 'Look there. That is what that stuff will do to you.' "

The testimony of Stanage relative to the warnings he shouted to Allen just prior to the explosion has been heretofore set out, and there is no necessity to reiterate that evidence.

It is clear that Allen had observed the dangerous propensity of the liquid at least once prior to February 18. It is also undisputed that on that date Allen was warned three times not to light the trash pile down in the ravine, Stanage specifically saying, "You are liable to get blown up."

It being apparent from what has been said that any failure on the part of appellee or its employees to personally warn Allen of the dangers of the solvent was not a proximate cause of appellant's injuries and death, the trial court did not err in directing the jury to return a verdict for appellee.

Affirmed.

EMPLOYERS PROTECTIVE LIFE ASSURANCE COMPANY v. WILLIAM V. GATLIN

5-4867 437 S.W. 2d 811

Opinion Delivered March 3, 1969

Eubanks & Hood by *Phillip K. Kinsey* for appellant.

Hardin & Rickard for appellee.

GEORGE ROSE SMITH, Justice. This action was brought by the appellee to recover $1,000 in benefits under a hospitalization policy which was applied for but never actually issued. The trial court, sitting as a

jury, made a general finding of fact that a valid contract had in fact been agreed upon. This appeal is from the ensuing judgment for $1,000, plus penalty and attorney's fee. For reversal the insurer argues that the proposed agreement was never consummated.

The facts, stated favorably to the appellee, are simple. On August 10, 1967, Fred Nolan, a soliciting agent for the appellant, called at Gatlin's home and obtained his written application for a $1,000 hospitalization policy. For the first quarterly premium of $46.37 Gatlin gave a check, postdated September 1, which was eventually cashed by the insurance company. Nolan signed and issued a printed form of receipt which merely acknowledged receipt of $46.37 "as payment on insurance applied for" in the company. The application, which Gatlin signed without having read it, concluded with a paragraph reading in part:

> I hereby apply to Employers Protective Life Assurance Company at Little Rock, Ark., for a policy to be issued solely and entirely in reliance upon the written answers to the foregoing questions, and agree that it shall not be effective until a policy has been actually issued while all of the above members are alive and in sound health.

(The pertinent clauses in the application and in the receipt are not set out in the appellant's abstract, as they should have been, but they are quoted in the appellant's brief, which is a substantial compliance with our Rule 9. *Gott* v. *Moore*, 218 Ark. 800, 238 S.W. 2d 754 [1951].)

Gatlin testified that Nolan told him that the policy went into effect "as soon as I wrote you that receipt." Nolan denied that statement, saying that he told Gatlin that the policy would go into effect as of the date of the application if it was approved by the home office. We accept Gatlin's version, for that view was evidently taken by the trial court.

On August 23 Gatlin was injured in an automobile accident and ultimately incurred hospital expenses exceeding the face amount of the policy. On September 13 the company sent Gatlin its check for the amount he had paid and informed him that "we are not able to issue this coverage to you." Gatlin refused the tender and filed this suit.

We are unable to sustain the judgment. Gatlin relies on our holding in *Union Life Ins. Co.* v. *Rhinehart*, 229 Ark. 388, 315 S.W. 2d 920 (1958), but that case is not in point. There the company issued a "binding" receipt, which, when read along with the application, provided temporary insurance. We distinguished that case in *Dove* v. *Ark. Nat. Life Ins. Co.*, 238 Ark. 1033, 386 S.W. 2d 495 (1965), where both the application and the receipt recited that the policy would take effect as of the date of the approval of the application at the company's home office. Here the application states explicitly that "it shall not be effective until a policy has been actually issued." Since, as we said in the *Dove* case, the application and the receipt are to be read together, the case at bar is substantially similar to the *Dove* case, where we held that there was no coverage until the application was approved at the company's home office. We cannot distinguish that case from this one. It is immaterial that Nolan stated that the policy would be effective immediately, as a soliciting agent has no authority to agree upon the terms of the policy or to change or waive those terms. *Holland* v. *Interstate Fire Ins. Co.*, 229 Ark. 491, 316 S.W. 2d 707 (1958). With respect to the effective date of the policy see also Appleman, Insurance Law & Practice, § 103 (rev. ed. 1965).

Reversed and dismissed.

ETHEL LOUISE NELSON ET AL v. MARY BUSBY ET AL

5-4803 437 S.W. 2d 799

Opinion Delivered March 3, 1969

Mann & McCulloch and *Frank N. Burke, Jr.* for appellants.

Spears & Sloan and *Carrold Ray* for appellees.

LYLE BROWN, Justice. Ethel Louise Nelson and Helen M. Littlefield, her guardian, appeal from a judgment in tort. While operating her automobile on the streets of Marianna, Mrs. Nelson struck Mrs. Mary Busby, a pedestrian. Mrs. Busby recovered for personal injuries, and her husband, Bruce Busby, was compensated for loss of consortium and medical expenses. The appeal challenges the competency of the testimony of three witnesses and urges that the trial court should have given appellants' requested instruction on unavoidable accident. Appellee Bruce Busby appeals, objecting to the reduction of his award commensurate with Mrs. Busby's negligence.

Mrs. Busby emerged from the post office on the north side of the street and was proceeding across the street to enter a vehicle parked on the south side. The second tier of steps in front of the post office led directly to the street curb and near the center of the block. Just as Mrs. Busby entered the street, Mrs. Nelson pulled out from the curb where she was parked to the left of Mrs. Busby. The Nelson car struck Mrs. Busby, ran over her body, and allegedly dragged her some twenty feet. The jury fixed Mrs. Nelson's negligence at 65% and that of Mrs. Busby at 35%. Neither

the fixing of negligence nor the amount of total damages is argued on appeal. The three points raised by Mrs. Nelson for reversal will be enumerated and separately discussed.

Point 1. *The court erred in permitting the chief of police to testify as to point of impact.* The investigating officer testified by deposition. Prior to trial his testimony was examined by court and counsel, at which time objections were made and some portions of his testimony were deleted, while other objections were overruled. We have examined his testimony on the question of point of impact. Here are the proceedings on direct examination for the plaintiff:

Q. What evidence did you find in your investigation as to how she started from—came from the parking spot where she was located?

A. Well, just in front of the first meter, parking meter, west of the corner, there were skid marks leading to the point of impact, which was six feet from the curb, and the skid marks indicated to me, as a police officer, a rather rapid start, but that is how I arrived at her parking place. I traced those skid marks from just in front of that first meter—those were made by the rear wheels—21 feet farther west on Main Street.

MR. MCCULLOCH:

Now, Your Honor, we object to that portion of that which says, "... indicated to me, as a police officer, a rather rapid start."

DEPOSITION CONTINUED:

Q. And 21 feet of skid marks that you could see?

A. Yes, sir, which I indicated, yes, sir.

Q. How far from the intersection would you say this accident occurred?

A. Are you referring now to the point of impact, sir?

Q. Yes.

A. The point of impact was 56 feet from the intersection of Church and Main Street.

The only recited objection on direct examination is the one we have quoted and that objection referred to the officer's testimony as to "a rather rapid start." Then on cross-examination counsel for defendant pursued the subject of point of impact at length. In response to one of those questions the witness again referred to the point of impact as being approximately six feet from the curb. Thereupon this colloquy occurred:

MR. MCCULLOCH:

Just for the record, we will object to it [referring to point of impact].

THE COURT:

All right.

MR. MCCULLOCH:

We object to that part of it on the grounds that he did not make sufficient investigation, and was not qualified to state where the impact was.

That specific objection was not well taken because the officer had detailed his many years experience as a policeman and had established by his testimony that he had in fact made an immediate and thorough investigation. Appellants argue here that the establishment of the point of impact by opinion evidence was error because the jury could have drawn its own conclusion with

respect thereto. If counsel thought the conclusion of the officer invaded the province of the jury then he should have called it to the attention of the trial court.

Under this point appellants also challenge the right of the officer to state his conclusion concerning a rapid start. The trial court was correct in permitting the officer to so testify. In fact the court gave a logical reason:

> . . . police officers are familiar with skids and can tell most of the time whether one was made on starting or on stopping. In other words, whether it is a dragging of a tire that made the mark, or the spinning of a tire. I think an experienced officer could tell that . . .

It would hardly be reasonable to say that skid marks could be otherwise described to a jury so as to enable them to be equally capable with the officer in telling under what conditions they were made.

Point II. *It was error to permit Doctors Robertson and Williams to testify as to statements about the collision related to them by Mrs. Busby.* Those two doctors were treating physicians. Dr. Robertson took Mrs. Busby's history. With respect to the history he testified by deposition as follows:

> Yes, she stated she had been well until about 1:30 p.m. on the 10th of July, 1964, when, as she walked out between automobiles in front of the post office on Main Street in Marianna, Arkansas. [sic] An automobile pulled out to her left and [without apparent slowing down literally] ran over her. She was not rendered unconscious and fell, landing mostly on her right shoulder, head and back. She sustained multiple abrasions and bruises and had immediate severe head, neck, right shoulder, and general body pain. She was seen by Dr. Gray and subsequently transferred to our

> hospital. Her past history revealed that she had had some heart difficulty and had been cared for by Dr. Tom Stern. In the past, she had also had some minor surgery.

Appellants' counsel objected to the foregoing testimony as being hearsay. The trial judge struck from the deposition that phrase we have bracketed. Dr. Williams also took a history and testified as follows:

> She stated that she stepped off the sidewalk on to the street at Marianna, Arkansas, on July 10th, 1964, when an automobile struck her and ran over her body. She stated that the automobile dragged her body, with the body being caught under the undersurface of the vehicle, and during this injury she sustained multiple abrasions [and was brought to the Baptist Hospital emergency room where she was seen by Dr. Robertson, and then he called me to see her in consultation].

Appellants' counsel challenged the foregoing testimony as being hearsay. The trial judge deleted from the deposition the bracketed phrase.

In *St. Louis, I.M.&S. Ry.* v. *Williams,* 108 Ark. 387, 158 S.W. 494 (1913), our Court said:

> Testimony relative to the statements made by the injured person to his attending physician as to how the accident happened, and what caused it, is not admissible in a suit to recover for alleged negligent injury. It is but hearsay, when not a part of the *res gestae,* and the fact that it is recited by the physician to whom it was related as the history of the case when the injured person sought treatment for the injury, does not make it any the less so.

Again, in *Mutual Benefit Health & Accident Ass'n.* v. *Basham,* 191 Ark. 679, 87 S.W. 2d 583 (1935), we held

that statements by an injured person to his attending physician "as to how an accident happened and what caused it is not admissible." Compared with other jurisdictions there has been very little development of our case law on this question. In many other states the stricter rule as exemplified in *Williams* has been relaxed. In fact, one of our leading authorities states the more logical rule to be that statements given "by the patient to the doctor for treatment which describe the general character of the cause or external source of the condition to be treated, so far as this description is pertinent to the purpose of treatment" should be looked upon with trustworthiness. He goes further and points out that professional standards require the assembling of that information from the patient "and the person treated will be fully conscious that his treatment may well be affected by his report as to the cause, whether a fall, a crushing by a heavy object, or a collision." McCormick Evidence HB § 266 (1954). However, he points out that other features of the incident, such as who was at fault, would seem unrelated to the treatment.

It is not necessary in the case at bar to deviate from, or relax, the rule in *Williams*. That is because it is clear to us that the challenged testimony of the doctors was not prejudicial; their recount of the incident was cumulative to the testimony of every eye witness, including the sister of Ethel Louise Nelson. In that connection we would point out that the *Williams* case was reversed because the doctor's testimony was found to be prejudicial. In that case no witnesses corrorated plaintiff's testimony as to the manner of the accident, whereas all of the railroad's witnesses denied there was any sudden jerking of the train as alleged by the plaintiff. The only witness which tended to support her, and prejudically so, was her doctor, who was permitted to recount what plaintiff had told him in reciting plaintiff's version of the cause of the accident. In that situation it was this Court's opinion that the doctor's testimony tended to improperly bolster plaintiff's case.

In appellants' reply brief they challenge the testimony of the two doctors with reference to two other physical complaints related by the patient in the course of treatment. Mrs. Busby complained of pain in one eye. As a result of that complaint the doctor found a recent onset of positive scotoma; however, he concluded that the eye complaint had no connection with the accident. The other point was with reference to her complaint about becoming stooped in the shoulders since the accident. Again, her own doctor testified in his opinion there was no connection between this complaint and the accident. We can perceive no prejudice when her own doctors related both complaints to other causes. We would also point out that a challenge made in a reply brief to matters not raised in the original brief cannot be considered because in that event appellee has no opportunity to reply. *O'Dell* v. *Young,* 210 Ark. 1073, 199 S.W. 2d 971 (1947). Appellants' counsel mentioned the subject matter in oral argument and appellees' counsel endeavored to answer it as best he could from personal recollection of the testimony. The fact that he attempted to answer the argument is hardly sufficient to constitute a waiver.

Point III. *The court should have given the requested instruction on unavoidable accident.* The defendants requested the giving of AMI 604 covering an unavoidable accident. Of this point little need be said because this mishap would certainly not have occurred except for negligence on the part of the driver or the pedestrian, or both. The usual circumstances which justify the giving of the requested instruction are not here present. *Cannor* v. *Cooper,* 245 Ark. 386, 432 S.W. 2d 761 (1968).

CROSS-APPEAL. Appellees, by cross-appeal, ask us to correct the judgment entered in favor of Bruce Busby, husband of Mary Busby. The jury found his total damages to be $5000 and the trial court entered judgment for $3250 because Mary Busby was found to

have been 35% negligent. We think appellees' contention is fairly answered in the negative by our own case of *Sisemore* v. *Neal,* 236 Ark. 574, 367 S.W. 2d 417 (1963). There we held that the husband's right to special damages for his loss of consortium and his wife's medical expenses was derivative. It is only logical that since his cause of action is derivative, Mr. Busby can have no better standing in court than is vested in his wife.

The judgment is in all respects affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY v. CONRAD J. WELLS

5-4794 437 S.W. 2d 797

Opinion Delivered March 3, 1969

[redacted]

Gannaway & Darrow for appellant.

Guy H. Jones & Phil Stratton for appellee.

JOHN A. FOGLEMAN, Justice. This case involves the liability of appellee upon a promissory note executed by him on December 21, 1959. The principal question involved is whether appellant who sued on the note was entitled to a directed verdict as a holder who had all the rights of a holder in due course. Since we agree with appellant on this point, it is unnecessary that we consider any of the other points raised.

Appellee Wells purchased a bulldozer from Kern-Limerick, Inc., on or about the date the note was executed. Appellee traded another piece of equipment as part of the down payment and gave the note in question for the remainder. This note was for $2,892.36 with interest at the rate of 8% per annum until maturity and 10% per annum after maturity. The balance of the purchase price was secured by a conditional sale contract which was assigned to Associates Discount Corporation.

The note to Kern-Limerick was negotiated to the First National Bank in Little Rock on December 23, 1959. The status of the bank as a holder in due course is undisputed. It was indicated on the face of the note that it was secured by a lien on the bulldozer. The note was payable in two installments due on June 1, 1960, and December 1, 1960, respectively. Kern-Limerick was engaged in the sale of construction equipment and handled many transactions in a similar manner. This concern filed a voluntary petition in bankruptcy and was declared bankrupt on or about May 24, 1960.

When the bank attempted to collect the note, it learned that it was not secured by a first lien on the bulldozer and that its lien was subject to the lien of the conditional sale contract. The bank then made a claim against appellant under its banker's blanket bond on this and other notes of a similar nature. Appellant's liability was settled by the payment of $125,169.04 and the assignment of the notes upon which the claim was recognized. It appears that the payment made represented the total of the balances due on these notes on the date of assignment. While the assignment bears no date, it is undisputed that it was made well after the date of the maturity of the last installment of the note in question.

After appellee's refusal to pay the note, appellant filed suit. At the trial, a verdict in favor of the appellee was rendered by the jury and judgment entered pursuant to this verdict.

Appellant bases its contention upon Ark. Stat. Ann. § 68-158 (Repl. 1957). This is § 58 of the Negotiable Instruments Law and is applicable to this transaction. See § 10-102 of Act 185 of 1961 and Compiler's Notes following Ark. Stat. Ann. § 85-1-101 (Add. 1961). Also notes on Ark. Stat. Ann. §§ 68-101—68-169 (Supp. 1967).

It is not contended that appellant was a party to any fraud or illegality affecting the note. While we do not know of any case in which this court has been called upon to construe this section and neither of the parties has been able to discover any, the language of the statute is clear. We do not see how it can be construed in any manner other than literally. Under a literal construction appellant was entitled to all of the rights of a holder in due course because it derived its title through the First National Bank in Little Rock. See *Transbel Inv. Inc.* v. *Scott*, 344 Pa. 544, 26 A. 2d 205 (1942); *Blow* v. *Ammerman*, 350 F. 2d 729 (D.C. Cir. 1965); *Ederer* v. *Fisher*, 183 S. 2d 39 (Fla. 1965).

Appellee argues, however, that appellant is not entitled to the rights of a holder in due course because the note was taken by appellant as an unwilling purchaser by assignment without endorsement after maturity with full knowledge of the fraud practiced by the original payee upon appellee and the bank. We find no support for this position in the statutes and find an overwhelming weight of authority to the contrary. It is immaterial that the transferee of a note from a holder in due course took it after maturity[*Ludlow* v. *Woodward,* 102 N.Y.S. 647 (1907); *Cormany* v. *Ryan,* 154 Tenn. 432, 289 S.W. 497 (1926); *Lanahan* v. *Clark,* 279 Pa. 297, 123 A. 798 (1924); *Toll* v. *Monitor Binding & Printing Co.,* 26 F. 2d 51 (8th Cir. 1928, apply Kansas statute); *Butterworth* v. *Beach,* 30 Wyo. 46, 215 P. 1085 (1923); *Johnston* v. *Wolf,* 118 Cal. 388, 5 P. 2d 673 (1931); *Case* v. *Fevig,* 187 Minn. 127, 244 N.W. 821 (1932); *Houston* v. *Lundy,* 45 Ga. App. 122, 163 S.E. 328 (1932); *North Hollywood Mort. Co.* v. *North American Bond & Mortgage Co.,* 137 Cal. App. 180, 30 P. 2d 446 (1934); In re *Canal Bank & Trust Co.,* 186 La. 366, 172 So. 421 (1937); *City of Florence* v. *Anderson,* 95 F. 2d 777 (4th Cir. 1938); *Wheeler* v. *Wallace,* 167 S.W. 2d 1043 (Tex. 1943)]; or without payment of value [*Ferber* v. *Third Street Realty Co.,* 152 N.Y.S. 352 (1915); *Toll* v. *Monitor Binding & Printing Co.,* supra; *Ludlow* v. *Woodward,* supra; *Wheeler* v. *Wallace,* supra]; or with notice of existing equities, infirmities or defenses [*Ludlow* v. *Woodward,* supra; *Toll* v. *Monitor Binding & Printing Co.,* supra; *Wheeler* v. *Wallace,* supra]. It is also immaterial that the holder in due course did not endorse the note, since transfer by assignment or by mere delivery is sufficient. *Smith* v. *Nelson Land & Cattle Co.,* 212 F. 56 (8th Cir. 1914, applying Kansas statute); *Cormany* v. *Ryan,* supra; *Tesdahl* v. *Hiebert,* 148 Mont. 241, 419 P. 2d 298 (1966, applying Washington law); *Johnston* v. *Wolf,* supra.

There is an analogy between this case and the cases involving suits by the United States against the makers

of notes acquired after default by the government from holders in due course through payment on account of Federal Housing Administration insurance of the notes. It has uniformly been held in these cases that the United States has all rights of a holder in due course under these circumstances and that the notes are not subject to any defense which the maker might assert against the original payee. See, e.g., *U. S.* v. *O'Hara,* 46 F. Supp. 780 (D.C. Mich. 1942, applying Michigan law); *U. S.* v. *Perpignano,* 86 F. Supp. 105 D.C. N.J. 1956).

Since it is clear that appellant was entitled to a directed verdict, the judgment of the lower court is reversed and judgment entered here[1] in favor of appellant in the sum of $2,892.36 the face amount of the note with interest as follows:

on the face amount of the note or $2,892.36 @ 8% per annum from December 21, 1959, until June 1, 1960;

on one-half or $1,446.18 @ 8% per annum from June 1, 1960, to December 1, 1960;

on one-half or $1,446.18 @ 10% from June 1, 1960, to December 1, 1960;

on the face amount @ 10% per annum from December 1, 1960. Judgment is also rendered against the appellee for the costs in both courts.

[1]See **Waxahachie Medicine Company v. Daly,** 122 Ark. 451, 183 S.W. 741.

DUEL KIRBY, ET AL v. LOIS HEDGEPETH

5-4838 437 S.W. 2d 807

Opinion Delivered March 3, 1969

Mobley, Bullock & Harris for appellants.

Irwin & Streett for appellee.

J. FRED JONES, Justice. This appeal grows out of a dispute between relatives as to the location of a property boundary line in relation to a water well. Mrs. Lois Hedgepeth erected a barbed wire fence along what she considered to be the west boundary line of her property, twenty seven inches west of a bored water well. Duel Kirby removed the wire from the fence posts claiming that the fence was erected on property he and his wife had purchased from Mrs. Hedgepeth. Mrs. Hedgepeth sought an injunction and restraining order against the Kirbys in the Pope County Chancery Court and after hearing the evidence adduced on both

sides, the chancellor and held that the issues had been settled by previous decree and he granted the petition for injunction and restraining order. The Kirbys are the appellants here.

The background for this case, including the previous litigation and decree, is as follows: On July 14, 1961, the appellee Lois Hedgepeth, sold to her brother-in-law and sister, Duel and Stella Kirby, a plot of land in Pope County under a metes and bounds description, as follows:

> "Part of the Southeast Quarter (SE¼) of the Southeast Quarter (SE¼) of Section 16, Township 7 North, Range 20 West, described as beginning at the Southwest corner of said Southeast Quarter of Southeast Quarter, Section 16, Township 7 North, Range 20 West, and run North 136 feet; thence East 98 feet; thence South 136 feet; thence West 98 feet to point of beginning."

The deed also contained a provision as follows:

> "It is specifically agreed that grantor and grantees shall have the right and privilege of the use of the well located on the above described lands."

In 1966, some differences arose between Mrs. Hedgepeth and the Kirbys as to who owned the water well and upon examination of her abstract of title, Mrs. Hedgepeth noticed that the language appearing in her deed to the Kirbys indicated that the well was located on the land she conveyed to them. So on March 11, 1966, Mrs. Hedgepeth filed a petition in the Pope County Chancery Court against the Kirbys alleging that the water well was not on the land conveyed to the Kirbys and that the deed so reciting constituted a cloud on her title. She prayed "that said cloud be removed from plaintiff's title, be declared to be void and of no effect, and title to said property be declared to be vested abso-

lutely in this plaintiff as against the defendants in this cause; for costs and all other proper relief." The Kirbys answered by general denial and affirmatively alleged that the deed was drawn as intended by the parties. After being fully advised of the facts in that case, the chancellor on September 1, 1966, decreed in language as follows:

> "4. That the said deed conveying the above described land contains the following language: 'It is specifically agreed that the grantor and the grantees shall have the right and privilege of the use of the well located on the above described land.'
>
> 5. That the well referred to above is not located on the land conveyed to the defendant by the plaintiff as described in Book 7-K page 665, but is located on the following described land: Begin at a point 98 feet East of the SW corner of the SE¼ of the SE¼ of Section 16, Township 7 North, Range 20 West, and run East 562 feet; thence North 355 feet; thence West 78 feet; thence South 169 feet; thence West 370 feet; thence South 44 feet; thence West 114 feet; thence South 142 feet; thence to the point of beginning, containing 2.9 acres more or less.
>
> 6. That the parties herein and each of them and their tenants, assignees, licensenees [sic] shall have the right to use the above mentioned well.
>
> It is therefore considered, ordered, and decreed that the deed recorded in Book 7-K page 665 from plaintiff to defendant be corrected as follows: 'It is specifically agreed that the grantor and grantees, their tenants, assignees, and licensenees [sic] shall have the right and privilege of the use of the well located on the plaintiff's property described as follows:

> Begin at a point 98 feet East of the SW corner of the SE¼ of the SE¼ of Section 16, Township 7 North, Range 20 West, and run East 562 feet; thence North 355 feet; thence West 78 feet; thence South 169 feet; thence West 370 feet; thence South 44 feet; thence West 114 feet; thence South 142 feet; thence to the point of beginning containing 2.9 acres more or less.
>
> The costs of this action are adjudged against the plaintiff."

No appeal was taken from the 1966 decree but soon after it was rendered Mrs. Hedgepeth erected the division line fence, now in litigation, seventeen inches west of the water well.

In the hearing on the petition giving rise to the appeal now before us the evidence was directed to the location of the north-south division line between the property conveyed to the Kirbys by Mrs. Hedgepeth and the property she retained. The evidence offered is in irreconcilable conflict. Mrs. Hedgepeth testified that she sold to Kirbys her land west of the water well; that Kirby measured the south boundary line from the southwest corner with a steel tape and drove a marker down at the southeast corner of the tract, stating "right here's where my land comes to." She testified that this corner was later verified by a survey done by Mr. Ragsdale, who also started from the southwest corner of the forty acre tract which was near the center of a county road on the west boundary of the property. She testified that the southeast corner of the tract was established by Kirby's measurement and the Ragsdale survey, immediately south and slightly west of the water well on her property and it was north from this point that she built her fence following the 1966 court decree. Kirby denied that he measured the south boundary line of the property when he purchased it and denied that he pointed out or assisted in any

manner with the establishment of the southeast corner of the property. He testified that when he purchased the property it was completely enclosed by an old fence with the water well about 15 feet inside the fence on the east side of the enclosure, and that he purchased all the enclosed land subject to survey. He testified that an old hedgerow had grown up just east of the fence along the east boundary line of the property he purchased and that this hedgerow was also east of the well and that it also marked the east boundary line of the property he purchased.

Mrs. Hedgepeth testified that the old fence and hedgerow marked the original boundaries of a yard for a house on the property and had nothing whatever to do with boundary lines. She denied that the property she sold to the Kirbys was ever enclosed by a fence and the testimony of other witnesses tended to support Mrs. Hedgepeth. A survey by Mr. Warndof in April 1968, tended to support Kirby's testimony to the effect that the true east boundary line of his property, as described in his deed, lay along the old hedgerow east of the water well. Mr. Warndof did not locate, or measure from, the southwest corner of the tract as the beginning point described in the deed but began at the nearest section corner and measured 1,222 feet west to the point he considered to be the southeast corner of the Kirby property. Mr. Warndof testified, in part, as follows:

> "Q. [A]re the sections, as far as you know, regular in this area?
>
> A. Well, it's all more or less. Generally this one here, I'm pretty sure it is 1320. All of these measurements is based on our way of surveying which is good enough usually. It's not precision surveying known to the coast and geodetic surveying or as you would do downtown where you pay $5,000.00 a front foot, but it's accurate as from local standards."

After hearing the evidence pertaining to the location of the division line between the two tracts, the chancellor found as follows:

> "From the evidence and a view of the premises, together with the proceedings in the previous case between the parties, #10,705, it is concluded that all issues between the parties were adjudicated in the previous suit. The previous decree located the well on plaintiff's property with both parties having the privilege of the use of the well. This of necessity fixed the boundary between plaintiff's and defendant's lands to the west of the well and in its present location as indicated by previous surveys and grading on defendant's land."

He then entered the following decree:

> "From the pleadings, testimony of witnesses before the Court, statements of counsel, and other things and matters before the Court, the Court finds:
>
> 1. That this Court has jurisdiction of the parties and the subject matter of this action.
>
> 2. That all issues of law and fact involved in this cause have heretofore been adjudicated in a prior cause bearing No. 10,705 of the Chancery Court of Pope County, Arkansas.
>
> 3. That Defendants and each of them, their servants, agents, and employees should be restrained and enjoined from interfering with the Plaintiff's fence in its present location, the said location being on a north-south line commencing 27 inches west of the well as it is presently located.
>
> 4. That the Defendant's right to the use of the well should be continued, unaffected by the location of the fence.
>
> 5. That the cost of this action should be equally divided by the Plaintiff and the Defendants.

IT IS THEREFORE ORDERED AND DECREED that the Defendants together with their agents, servants, and employees, and they hereby are enjoined and restrained from interfering with the Plaintiff's fence and from interfering with the Plaintiff's peaceful possession and use of said fence and the land east of the said fence, the said fence being located on a north-south line 27 inches west of the well as the well is now located. The Defendants are given the right to the use of said well free from interference by the Plaintiff. It is further ordered and decreed that the cost of this action be divided equally between the parties. The Court retains jurisdiction of the parties to make such other further orders as may be necessary."

On appeal to this court the Kirbys rely on the following points for reversal:

"The Chancery Court was in error in ruling that all issues between the parties were adjudicated in the 1966 litigation, Pope County Chancery case No. 10,705, and in ruling that the previous decree entered therein adjudicated the issue of the boundary line between the parties' lands, since the matter of the parties' boundary line was not in issue and the decree was too indefinite to establish a boundary line.

The preponderance of the evidence clearly established that the disputed boundary line between the parties' land was 98 feet east of the SW corner of the SE¼ of the SE¼ of Section 16, Township 7 North, Range 20 West, and that said boundary line physically consisted of the mature hedge and deteriorated remains of a fence which divided the parties' property."

The chancellor viewed the premises, he heard and observed the witnesses as they testified and was in a better position to resolve the conflict in the testimony

than we are from the record before us. Had the chancellor rendered his decree on the basis of the evidence in the record before us, we would be unable to say his decree is against the preponderance of the evidence. The chancellor was familiar with the evidence adduced at the trial in 1966, and his decree in that case placed the well on Mrs. Hedgepeth's property, which was the same thing as placing the division line west of the well. Mrs. Hedgepeth relied on that decree in erecting her fence only seventeen inches west of the well, where it remained undisturbed for two years and until Kirby took it down. We are unable to say that the chancellor erred in holding his 1966 decree *res judicata* as to the location of the east boundary line of appellants' property.

The doctrine of *res judicata* is based upon the policy of the law to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy. *Ted Saum & Co.* v. *Swaffar,* 237 Ark. 971, 377 S.W. 2d 606. In the case of *Robertson* v. *Evans,* 180 Ark. 420, 21 S.W. 2d 610, this court said:

> "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.*" (Emphasis supplied.)

And again in *Ted Saum & Co.* v. *Swaffar, supra*:

> " . . . [R]es judicata is applicable not only to an issue actually litigated, but also governs as to matters within the issue that might have been litigated."

We conclude that the chancellor did not err in his application of the above rules of law to the facts of this case, and having so concluded, appellants' second point is left without merit.

The decree is affirmed.

ST. LOUIS SOUTHWESTERN RAILWAY CO., ET AL v. WARD JACKSON, ADM'R, ET AL

5-4664 438 S.W. 2d 41

Opinion Delivered March 3, 1969

[redacted]

Audrey Strait and *Barrett, Wheatley, Smith & Deacon* for appellants.

Gordan, Gordan & Eddy for appellees.

CONLEY BYRD, Justice. Following our reversal and remand in *St. Louis Southwestern Railway Co.* v. *Jackson,* 242 Ark. 858, 416 S.W. 2d 273 (1967), this case was retried with the same witnesses used before, plus additional witnesses for both sides. The verdict in the former case was for $69,188.90 and the verdict upon which judgment was entered here is for $93,236.13. For reversal appellants set forth two points as follows:

I. There was absolutely no proof on negligence and a verdict should have been directed for all defendants.

II. The mental anguish award for the death of grandchildren was erroneous.

Appellees' witnesses again testified about the motorists' obstructed view of southbound freight trains and the dimness of the signal lights. Witnesses Otha Hewitt and Larry Coulson again testified that motorists traveling west did not have a clear and unobstructed view of a southbound train until they got within 150 feet of the railroad track. Other witnesses testified that this distance could be as much as 200 feet. Appellees' witnesses again testified that the signal lights were dim and difficult to see. One witness said they were much dimmer than the railroad's interlocking signal where the Missouri Pacific tracks cross the Cotton Belt tracks. A new witness, Albert Hess, testified that the signal lights were not near as bright as the flashing light on the car of the policeman called to investigate the second accident.

The testimony with reference to the previous two accidents within the same two-week period under similar circumstances was again presented, together with the traffic count and the overall view of the area. In the previous appeal we held this testimony sufficient to make a jury issue on excessive speed and abnormally dangerous crossing. We find that decision to be controlling here as the law of the case.

On the first appeal appellants contended that the grandparents were not entitled to recover damages for mental anguish occasioned by the death of the grandchildren because Tommy Jackson lived some few moments after the death of his children and thus any cause of action for mental anguish died with Tommy Jackson. We there pointed out that there was evidence from which the jury could find that all parties died simultaneously. In holding that the matter was properly submitted to the jury we said,

> "It is true that when we had our mental anguish statute before us in *Peugh, supra,* we there limited recovery for mental anguish to 'heirs at law' of the decedent. However, where a whole

family is killed in a matter of moments, as is the situation here, the bench and bar should not expect a too literal interpretation of the words 'heirs at law' as the same are used in *Peugh.* Act 255 of 1957, creating the right to recover for mental anguish, certainly did not intend that right to be so limited."

Upon retrial the matter came upon the same pleadings and was presented to the court under identical evidence but this time appellants contended that the grandparents are not within the enumerated relatives permitted to assert a cause of action for mental anguish under Act 255 of 1957. Under the doctrine of the law of the case, we hold that the trial court properly ruled against appellants on this issue.

We had before us an analagous situation in *Moore, Admx.* v. *Robertson,* 244 Ark. 837, 427 S.W. 2d 796 (1968) wherein we said:

"On cross appeal Robertson first contends that the trial court's decision in favor of his codefendants, on the merits, should inure 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."

We would be less than honest if we did not agree with appellant that the law of the case doctrine is a harsh rule, but when weighed on the scale of justice we find that the confusion and uncertainty which would result without use of the doctrine outweighs the harshness. In *Porter* v. *Hanley,* 10 Ark. 186 (1849) we had before us a case which after remand was retried upon substantially the same evidence. In applying the law of the case doctrine, we said:

"The counsel for the appellant has argued at some length, the main question decided by this Court upon the first appeal, and asks that we review that decision for the purpose of correcting what he assumes as error in the decision. We have duly considered this proposition (for the question is not raised by the assignment of errors) and inasmuch as the decisions of this Court have not been altogether uniform on this point, we will proceed to review them and determine whether, in the after adjudications of this Court upon the same case, its decisions can, under any circumstances, be modified or overruled. The cases of *The Real Estate Bank* v. *Rawdon et al.,* 5 Ark. 558. *Fortenbury* v. *Frazier et al.,* 5 Ark. 202 and *Walker & Faulkner* v. *Walker*, 2 Eng. 542 expressly decide that after the term has expired at which the decision is made, it is final and conclusive between the parties; that the Circuit Court is bound by the decision of this Court and must carry it into execution; that the inferior court cannot vary the decision, nor can it give further relief as to any matter decided, not

even when it is apparent that this Court has mistaken a material fact. In the case of *Fortenbury* v. *Frazier, et al.,* the court says 'After a case has been decided by the Supreme Court and remanded to the inferior Court and is again brought before the Supreme Court, nothing is before the Court for adjudication but the proceedings subsequent to the mandate.' In the case of *The Real Estate Bank* v. *Rawdon et al.,* 5 Ark. 558, upon a question as to whether the Court had power to reconsider its decisions at the close of the term at which they were made, although the Court were divided, a majority being of opinion that even though the motion is made at the same term, it must be decided also at that term or the judgment will be conclusive, still they were unanimously of the opinion, that where no motion for a reconsideration is interposed, the decisions at the close of its term, became final and conclusive upon the parties.

"In a more recent case, (*Rutherford, use,* &c. v. *Lafferty,* 2 Eng. 402,) this court seems to have departed from the rule laid down in these cases, whilst their authority is not questioned. On the contrary, it would seem that the court recognized the general principle, but based its decision upon the fact that the Supreme Court, in its former decision, had overlooked an important fact in the case. This was doubtless true; but then the question recurs, can the decision be held as conclusive between the parties and yet subject to correction and revision as to a misapprehension of facts? If for these, why not for errors as to the law also? We are at a loss for any satisfactory reason for the distinction, and are unwilling to concede that it should exist. It would not only authorize the appeal made to the court in this instance, but in all cases where the counsel, in their zeal for the success of their clients, might and doubtless would, where there was a hope of success, ask that the whole case be re-

viewed. The uncertainty and confusion which would result from such a practice, would strike vitally that progressive principle which lies at the foundation of all judicial proceedings so happily illustrated in the order and system of pleading and practice, which make each definite step in the progress of the cause conclusive upon the parties, and point them prospectively to an ultimate and final decision of the case. These rules of pleading have their origin in the same common principle alike applicable to the judgments of courts, where litigation ceases, and the judgment of each court is final and conclusive in the inferior courts unless set aside or reversed by an appellate tribunal; in the superior court, unconditionally so. If the propriety of this rule could need illustration, it is abundantly to be found in the case of *Rutherford, use, &c.* v. *Lafferty*. There the Supreme Court decided that the plaintiff had no right of action whatever in the matter in controversy, and reversed the decision of the Circuit Court. When the case returned to the Circuit Court, in obedience to the decision of this court it decided that the plaintiff had no right of action, and rendered judgment against him for costs. The plaintiff appealed to this court again, and this court reversed the decision of the Circuit Court which had been rendered on the mandate of this court, for the reason that this court had mistaken an important fact in the case. So that, in fact, there are two decisions on the point totally different. We think the cases of *Fortenbury* v. *Frazier et al.*, and the *R. E. Band* v. *Rawdon et al.*, well sustained, both upon authority and principle, and give them our full approbation."

In *Floyd* v. *Miller Lumber Company*, 160 Ark. 17, 254 S.W. 450 (1923), the issue relative to the validity of the severance tax act came before us on the pleadings. In the trial court, the complaint alleged that the tax act was unconstitutional. The trial court overruled a

demurrer by Floyd, and when he elected to stand thereon, rendered judgment for the lumber company holding the act unconstitutional. On appeal we upheld the validity of the act and reversed. Upon remand, the Lumber Company amended its complaint to raise the issue that the tax act was not applicable to it. On the subsequent appeal, *Miller Lumber Company* v. *Floyd,* 169 Ark. 473, 275 S.W. 741 (1925), we held that the issue of applicability of the tax act to the Lumber Company had been foreclosed by the law of the case doctrine. In so doing, we said:

> "Having reached the conclusion that the tax levied by the statute was a tax on business and not on property, four members of this court for different reasons united in a decision that the tax was an occupation tax and not a property tax, and therefore was not in violation of the provision of the Constitution above quoted. Whether this decision was right or wrong, it is the law of the case; it is *res judicata.* The rule has been long established in this State and uniformly adhered to that in the same cause this court will not reverse nor revise its former decisions., *Fortenberry* v. *Frazier,* 5 Ark. 200; *Porter* v. *Doe,* 10 Ark. 186; *Taliaferro* v. *Barnett,* 47 Ark. 359; *Vogel* v. *Little Rock,* 55 Ark. 609; *United States Annuity & Life Ins. Co.* v. *Peak,* 129 Ark. 43; *Danaher* v. *S. W. Tel. & Tel. Co.,* 137 Ark. 324; *Ft Smith Lbr. Co.* v. *State of Arkansas,* 138 Ark. 581; *Stuart* v. *Barron,* 148 Ark. 380; *Mo. Pac. Rd. Co.* v. *Walnut Ridge-Alicia Road Imp. Dist.,* 160 Ark. 297; *St. L. S. F. R. Co.* v. *Kirkpatrick,* 162 Ark. 65, and numerous other cases cited under the head of Appeal and Error in 1 Crawford's Digest, §§ 405 and 5 Crawford's Digest, § 405. This general rule is grounded on public policy, experience, and reason. If all questions that have been determined by this court are to be regarded as still open for discussion and revision in the same cause, there would be no end of

> their litigation until the financial ability of the parties and ingenuity of their counsel had been exhausted. A rule that has been so long established and acted upon and that is so important to the practical administration of justice in the courts should be followed and not departed from."

This doctrine is neither new or antiquated, but has constantly lived with this court through its many applications. At this time, we are unwilling to overrule the many precedents wherein it has been applied. For this reason the judgment is affirmed.

GEORGE ROSE SMITH, J., concurs; BROWN & FOGLEMAN, JJ., dissent.

GEORGE ROSE SMITH, Justice, concurning. I join in the majority opinion, but I think it appropriate to add a few words of separate concurrence to call attention to an assumption made in the dissenting opinion which I think to involve a misconception of the practice that we follow in remanding a case for a new trial.

The keystone of the minority opinion in this case is the assertion that the appellant should escape the rule of the law of the case because counsel could not have successfully urged their present contention on the first appeal. This is the pivotal language in the dissenting opinion:

> I would agree that when the record was such that the party against whom the rule [of the law

> of the case] is invoked could have argued the point on the first appeal, he should be foreclosed from arguing it on a second appeal. But that is not the case here. Appellants could not have argued the point on their first appeal. We would have rejected their argument had they done so, because the question would have been raised for the first time on appeal.

When we are *affirming* a case we customarily reject arguments that are vulnerable to technical procedural defects, such as a failure to make the proper objection in the trial court, a failure to include in the motion for a new trial an objection in a criminal case, a failure by the trial judge to give a requested instruction that was imperfectly drawn, a failure to save an exception in a criminal case, and a host of other procedural defects that must ordinarily be given effect in the orderly conduct of litigation.

When, however, we have *already* found reversible error and are *remanding* the case for a new trial, the situation is wholly different — quite as much so as night from day. It is then our practice — and rightly so — to consider on its merits any contention that may arise again when the case is retried, regardless of procedural defects that would otherwise compel us to reject the contention. The only requirement is that the point be brought to our attention in the briefs (which was not done on the first appeal in *Mode* v. *State,* relied upon by the minority opinion in the case at bar).

Our practice in this respect is so well settled that examples could be found in any volume of our Reports published during the past quarter century or so. I will cite only our unanimous opinion in *Arkansas State Highway Commn.* v. *Ark. Real Estate Co.,* 243 Ark. 738, 421 S.W. 2d 882 (1967), because there we considered on the merit not one but two contentions that were procedurally defective. One, we held that upon a new

trial the appellant would be entitled to a certain instruction, even though the one offered at the first trial was properly rejected because it was imperfectly drawn. Two, we pointed out that one of the appellant's contentions might be unsound upon a second trial, even though we could not tell from the appellant's abstract on the first appeal whether the trial court had erred at the original trial.

Our practice is demonstrably right. It involves no unfairness either to the trial court or to the losing party, because the case is going back for a new trial in any event. Hence what we try to do is to prevent still a third trial as a result of some error that is called to our attention upon the first appeal. The view of the dissenting opinion, on the other hand, would encourage such unnecessary third trials by requiring us to reject, on procedural grounds, contentions that ought to be disposed of on their merits upon the first appeal.

Indeed, the present case illustrates my point. The minority opinion is in error, I think, in its concluding observation: "In this case it should be less difficult to recognize the error urged by appellants because we would not be faced with the bugaboo of a third trial. We simply could reduce the judgment by the amount of the award for mental anguish."

Here the bugaboo is not that of a *third* trial; it is that of a *second* trial, as far as the point now at issue is concerned. On the first appeal the railroad company argued, though for the wrong reason, that the grandparents were not entitled to recover for mental anguish. The company could and should have presented its present argument at that time. In that way even a second trial upon the extent of the grandparents' mental anguish (which is a question of fact under *Peugh* v. *Oliger,* 233 Ark. 281, 345 S.W. 2d 610 [1961]) would have been avoided. Thus the damage has already been done, and it is only by adhering to the doctrine of the law of the case that we can effectively prevent such

wasteful and unnecessary retrials in the future.

JOHN A. FOGLEMAN, Justice. I concur in all of the court's application of the "law of the case" except as to that portion relating to the mental anguish award to grandparents. I do not think that the doctrine has any application to this part of the judgment of the court below. While the rule is a necessary and salutary one, its recognized harshness should not be extended beyond those situations in which it is necessary, particularly to reach a patently erroneous result, as is the case here. I have been unable to find any case where this court has made the doctrine applicable to a situation of this sort.

In order to illustrate, it is necessary to review the record of this and the previous proceeding. At the time of the first trial, the circuit judge gave instructions permitting recovery by grandparents for mental anguish. The reason given for the objection by appellants to the instructions was that the proof showed that the children were survived by their father and that the claim for mental anguish died with him, extinguishing itself, and did not then pass on to the grandparents. The point relied on by appellants on the first appeal is stated in the opinion. See *St. Louis Southwestern Railway Co. Et Al* v. *Ward Jackson, Adm'r Et Al,* 242 Ark. 858, 416 S.W. 2d 273, 283. The point was argued on the basis that the right to recover for mental anguish was vested in the father and that the undisputed evidence showed that he survived the two children by from one to fifteen minutes.

We disagreed with the appellants on this point but solely on the ground that there was testimony from which the jury could find that all occupants of the automobile were killed instantly. In covering the point, we said:

> "It is true that when we had our mental anguish statute before us in *Peugh, supra,* we there limited recovery for mental anguish to 'heirs at law'

of the decedent. However, where a whole family is killed in a matter of moments, as is the situation here, the bench and bar should not expect a too literal interpretation of the words 'heirs at law' as the same are used in *Peugh*. Act 255 of 1957, creating the right to recover for mental anguish, certainly did not intend that right to be so limited."

This point was not treated any further. Its determination was not necessary to a decision of the case. We reversed for error of the trial court in admitting expert testimony as to the abnormally dangerous condition of the railroad crossing and for admission of certain special instructions given by appellants to their employees. Our opinion directed a new trial.

I do not think that the doctrine of the law of the case should be applied because the present issue is not one which was decided on the previous appeal and the decision made on the previous appeal was not necessary to the disposition of the case. When the instructions concerning the grandparents' right to recover for mental anguish were presented on the new trial, appellants did not attempt to again raise the question which was decided by this court. It simply objected on the basis that grandparents had no right to recover mental anguish for the death of grandchildren under our statute because they are not within any permissible class of relationship.

The application of the rule made by the majority would mean that every litigant will have to make every possible objection to any step in the trial which he considers erroneous, even when the trial court may rule favorably on the first objection he makes. This would mean that one who had objected to testimony on the basis that it was irrelevant could not object to it on the basis that it was hearsay in a new trial granted upon reversal of the trial court because of its erroneous ruling on that point in the first trial. I cannot find

any case where such an extreme application of the rule has been made. The majority has cited no such case in its opinion. The cases it did cite are distinguishable.

In *Moore, Adm'x* v. *Robertson,* 244 Ark. 837, 427 S.W. 2d 796, we clearly said that since the contention in question could and should have been made on the first appeal, it was barred. I would agree that when the record was such that the party against whom the rule is invoked could have argued the point on the first appeal, he should be foreclosed from arguing it on a second appeal. But that is not the case here. Appellants could not have argued the point on their first appeal. We would have rejected their argument had they done so, because the question would have been raised for the first time on appeal.

In *Storthz* v. *Fullerton,* 185 Ark. 634, 48 S.W. 2d 560, this court remanded an equity case to the chancery court with directions to enter a decree and for further proceedings to enforce a vendor's lien for the benefit of Fullerton. See *Fullerton* v. *Storthz,* 182 Ark. 751, 33 S.W. 2d 714. On remand, Storthz filed a new pleading in which he sought to reach the lien note in Fullerton's hands by equitable garnishment. The court referred to the "law of the case," but actually applied res judicata. It is clear, however, that the contentions made there could have been made on the former appeal. In this case the direction was to grant a new trial, not to enter a judgment. Storthz was endeavoring to have the court determine whether the judgment directed by this court be entered and carried into effect. Appellants are not seeking to do this. Furthermore, appellants could not have argued the objection now urged on the former appeal.

In *Miller Lumber Co.* v. *Floyd,* 169 Ark. 473, 275 S.W. 741, the appellees had filed a demurrer, which was overruled and final chancery decree was entered against them. The judgment was reversed and the

cause remanded for proceedings not inconsistent with the opinion. The only question involved the constitutionality of the Severance Tax Act. On remand, appellees in the first case amended the complaint raising issues as to the construction and application of the act. The trial court sustained a demurrer to the amended complaint and again entered final decree. From this decree, the second appeal was taken. Appellants again argued that the act was unconstitutional. On the first appeal, the decision was based upon a holding that the tax was an occupation tax not a property tax. On the second appeal the contentions of Miller Lumber Company were such that it would have been necessary for the court to say that the tax was on property rather than on the occupation. We properly applied the "law of the case" doctrine because to do otherwise would have required a reversal of the holding that the tax was not a property tax.

Although the doctrine has been applied in Arkansas with reference to instructions given on the first trial, none of the cases indicate that it has application where the objection made on the second trial was not the same as that made on the first trial.

In *Friedman* v. *Cornish,* 99 Ark. 648, 139 S.W. 543, we recited that all the instructions on the former trial were repeated on the second trial except for an erroneous instruction, in lieu of which an instruction in accordance with the opinion of the court on prior appeal was given. The points raised on the second appeal are not stated. The court only said that the instructions approved on the former appeal or not disapproved were the law of the case and the instructions, as given, fairly submitted the cause to the jury.

In *St. Louis, I. M. & S. Ry. Co.* v. *Gibson,* 113 Ark. 417, 168 S.W. 1129, we only said that it was sufficient answer to unspecified assignments of error to the giving of instructions to say that the instructions given on the second trial were in conformity with the rules of law laid down in the opinion on the first appeal.

In *Scott* v. *Cleveland,* 122 Ark. 259, 183 S.W. 197, it was held that the opinion on a former appeal did not settle the law of the case as to certain instructions. The former opinion had stated that the only error committed by the trial court was in refusing to grant a continuance. The instructions in question were refused, but it does not appear that these two instructions were asked and refused on the former trial, and they were not discussed in the first opinion. The court reversed for failure to give the instructions.

In *McCombs* v. *Moss,* 131 Ark. 509, 199 S.W. 545, we held that instructions on the second trial conforming to the rules of this court on appeal from the judgment on the first trial are deemed correct on second appeal. The case was reversed on the first appeal for failure to give an instruction. See *McCombs* v. *Moss,* 121 Ark. 533, 181 S.W. 907.

In *Missouri Pacific Railroad Co.* v. *Foreman,* 196 Ark. 636, 119 S. W. 2d 747, the court stated that instructions given on the first trial were not subject to review on the second appeal, since they were approved by the holding that there was no error in the record of the first trial except in the argument of one of the attorneys. The first opinion (194 Ark. 490, 107 S.W. 2d 546) specifically stated that the usual questions arising in such cases were present and discussed in the briefs but that no error was found except in the particulars stated therein.

In *Thacker* v. *Hicks,* 215 Ark. 898, 224 S.W. 2d 1, the principal objection to the instructions was that there was no competent evidence to support the giving thereof. We said that the holding on the first appeal, that there was no error in the refusing or giving of instructions, was binding as the law of the case insofar as these instructions were concerned.

The only question decided on the first appeal in this case was that there was a fact question as to whether

the father of the minors survived them. The instruction given was not mentioned, nor was anything said about the right of grandparents to recover for mental anguish. It was not necessary to the decision of the case to do so. The former opinion has become binding as the law of the case to the extent that the *questions* there involved were decided. *Baker* v. *State,* 201 Ark. 652, 147 S.W. 2d 17. See also *St. Louis, I. M. S. Ry. Co.* v. *DeLambert,* 120 Ark. 61, 178 S.W. 926. In *St. Louis & S. F. R. Co.* v. *Conarty,* 124 Ark. 454, 188 S.W. 310, we quoted with approval a statement by the United States Supreme Court that the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision. We also said:

> "Whatever was before the court and disposed of is considered as finally settled, but the inferior court, upon the case being remanded, is justified in considering and deciding any question left open by the mandate and opinion, and may consult the opinion to ascertain exactly what was decided and settled. * * * "

While our opinions have stated that the law of the case applied to all questions which were raised, or might have been raised on the first appeal, I find none that extend the principle to those which might have been raised in the trial court but not in this court. Obviously, any question raised on appeal that was not raised in the trial court would not be entertained by this court. We have refused to consider such questions in many cases where a new trial was or should have been anticipated. *Holland* v. *Ratliff,* 238, Ark. 819, 384 S.W. 2d 950; *Ransom* v. *Weisharr,* 236 Ark. 898, 370 S.W. 2d 598; *Industrial Farm Home Gas Co.* v. *McDonald,* 234 Ark. 744, 355 S.W. 2d 174; *Lee Rubber & Tire Corporation* v. *Camfield,* 233 Ark. 543, 345 S.W. 2d 931; *Robinson* v. *Martin,* 231 Ark. 43, 328 S.W. 2d 260; *Missouri Pac. R. Co.* v. *Gilbert,* 206 Ark. 683, 178 S.W. 2d 73.

In order to say that an objection not raised in the trial court on the the first trial cannot be raised on the second trial, we must disregard the effect of the remand of a case for a new trial on reversal. When we do this, the slate is wiped clean, as if there had never been any trial. The case stands in the attitude it was just prior to going into trial. *Heard* v. *Ewan,* 73 Ark. 513, 85 S.W. 240. In *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475, 96 S.W. 393, we said:

> " * * * When, on appeal or writ of error, a cause is reversed and remanded for new trial, the case stands as if no action had been taken by the lower court. *Harrison* v. *Trader,* 29 Ark. 85; Heard v. Ewan, 73 Ark. 513, 85 S.W. 240. If the facts developed on second trial remain the same as they were on the first trial, the lower court *must be governed,* in applying the law to the facts, *by the principle announced by this court in that case as controlling.* * * * " [Emphasis mine.]

No better statement of the principle involved could be made than was contained in *Palmer* v. *Carden,* 239 Ark. 336, 389 S.W. 2d 428, where we said:

> " * * * This court reversed the trial court judgment in that case, and remanded the cause, and we have said, on numerous occasions, that, when a judgment is reversed and remanded for new trial, the case stands as if no action at all had been taken by the trial court. This was first stated as far back as 1874 in the case of Harrison v. Trader and Wife, 29 Ark. 85. In that case, we quoted language from the case of Simmons v. Price, 18 Alabama 405, as follows:
>
> > 'When a judgment is reversed, the rights of the parties are immediately restored to the same condition in which they were before its rendition; and the judgment is said to be mere waste paper.'

> Since that time, we have had occasion to reiterate this statement many times. See Hartford Fire Ins. Co. v. *Enoch,* 79 Ark. 475, 96 S.W. 393; Holt v. Gregory et al., 222 Ark. 610, 260 S.W. 2d 459. * * * ."

See also *Clark* v. *Ark. Democrat Co.,* 242 Ark. 133, 413 S.W. 2d 629, Supplemental Opinion, 242 Ark. 497, 413 S.W. 2d 633; *Morgan Engineering Co.* v. *Cache R. Drain. Dist.,* 122 Ark. 491, 184 S.W. 57.

Not only did our opinion specifically remand the case for a new trial, but the mandate directed "further proceedings not inconsistent with the opinion herein." The result reached by the majority would probably be proper if the case had not been remanded for new trial. The rule followed in the majority opinion would be applicable as to any issues if the mandate had given instructions to render a judgment in accordance with the opinion on first appeal. See *Hollingsworth* v. *McAndrew,* 79 Ark. 185, 95 S.W. 485; *Hill* v. *Draper,* 63 Ark. 141, 37 S.W. 574; *Prewitt* v. *Waterworks Improvement Dist. No. 1,* 176 Ark. 1166, 5 S.W. 2d 735. The same result has been reached as to new issues where the directions to the circuit court were to affirm the judgment of a county board of education. *Milsap* v. *Holland,* 184 Ark. 996, 44 S.W. 2d 662. The correct result was reached as to new issues in *Shackleford* v. *Arkansas Baptist College,* 183 Ark. 404, 36 S.W. 2d 78, because we affirmed the judgment of the trial court, as modified, on first appeal. See 181 Ark. 363, 26 S.W. 2d 124. While the rule is called "law of the case" there, the doctrine of res judicata was actually applicable.

It is only the *law* specifically declared on the first appeal that must be followed. In *Linograph Co.* v. *Bost,* 180 Ark. 1116, 24 S.W. 2d 321, we said:

> "Where a case has been to the Supreme Court and been reversed, the law announced on the former appeal is the law of the case. Propositions of law

once decided by an appellate court are not open to reconsideration in that court upon a subsequent appeal. Whatever was decided on the first appeal remains the law of the case for all further proceedings. *Morris & Co.* v. *Alexander & Co.*, 180 Ark. 735, 22 S.W. (2d) 558; *Fentres* v. *City National Bank*, 172 Ark. 711, 290 S.W. 58. However, the decision on former appeal is the law of the case as to so much of the case as was adjudicated. *Henry* v. *Irby*, 175 Ark. 614, 1 S.W. (2d) 49; *Chicago Mill & Lumber Co.* v. *Osceolo Land Co.*, 94 Ark. 183, 126 S.W. 380.

The only question adjudicated in this case on former appeal was the right of appellant to maintain the suit. This question was settled on the former appeal and cannot be reconsidered. The other issue raised by the pleadings was not adjudicated on former appeal and is not res adjudicata."

We have previously permitted new issues to be raised on a retrial after reversal and remand. For instance, in *American Surety Co. of N. Y.* v. *Kinnear Manufacturing Co.*, 185 Ark. 959, 50 S.W. 2d 586, this court refused to apply the "law of the case" from a previous appeal. Upon remand the complaint was amended to allege that an architect was guilty of such inattention and indifference as to imply bad faith. This issue was then submitted to the jury under instructions correctly declaring the law on that subject. On the previous appeal, the court had held an instruction touching upon this issue to be correct. The reversal was for failure to give that instruction. Thus, one of the parties was permitted, upon retrial, to raise a new issue. In effect, this is what is being done here.

In *Morgan Engineering Co.* v. *Cache R. Drain. Dist.*, supra, the court refused to apply the doctrine. The appellant contended that the circuit court on trial after remand, was foreclosed from inquiring into the validity

of a contract. It asserted that the language of the opinion on the former appeal was an adjudication of the binding effect of the contract and that the trial court and the parties were bound under the law of the case. The reversal on the former appeal was based upon the failure of the trial court to take proof of the value of services rendered under the contract and to find for appellant for that amount. On retrial, an issue was made as to the validity of the appellee district and, incidentally, the validity of the contract. In referring to authorities cited by appellant, we said that those decisions simply announced and adhered to the rule that where an issue has been *raised in the court below* and has been finally adjudicated on appeal to the Supreme Court the same issue cannot be reopened on another trial. We said that a remand for further proceedings in accordance with the opinion was in effect a remand for a new trial in general, which contemplated that there was to be a new trial on the *issues that might be presented.* The language used there is particularly significant here:

> "Now, on the first trial the appellees (Interveners) did not challenge the validity of the drainage district, and they introduced no evidence to show that the district was invalid. Their contention was that under the act abolishing the district the appellant should be allowed to recover only such compensation as the jury might find reasonable. They did not directly call in issue appellant's contract, but only claim that it was not entitled to recover under it. On the last trial the issues were entirely changed. By permission of the court the appellees were permitted to put forth an entirely new defense to appellant's claim, and to set up that, the district being void for uncertainty, the directors had no authority to enter into a contract with appellant, and that therefore such contract was void, and that appellant was not liable at all, and they introduced evidence to su-

stain their contention. Thus the issues and the facts on the last trial were entirely different from what they were on the former appeal, and hence what was said by us in the former opinion as to the contract and its binding effect would not be the law applicable to the changed issues and facts as discovered by this record."

This court has actually followed and applied the principle I would follow in *Mode* v. *State*, 234 Ark. 46, 350 S.W. 2d 675. The rule of law of the case was applied in this second appeal from a conviction of murder. On the second appeal, the admission of testimony relating to the good character of the deceased was asserted as error. The court decided the question of admissibility, saying:

> "This assignment cannot be disposed of by the rule of 'law of the case' because, in the first trial, there was no objection to testimony of the good character of the deceased."

If by making no objection to the admissibility of testimony, a party is not later barred from objecting, I can perceive of no reason why he should not be permitted to make a different objection on a second trial. In order to say that a different objection cannot be made on a second trial, we must necessarily apply the doctrine of waiver, which would be just as applicable in a case where a party made no objection. If the principle followed in *Mode* v. *State* were applied to jury instructions, then a party who had made no objection to a jury instruction on a first trial could object on a trial after reversal and remand. I can see no logic in permitting this and not permitting a party to make a different objection on the second trial.

In this case it should be less difficult to recognize the error urged by appellants because we would not be faced with the bugaboo of a third trial. We simply could reduce the judgment by the amount of the award

for mental anguish. The jury awarded $24,000 to each set of grandparents. We could correct the error by reducing the judgment in the amount of $48,000.

BROWN, J., joins in this dissent.

WYNETTE WILES v. ROY WILES, JR.

5-4786 437 S.W. 2d 792

Opinion Delivered March 3, 1969

Lohnes T. Tiner and *Henry J. Swift* for appellant.

W. B. Howard and *Jack Segars* for appellee.

FRANK HOLT, Justice. This is a divorce action. In her complaint, appellant seeks a divorce upon the grounds of indignities and asks that she be awarded all of her statutory rights, including her interest in the appellee's property. The appellee's answer is in the

nature of a general denial, except for the marriage and separation. He avers that he does not want a divorce and offers reconciliation.

The chancellor temporarily awarded the use of certain property to the appellant and temporary alimony in the sum of $30 per week, together with costs and attorney's fees. Upon trial the chancellor denied appellant a divorce and awarded her $200 per month separate maintenance.

About a month later both parties petitioned the court for modification of its decree. Appellee contended there that the court erred in awarding separate maintenance inasmuch as the court had refused appellant a divorce. In response, appellant urged that the court had erred in denying her petition for divorce and, further, in not awarding to her the statutory property rights to which she was entitled, including alimony and attorney's fees. After a hearing, the court modified its previous decree by dismissing the order requiring the appellee to pay $200 per month separate maintenance; denied an attorney's fee, and found all issues of fact and law for the appellee. From that modified decree, this appeal follows.

For reversal appellant contends that the finding of the chancellor, in refusing to award her an absolute divorce together with her statutory rights, is against the preponderance of the evidence.

The parties were first married in July of 1966. Appellant secured a divorce, by agreement of the parties, on March 10, 1967. That night they discussed reconciliation and about a month later they remarried. About five months thereafter, the present separation occurred. Appellant testified that during this brief period of their remarriage appellee subjected her to extreme physical abuse on two occasions and constantly harassed and subjected her to such mental cruelty that her marital situation became so intolerable she could no longer live

with him. According to her, he had an ungovernable temper and at times would call her vile names. It appears that his conduct toward her vacillated somewhat, since she testified that he was generous with her and "he could be the sweetest, finest person that ever was one time and everything would be fine. Then he could get mad at someone downtown and come in and take it out on me." Appellant's eighteen-year-old daughter by a former marriage corroborated her testimony about one instance of physical abuse and their arguments.

The appellee denied that he had physically abused the appellant on the two occasions about which she testified. He characterized these acts as merely being spankings which resulted from arguments that she provoked by her opprobrious language with reference to his daughter by a former marriage. According to him, the only other time he ever struck her with his hand was when she bit him. He admitted that when she used bad language about him or his family, it resulted in an exchange of uncomplimentary words. He testified that the basic cause of most of their problems during both brief marriages was her inability to manage and live within their finances and, further, that their quarreling was sporadic during their five-month remarriage. Appellee expressed a desire to avoid a divorce in the hope of reconciliation and testified that he had made conciliatory efforts. Several witnesses testified on behalf of the appellee to the effect that publicly they appeared to be congenial.

Chancery cases are reviewed de novo on appeal and a chancellor's decree will not be reversed on a question of disputed facts unless the finding is against the preponderance of the evidence. *Greer* v. *Greer,* 193 Ark. 301, 99 S.W. 2d 248 (1936). A compelling reason for this well settled rule is the fact that the chancellor is in a better position to evaluate the testimony of the witnesses since he hears them and observes their demeanor and interest in the case. *Dennis* v. *Dennis,* 239

Ark. 384, 389 S.W. 2d 631 (1965). In the case at bar, the evidence is in conflict that the alleged indignities were being continuously and persistently pursued with the purpose and effect of causing an enduring alienation and estrangement which is a requisite in this type of action. *Gibson* v. *Gibson,* 234 Ark. 954, 356 S.W. 2d 728 (1962); *Pryor* v. *Pryor,* 151 Ark. 150, 235 S.W. 419 (1921). The absence of congeniality and consequent quarrels resulting therefrom are insufficient to constitute that cruelty or those indignities required by our statute to justify a divorce. *Bell* v. *Bell,* 105 Ark. 194, 150 S.W. 1031 (1912). In the case at bar, we are unable to say that the finding of the chancellor refusing appellant a divorce and her attendant statutory rights is against the preponderance of the evidence.

Appellant asserts the chancellor erred in denying her maintenance and support. Before appellant first married appellee, she was employed at $85 per week. At the time of rendition of the modified decree, she was employed and receiving as take-home pay $53 per week. She now lives with her mother and her thirteen-year-old daughter by her former marriage. She had been receiving $200 per month maintenance from her first husband for their two children, and now receives $100 per month for the younger child. It appears that the older daughter is now married.

Appellee placed the bulk of his property in trust before their remarriage. He said this was with her knowledge. According to appellant, the appellee now has approximately $500 per month personal income left after meeting his financial obligations, including $400 per month which he pays to a former wife and their two children as alimony and maintenance.

The chancellor has broad powers and wide discretion in fixing or refusing support payments and we do not disturb his action unless there is an abuse of discretion. *Carty* v. *Carty,* 222 Ark. 183, 258 S.W. 2d 43 (1953). In each case, proper consideration must be

given to the respective financial conditions of the parties and many other circumstances, including their mutual conduct. *Upchurch* v. *Upchurch,* 196 Ark. 324, 117 S.W. 2d 339 (1938); *Lewis* v. *Lewis,* 202 Ark. 740, 151 S.W. 2d 998 (1941). In the case at bar, we are unable to say that the chancellor abused his broad discretionary powers in refusing to continue an award of maintenance and support which appellant had received for approximately six months. Further, we find no abuse of discretion in disallowing additional attorney's fees.

The decree is affirmed.

STATE OF ARKANSAS v. JIM BRUTON

STATE OF ARKANSAS v. JIM BRUTON, E. L. FLETCHER AND JESS WILSON

5-5372 and 5-5373 437 S.W. 2d 795

Opinion Delivered March 3, 1969

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellant.

Reinberger, Eilbott, Smith & Staten for appellees (Bruton & Wilson); *Douglas Bradley & Hartman Hatz* for appellee (Fletcher).

JOHN C. DEACON, Special Chief Justice. Appellees, employees of the Arkansas penitentiary, were charged by information in two cases with administering excessive punishment to prisoners in October 1964 and January 1965 in violation of Arkansas Statutes 46-158. The appellees filed a demurrer and motion to dismiss, alleging that the statute was void because of an unconstitutional delegation of legislative power. The trial court agreed and dismissed the cases and the state brings these appeals.

The issue in these cases is simply whether appellees were charged with a crime under a valid Arkansas penal statute. We are not asked to consider whether the use of the strap in the penitentiaries of Arkansas is cruel or unusual punishment prohibited by Article 2, Section 9 of the Arkansas Constitution. This point was recently before the Eighth Circuit in *Jackson* v. *Bishop,* 404 F. 2d 571 (1968), which held use of the strap to be in violation of the Eighth Amendment to the Constitution of the United States. Neither do we consider here whether appellees might have been charged with a crime under some penal statute other than Section 46-158.

This law was enacted in 1893 as Section 62 of Act 76, which was a comprehensive measure providing for the management of the penitentiary. The constitutionality of this section has not been previously tested. It provides as follows:

> "The board [State Penitentiary Board] shall prescribe the mode and extent of punishments to be inflicted on convicts for the violation of the prison rules; and any superintendent, subordinate officer or guard having in his charge any convicts who shall himself, or who shall cause any other

> person to inflict on any convict any greater or more severe punishment than is prescribed by said board, said superintendent, subordinate officer or guard shall be deemed guilty of a felony, and on conviction thereof shall be confined in the penitentiary for not less than one (1) nor more than five (5) years; and if death ensues from said punishment, he and his aiders and abettors shall be guilty of murder or manslaughter as the case may be."

This statute has no guidelines. It permits the State Penitentiary Board in its sole discretion to prescribe for its employees the limits of conduct which would constitute a felony. In the absence of an adequate yardstick for the guidance of the board, it could set minimums or extremes of punishment without restraint. The effect of this is to authorize an administrative body to impose criminal liability upon penitentiary employees based upon rules fixed by it. Enactment of penal statutes, always strictly construed, is a function of the legislative branch of our state government.

We hold that Arkansas Statute 46-158 is an unconstitutional delegation of legislative power. *Walden* v. *Hart*, 243 Ark. 650, 420 S.W. 2d 868 (1967).

Affirmed.

HARRIS, C.J., disqualified.

HOLT, J., not participating.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v.

BARBARA GIPSON

5-4797 439 S.W. 2d 931

Opinion Delivered March 10, 1969

[Supplemental Opinion on denial of Rehearing delivered May 12, 1969, p. 967.]

Wright, Lindsey & Jennings by *William R. Overton* for appellant.

Howell, Price & Worsham for appellee.

CARLETON HARRIS, Chief Justice. This is a railroad crossing accident case. Mrs. Barbara Gipson, a 24-year-old housewife, was driving her husband's 1953 Studebaker pickup truck with her two daughters, ages 3 and 2, as passengers, on May 26, 1965, about 9:30 a.m. Mrs. Gipson stopped the truck at a railroad crossing in the town of Bigelow, Arkansas. She then attempted to start the truck, but it would not start; however, as she was trying to start it, the truck rolled onto the

tracks.[1] She again attempted to start it, but the starter just "grinded," and about the same time she heard an approaching train. Mrs. Gipson tried once more to start the truck, concluded that it was not going to start, and got out. She threw both little girls from the vehicle, and all reached a position of safety, but one of the children attempted to run back to the truck as the train neared the crossing. Mrs. Gipson ran after the child, and the train struck the front part of the truck and knocked it against appellee, who sustained injuries. Suit was instituted against the railroad, and on trial, the jury found Mrs. Gipson 20% negligent, the railway company 80% negligent, the engineer guilty of no negligence, and Mrs. Gipson's damages were assessed at $50,000.00, the amount sought in the complaint. From a judgment entered in the amount of $40,000.00, appellant brings this appeal. Five different contentions are urged for reversal. Since we are of the opinion that the court erred in refusing to direct a verdict for appellant, there is no need to discuss the other alleged errors.

Appellee's case is founded upon contentions that the train crew did not keep a proper lookout; that the employees of the company negligently failed to sound the whistle or ring the bell to warn of the train's approach; that high weeds and grass were permitted to grow along the right-of-way to such a height as to prevent appellee from seeing the train; and that the crossing was abnormally dangerous.

There is testimony that the train crew failed to sound a whistle or bell, and also testimony that these warnings were given; and there is testimony pro and con relative to the other contentions. However, it is not really pertinent to a determination of this lawsuit

[1] "Well, I pulled up to the track and I stopped and the truck died and I tried to start it and the starter was under the clutch and when I tried to start it it rolled forward and I heard the train then . . ." The front end of the truck protruded out upon the track.

whether the whistle and bell were sounded in time to give warning; whether a proper lookout was maintained by the railroad employees; or whether there is evidentiary support for the other allegations of negligence, for it is uncontradicted that Mrs. Gipson knew the train was coming while she was still sitting in the truck on the track. Her knowledge that the train was approaching is the controlling and determinative fact in this litigation, for any failure on the part of appellant to properly warn could not have been the proximate cause of the injuries complained of. In *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Doyle,* 203 Ark. 1111, 160 S.W. 2d 856 (1942), we said:

> "In the instant case, even though the statutory signals were not given, this was not the proximate case of the injuries complained of, for the reason that Mrs. Doyle admitted that she saw the headlight from the train and it was moving as it approached the crossing. Under these circumstances it was her duty, in the exercise of ordinary care for her own safety, to stop her car, and this she admits she failed to do."

In *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Carruthers, Adeno,* 204 Ark. 419, 162 S.W. 2d 912 (1942), the court said:

> "* * * The statute, § 11135 of Pope's Digest requires railroad companies to ring the bell or blow the whistle at crossings, that is, to do one or the other, beginning 80 rods away, and to continue until the crossing is passed. We have held in many cases that these statutory signals cease to be factors and that no recovery can be had for failure to give them when the presence of the train is plainly discoverable by other means, the latest being the Howard case."

In *Missouri Pacific Railroad Company, Thompson,*

Trustee v. *Dennis, Admr.,* 205 Ark. 28, 166 S.W. 2d 886, it was stated:

> "In the instant case, even though the statutory signals were not given, this was not the proximate cause of the collision and consequent damages. As we have indicated, it was Isaac Dennis' negligence in failing to look that caused his death. In the recent case of *Mo. Pacific Ry. Co.* v. *Doyle,* 203 Ark. 1111, 160 S.W. 2d 856, we said: 'We have many times held that the purpose of giving signals is to warn the traveler of the approach of a train, but when the traveler has this knowledge otherwise warning signals cease to be factors. In *Chicago, R. I. & Pac. Ry. Co.* v. *Sullivan,* 193 Ark. 491, 101 S.W. 2d 175, this court said: "The object of signals is to notify people of the coming of a train. Where they have that knowledge otherwise, signals cease to be factors." ' "

In *Kansas City Southern Railway Company* v. *Baker,* 233 Ark. 610, 346 S.W. 2d 215, it was contended by appellee that there was sufficient testimony to sustain a finding that the statutory signals, required of the train crew, were not sounded. Two persons testified that, though they were in a position to have heard the signals had they been sounded, they heard none.[2] In reversing a judgment for appellee, we again said:

> "But it is not necessary to decide this point at this time because in the case at bar Mrs. Baker cannot recover, even though no signals were given, because if she saw the train approaching and walked in front of it, there can be no recovery regardless of whether the statutory signals were sounded.

[2]One person testified to the same thing in this case, while two residents of Bigelow and the train crew testified that the whistle was blown in plenty of time. Mrs. Zelma Wilson testified that the train "started whistling before it passed our house, and we got alarmed when it kept whistling before it hit the truck." She lived in Fouche, a mile from Bigelow.

> There is direct and circumstantial evidence that Mrs. Baker did see the train and tried to cross in front of it. There is no substantial evidence to the contrary. In the case of *Missouri Pacific R.R.* v. *Doyle,* 203 Ark. 1111, 160 S.W. 2d 856, this Court said: 'We have many times held that the purpose of giving signals is to warn the traveler of the approach of a train, but when the traveler has this knowledge otherwise, warning signals cease to be factors.' "

The testimony of appellee herself establishes that she was well aware of the approach of the train before the accident occurred, and, in fact, had reached a place of safety, together with the children, until one child started back to the truck. After testifying that she tried to start the vehicle once after hearing the train, she said she got out of the truck onto the ground; then "I got Suzanne and threw her and I got Pamela and threw her." She stated that the children had reached a safe place, and she had reached a safe place, and all three would have been out of the way if one of the children had not started back toward the truck. When this happened, Mrs. Gipson ran to pull the child back, and she was thus in a position of danger when the train reached the crossing.

Of course, the mother, in going back for the child, did what any parent would do, for a normal parent would, without hesitation, risk injury if it appeared that one of the children was in danger. Though that be true—the railroad company cannot be held responsible because a person chooses to place himself in a position of peril. Appellee argues in her brief:

> "The jury might well have concluded that had the railroad kept a proper lookout, applying the brakes sooner and before impact so as to slow down the advance of the train, or had the railroad given the required warning by sounding the whistle con-

> tinously for a quarter of a mile prior to reaching the crossing, the appellee would have had sufficient time to have fled to safety, or that impact would not have been as violent so as to spin the truck around and knock it into her."

This, of course, is pure speculation—but we do know, from the mouth of appellee, that she had earlier reached a place of safety, and was only injured because she voluntarily returned toward the tracks.

Reversed and dismissed.

BYRD, J., concurs.

CONLEY BYRD, Justice. I do not agree with the majority that Mrs. Gipson had reached a place of safety. I do think there was error in the giving of the instructions on lookout and abnormally dangerous crossing. The only evidence on lookout is that the train crew saw the vehicle just as soon as it could possibly be seen after the train rounded the blind curve. With respect to the abnormally dangerous crossing, it is difficult to understand how it should be applied to a stalled vehicle.

However on the matter of the sounding of the whistle and bell, there was evidence from which the jury could have found that they were not sounded in time to give a warning to Mrs. Gipson since her view of the train was obstructed by a blind curve. For this reason I would remand for a new trial rather than a dismissal.

SIMMONS FIRST NATIONAL BANK, ADMINISTRATOR v. DEWEY LUZADER, ET AL

5-4809 438 S.W. 2d 25

Opinion Delivered March 10, 1969

Wright, Lindsey & Jennings for appellant.

Fenton Stanley for appellees.

CARLETON HARRIS, Chief Justice. This appeal involves the validity of a written contract entered into by N. F. Yarbrough and his nephew and his wife, Dewey Luzader and Anna Pearl Luzader, appellees herein. The instrument provided that the Luzaders should have $12,000.00, which was on deposit with the Southern Federal Savings and Loan Association in Pine Bluff, if appellees gave him a home until his death. A factual background is as follows:

Yarbrough's wife died on September 19, 1966, Mr. Yarbrough being 84 years of age at that time. On the

day following Mrs. Yarbrough's death, and also a few days later, Yarbrough, together with his brother, Claude, went to the Southern Federal office for the purpose of transferring savings accounts. Yarbrough held four or more such accounts, which totaled more than $49,000.00. One account, in the amount of $7,000.00, was placed entirely in the brother's name. Remaining accounts were changed to require the signatures of both brothers in order to make withdrawals. Subsequently, Frank (N. F.) Yarbrough returned to the Southern Federal office on one other occasion to discuss the accounts with the company secretary.

Yarbrough had long expressed the desire to live with the Luzaders in the event of the death of his wife, and he went to the Luzader home at Leola, Grant County, Arkansas, three days after the funeral of Mrs. Yarbrough. On October 25, Mr. Yarbrough, accompanied by Anna Pearl, went to the office of Pierce A. Reeder, postmaster at Leola, and a contract was handed to Reeder, Mrs. Luzader requesting the postmaster to "notarize" it. Reeder testified that he read it, and concluded that it should be drawn up in a form where it could be witnessed by two other people.[1] When Mrs. Luzader left to find two persons, Reeder typed up the agreement, and made it ready for signatures. The postmaster testified that he copied the paper handed him, and added the part about the presence of witnesses. Mr. Yarbrough then executed the typed contract, and the two witnesses signed their names.[2]

[1]Reeder was under the impression that the instrument was a will.

[2]"When and if Dewey Luzader and his wife, Anna Pearl Luzader gives me a home until my death, it is understood that they shall have the sum of Twelve Thousand Dollars ($12,000.00) of my money on account in the Southern Federal Loan and Savings at Pine Bluff, Arkansas or wherever it may be at the time of my death. Signed this 25th day of October 1966. Signed /s/ N. F. Yarbrough. In the presence of the following witnesses and in the presence of each other on this 25th day of October, 1966.
/s/ Olen Biggs, Leola
/s/ Austin Lamb, Leola."

On December 5, 1966, Mr. Luzader petitioned the Probate Court for the appointment of a guardian for Yarbrough, the allegations being that the latter was incompetent, because of senility and old age. On December 9, the court held Yarbrough incompetent, and appointed Simmons First National Bank of Pine Bluff as guardian. At this hearing, Claude Yarbrough relinquished the interest in his brother's savings accounts, and the court awarded appellees the sum of $150.00 per month for keeping the old man. Yarbrough died on August 21, 1967, and appellant bank was named administrator of the estate. The Luzaders filed a claim for $12,000.00 based on the written contract heretofore mentioned. The bank refused to allow this claim, but on hearing, same was allowed by the Probate Court. From the judgment allowing the claim in the amount of $12,000.00, the bank brings this appeal. For reversal, it is asserted that the court erred in holding that the administrator had failed to overcome the presumption of Yarbrough's competency, and it is also alleged that the contract was unenforceable for failure of consideration.

All parties agree that the document in question was not a conveyance, or will, but was a contract. The court, in its written opinion at the conclusion of the case, held that the bank had "failed to overcome the presumption of competency that follows the execution of a written instrument." Appellant disputes that there is such a presumption, and points out that the Chancellor cited no case in support thereof. We disagree with this argument. In *Dalton* v. *Polster,* 200 Ark. 168, 138 S.W. 2d 64, this court said:

> "Having pleaded her incompetency, the burden was on appellants to show it. *Incompetency is never presumed, but the contrary is.*"[3]

In *Harris* v. *Harris,* 236 Ark. 676, 370 S.W. 2d 121, we commented:

[3]Our emphasis.

> "There is a presumption of law that every man is sane, fully competent and capable of understanding the nature and effect of his contracts."

Harris v. *Harris* is also quoted with approval in *Union National Bank of Little Rock, Trustee* v. *Smith,* 240 Ark. 354, 400 S.W. 2d 652. Of course, in addition, the execution of the contract having been shown, the burden of proving incompetency rested with the bank, since it sought to invalidate the instrument. The cited cases are likewise authority for this last.

As a matter of proving the mental incompetency of Yarbrough, appellant relies upon the testimony of Claude Yarbrough, the brother of the deceased, Connie Haner, a niece of N. F. Yarbrough, and Hattie Bea Blaser, Secretary of the Southern Federal Savings and Loan Association of Pine Bluff. Mrs. Haner testified that she probably saw Yarbrough twice between the time of his wife's death and the execution of the contract with the Luzader's. When interrogated as to her uncle's mental condition at the time of his wife's death, she replied:

> "Just like he always was the last few years. Just a little, well, you'd have to know Uncle Frank to know him. He was just sort of here and there."

Mrs. Haner said that he could remember some things pretty well, but could not remember others; that he had "been like that for years." When asked if he had an understanding of the nature and extent of his property, the witness said:

> "Well, he knew he had his money and we talked about it and different things like that. He liked to talk about his money to me. * * * He didn't know how much he had, really. He didn't know that, no."

She said that in April, 1967, a relative had died, and she talked to her uncle in Gurdon; that he told her

at that time that he wanted to go to Pine Bluff, and get his money out of the bank, because Anna Pearl had written a paper that would give her $12,000.00, and he didn't want her to have it. She also said that he desired to move back to Pine Bluff. The witness made clear that she was not saying that her uncle had been compelled to sign the paper. "He said that she wrote out a paper and I signed it that I would give her this money." Mrs. Haner did agree that Yarbrough had been anxious to live with his nephew and wife at the time of the death of his wife.

Claude C. Yarbrough lives in Little Rock. He testified that he went to the N. F. Yarbrough home in Pine Bluff the morning after Mrs. Yarbrough's death, and "he [N. F. Yarbrough] told me, as he had previously, that he wanted to sign over all of his savings in my name." They went to the Southern Federal Savings and Loan Association, and $7,000.00 was transferred to the witness; the balance was not transferred, because he did not have the "deposit slips." N. F. Yarbrough did not know where these were located, but a stepdaughter, who arrived the next day from Illinois, produced them, the balance amounting to about $42,000.00. The Yarbroughs returned to the savings and loan office, and these amounts were placed in joint accounts for the two brothers, with right of survivorship; during their lifetime, the money could not be drawn out without both signatures. Claude testified that his brother did not know how much money he had with the savings and loan, and he said that N. F. argued with the secretary of the association that he only had $21,000.00. The witness stated that N. F.'s mind was "bad then," and it kept deteriorating until he was completely blank the last month or two of his life. While Claude testified that, at the probate hearing, he agreed to turn over all of these accounts to the guardian, it appeared on cross-examination that he might have been a little reluctant to do so.

The strongest evidence offered by appellant was that of Hattie Bea Blaser, the secretary for the savings and loan association. She said that N. F. Yarbrough, accompanied by Claude, came to the office on September 20, and informed her that his wife had passed away the night before, and he would like to transfer his money to his brother's name. She told him that he would need his pass book and certificates of deposit, and he then asked how much money he had. After checking the accounts, Mrs. Blaser advised that there was $42,000.00 in four different accounts. Referring to the deceased, the witness stated:

> "* * * I've known him for several years. He was a peculiar person in a certain sense. One account he would carry in a different name. One would be Newton F. and one would be in N. Frank Yarbrough or N. F. Yarbrough. He always, you know, in opening a new account, would use his name in a different manner."

Mrs. Blaser said that he didn't seem to have any idea of how much he had on deposit, and that it was her personal opinion that he didn't understand the effect of transferring the accounts. She added that, for the last three or four years, N. F. Yarbrough had not been as alert as she had known him to be in years past; that for the last two years, there never was a time when he knew what he was doing. She later modified this statement, saying that, during that period, she did not believe him able to take care of a business matter.

Mrs. Luzader testified that Yarbrough came to Leola to live with the Luzader family three days after his wife's death; that he died on August 21, 1967, in a hospital, after suffering a stroke on July 7. She detailed the necessary duties in taking care of Mr. Yarbrough, who, after a few months, lost control over his bodily functions. Appellee said that sometimes the bathroom would have to be cleaned two or three times

a morning, and that this lack of control was evidenced in the family automobile; that it was difficult to get Yarbrough to a barber and back home without changing his clothes; that her 16-year-old son would bathe him, and they would dress him. She said that Yarbrough was happy in the home, but embarrassed.

Mrs. Luzader testified that she received the $150.00 per month allowed by the probate court for Mr. Yarbrough's maintenance, and that Yarbrough paid her an additional $150.00 per month from his railroad retirement check after the first of the year, 1967.

Glenn Paul Luzader, the son, testified that on one occasion, when they were sitting in the den, he heard his Uncle Frank tell his mother that Yarbrough wanted her to have the $12,000.00 after he passed away.

Iona Jones, daughter of the Luzaders, testified that she had many times, as a child, heard her uncle express the desire to live with her parents if he out-lived his wife; he did not want to go to a home for old folks. She said that she would visit on weekends following his move to Leola, and that he had told her that he was very thankful that he didn't have to go to a rest home, but could spend the rest of his life with her folks.

Evelyn Smith, the housekeeper, had been going to the Luzader home one day per week for years, but after Yarbrough moved in, Mrs. Smith worked two days per week. She said that she helped Mrs. Luzader rearrange the furniture, giving Mr. Yarbrough the bedroom closest to the bathroom, and that she had many conversations with him while she was ironing. Mrs. Smith stated that he would mention that he did not want to go to a rest home, and that he wanted Mrs. Luzader

to have a part of his savings.[4]

We agree with the Chancellor that the evidence was insufficient to establish the incompetency of Mr. Yarbrough. It is noticeable that no medical evidence was introduced that Yarbrough was incompetent, though, according to Mrs. Blaser, he appeared, in her opinion, to have been unable to attend to business matters for the last two years before his death. Medical testimony of incompetency, though certainly not essential, is important and potent evidence in this type of case, and, in *Harwell* v. *Garrett,* 239 Ark. 551, 393 S.W. 2d 256, we emphasized that not a single medical witness testified that Frank Garrett was incompetent.

The fact that Yarbrough did not seem to understand the result of a joint account, or did not know just how much money he had, is, in our view, of no great significance under the circumstances of this case. We daresay there are many people in their 80's, who have but little knowledge of business affairs, and who have difficulty in remembering details. Certainly, Claude Yarbrough must have considered that his brother was competent to make the changes in the accounts, or he would not have permitted this to be done. It would appear, according to the testimony of Mrs. Blaser, that N. F. Yarbrough had acted peculiarly for a number of years. She mentioned that each time he opened an account, he would use a different version of his own name, but peculiarities do not establish one's mental incomp-

[4]H. B. Atwood, trust officer for Simmons First National Bank, produced a letter which he had received from Mrs. Martha Frances Grothe Lyche, a stepdaughter of N. F. Yarbrough, in which she said that her mother and stepfather did not want to be placed in a nursing home; that Mr. Yarbrough had always desired to live with the Luzaders, and that the Luzaders were giving him a good home. The introduction of the letter was objected to as hearsay, and the Chancellor reserved his ruling. He never did pass upon the admissibility of the evidence, but apparently did not consider it, since it is not mentioned in a rather lengthy opinion rendered by the trial court.

etence. In *Harwell* v. *Garrett, supra,* in quoting from Volume I, Page on Wills, § 12.37, we said:

> "The fact that the testator was filthy, forgetful and eccentric, or that he was miserly and filthy, or that he was blasphemous, filthy, believed in witchcraft, and had dogs eat at the same table with him or that he was filthy, frequently refused to eat, and would lie in bed with his clothes on for two weeks at a time, or that he would leave his home only at night, and would count or recount his money, or that he was high tempered and violent, or was irritable and profane, or that testator thought that others were plotting against him and was afraid to go out in the dark, or that he was inattentive when spoken to and mumbled when trying to talk, does not establish lack of capacity."

It is readily apparent that Mr. Yarbrough's acts in no wise compared with the language just quoted, and we have many times said that being forgetful and eccentric does not establish lack of mental capacity.

Of course, it is necessary that appellant show the lack of Yarbrough's mental capacity to enter into the contract *at the time this instrument was executed.* Here, there is not one line of evidence relative to that point offered by the appellant; in fact, the only effort was an attempt to show that Yarbrough was mentally deficient thirty-eight days before he signed the agreement. In *Petree* v. *Petree,* 211 Ark. 654, 201 S.W. 2d 1009, Mrs. Anna Petree executed a contract on June 22, 1942. Lay evidence was offered that she was not able to transact business in June, 1942, and medical evidence was offered to the same effect, although the doctor so testifying did not examine Mrs. Petree thoroughly until September or October of that year. The physician stated that her condition had not come on suddenly; however, he was unwilling to testify that she was incompetent in June. We held Mrs. Petree competent. In the instant

litigation, we reiterate that there is not one iota of evidence to the effect that Mr. Yarbrough was mentally incompetent in October, 1966.

This court has said that mental weakness, though not to the extent of making one incapable of executing a deed, may cause a person to be more susceptible to fraud, duress, or undue influence, and that when that mental incapacity is coupled with any of those conditions, a contract may be voidable. *Cain* v. *Mitchell,* 179 Ark. 556, 17 S.W. 2d 282. Here again, there is no proof of fraud, duress or undue influence. One paragraph in appellant's brief is devoted to the argument of undue influence, and this is based upon a comment by Mrs. Blaser that it was her personal feeling that Yarbrough was easily influenced by anyone close to him. It hardly seems necessary to state that that testimony comes nowhere near establishing that Mrs. Luzader exercised undue influence upon the uncle.

It is argued that appellees were well paid for their services in taking care of Mr. Yarbrough by virtue of the fact that they received $300.00 per month. One hundred and fifty dollars ($150.00) of this was allowed by the Probate Court, and the other $150.00 was paid to Mrs. Luzader by Yarbrough from his retirement check. Appellant says that certainly Mr. Yarbrough did not contemplate, in agreeing that they should receive $12,000.00, that appellees would also receive $300.00 each month; that accordingly, the consideration for the agreement fails. We do not know what Mr. Yarbrough contemplated, but the evidence certainly indicates that he was quite devoted to the Luzaders.

It is established by the evidence, in fact, undisputed, that Mr. Yarbrough had a strong aversion to being placed in a nursing, or old folks, home; he expressed the desire many times to live with his nephew and wife. It is likewise established that the Luzaders took care of

Mr. Yarbrough, as they agreed to do; in other words, they carried out their part of the agreement.

Let it be remembered that this is not a case where a man is depriving his wife or children of needed monies—this is not a case where loved ones are cast aside for strangers. To the contrary, all heirs are collateral heirs, none of whom, from the record, had anything to do with helping Yarbrough accumulate his savings. Nor does it appear that the other relatives were anxious to take care of this aged man.[5] Also, the Luzaders are not receiving all of his money; in fact, including the amount allowed by the Probate Court, they will be receiving but little more than one-fourth of the estate.

We find no reversible error.

Affirmed.

BROWN, J., not participating.

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[5]Mrs. Connie Haner testified emphatically that Yarbrough wanted to go to the home of the Luzaders in September, 1966, twice stating, "Oh, yes. He wanted to go there." However, this testimony was a contradiction of earlier evidence given by this witness on direct examination. From the record:

"Q. Has he told others of the family, other members of the family, that he was willing or that he wanted to go live with them?

A. Yes. He had told different ones from time to time that he would like to live with them. He never did tell me. I was a widow or I guess I might have wound up with him."

JOHN A. DODDS v. JAMES E. DODDS, ET AL

5-4828 438 S.W. 2d 54

Opinion Delivered March 10, 1969

Charles E. Yingling, Jr. & *Comer Boyett, Jr.* for appellant.

Martin, Dodds, Kidd, Hendricks & *Ryan* for appellees.

GEORGE ROSE SMITH, Justice. This is a partition suit filed by the appellant, John A. Dodds, as one of four tenants in common. After an extended hearing the chancellor entered a decree which first adjusted the accounts among the four owners and then ordered a sale of the property, with the proceeds to be divided equally after the various debits and credits had first been taken care of. The appellant does not question the order of sale, but he does insist that the court should have allowed him more money than it did for his improvements and maintenance expenses.

The principal tract, a 143-acre farm in White county, was formerly the homestead of J. B. Dodds, Sr., and

his wife, Mattie Dodds. At Mr. Dodds' death in 1939 title passed to his widow as the surviving tenant by the entirety. Mrs. Dodds occupied the land with her son, John, the plaintiff, until her death in 1962. The property was then inherited by her four sons, John, James, W. P., and J. B., Jr. In 1964 J. B. Dodds, Jr., died testate, leaving all his property to his widow, the appellee Loukate Dodds, who is now the fourth tenant in common. A second tract of 105.96 acres was purchased in 1943 and is also owned by the three surviving Dodds brothers and their sister-in-law.

At the outset the appellees insist that the decree should be affirmed for the reason that the appellant has accepted certain benefits under it and is therefore not in a position to question it. The motion appears to be well founded, but the decree may also be affirmed on the merits. We prefer the latter course.

Upon the issues still in dispute the testimony at the trial was in such conflict that the predominant question was that of credibility. Many of the contradictions were between W. P. Dodds on the one hand and either John or James on the other. Where the sole issue is that of credibility as between interested parties, our practice is to abide by the chancellor's judgment in the matter. *Souter* v. *Witt,* 87 Ark. 593, 113 S.W. 800, 128 A.S.R. 40 (1908).

Moreover, the appellant, as the plaintiff in the trial court, had the burden of proof. In some respects his testimony is inherently lacking in persuasiveness. He described expenditures that were made within three or four years before the trial and that involved thousands and thousands of dollars. Yet, even with respect to such recent outlays of substantial sums he was unable in most instances to produce supporting proof, either in the form of corroborating testimony or in the form of checks, receipts, or other documentary evidence. Nor did he satisfactorily explain the source of the funds that

he claimed to have spent, other than saying that he had been "gypsy trading," which he described as the buying of farm equipment in Arkansas for the purpose of selling it in other states. Again, no records were submitted to substantiate his testimony.

In the light of what we have just said we do not find it necessary to discuss the appellant's specific claims in great detail. Four of the items are asserted capital expenditures. John asked to be awarded $10,000 for having built an annex to the house on the main farm. The chancellor disallowed this claim but permitted John to remove the annex. Instead, John sold the annex to the purchaser at the partition sale. He is not in a position to ask to be reimbursed a second time for the annex.

Upon John's claim for $8,000 for having had ditches dug on the place the chancellor allowed only $3,000. The testimony was in sharp conflict, with W. P. Dodds stating that the county dug the ditches without charge. The chancellor's conclusion was in the nature of a compromise, which we do not consider to be against the weight of the evidence.

A third claim was for the construction of a $5,000 barn, but according to W. P. that building was erected with the proceeds of a fire insurance policy upon another structure that had burned down. The fourth capital claim, that of $1,200 for repairs upon a tenant house, was reduced by the chancellor to $500 in harmony with W. P.'s testimony that the house was not worth even that much. The test is the enhancement in value to the land, not the amount of the outlay. *McDonald* v. *Rankin,* 92 Ark. 173, 122 S.W. 88 (1909).

In addition to his capital claims the appellant seeks to recover certain maintenance expenses. The largest is a demand for $3,600 as compensation for having managed the farm property for the three years immediately

preceding the filing of the suit. John testified that after the death of Dodds, Sr., in 1939 it was agreed that John would receive $100 a month for managing the property. There is, however, no proof that John ever actually received any such payments at all during the period in excess of 25 years that intervened between the asserted agreement and the institution of the suit. Even if such an agreement was made it was quite evidently abandoned long ago. There is also a small claim for repayment of fire insurance premiums, but the proof shows that part of the coverage was upon the annex which was awarded to John himself and that the policies were payable only to John and James, who pretty well made common cause against their co-tenants at the trial. We cannot say that the chancellor's allowance of $370 was an inadequate reimbursement for the premiums.

On the record as a whole we are not convinced that the chancellor's total allowances of $6,336 to John Dodds are so clearly against the preponderance of the proof as to call for revision in this court. To the contrary, we are persuaded that substantial justice was accomplished by the decree.

Affirmed.

J. CECIL TATE ET UX v. CITY OF MALVERN

5-4762 438 S.W. 2d 52

Opinion Delivered March 10, 1969

Fenton Stanley and *Dorsey D. Glover* for appellants.

William C. Gilliam and *Wiley Smith* for appellee.

LYLE BROWN, Justice. This is a zoning case. The appellants are J. Cecil Tate and wife and appellee is the City of Malvern. Appellants were unsuccessful in having the subject property rezoned from residential to business classification. The chancery court held that the planning commission's refusal to reclassify the property was not unreasonable, capricious, or arbitrary. The landowners here contend that the trial court's ruling was against the preponderance of the evidence.

Cecil Tate has for a number of years held the Ford franchise for Malvern. It is his desire to move from the congested area of the business district and construct a modern retail outlet on the outskirts of the city. For that purpose he purchased an eight-acre tract on U. S. Highway 270 between Malvern and Interstate 30. The Tate acreage is surrounded by, and included in, a substantial tract of land which was zoned in 1960 as residential. In 1958 Malvern obtained the services of the city planning division of the University of Arkansas and after a two-year study a zoning plan for the entire city was adopted. A few years later the then owner of the eight acres sought unsuccessfully to have it reclassified commercial. Mr. Tate thereafter, in 1964, bought the property.

Appellants presented a very persuasive case for reclassification. It was shown that the votes by the planning commission and the city council, whereby rezoning was denied, were close. There are three water mains crossing the eight acres at the back and those easements would there constitute a problem in the construction of homes. A qualified real estate broker and appraiser testified that the highway frontage was most desirable for commercial use and that the rear of the Tate property was low. It was shown that a bowling alley and a dairy bar are located within the residential zoning, they having been constructed prior to the classification. They are permitted to operate as nonconforming uses. A former owner of the Tate tract was of the opinion that the back part was too low to be sewered. Highway 270 will be a major entrance to Malvern off of Interstate 30. Mr. Tate produced a very attractive plan for his proposed construction. Those plans, involving an expenditure of over $125,000, have been approved by Ford Motor Company.

Looking at the other side of the coin, we find considerable evidence favoring the action of the city in denying rezoning. We think the most significant fea-

ture in that respect is the physical development of properties adjacent to the Tate tract. It is bordered on the north by the city park and a reservoir into which water is pumped from the Ouachita River. On the south side there are two residential subdivisions. Brownwood Subdivision contains thirty-three residential lots and at the time of trial contained twenty-nine residences. Immediately south of Brownwood is River Heights Subdivision, containing twenty lots, most all of which have been developed. On the west across Highway 270 and in front of the Tate tract is Edgewood Subdivision. It contains some forty-seven lots which are substantially developed. Finally, on the east side the Tate tract is bordered by a street, a railroad, and three residences. Some fourteen pictures of homes were introduced. They are modern, built mainly of brick, and several have double carports. The shrubs and lawns reflect pride of ownership. A plat of all the described lots in the area bordering the subject property reveals eighty-one separate owners. The few lots still available in Edgewood are described by a real estate agent as being priced at $3500.

Among the eight witnesses who testified in opposition to rezoning were four men who served on the planning commission. Three of them are homeowners in the area in question. Two witnesses were city councilmen and another was mayor at the time the Tate petition was denied. The mayor also resides in the affected area. The points sought to be established by the different witnesses may be summarized as follows: The zoning plan was two years in the making and under the supervision of professional planners from the University of Arkansas; during that period the planning commission met once a month; the entire area was inspected and traffic counts, door-to-door inquiries, and land use maps were utilized; since the adoption of the plan there has been no commercial development in the area; the Tate property is as suitable for residential as it is for any other use; rezoning of the Tate property will be

spot zoning and will devalue the residences; the city council leaned heavily on the judgment of the planning commission; homes were built on the assumption that they would be protected from commercial development; and once the Tate property is rezoned there is no assurance that the ordinary nuisances accompanying the operation of the average garage will not develop.

A total of twenty witnesses testified, many of them extensively. We have fairly summarized the meat of the record. We have not detailed all the factors about which the witnesses testified, but that does not mean that we have overlooked them. We would point out additionally that the chancellor had an unusual problem in judging the weight and credibility of the testimony of a number of witnesses. That was because some of them had at one time favored rezoning of the disputed tract and later changed their thinking. Then there was the problem of the possibility of a conflict of interest as to members of the planning commission who resided in the described residential areas. Of course the chancellor was at a vantage point in ferreting out the answers to those problems.

We recently had occasion to recount some fundamental rules of law applicable generally to zoning cases. *Marling* v. *City of Little Rock,* 245 Ark. 876, 435 S.W. 2d 94 (1968). The burden is on the landowner to preponderantly show, at the trial level, that the action of the city was arbitrary; on appeal we determine whether the trial court's finding was contrary to a preponderance of the evidence; home owners who have relied on residential zoning are entitled to consideration and the use of a particular tract may be reasonably restrained so as not to cause them injury; and rezoning cannot be justified solely on the ground that it is necessary to put a particular tract to its most remunerative use.

Another rule of law comes into play because the Tate tract is surrounded by property zoned residential.

That means that he is asking for spot zoning. Therefore an additional burden of proof is placed on the applicant. The decided weight of authority is found in Yokley, Zoning Law and Practice, § 8-4, third edition (1965). It is there stated that the council can so amend a zoning ordinance when the character of a zoned area has become so changed that a modification is necessary to promote public health, morals, safety, and welfare; but mere economic gain to the owner of a comparatively small area is not sufficient cause to amend.

Applying the recited law to the record before us, we are unable to say that the chancellor's finding that the action of the city was not arbitrary is against the preponderance of the evidence. It is possible that the full development of Highway 270, as presently located, as the connecting link between Malvern and Interstate 30, may eventually change the character of the described subdivisions; nevertheless, we cannot base a finding on that unpredictable event.

Affirmed.

OLD AMERICAN LIFE INS, CO. ET AL v. DAVID LEWIS

5-4831 438 S.W. 2d 22

Opinion Delivered March 10, 1969

Alfred J. Holland for appellants.

Guy Brinkley for appellee.

LYLE BROWN, Justice. Appellee David Lewis was awarded judgment against appellants, Old American Life Insurance Co. and National Security Life Insurance Co. Defendants below petitioned the court to set aside the judgment, alleging unavoidable casualty as justification for their failure to appear on the day set for trial. In dismissing that petition the trial court specifically found that they had not complied with Act 123 of 1963; Ark. Stat. Ann. § 27-2106.3 to 27-2106.6 (Supp. 1967). That act provides for the extension of the time for giving notice of appeal in cases where certain specified motions are filed. The sole question on appeal is whether the trial court applied the applicable law in denying the petition to vacate the judgment.

We discussed Act 123 in *St. Louis S.W. Ry.* v. *Farrell,* 241 Ark. 707, 409 S.W. 2d 341 (1966). "Act 123 was evidently intended to remedy an awkward situation created by Act 555 of 1953." Act 555 required a notice of appeal to be filed within thirty days after entry of judgment by the trial court. That requirement had to be abandoned for the benefit of a losing party who might have good reason to file a post-judgment pleading, such as a motion for a new trial, or one of the several motions enumerated in Act 123. Consequently, Act 123 established a procedure whereby the time for filing notice of appeal could be postponed pending the determination of such a post-judgment pleading.

Act 123 does not affect the long established procedures for the setting aside of judgments. It is clear from an examination of the act that the principal subject of all four sections is "notice of appeal"; in fact

that phrase appears in every section and a total of seven times in the comparatively short act. Any doubt about the act not affecting existing procedures for review by the trial court of its proceedings is dispelled by the last sentence: "Nothing herein contained shall be deemed to limit the right of any party to review of proceedings upon any motion which the law may permit to be filed after expiration of the time for giving notice of appeal."

Appellants are entitled to have a hearing and determination of their petition under the appropriate statutory procedure.

Reversed and remanded.

HARTFORD ACCIDENT & INDEMNITY COMPANY v. FRED H. WARREN

5-4826 438 S.W. 2d 31

Opinion Delivered March 10, 1969

Daggett & Daggett for appellant.

Jake Breick for appellee.

JOHN A. FOGLEMAN, Justice. Hartford Accident & Indemnity Company appeals from a judgment in favor of Fred H. Warren under the uninsured motorists clause of a policy issued to him by Hartford. The principal point urged by appellant for reversal is its contention that a judgment against the uninsured motorist was a condition precedent to this action.

The policy in question contained clauses identical with those in the policy involved in *MFA Mutual Ins. Co.* v. *Bradshaw,* 245 Ark. 95, 431 S.W. 2d 252. In that case we held that when consent of the company to an action against the uninsured motorist was required to make a judgment therein conclusive on the company, the insured had the option to sue either his insurance company or the uninsured motorist or both. We deem this decision to be controlling here. This does not in any way prevent the insurance company from cross complaining against the uninsured motorist in an action brought against it, nor does it prevent a separate action by the insurance company against the uninsured motorist after a judgment in favor of its insured has been paid by it.

Appellant urges that the policy in this case does not contain the "consent" clause which influenced our decision in the *Bradshaw* case. In this respect, appellant is in error as the policy exhibited does contain this clause. The fact that reliance was placed on the lack of consent in the *Bradshaw* case but not in this case makes no difference in the application of the principle involved.

Appellant also contends that the judgment for $12,000 is excessive and reflects the passion and prejudice of the jury.

There was evidence showing that appellee was earning $90 per week at the time of his injury. Warren's testimony was in substance:

> During the rush season he was also paid for overtime. Although he had an arthritic condition, it had never caused him to miss any work prior to the collision in which he was injured. After the automobile he was driving was struck from the rear by the uninsured motorist, Warren went to the emergency room of the hospital in West Memphis with soreness in the stomach area. The next morning he returned for a more thorough examination by Dr. Peeples. At that time his neck was beginning to get sore and his back stiff. He was hurt from the back of his neck down through his legs. He missed one or two days of work at this time. Because of his condition, his foreman got others to do some of the work he was normally expected to do. The foreman actually did some of it himself. Warren was given light work and was assigned the duty of instructing newly employed persons. About two months after the collision Dr. Peeples prescribed traction and placed Warren in the hospital for ten days. During this stay in the hospital, Warren only remained in traction about three hours. He was removed from traction by the doctor because of the severe pain it was causing. He has obtained no relief from his condition and cannot lie flat on his back even long enough for the taking of x-rays without severe pain because of these injuries. He cannot lift his right arm above his head because "it couldn't be any worse if one of these doctors was tearing it off." He complained of a catch in this arm at any time he at-

tempted to reach behind him. He also said that his left arm was involved.

Although Warren is now totally disabled because of tuberculosis, he claims to have lost approximately three weeks from work during the five months following the collision because of his injuries.

Dr. A. H. Crenshaw, an orthopedic surgeon of Memphis, Tennessee, first saw Warren on a reference by Warren's West Memphis physician. This was about seven weeks after his injury. Dr. Crenshaw's diagnosis was sprain of the neck and low back superimposed upon preexisting osteoarthritis. He prescribed mild analgesics, application of wet hot packs, continuation of regular work, and staying in touch with Dr. Peeples. He next saw Warren about one year later when he found that the patient had reached maximum improvement. He expressed the opinion that appellant had a permanent partial disability to the body as a whole of about 20 percent, with one-half resulting from the preexisting condition and the other half from the collision. An examination about ten months later revealed no changes. Dr. Crenshaw expressed the opinion that Warren would not have suffered any disability from the collision in the absence of the preexisting arthritic condition and that this condition was aggravated by the collision sufficiently to cause the onset of his discomfort. While Dr. Crenshaw admitted that his evaluation of the disability resulting from the collision was based almost entirely on the subjective symptoms, he also said that it was based in part on his experience in treatment of numerous cases of this type. He expressed the opinion that appellant was not a malingerer.

In addition there was testimony that Warren discontinued his hunting and fishing and other outdoor activities after his injury. His wife testified that he had often come in from work and gone to bed without eating because of the pain he was suffering. She said that he

avoided driving the automobile because of his inability to turn his head. After the collision he became very irritable with members of his family.

It was stipulated that appellee had an average future lifetime expectancy of 19 years.

We have no means for accurate measurement of pain and suffering. Nor do we have any means of determining the exact impact of a 10 percent disability upon the future earnings or earning capacity of one whose livelihood is earned through physical activities. In view of the evidences of pain exhibited by Warren, his hospitalization and his disability, we are unable to say that the judgment for $12,000 evidences passion or prejudice on the part of the jury or that it shocks the conscience of the court. Consequently, we cannot reverse the judgment on this basis.

The judgment is affirmed.

JAMES Q. BRYAN v. FORD, BACON & DAVIS, ET AL

5-4807 438 S.W. 2d 472

Opinion Delivered March 10, 1969

[Rehearing denied April 14, 1969.]

Bernard Whetstone for appellant.

Shackleford & Shackleford for appellees.

J. Fred Jones, Justice. This is a workmen's compensation case and involves the running of the statute of limitations for filing a claim with the Workmen's Compensation Commission while the claimant pursued his employer's public liability insurance carrier in a vain attempt to collect a personal injury judgment he had obtained by default against a fellow-employee third party tort feasor.

The facts, as revealed by the record, are as follows: The appellant, James Q. Bryan, was employed by Ford, Bacon & Davis Construction Corporation. Aetna Casualty and Surety Company was the compensation insurance carrier for Ford, Bacon & Davis, as well as the public liability carrier on a bus owned and used by Ford, Bacon & Davis, for the purpose of transporting employees to and from job sites.

On November 24, 1964, Bryan sustained injuries while in the course of his employment and while a passenger on his employer's bus, being driven at the time by a fellow-employee, Reid. Aetna immediately recognized and accepted the injuries as compensable under the compensation coverage and paid to Bryan $585.00 for 16 weeks and five days temporary total disability. Aetna also paid the medical bills in the amount of $501.96 and tendered to Bryan $1,190.00 in payment of 34 weeks permanent partial disability on a medical estimate of 7.5% loss of use of the body as a whole.

On May 28, 1966, Bryan refunded to Aetna the amount of $1,086.96 by cashier's check with a letter stating "I am making no claim for workmen's compensation benefits," and Bryan refused to accept the $1,190.00 tendered in payment of permanent partial disability. On January 24, 1966, Bryan filed suit for personal injuries in the Union County Circuit Court against his fellow-employee, Herman Reid, alleging that Reid's negligence in driving the bus owned by the appellee, Ford, Bacon & Davis, was the proximate cause of Bryan's injuries.

Reid filed no answer and on March 5, 1966, a default judgment in the amount of $75,000.00 in favor of Bryan and $10,000.00 in favor of Bryan's wife was rendered against Reid. The judgment against Reid was not paid so on June 3, 1966, Bryan filed suit against Aetna alleging that at the time of his injury Reid was driving the bus with the knowledge and consent of the owner and named insured, Ford, Bacon & Davis, and that Reid was an insured under the omnibus clause of the liability policy.

Both the U. S. District Court and the Eighth Circuit Court of Appeals held that Reid was not an insured under the liability policy because of a provision in the policy which provided that the insurance did not apply to any employee of the named insured with respect to injury to another employee of the same employer in-

jured in the course of such employment in an accident arising out of the maintenance or use of the vehicle in the business of such employer.

On September 12, 1967, Bryan filed claim with the Workmen's Compensation Commission for total and permanent disability and Ford, Bacon & Davis and Aetna pleaded the statute of limitations.

Arkansas Statutes Annotated § 81-1318 (a) (1) and subsection (b) (Repl. 1960) provides as follows:

> "A claim for compensation for disability on account of an injury . . . shall be barred unless filed with the Commission within two [2] years from the date of the accident . . .
>
> 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, which ever is greater."

The referee and the full Commission allowed the claim and awarded to Bryan the temporary total compensation and medical payments previously paid and refunded by him. The referee and the Commission also awarded to Bryan a 25% permanent partial disability to the body as a whole, and awarded to Bryan's attorney the maximum attorney's fee on the amount controverted in excess of the 7½% originally tendered.

On appeal and cross-appeal to the Union County Circuit Court, the trial judge held that the claim was barred by the running of the statute of limitations, but that Bryan was still entitled to the uncontroverted amounts originally paid to and refunded by him. Bryan has appealed and Ford and Aetna have cross-appealed from the judgment of the trial court.

On direct appeal, the appellant relies on the following points:

> "The Circuit Court erred when it found as a matter of law that the Statutes of Limitations barred the Appellant's Workmen's Compensation Claim.
>
> The Workmen's Compensation Commission erred as a matter of law when it found that the claimant was not entitled to 65% of the difference between the weekly wages earned by him prior to November 24, 1964, and the weekly wages that he earned subsequent to November 24, 1964; and, the Workmen's Compensation Commission erred as did the Circuit Court when it found as a matter of fact that the claimant was not permanently and totally disabled within the meaning of the Arkansas Workmen's Compensation Act."

Since we agree with the trial court on the first point raised by the appellant, we do not reach appellant's second point.

On cross-appeal, the appellees designate the following points to be argued:

> "The circuit court was correct in its finding that the statute of limitations barred appellant's workmen's compensation claim.
>
> If it be found that the statute of limitations does not bar appellant's claim, the appellant is not entitled to permanent total disability benefits.
>
> The circuit court erred in finding that the appellees should pay to the appellant any sum of money."

Since we agree with appellees' first point we do not reach the appellees' second point, but appellees' third point has given us considerable difficulty.

Judge Mayfield has favored us with a very thorough, written opinion in which he clearly analyzes the award of the Commission and the trial court made findings of fact and conclusions of law, in part as follows:

> "... [T]he carrier resisted the claim on the basis that it was barred by the provisions of Section 18, (Ark. Stats. 81-1318) of the Workmen's Compensation Act.
>
> Both the Referee and the full Commission rejected the carrier's contention and awarded claimant a permanent partial disability to the body as a whole of 25 per cent based on loss of earning capacity. The reasoning behind the holding that the claim was not barred comes from a construction placed upon Subsection (e) of Section 18 (Ark. Stats. 81-1318). This subsection provides:
>
>> 'Whenever recovery in an action at law to recover damages for injury to or death of an employee is denied to any person on the ground that the employee and his employer were subject to the provisions of this act, the limitations prescribed in subsections (a) and (b) shall begin to run from the date of the termination of such action. In such event the employer or carrier shall be allowed a credit for actual cost of defending the action at law, not to exceed two hundred fifty dollars ($250), which shall be deducted from any compensation paid.'
>
> Looking at 18 (e) we see that it requires: (1) an action at law to recover damages, (2) a denial of recovery and (3) that the denial be on the ground that the employee and his employer were subject to the Arkansas Workmen's Compensation Act. When these three requirements are met *then* the limitations in subsections (a) and (b) shall

begin to run from the date of the termination of the action at law.

Laying the facts of this case down beside these requirements we find that there was an action at law to recover damages, but that there was no denial of recovery. To the contrary the claimant recovered a judgment in the sum of $75,000.00. It is true that the claimant was not successful in his attempt to collect his judgment from the liability insurer, but Section 18 (e) does not even talk about collection of the judgment and certainly it does not provide that the time of limitation in which to make claim for compensation benefits begins to run from the date an action seeking to collect a judgment from an insurance company is unsuccessfully terminated.

In fact, Section 18 (e) is not even dealing with a situation against a third party such as we have here. The last sentence of Section 18 (e) provides for the employer or his carrier to be allowed a credit for the actual cost, not to exceed $250.00 of [sic] defending the action at law. Obviously the legislature was not thinking about a suit against a third party, but was thinking about situations where the employer would successfully defend that action on the ground that the employer and his employees were subject to the Workmen's Compensation Act.

In addition to the above, the facts here are that the action at law to collect the judgment from the liability insurer was unsuccessful not because the claimant and his employer were subject to the Workmen's Compensation Act, but because of a provision in the liability policy that provided that it did not cover the liability of an employee with respect to an injury to a co-employee in the course of employment and in an accident arising out of the maintenance or use of the insured vehicle in the business of such employer.

* * *

The referee cited the case of *Aetna Casualty & Surety Co.* v. *Jordan,* 234 Ark. 339, 352 S.W. (2) 75, in his opinion, but that case does not seem to support his construction of Section 18 (e) as applied to the facts in this case. There the claimant attempted to recover Workmen's compensation benefits in Louisiana for injuries sustained in Arkansas. The Louisiana Court held that the Arkansas Workmen's Compensation Commission had exclusive jurisdiction of the matter and dismissed his Louisiana action. The claimant then filed claim in Arkansas and it was held that the time limitations in Section 18 did not start to run until the termination of his action in Louisiana.

. . . "[T]he claim made in Louisiana was against the employer and not some third party and no recovery was allowed because the claimant and his employer were subject to the Arkansas Workmen's Compensation Act . . . "

We find no difficulty at all in affirming the trial court in holding that the statutory period had run for the filing of claims when the claim was filed in this case. Appellees' third point and the trial court's treatment of it have given us some difficulty, but we conclude that the trial court reached the proper results. The trial court's reasoning on this point is set out in his opinion as follows:

"Having concluded that the construction placed on Section 18 (e) was incorrect still, in the Court's opinion, the claimant is entitled to be paid the $1190.00 which was tendered to him for permanent partial disability resulting from the 7½ per cent loss of use of the body as a whole. And the Court also thinks that the claimant is entitled to a refund of the $1086.96 which he returned to the carrier for the hospital and medical benefits

paid for his behalf and for the sixteen weeks and five days temporary total disability paid to him.

It was found by both the Referee and the full Commission that the above amounts are not controverted by the carrier and that the only things controverted is the claim for permanent disability above the 7½ per cent. It is not clear whether this is based on what was thought to be the carrier's contentions at the hearings or whether it is based on the carrier's voluntary action in paying and tendering these amounts.

It is clear that the carrier contended that the claimant had waived his right to recover anything above the permanent partial disability of 7½ per cent to the body as a whole. On the waiver matter the Commission relied on Section 20 (a) (Ark. Stats. 81-1320 (a)) and Section 40 (a) (2) (Ark. Stats. 81-1340 (a) (2)) of the Act and held that a claimant cannot, as a matter of law, waive his rights to compensation benefits. * * *

But if there is any question about waiver of the claimant's right to be paid the $1190.00 for the 7½ per cent permanent partial disability or to have refunded to him the $1086.96 which he returned for hospital, medical and temporary total disability benefits paid, the question of waiver as to those benefits must be determined. This is true because these benefits could not be barred by Section 18 of the Act. These benefits were paid or tendered by the carrier without any claim being filed with the Commission and the question is, to whom does this money now belong?

The answer must be that this money still belongs to the claimant. It is beyond question that the only reason the claimant returned and refused the amounts paid and tendered was because he wanted to collect his judgment against his co-em-

ployee from the liability insurer. It would not do, he thought, to claim that he was not injured in the course of his employment while retaining workmen's compensation benefits paid to him and for him. It would have been equally incongruous for the carrier, which just happened to also be the liability insurer, to accept the return of the compensation benefits and still say that the claimant was in the course of his employment at the time he was injured.

So the claimant tried to return the benefits paid and tried to refuse the benefits tendered but the carrier did not really accept the return and in the Final Report and Settlement Receipt which is in the Record the carrier states that the check refused by the claimant 'will be paid on demand.'

The truth of the matter is that these benefits were, in effect, laid aside by both employee and employer while they awaited the outcome of the suit against the liability insurer. That suit has now been concluded and the money which was 'laid aside' belongs to the claimant and should be turned over to him.

So rather than rest our determination on the Commission's finding that, as a matter of law, these benefits could not be waived we prefer to affirm the Commission on this point for the reason that there is no evidence in the Record to support a finding of waiver of these benefits already paid or tendered."

The trial court then held:

" . . . [T]he order or award of the Commission is modified to provide that the carrier is ordered to pay to the claimant the sums of $1086.96 and $1190.00, or a total of $2,276.96, with no credit allowed the carrier against this total and with no

attorney's fee to be paid to claimant or his attorney by the carrier.

Any order or award of the Commission contrary to that above provided is reversed and set aside and so far as the same conforms to what is above provided it is affirmed."

This is the first instance we have encountered under our Workmen's Compensation Law where a claimant has attempted to avoid receipt of compensation benefits. Of course, an employee is unable to take his employment from under the provisions of the Workmen's Compensation Act by entering into an agreement waiving his rights to compensation under the Act, but there is no provision in the Workmen's Compensation Law that will force an injured employee to accept or keep compensation benefits to which he is entitled after they are paid or tendered to him.

Arkansas Statutes Annotated § 81-1320 (a) (Repl. 1960) provides as follows:

"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."

We are of the opinion that this section has no application to the facts in the case at bar. This section was intended to protect employees against the archaic procedure so prevalent in the early history of Workmen's Compensation Law, when unscrupulous employers were able to avoid compensation liability by the simple device and procedure of having the employee sign a contract waiving all rights to compensation in consideration of being employed. See *Griffiths* v. *Earl of Dudley*, 9 Q.B.D. 357 (1882).

The real question on this point in the case at bar, is what part, if any, of the original amounts paid and tendered to the appellant, but refunded and refused by him, is covered under, and dependent upon, the untimely claim filed by the appellant. The claim as filed by the appellant did include these amounts, so the question boils down to whether it was necessary that a claim be timely filed with the Commission in order to recover these amounts. Certainly no equitable principle would cast such penalty on the appellant for his error in the law, but statutes of limitations present questions of law and not of equity.

Arkansas Statutes Annotated § 81-1319 (Hepl. 1960) provides as follows:

> "Compensation shall be paid directly to the person entitled thereto without an award, except in those cases where liability has been controverted by the employer. * * * "

Subsequent sections of the statute direct when the payments are to be made by the employer and provide penalties for noncompliance. The appellees did not controvert appellant's right to compensation in this case. On the contrary, they recognized appellant's injuries as compensable and accepted their responsibility in connection therewith. They made weekly payments of compensation to the appellant as the payments became due. The appellant was paid and accepted all he was entitled to and all that the appellees owed for temporary partial disability suffered by the appellant. The appellees also furnished and paid for all the hospital and medical services to which the appellant was entitled and for which the appellees were obligated and liable. The appellant simply returned this amount to the appellee insurance carrier who makes no claim to its ownership, but who only contends that repayment is barred by the statute of limitations for filing claims.

The statute of limitations as set out in the act, Ark. Stat. Ann. § 81-1318 (a) (1) and (b), supra, was designed

and intended to bar late claims for compensation for disability on account of injury and was not designed or intended to bar an employee's right to recover money paid to him in compensation and paid by him to someone who has no legal right to accept or retainit. So we conclude that the trial court was correct in holding that the appellant is entitled to a return of the temporary total compensation and medical payments he paid to the appellee.

Arkansas Statutes Annotated § 81-1319 (h) (Repl. 1960) provides as follows:

> "Within thirty (30) days after the final payment of compensation has been made, the employer shall send to the Commission a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails so to notify the Commission within such time, the Commission may assess against such employer a civil penalty in an amount not exceeding one hundred ($100.00) dollars, but no penalty shall be assessed without notice to the employer, giving him an opportunity to be heard."

Upon payment of compensation for the 7½% permanent partial disability, the appellees furnished this notice of final payment on form A-11 prescribed by the Commission. On the bottom portion of this form is a portion designated "final receipt" intended for the appellant's signature acknowledging the receipt of payment. This receipt form was unsigned by the appellant but was filed with the Commission bearing the notation "check for PPD not accepted. Will be paid on demand." So we conclude that the trial court was correct in holding that the appellant is entitled to this amount also.

We conclude that the Commission was substantially correct in its statement that "when a claimant erroneously brings an action in law against his employer, the statute for the filing of claims is tolled until the termination of the action of law." Indeed it would appear that the action at law would of necessity be against an employer before recovery could be denied "on the ground that the employee and his employer were subject to the provision of this act" as provided in § 18 (e), supra.

We conclude, however, that the Commission must have considered the action to recover damages in the case at bar was either brought against the employer, or that recovery was denied on the ground that the employee and his employer were subject to the provisions of the Workmen's Compensation Act. In this, we conclude, the Commission erred.

The practical question is not whether the appellant is entitled to the workmen's compensation benefits originally paid by the appellees, the appellees having admitted that the appellant was so entitled when the benefits were paid without controversion, without award and without the necessity of filing a claim. The practical question is whether the appellees are entitled to keep the benefits returned to them by the appellant. The appellant is not required to file a claim with the Commission for compensation benefits already paid to and received by him, and the jurisdiction of the Commission to order a return or repayment of compensation benefits, once paid to a claimant and then voluntarily returned by him to the compensation insurance carrier, is not questioned in this case.

The judgment is affirmed.

WALTER HINTON, ET AL v. STATE OF ARKANSAS EX REL. JOE PURCELL, ATTORNEY GENERAL

4836 438 S.W. 2d 57

Opinion Delivered March 10, 1969

J. W. Barron for appellants.

Joe Purcell, Attorney General and *Larry W. Chandler,* Assistant Attorney General, for appellee.

Gannaway & Darrow amicus curiae brief.

CONLEY BYRD, Justice. At issue here is the validity of certain regulations of the Alcoholic Beverage Control Board and "Class Six Club Permits" promulgated pursuant thereto, authorizing "Class Six" permittees to sell for consumption on the permitted premises spirituous liquors as defined by the Thorne Liquor Act, Act 108 of 1935. The trial court held that the regulations and permits issued thereunder con-

travened the provisions of the Thorne Liquor Act and enjoined issuance of permits. Appellants Walter Hinton, John Cage and Claude Williams, Jr. as members of the Alcoholic Beverage Control Board appeal.

The regulation here involved provides in part as follows:

> "The following regulations apply for Class 6 Club Permits pursuant to the provisions of Ark. Stats. 48-302 (1964 Repl.), this being Section 2 of article 3 of Act 108 of 1935 as amended . . .
>
> "(2) No member of such Club or any officer, agent or employee shall be paid or directly or indirectly receive in the form of salary or other compensation any part of the revenue derived from the disposition or serving of alcoholic beverages beyond the amount of such salary or other compensation as may be fixed and voted at meetings by the members or by the directors or other governing body . . . .
>
> "(5) The Holder of a Class 6 Club Permit will be authorized to serve on its permitted premises vinous, spirituous or malt liquors . . . to the Club's adult members, and the members of their families over the age of 21 and duly qualified adult guests . . . and to assess an appropriate charge therefor . . . .
>
> "(7) Each licensee shall keep complete and accurate records of alcoholic beverages purchased . . . .
>
> "(9) All wholesalers of alcoholic beverages are prohibited from selling to holders of Class 6 Club Permits."

The Arkansas Alcoholic Control Act, or Thorne Act, Act 108 of 1935, was enacted following the adoption of

the twenty-first amendment to the United States Constitution. This comprehensive act, providing for regulation of the manufacture, distribution and dispensing of spirituous, vinous and malt liquors through the issuance of permits, with minor amendments, is codified under Title 48 of Arkansas Statutes. It provides as follows:

"ARTICLE I

"Section 1. The word 'person' as used in this Act shall include any and all corporations, partnerships, associations or individuals.

"Section 2. The word 'manufacturer' shall mean, unless otherwise specified, any person engaged in the business of distilling, brewing, making, blending, rectifying or producing for sale in wholesale quantities alcoholic liquors of any kind, including whiskey, brandy, cordials, liquors, also beers, or other liquids containing alcohol except wines.

"Section 3. A 'dispensary' shall mean any store which, under the provisions of this Act, and having paid all taxes required by the State, sells at retail in unbroken packages for non-consumption on the premises any intoxicating alcoholic liquor as defined by this Act.

"Section 4. The words 'Commissioner' or 'Commissioner of Revenues' refer to Arkansas State Commissioner of Revenues . . . .

"ARTICLE II

"Section 1. The provisions of this Act shall be enforced by the Commissioner of Revenues of the State of Arkansas . . . .

"Section 3. The Commissioner of Revenues shall have the following powers, functions and duties:

"(a) To grant and revoke for cause permits issued under the provisions of this Act.

"(b) To fix by rule the standards of manufacture, rectifying and blending in order to insure the use of proper ingredients and methods in the manufacture, rectifying and blending of vinous, spirituous or malt liquors, to be sold in the State.

"(c) To adopt rules and regulations for the supervision and control of the manufacture and sale of vinous, (except wines) spirituous or malt liquors throughout the State *not inconsistent with law.* [Emphasis ours.]

"(d) To carry on by its agents or employees inspections of any premises where beer, or spirituous liquors are manufactured for sale or sold."

"ARTICLE III

"Section 1. (a) It is hereby declared to be the public policy of the State that the number of permits in this State to dispense vinous, (except wines) spirituous or malt liquor shall be restricted, and the Commissioner of Revenues is hereby empowered to determine whether public convenience and advantage will be promoted by issuing such permits . . . .

"Section 2. No vinous, (except wines) spirituous or malt liquors shall be manufactured in this State for storage or sale at retail within the State after this Act becomes effective without a permit therefor issued by the Commissioner of Revenues as herein provided. No person shall sell vinous, spirituous or malt liquors in this State, except as provided in this Act, provided the provisions of this Act shall not apply to the manufacturer, sale, and distribution of wines in this State.

"There shall be six kinds of permits, each of which shall be distinctive in color and design so as to be readily distinguishable from each other, to-wit: (1) Distiller's permit; (2) brewer's permit; (3) rectifier's permit; (4) wholesaler's permit; (5) dispenser's permit, and (6) hotel, restaurant or club permit.

"Section 3. (a) Any person may apply to the Commissioner of Revenues for a permit to manufacture, distill, transport, store and sell to a wholesaler, jobber or distributor spirituous, vinous (except wines) or malt liquors to be used and sold for beverage purposes . . . .

"(c) A distiller or manufacturer may, under such rules as may be adopted by the Commissioner of Revenues, sell, deliver or transport only to (1) wholesalers, (2) rectifiers, (3) export out of the State.

"Section 4. (a) Any person may apply to the Commissioner of Revenues for a permit for rectifying, purifying, mixing, blending or flavoring of spirituous liquors or the bottling, warehousing or other handling or distribution of rectified distilled spirits . . . .

"(b) Any rectifier may, under such rules as may be adopted by the Commissioner of Revenues, sell, deliver, or transport only to (1) wholesalers, (2) other rectifiers, (3) export out of the state.

"Section 5. Any person other than a distiller, manufacturer or rectifier, may apply to the Commissioner of Revenues, for a permit to sell spirituous, vinous (except wines) or malt liquors at wholesale . . . .

"No wholesaler shall sell or contract to sell any spirituous, vinous, or malt liquors to any dis-

pensary, hotel, restaurant or club, who is not duly authorized under this Act to receive, possess, transport, distribute or sell same.

"Section 6. Any person, other than a distiller, rectifier or wholesaler, may apply to the Commissioner of Revenues for a permit to sell and dispense vinous or spirituous liquors for beverage purposes at retail . . . . Such permit shall contain a description of the premises permitted and in form and substance shall be a permit to the person therein specifically designated to sell and dispense at retail spirituous or vinous liquors.

"All such sales shall be in unbroken packages and the same shall not be opened or the contents or any part consumed on the premises where purchased."

The duties of the Commissioner of Revenues set out in the 1935 Act have been transferred to appellants by Acts 1951, No. 159.

Thus we see that under Acts 1935, No. 108, the Commissioner of Revenues could only "adopt rules and regulations for the supervision and control of the manufacture and *sale* of vinous, (except wines) spirituous or malt liquors . . . *not inconsistent with law.*" By Article III, Section 1, it is provided " . . . that the number of permits . . . *to dispense* . . . liquor shall be restricted, and the Commissioner of Revenues is . . . empowered to determine whether public convenience . . . will be promoted by issuing such permits." Since a "dispensary", under Article I, Section 3, is defined as any . . . "store which . . . sells at retail in unbroken packages for non-consumption on the premises any intoxicating . . . liquor," it appears that the use of the word "dispense", as used in connection with the permits the Commissioner was authorized to supervise, should have the same limitation.

That the word "dispense" was used, in Article III, Section 1, to prohibit the on-premises consumption of intoxicating liquors is further demonstrated by Article III, Sections 2, 3, 4, 5, and 6. While it is true that section 2 provides for six classes of permits, the last of which is "(6) hotel, restaurant or club permit," it also provides that, "No person shall sell vinous, spirituous or malt liquors . . . except as provided in this Act . . . . " Under the scheme of the same Article, section 3 permits a person to apply for a distiller's or manufacturer's permit; section 4 permits a person to apply for a rectifier's permit; and section 5 permits a person to apply for a wholesaler's permit, all of whom are prohibited from selling " . . . to any dispensary, hotel, restaurant or club, who is not duly authorized under this Act to receive, possess, transport, distribute or sell same." Section 6 of the same Article permits a person to apply for a retailer's permit but with the restriction that the permit "to sell and dispense at retail . . . " shall " . . . be in unbroken packages and the same shall not be opened or the contents or any part consumed on the premises where purchased." Thus we have a statutory scheme authorizing the issuance of permits for dispensing spirituous liquors and authorizing persons to apply for distiller's permits, rectifier's permits, wholesaler's permits and retailer's permits, but no such authorization is given for a permit for on premises consumption of spirituous liquors. We can find no reason for legislative designation of permits that could be applied for except to exclude by implication application for any other type of permit, *Cook Commissioner of Revenues* v. *Arkansas Missouri Power Corp.*, 209 Ark. 750, 192 S.W. 2d 210 (1946).

Therefore we hold that appellants were not authorized to issue permits for on premises consumption of vinous, spirituous or malt liquors. It necessarily follows that the regulations for Class Six Club Permits are not authorized by law and are invalid.

Affirmed.

GERTRUDE E. MCCORMICK v. ROBERT EARL MCCORMICK

5-4814 438 S.W. 2d 23

Opinion Delivered March 10, 1969

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

Butler & Dishongh for appellee.

FRANK HOLT, Justice. This appeal is from the refusal of the chancellor to vacate and set aside a decree of divorce which was granted to appellee by default.

Appellant alleged in her motion to vacate the decree that she was prohibited by unavoidable circumstances from appearing and defending, and, further, that she had a meritorious defense to the complaint. We find no merit in either contention.

Appellant and appellee were married in 1958 and were separated in 1963. On January 18, 1968, the appellee filed suit for divorce against the appellant, alleging, inter alia, the statutory ground of three-year separation. On that date an attorney ad litem was appointed to notify appellant, a nonresident, and the requisite warning order was issued. The attorney ad litem notified her by certified mail of the pendency of the lawsuit. He enclosed a copy of the complaint; advised her she had thirty days to defend the action to avoid a default judgment; that she should engage an attorney immediately, and that he could not represent her. He received a return receipt, dated February 5, 1968, from appellant. Next, he received from her a letter dated February 19, 1968, wherein she acknowledged receipt of the notice, stated that she was seeking legal advice and desired some additional time to get "necessary information and advice" and after that, she would decide what she should do. The attorney ad litem included the return receipt and her letter in his reports to the court. Nothing further was heard from her and on February 29 the chancery court granted appellee a divorce based upon three-years separation. On March 26, 1968, appellant filed her motion to vacate this decree. Upon a hearing, she testified that she had sought advice from an attorney in the state of Washington, where she lives, and that he had furnished her the name of a local Arkansas attorney with whom she communicated; that he advised he was unable to

represent her and furnished two other names. She wrote to one of them who replied that he could not represent her and, further, that a divorce had already been granted. Subsequently her present counsel filed this motion to vacate the divorce decree.

It is within the discretion of the trial court to set aside a default judgment upon the showing of excusable neglect, unavoidable casualty, or other just cause which prevents a party from appearing or defending. Ark. Stat. Ann. § 29-401 (Repl. 1962). Appellant relied upon this statute and argues that the evidence in this case brings her within its provisions. We cannot agree.

Appellee complied with all the requirements of our laws in securing his divorce. Appellant had 24 days notice before rendition of the final decree. During this time she actually consulted and communicated with legal counsel. She made no appearance and no pleading was filed in the case until almost one month after the decree was rendered. Where one has notice of the pendency of an action for divorce and fails to appear and defend, a motion to vacate the decree will be denied where there is negligence or a lack of diligence shown. *Gaines* v. *Gaines,* 187 Ark. 935, 63 S.W. 2d 333 (1933); *Hagen* v. *Hagen,* 207 Ark. 1007, 183 S.W. 2d 785 (1944); *Sariego* v. *Sariego,* 231 Ark. 35, 328 S.W. 2d 136 (1959). In *Gaines* we upheld the refusal of the trial court to vacate the decree where the appellant had only 7 days' notice of the pendency of the action. In *Hagen,* the wife, upon receiving notice to defend a divorce action against her, replied that she desired to defend. However, during the 23-day interim she took no further action. The chancellor granted her motion to vacate the decree. In reversing, we held that she had ample notice of the pendency of the action and was negligent in not defending it. In the case at bar, appellant had sufficient notice and ample time to appear and defend the action and her failure to do so was negligence and a lack of legal diligence.

Furthermore, at the hearing of her motion to vacate appellant agreed and it was stipulated that she and appellee had lived separate and apart for more than three consecutive years. A divorce under this section [§ 34-1202 (7) (Repl. 1962)], upon proper proof, is mandatory upon the suit of either party, regardless of what caused the separation or who was at fault. *Brooks* v. *Brooks,* 201 Ark. 14, 143 S.W. 2d 1098 (1940); *Mohr* v. *Mohr,* 214 Ark. 607, 215 S.W. 2d 1020 (1948).

However, when a divorce is granted upon three-years separation, the question who is the injured spouse is then considered in the settlement of property rights and the question of alimony. *Jones* v. *Jones,* 199 Ark. 1000, 137 S.W. 2d 238 (1940). Therefore, appellant argues that even though the divorce is valid, she has a meritorious defense as an injured party and is entitled to a hearing on the question of property rights, alimony and attorney's fees. Appellant, who became a naturalized citizen in 1957, is 51 years of age, in good health and is gainfully employed as a registered nurse with an income of approximately $6,000 per year. Appellee is a non-commissioned officer in the military service. There are no children.

In 1963, following their separation, a comprehensive and detailed written property settlement was drafted by legal counsel and signed by appellant and appellee. This occurred while they were stationed in Germany, her native country, on military duty. The settlement recites that she speaks English fluently and has no difficulty in reading and understanding the English language. Further, that she was completely advised, "from the attorney of my own selection." During the next four years, appellee performed his agreed obligations which were completely fulfilled in 1967. Appellant accepted all the benefits. Now it is asserted that it was improper to consider and insert this instrument into the default decree. However, it is expressly agreed in this written instrument that "the terms of this agreement will be entered as part of any

decree entered'' in a divorce proceeding. Even if we should exclude the property settlement, which appears to meet the test of fairness and reasonableness, we are of the view that appellant is not an injured spouse in this action. Certainly, we cannot say there was an abuse of discretion by the chancellor in refusing to vacate and set aside the default decree of divorce in the case at bar.

Affirmed.

BYRD, J., not participating.

EDWARD PAGE v. BOYD-BILT, INC.

5-4790 438 S.W. 2d 307

Opinion Delivered March 17, 1969

Leon Burrow and *Oscar Fendler* for appellant.

Everett E. Harber for appellee.

CARLETON HARRIS, Chief Justice. Edward Page, appellant herein, employee of Phillips Construction Company, was allegedly injured on March 26, 1966, when he stepped upon a roofing nail while working on a construction job. The general contractor in charge of constructing a building for Ark-Mo Power Company in Blytheville, was Phillips Construction Company. Boyd-Bilt, Inc., appellee herein, had no connection with Phillips, but, according to a complaint filed by Page against this company, appellee had allegedly purchased a dwelling located on the work site, and had agreed to move the dwelling and clear the site in order for Phillips to proceed with construction of the office building. The complaint asserted that, in tearing down the garage next to the dwelling, agents, servants, and employees of appellee had been negligent in allowing nails and other dangerous objects to be spread and scattered about the premises upon which Page was working, in disregard for the safety of other persons rightfully working upon said premises; that appellee was further negligent in failing to clean up or "police" the area in which Phillips employees were working. Personal injuries were alleged as a direct result of appellee's negligence, and damages were sought in the amount of $50,000.00. An

answer was filed by Boyd-Bilt, Inc., admitting that it was a corporation, but denying all other allegations as to negligence, injury, and damages. The answer was subsequently amended to assert that, if plaintiff received an injury, it was caused by someone other than appellee; that Page assumed the risk of his injury, knowing the situation, and realizing that he could be injured. On trial, at the conclusion of appellant's testimony, appellee moved for a directed verdict, which motion was granted. From the judgment accordingly entered, appellant brings this appeal. For reversal, it is simply asserted that the court erred in directing the verdict, since there was sufficient evidence offered by appellant to warrant submission of the case to the jury.

We first point out that, since we are dealing with a directed verdict, we must take that view of the evidence which is most favorable to the party against whom the verdict is directed, and, if there is any substantial evidence tending to establish an issue in his favor, it is error for the court to take the case from the jury. In testing where there is substantial evidence, the testimony and all reasonable inferences deducible therefrom must be viewed in the light most favorable to the party against whom the verdict is directed, and, if there is any conflict in the evidence, or where the evidence is not in dispute, but is in such state that fair-minded men might draw different conclusions therefrom, it is error to direct a verdict. *Huffman Wholesale Supply Company v. Terry*, 240 Ark. 399, 399 S.W. 2d 658.

Page, 49 years of age, testified that he was a carpenter, and, at the time of the accident, was employed by Phillips Construction Company on the Ark-Mo job in Blytheville. Just prior to sustaining the injury, Page, with another employee, Mode Sickles, had gone to the Park Street side of the construction site to pick up some steel reinforcing rods. This was not a normal job for Page and Sickles, but other laborers were busy endeavoring to complete the digging of the basement

before it rained. In returning, they used a different route, one they had not used before, because the shorter route was muddy. The job of carrying the rods required two men, with Page at the front and Sickles at the rear. They passed about 15 to 20 feet from where the garage had been torn down. The area being traversed was grassy. Page suddenly stopped, telling Sickles not to follow him, as he (Page) had stepped on a nail in a roofing shingle. Other shingles were scattered about the premises. Page said that he had not been looking at the ground, while carrying the steel, because he knew that the area had been previously cleaned up by the Phillips workers,[1] and he was not aware that the nails and shingles were on the ground. Page took off his boot and sock, and found one spot of blood. The nail, a four-penny shingle nail, was rusty at the end. He returned to work, but was unable to report to the job the next day, and was thereafter unable to resume his employment until June 8, 1966. Page testified relative to the seriousness of his injury, and treatment received therefor, but that question is not involved on this appeal. Appellant was wearing construction boots, the sole being ⅜ to ½ of an inch thick.

Sickles testified that he saw Page step on a shingle, pull his foot up, and that appellant then warned him, "Don't come this way." The witness said that he then looked over the area they were approaching, and saw shingles scattered all out in front of them. He said that Page stepped on the nail about 15 feet behind and to the rear of the location of the garage.

Tillman Dill, employed by Phillips Construction Company as superintendent, testified that Page was working for him on the Ark-Mo job. Dill said that he (Dill) had complained several times about the house and garage not being cleared from the property, and he

[1]Other houses had been torn down or moved at an earlier time, and some of the Phillips workers had cleaned up remaining debris.

did not remember exactly when the garage was torn down; he did know that it was still standing on February 15. The witness stated that the tearing down of the garage could have been a week or week and a half before Page was injured, and he testified that his men had cleaned up the entire area to the edge of the house and garage prior to the tearing down process. The foreman said that Page reported to him that he had stepped on a nail, and that appellant was wearing the type boots used in construction work at the time.

It is argued by appellee that there is no showing of negligence on the part of Boyd-Bilt—or that the shingles had been placed in that particular area by employees of Boyd-Bilt. It is mentioned that the spot where the alleged injury took place was about 20 feet from the garage, and it is also pointed out that there was no showing that the garage had been covered with wooden shingles.

We think appellee's argument lacks merit. Appellant had filed certain requests for admissions, No. 4 which was admitted, being as follows:

> "The defendant, in tearing down this garage, removed the roofing from the top of said building."

The evidence, heretofore set out, reflects that all debris, occasioned by the moving of other buildings, had already been cleared away, which would mean that the shingles scattered over the ground near the garage were the same shingles that had composed the roof of the garage. This is certainly a logical inference; contrariwise, it would be most illogical to assume that some person carried the shingles to that location and strewed them over the ground. After all, 15 to 20 feet is not a great distance for shingles to fall when they are being removed from a roof and tossed to the ground. As far as the negligence of Boyd-Bilt is concerned, we think a jury question is made, rela-

tive to whether leaving exposed shingles with nails in them on premises where other people are working, constitutes negligence. Nor do we find merit in the argument relating to assumption of risk. Of course, this doctrine (which has been described as harsh) is generally applied in cases involving an employer-employee relationship, though there are some other situations that it can also apply to.[2] Certainly, under the facts presently before the court, Page could not, as a matter of law, be held to assume the risk of a danger, that, according to his testimony, he knew nothing about. An essential element of the doctrine of assumption of risk is that the person injured had knowledge of, and appreciated, the danger incident to his undertaking. In *E. L. Bruce Company* v. *Leake*, 176 Ark. 705, 3 S.W. 2d 988, this court said:

> "When a servant enters into the employment of anyone, he assumes the ordinary risks and hazards which are incident to the service and this includes all those defects and dangers which are obvious and patent. He assumes all the risks which he knows to exist and all those which are open and obvious."

In *Pona* v. *Boulevard Arena* (N.J.), 113 A. 2d 529, the court said:

> "It is well settled that a dismissal by the court on the ground of assumption of risk . . . may only be entered in the clearest case where a contrary hy-

[2]For instance, in **Bugh v. Webb**, 231 Ark. 27, 328 S.W. 2d 379, Webb rode in an automobile driven by Bugh at a time when Bugh was engaged in an automobile race, commonly known as a "drag race." During the "contest," a pickup truck was struck by both Bugh's car and the car engaged in the race with him, Webb receiving injuries. A jury awarded damages, but we reversed, holding that Webb, in getting into the automobile, knowing full well of the hazards of drag racing at night on a heavily traveled highway, assumed the risk of proceeding in the face of danger, and was thus barred from recovery.

> pothesis is not fairly admissible. * * * The elements 'must be of such a prominent and decisive character as to leave no room for a difference of opinion thereof by reasonable minds.' * * * The facts must appear clearly and convincingly, or as the necessary and exclusive inferences to be drawn by all reasonable men in the exercise of a fair and impartial judgment; otherwise the question is for the jury."

Prosser, Law of Torts, 3rd Ed. § 67, pp 453-54, citing the above case, states that assumption of risk is a jury question in all but the clearest cases. See also *Haynes Drilling Corporation* v. *Smith,* 200 Ark. 1098, 143 S.W. 2d 27, and cases cited therein.

We think it apparent that, under the state of this record it cannot be said that the facts show clearly and with no contrary hypothesis fairly admissible, that Page assumed the risk of stepping on shingles with nails when he helped carry the rods through the area.

Reversed and remanded.

WILLIAM HOWARD MOSLEY v. STATE OF ARKANSAS

5-5397 438 S.W. 2d 311

Opinion Delivered March 17, 1969

Bill J. Davis for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellant.

George Rose Smith, Justice. This appeal is from a verdict and judgment finding William Howard Mosley guilty of rape and fixing his punishment at life imprisonment. The appellant's attorney, who was appointed by the court, argues three points for reversal.

Before the trial counsel filed a motion to suppress the defendant's confession, on the grounds that he was not properly warned of his constitutional rights and that he was too young to comprehend such a warning. The trial judge held a hearing on the motion to suppress and found the confession to be admissible. In accordance with our practice as set forth in *Harris* v. *State,* 244 Ark. 314, 425 S.W. 2d 293 (1968), we have independently reviewed the record and have reached the conclusion that the confession was admissible.

The offense of rape was committed in August of 1966. In the following May young Mosley, who was

wanted as an escapee from the Boys Industrial School, was arrested and questioned about a more recent offense involving burglary and assault. The two officers who questioned Mosley testified that they first explained his constitutional rights and obtained his signature to a printed form of waiver containing a full statement of those rights. Mosley quickly admitted his guilt of the offense under investigation and signed a confession with respect to it.

The officers then repeated their explanation of Mosley's rights and obtained another signed waiver before questioning him about the older charge of rape. Mosley again admitted his guilt and signed a confession that agreed in all material details with the version later given by the prosecuting witness at the trial of the case. This is the confession that the trial judge found to have been voluntarily given.

We agree with that conclusion. Mosley testified at the hearing on the motion to suppress. He admitted that the officers read the waiver to him, but he testified that he did not understand it. He does not contend that he was physically mistreated, though he does say that one of the officers threatened to "bust" him when he got out of the reform school.

Mosley was fifteen years old when he was interrogated. He had served a term in the penitentiary and had also been confined to the Boys Industrial School. The trial judge made detailed findings of fact, which included this statement based upon firsthand observation: "He appeared to me to be completely normal and possessing the intellect of an average sixteen-year-old boy." Needless to say, officers who question an underage suspect should take his youthfulness into consideration in conducting their interrogation. In this case we do not find that young Mosley was abused or treated unfairly in any way. By the great weight of authority a minor is capable of making an admissible voluntary confession,

there being no requirement that he have the advice of a parent, guardian, or other adult. The cases are analyzed at length in *People* v. *Lara,* 62 Cal. Rptr. 586, 432 P. 2d 202 (1967), and need not be re-examined here.

Secondly, counsel contends that the State failed to make a prima facie case, because Mosley's confession is the only evidence that connects him with the crime. That is all the law requires, it being sufficient for the other proof to show that the offense charged was committed by someone. Ark. Stat. Ann. § 43-2115 (Repl. 1964); *Charles* v. *State,* 198 Ark. 1154, 133 S.W. 2d 26 (1939). The testimony of the prosecutrix satisfied the statutory requirement.

Finally, counsel complains of two references during the trial to the subsequent incident involving burglary and assault. Both references occurred during the cross-examination of Officer Calhoun, a witness for the State. Calhoun was asked what happened just before Mosley confessed to the rape, and the witness answered: "I was questioning him about a house burglary where he assaulted a woman and broke in her house." The answer could not have been unexpected, for the officer had given the same testimony at the earlier hearing upon the motion to suppress. Moreover, defense counsel continued his cross-examination without making any objection to the officer's reply to the question.

A few moments later counsel returned to the point, asking Officer Calhoun if Mosley had signed another statement before signing the confession of rape. Calhoun answered: "Yes, sir. He signed one before this one admitting to assault of this other woman over there." Counsel then made an objection and asked the court to admonish the jury, which was done. It was not until counsel had concluded his cross-examination that he asked for a mistrial, which he now insists should have been granted. The court properly refused to declare a mistrial, not only because that request manifestly came

too late but also because counsel's questions had elicited the information in the first place. Doubtless counsel expected to derive some benefit for his client by showing that the youth had already been questioned for about 70 minutes before the officers began to interrogate him about the rape charge. Counsel cannot be permitted to obtain the advantage of that argument to the jury and still insist upon a mistrial when the strategy proved to be unavailing.

Affirmed.

FLOYD BAILEY, JR. v. STATE OF ARKANSAS

5-5400 438 S.W. 2d 321

Opinion Delivered March 17, 1969

Harold L. Hall for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellant.

LYLE BROWN, Justice. Floyd Bailey, Jr. was convicted of illegally possessing narcotics. Court-appointed counsel was relieved after the trial and appellant, Bailey, went to the penitentiary. The time ordinarily allowed for appeal expired; however, the trial court granted Bailey a belated appeal because he did not have the assistance of counsel to represent him and timely file the appeal. Bailey challenges the validity of a search of his apartment and of his person, both of which revealed the presence of marijuana. The pertinent facts will be related under our discussion of Bailey's two points for reversal.

POINT I. *The court erred in admitting evidence obtained by affidavit and search warrant issued upon insufficient facts and information in violation of the constitutional rights of the defendant.* The two arguments under this point are (1) that the affidavit for search warrant was signed by Officers Terry and Gibson, who did not appear before the magistrate; and (2) that the affidavit provides only the unsupported conclusions of the affiants. In other words, appellant says the affidavit does not present the underlying facts or circumstances so that the examining magistrate could have made an independent determination as to the existence of probable cause. It is therefore argued that evidence obtained at defendant's home was inadmissible.

With respect to the execution of the affidavit for search warrant, here is what the record reveals: Officers Terry and Gibson obtained from a source not disclosed a printed form used by the Municipal Court of Little

Rock and titled "Affidavit for Search Warrant." The body of the affidavit is as follows: "I, John Terry and W. D. Gibson, LRPD, do solemnly swear that illegal narcotics, marijuana, and drugs, are concealed in the premises occupied by Floyd "Spike" Bailey at 1003 High Street, Apt. 14, LR., in the State and County aforesaid, and pray a warrant from said court to search said premises." The two officers signed the instrument. The jurat to the affidavit reads: "Sworn to and subscribed before this 27 day of May, 1966. ....., Clerk." The jurat is not executed by any official. The Clerk of the Municipal Court, Criminal Division, testified that he took no part in the execution of the affidavit.

We examine the search warrant issued on the basis of the proposed affidavit. The warrant recites that "complaint has been made, on oath, before the clerk or judge of the Municipal Court of Little Rock, by John Terry and W. D. Gibson, LRPD, that certain illegal narcotics, marijuana, and drugs are concealed on the premises occupied by Floyd "Spike" Bailey at 1003 High Street, Little Rock, and whereas, being satisfied that there is reasonable ground for such suspicion, you are therefore hereby commanded to search the said place above mentioned..." It will be noted that the search warrant issued by Judge Sullivan stated that it was issued on information supplied by Officers Terry and Gibson. It was undisputed that these officers did not appear before the magistrate. Officer Baer said he obtained the search warrant for Officers Gibson and Terry. There is but one conclusion to be reached from the testimony. Officers Terry and Gibson executed a form of affidavit for a search warrant and asked Detective Baer to present the document to Judge Sullivan and obtain a search warrant.

The affidavit for a search warrant is void on its face. The Constitution of Arkansas, Art. 2, § 15, requires the search warrant to be supported by oath or affirmation. The affidavit shows that the officers who

executed the document did not appear before any officer authorized to take such an acknowledgment. The proof shows that the subscribing officers sent a third party, Detective Baer, to obtain the warrant. The purported affidavit, which is the sole evidence of probable cause afforded the magistrate, is defective in that it states a mere conclusion. A magistrate is not permitted to accept a complainant's conclusions without question. *Walton and Fuller* v. *State,* 245 Ark. 84, 431 S.W. 2d 462 (1968); *Giordenello* v. *United States,* 357 U.S. 480 (1958). Mr. Justice White's concurring opinion in *Spinelli* v. *United States,* 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969), analyzes *Giordenello* and six other cases on the question of prerequisites for issuance of a search warrant. If an officer swears there is contraband at a particular address there are three possibilities for the basis of his conclusion:

(1) The officer has seen the illegal object or objects. In that event his affidavit should assert personal observation; or,

(2) The officer "observed or perceived facts from which the presence of the equipment may reasonably be inferred. In that event the affidavit must recite the perceived facts so that the magistrate may judge the existence of probable cause"; or,

(3) The officer has obtained the information from someone else, for example, an informer. In that event the warrant should not issue unless good cause is shown in the affidavit (or supporting testimony) for crediting that hearsay.

There are a multitude of cases from the United States Supreme Court, in addition to those cited by Mr. Justice White, which detail the manner in which the requirements under alternatives (2) and (3) must be met.

POINT II. *The court erred in admitting in evidence the marijuana obtained from the defendant's person.* The officers first went to Bailey's apartment to conduct a search. Bailey was not at home and they decided to find him before searching. One of the officers knew that Bailey might be found in the vicinity of Wright Avenue and High Street. He was there located and the officers took him into custody for the purpose of taking him to the apartment. They had no warrant for his arrest, nor did they have a search warrant for his person. Prior to placing Bailey in the patrol car the officers searched him, assertedly for weapons. Officer Hunter took the suspect's billfold from his pocket and handed it to Officer Terry. In the course of the wallet being passed between the officers a tightly rolled cigarette dropped therefrom. The billfold was then inspected and three small brown envelopes were found. The cigarette and the envelopes contained marijuana.

Ark. Stat. Ann. § 43-403 (Repl. 1964) authorizes an arrest by an officer in obedience to a warrant of arrest, and without a warrant if a public offense is committed in his presence, or if the officer has reasonable grounds for believing that the person has committed a felony. We view the search in light of the particular purpose for which the officers testified they made it. First, they did not say they arrested the defendant because they had reasonable grounds to believe he had committed a felony. Specifically, the officers explained that they wanted to take him back with them to the apartment, ostensibly to have him present when the search was made. Officer Hunter explained the purpose of the search thusly:

Q. Why did you shake him down there?

A. Well, I knew the man and I knew that he was subject to carrying a weapon and, inasmuch as we would be going to carry him back to his apartment, well, I searched him.

Under the recited circumstances we conclude the defendant was not legally under arrest; therefore the search was not incidental to a lawful arrest. However, we recognize there are circumstances under which a suspect may be checked for weapons. If we here concede, without deciding, that the officers had a right under the circumstances to check Bailey (as a suspected felon) for weapons, yet we must ascertain whether that search was "reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man." *Sibron* v. *New York,* 392 U.S. 40 (1968). On the same date *Sibron* was handed down, the Court decided another search for weapons case, the latter being *Terry* v. *Ohio,* 392 U.S. 1 (1968). The searches of Sibron and Terry were compared in *Sibron* and the Court had this to say:

> The search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in *Terry* place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin... Such a search violates the guarantee of the Fourth amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents.

As in *Sibron* the searching officer in the case at bar thrust his hand in Bailey's pocket and took the pocketbook. That item could conceivably have no reasonable relation to the object of the search, that being for a weapon.

Reversed.

O. H. COOPER v. STATE OF ARKANSAS

5-5404 438 S.W. 2d 681

Opinion Delivered March 17, 1969
[Rehearing denied April 21, 1969.]

Robert W. McCorkindale for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

JOHN A. FOGLEMAN, Justice. Appellant seeks reversal of his conviction of the crime of malicious injury to graves or monuments. The charge is based on Ark. Stat. Ann. § 41-3706 (Repl. 1964). Under this act the wilful and malicious destruction, injury or defacement of any grave or monuments or the wilful and malicious removal or destruction of a monument constitutes a felony. Appellant argues three points for reversal. They are:

1. Error in refusal of his motion for directed verdict;

2. Error in modifying his requested instruction No. 3 and in giving the instruction as modified;

3. Error in denying a motion for new trial.

In reviewing the sufficiency of the evidence as against the motion for directed verdict, we must view it in the light most favorable to the state.

Terry Pillow testified that he had been familiar with the cemetery known as the Adderholt Cemetery for 10 or 15 years and had known of its location for 35 or 40 years. He said that the graves of some of his relatives were

definitely marked by monuments. According to him, some of the monuments were fieldstone bearing names and dates and others were rocks piled over the grave with initials and dates carved on the top rocks. He testified that a dwelling house had been built within 12 or 15 feet of the graves of his relatives. On his visit to the graves preceding that when he saw the house, there was still a fence around the graves. He estimates that there were from 20 to 35 graves in the graveyard all of which were marked with tombstones. He recalled that the graves of the Baker family were marked with marble tombstones. He found the fence in place shortly before appellant bought the property which included the graveyard.

Mrs. Ora Belle Baker McGaughey testified that gray marble tombstones were placed on the graves of her grandparents but that the tombstones were gone at the time of the trial.

Mr. Richard Shipman who purchased the land including the graveyard along with appellant testified that their deed was made December 22, 1965. After the purchase of the land, he and Cooper walked over it and found evidence of the cemetery in the form of marble tombstones bearing the name of Baker and covered graves. Shipman received a call through which he was advised that there was a graveyard on the land. He relayed this information to Cooper. It was later verified by the person from whom they purchased the land. Shipman also described fieldstone and flat sandstone standing 18 inches off the ground so as to enclose what appeared to be graves. He told Cooper that they should put a small fence around the cemetery if they could establish the boundary lines, saying that they couldn't afford to molest the cemetery. Shipman returned to the site after a road was constructed and found that the two marble tombstones were gone. The graves appeared to be intact at that time. Shortly, thereafter, Shipman sold his interest in the land to Cooper. He returned to

the site later and saw a dwelling house within 10 or 12 feet of the place he had seen the tombstones and graves.

Herbert Terry told of going to the cemetery about the time a road was being constructed by appellant. He stated that he asked Cooper to leave the rock where his relatives' graves were. At that time the rocks were still in place but the Baker monuments were not. He returned to the site in June or July of 1968 and the rocks on his relatives' graves had disappeared. Cooper advised Terry that the rocks were in the footings where he was building a house. According to Terry the house was sitting where the graveyard had been and the driveway was the cemetery. Terry claimed that the headstone of his grandfather's grave was jerked up twice during the construction by Cooper and that he and his wife had replaced it both times. He found it removed a third time but did not replace it because it was broken in two or three places.

Pat McEntire testified that Cooper employed him to haul some rock that was piled at or near the site of the cemetery. The rock was put under the floor of Cooper's brother-in-law's house for fill.

Charles Youngblood stated that he was hired by Cooper to level some ground at or near the location of the cemetery. He stated that Cooper picked up some flat sandrock stacked to make what appeared to be a tomb and put it in his pickup truck. Youngblood had previously refused to haul the rock off and told Cooper that it appeared to be tombstone rock. He testified that Cooper told him they were graves.

Tom Bearden was employed by Cooper to install the plumbing in the house built near the graves. When he first went to the site he saw two stacks of rocks which looked to him like graves. Later he noticed they were gone. Bearden engaged in a conversation with Cooper and one L. E. Stewart with reference to the

choice of a shallow or a deep septic tank for the house being constructed. He could not recall the particular statements made but stated that a decision was reached to use the shallow tank in order to avoid digging in any graves in the cemetery.

George Lowe was a roofer employed by Cooper to roof the house built near the cemetery. He noticed three or four graves near the house. Lowe saw L. E. Stewart using a backhoe in Cooper's presence to dig for the installation of a septic tank. According to Lowe, a trench for the septic tank line was being dug across the graves, and he and his son went to the trench where they could see the dark form of a grave six feet from the foundation of the house. Lowe heard Herbert Terry make an angry protest to Cooper and heard Cooper say if Mr. Rockefeller could get by with it so could he.

This evidence was certainly sufficient for a jury to find a guilty verdict if the testimony was accepted at face value.

Appellant requested the following instruction to the jury:

> "The three essential facts to constitute the crime with which the defendant is charged are:
>
> 1. That he committed the acts charged in the indictment;
>
> 2. That he did so wilfully;
>
> 3. That he did so maliciously.
>
> You are further instructed that word 'maliciously' means the doing of an act in a manner showing a heart regardless of social duty and fatally bent in mischief. It means an act done intentionally and with evil intent, without just cause or excuse, or as a result of ill-will."

The circuit judge refused the instruction as requested but over appellant's objection gave the following instruction:

> "The three essential facts to constitute the crime with which the defendant is charged are:
>
> 1. That he committed the acts charged in the indictment;
>
> 2. That he did so wilfully;
>
> 3. That he did so maliciously.
>
> The jury is instructed that a malicious act is a wrongful act intentionally done without legal justification or excuse. It is an unlawful act done wilfully or purposefully, the evidence of which may be inferred from the acts committed or words spoken."

The gist of appellant's contention with reference to the instruction given seems to be that it does not sufficiently define the word maliciously as used in the statute.

This court had occasion to consider the meaning of this word in a case wherein the sufficiency of an indictment for burglary was attacked because the statutory word "maliciously" was not used. *Shotwell* v. *The State,* 43 Ark. 345. In treating this question this court said:

> "In the use of the word 'maliciously' in the statute we cannot presume that the legislature intended that malice towards the owner of the house entered, or toward any one else should become an element in the intent with which the breaking is done. The word must be understood from its *context* to be intended in its restricted legal signifi-

cance which implies 'the intent from which follows any unlawful or injurious act, committed without legal justification.' 1 *Bishop Cr. Law Sec.* 429. It means doing a wrongful act without just cause or excuse. 2 *Bouvier L. Dict.* Malice.

Bishop says that 'maliciously' in an indictment has been adjudicated an equivalent to 'wilfully' in the statute. 'Maliciously' is of somewhat larger meaning than 'willfully,' which in an indictment would not therefore supply the place, it is presumed, of maliciously in the Statute. 2 *Bish. Cr. Pr. Sec.* DC."

We find that the instruction given by the trial court was correct and that the requested instruction was properly refused. The one offered would have been incorrect even under *Gordon* v. *State,* 125 Ark. 111, 187 S.W. 913.

Appellant's assertion of error in the failure to grant a new trial is based upon the argument that the court should have granted his motion because it had been discovered that the testimony of George Lowe was false. The motion asked a new trial on grounds of newly discovered evidence.

In support of the motion appellant offered the testimony of L. E. Stewart, Joe Miller and appellant's attorney, J. Loyd Shouse. They also presented the witness George Lowe.

Stewart testified that Lowe had stated subsequent to the trial that his testimony at the trial was false. Joe Miller who numbered both Lowe and Cooper among his hardware customers stated that Lowe came into Miller's store a week or ten days after the trial when Cooper was present. He overheard parts of a conversation between Lowe and Cooper about the former's testimony. According to him the two went out into the yard where they engaged in some conversation which was continued

when they returned into the store. He heard a discussion between them as to what would be perjury and what would not and advised them to go to appellant's attorney. Miller said that he later saw Lowe and learned that he had not been to the attorney's office as promised. He then asked Lowe why he hadn't been, and Lowe responded that he wasn't going.

Appellant's attorney testified that Lowe and Cooper came to his office about a week after the trial. Cooper advised him that Lowe wanted to make a statement. The attorney testified that Lowe said all his testimony in the trial was false, particularly that part about Cooper's having said that if Rockefeller could tear up a graveyard he ought to be able to do so. He said that Lowe also stated that his testimony about looking down into the excavation for the septic tank and seeing graves was false. When Lowe told Mr. Shouse that Bill Doshier, the prosecuting attorney, made him testify as he did, Shouse said that he didn't believe him and refused to write up a statement about what Bill Doshier did. Mr. Shouse said that he told Lowe that he would not write out any statement for him because of his disbelief of the statement that the prosecuting attorney had encouraged him to testify falsely. Mr. Shouse suggested that Cooper and Lowe return the next day but Lowe never came back.

Lowe testified that his testimony at the trial was true. He said that he was asked to go to Shouse's office by the appellant in order to see if there wasn't some way to obtain a suspended sentence or probation. He claimed that Cooper declined to wait until he could talk to the prosecuting attorney. He said that he left the Shouse office after Cooper had insulted him twice. He denied having told Shouse that his testimony was false or that he had followed Doshier's suggestions in testifying. On the other hand, Lowe testified that Cooper had suggested that these were the facts. Lowe's version of the conversation with Miller and Cooper was

that they threatened him with civil suits because of his testimony.

Newly discovered evidence is one of the least favored grounds for motion for a new trial. It is addressed to the sound legal discretion of the trial judge, and this court will interfere only in case of an apparent abuse of discretion or injustice to the movant. The determination of whether the application is in good faith and of the weight and sufficiency of the supporting evidence is within the discretion of the trial judge. In order to justify the granting of the motion, the evidence in support thereof should be clear and satisfactory. *Gross* v. *State,* 242 Ark. 142, 412 S.W. 2d 279.

Impeaching testimony is not sufficient grounds for granting a new trial on the basis of newly discovered evidence. *Philyaw* v. *State,* 224 Ark. 859, 277 S.W. 2d 484. Even if it could be said that there was a recantation on the part of a witness, it is the duty of the trial court to deny a new trial where it is not satisfied that the recanting testimony is true, especially where it involves a confession of perjury. The question whether a new trial shall be granted on this ground depends on all the circumstances of the case including the testimony of the witnesses submitted on the motion for new trial. The answer lies largely within the discretion of the trial court. *Clayton* v. *State,* 186 Ark. 713, 55 S.W. 2d 88.

We cannot say that there was any abuse of the trial court's discretion in this regard.

The judgment is affirmed.

HOLT, J., not participating.

NANCY YOUNG NEAL v. J. P. OLIVER

5-4820 438 S.W. 2d 313

Opinion Delivered March 17, 1969

Sexton & Wiggins for appellant.

Shaw & Bedwell for appellees.

J. FRED JONES, Justice. The appellant, Nancy Young Neal, sustained a compensable injury to her left hand while in the course of her employment as a mangle operator for 7-11 Laundry and Cleaners in Fort Smith. 7-11 Laundry and Cleaners is a domestic corporation with J. P. Oliver, his wife and son as the sole owners of the corporate stock. Oliver is the president of the cor-

poration and was general manager and supervisor of employees at the time of appellant's injury. 7-11 Laundry and Cleaners came within the provisions of the Workmen's Compensation Law and the appellant was paid full compensation benefits for her injury. The appellant subsequently filed suit in the Sebastian County Circuit Court for personal injuries against Mr. and Mrs. Oliver alleging negligence in assigning her to work on an unsafe machine and in failing to provide the machine with a protective device, in the form of a safety bar, in violation of the state safety code.

On motion for summary judgment, the trial court dismissed the complaint under findings as follows:

> "That the Plaintiff, Nancy Young Neal, while employed by the Defendant, J. P. Oliver, and within the course of her employment, did, on April 30, 1965, sustain an injury while operating a mangle ironing machine.
>
> That the Defendant carried full Workmen's Compensation benefits and that the Plaintiff received full compensation benefits including medical and disability both temporary and permanent.
>
> That in view of the pleadings, the Motion and Affidavit attached thereto, the Court finds there is no genuine issue as to any material facts. That question of law is presented to the Court, and the Court finds, as a matter of law, that the Plaintiff, receiving, and accepting full Workmen's Compensation benefits from the Defendant, J. P. Oliver, is therefore barred from filing a suit in negligence at common law against the same employer, J. P. Oliver."

On appeal to this court, the appellant designates the following point for reversal:

> "Appellee, a supervisor, officer and manager, is a third person within the meaning of the Workmen's Compensation statute and, as such, may be held to answer for his own negligence."

The appellant says "this cause involves the sole issue as to whether or not the manager of a corporate business is a third person within the meaning of the Arkansas Workmen's Compensation Laws, Ark. Stat. Ann. § 81-1301, *et seq.*," and appellant cites several cases from other jurisdictions wherein managers of corporate businesses have been held to be fellow-employees against whom negligent tort actions will lie. But we do not consider the issue in the case at bar to be quite as broad and general as the appellant indicates. The sole issue, as we view the facts in this case, is whether Mr. Oliver, the manager of the corporate business involved in *this* case, was a third party within the meaning of the Arkansas Workmen's Compensation Law (Ark. Stat. Ann. § 81-1340 (a) (Repl. 1960), under the specific facts of this particular case. We conclude that he was not for the reason that he was also the appellant's employer.

The compensation law does not *give or create* a cause of action against a third party causing a compensable injury to the employee, but only makes it plain that such common law remedy as the employee already had against tort feasors prior to the enactment of the Workmen's Compensation Act, was fully preserved and left unchanged by the act when the tort feasor is other than the employer.

Arkansas Statutes Annotated § 81-1340 (a) (Repl. 1960) is as follows:

> "(1) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in court against any third party

for such injury, but the employer or his carrier shall be entitled to reasonable notice and opportunity to join in such action. If they, or either of them, join in such action they shall be entitled to a first lien upon two-thirds [2/3] of the net proceeds recovered in such action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his dependents.

(2) The commencement of an action by an employee or his dependents against a third party for damages by reason of an injury, to which this act [§§ 81-1301—81-1349] is applicable, or the adjustment of any such claim shall not affect the rights of the injured employee or his dependents to recover compensation, but any amount recovered by the injured employee or his dependents from a third party shall be applied as follows: Reasonable costs of collection shall be deducted; then one-third [1/3] of the remainder shall, in every case, belong to the injured employee or his dependents, as the case may be; the remainder, or so much thereof as is necessary to discharge the actual amount of the liability of the employer and the carrier; and any excess shall belong to the injured employee or his dependents."

The term "third party" is not defined in the act and the first and second parties are not even mentioned, but from the language employed in the context it is used in § 1340 (a), supra, "third party" can only mean some person or entity other than the first and second parties involved, and the first and second parties can only mean the injured employee and the employer or one liable under the compensation act. Thus, it is obvious from the wording of the statute, as well as common sense, that a "third party" within the meaning of the act, must be some party other than an employer who is

liable under the act and to whom is also given a statutory right of subrogation against a third party tort feasor. The terms "employer," "employee" and "employment" are defined in the compensation act, Ark. Stat. Ann. § 81-1302 (a) (b) and (c) (Repl. 1960), as follows:

> "(a) 'Employer' means any individual, partnership, association or corporation carrying on any employment, or the receiver or trustee of the same, or the legal representative of a deceased employer.
>
> (b) 'Employee' means any person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession or occupation of his employer. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representative, dependents and other persons to whom compensation may be payable.
>
> (c) 'Employment' means:
>
> (1) Every employment carried on in the State in which five [5] or more employees are regularly employed by the same employer in the course of business or businesses, except domestic service, agricultural farm labor, institutions maintained and operated wholly as public charities, the State of Arkansas and each of the political subdivisions thereof, any person engaged in the vending, selling or offering for sale, or delivery directly to the general public, any newspapers, magazines or periodicals, or acting as sales agent or distributor as an independent contractor of or for any such newspaper, magazine or periodical.

(2) Every employment in which two [2] or more employees are employed by any person engaged in building or building repair work.

(3) Every employment in which one or more employees is employed by a contractor who subcontracts any part of his contract.

(4) Every employment in which one or more employees is employed by a subcontractor."

Appellant correctly points out that this court has held a fellow-employee to be a third party within the meaning of the act, and cites *King* v. *Cardin,* 229 Ark. 929, 319 S.W. 2d 214. In the *King* case King drove a dump truck in hauling asphalt on a highway construction job and Dyer spread the asphalt hauled by King. They both were employed by the same contractor. King negligently backed a dump truck over Dyer and fatally injured him. Dyer was not working *for* King, he only worked *with* King and, of course, the compensation act did not absolve King from the legal consequences of his own acts of negligence toward Dyer while they both were working for the same employer. In the *King* case we said:

"We are not impressed by the argument that the Workmen's Compensation Act prevents an employee, or his personal representative, from maintaining an action for the negligence of a fellow employee. Our statute merely provides that the remedies under the Act are exclusive of other remedies against the employer. Ark. Stats. § 81-1304. The making of a claim for compensation does not affect the right of the employee or his dependents to maintain an action against a third person. § 81-1340. Under a statute like ours a negligent co-employee is regarded as a third person. *Botthof* v. *Fenske,* 280 Ill. App. 362; *Kimbro* v. *Holladay,* La. App., 154 So. 369; *Churchill* v. *Stephens,* 91 N.J.L. 195, 102 Atl. 657."

The appellant cites *Brooks* v. *Claywell,* 215 Ark. 913, 224 S.W. 2d 37, and argues that since we have held a president of a corporation to be also an employee for the purpose of bringing the business under the provisions of the compensation act, we should now "pierce the corporate veil" and hold the president and manager of a family corporation to be a fellow-employee for the purpose of third party liability. We do not agree with this contention, for the difference lies in the employee-employer relationship in determining third party liability as in the case at bar and as distinguished from the title of the chief officer of the business entity and nature of the tasks he performs in determining liability for compensation coverage and jurisdiction of the Commission under the act as in *Brooks* v. *Claywell.* One is the relationship between two individuals; the other is the relationship between one individual and the business. Brooks was the president of a family corporation and worked in the business along with four other regular employees. Brooks was found to be an employee for the purpose of bringing his business under the definition of "employment" as defined in § 81-1302 (c), supra, and his business was held to be subject to the jurisdiction of the Workmen's Compensation Commission, Brooks constituting the fifth employee for that purpose. The question of whether Brooks could have also been a third party tort feasor against whom an injured fellow-employee could have maintained a separate tort action was not raised in that case.

The Workmen's Compensation Act, Ark. Stat. Ann. §81-1304 (Repl. 1960) provides as follows:

> "The rights and remedies herein granted to an employee subject to the provisions of this act [§§ 81-1301—81-1349], on account of injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representative, dependants, or next kin, or anyone otherwise entitled to recover damages from such employer on account of such

injury or death, except that if an employer fails to secure the payment of compensation, as required by the act, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under this act or to maintain a legal action in court for damages on account of such injury or death. In such action it shall not be necessary to plead or prove freedom from contributory negligence nor may the defendant employer plead as a defense that the injury was caused by the negligence of a fellow-servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee."

It is well established that a co-employee may be liable as a third party tort feasor in a workmen's compensation case, and the predominent view does not distinguish between a co-employee who occupies a supervisory position and one who has not achieved a status of such prominence. *Tully* v. *Gardner's Estate,* 196 Kan. 137, 409 P. 2d 782; *Roda* v. *Williams,* 195 Kan. 507, 407 P. 2d 471. See also: *Gardner* v. *Stout,* 342 Mo. 1206, 119 S.W. 2d 790, involving the foreman of a flour mill; *Ellis* v. *Garwood,* 168 Ohio St. 241, 152 N.E. 2d 100, involving the head of an engineering section; *Webster* v. *Stewart,* 210 Mich. 13, 177 N.W. 230, where a corporate vice-president was involved. *Churchill* v. *Stephens,* 91 N.J.L. 195, 102 A. 657, where a shop foreman was sued.

The phraseology of the statute controls in many of the states in suits against fellow-employees by injured workmen and the case results are as varied as the statutory phraseology. In all the states the cases seem to turn on their own peculiar facts.

In *Echols* v. *Chattooga Merchantile Company,* 74 Ga. App. 18, the general manager of a company was held liable in tort for an assault on a fellow-employee. The court held in that case: "The defendant Berry and

Chattooga Merchantile Company are not identical parties. His duty not to harm the employee was both as representative of the company and as an individual."

In *Evans* v. *Rohrbach, et al.,* 35 N.J. Super. 260, an employee was injured in the course of his employment while spreading a liquid plastic material inside a tank and an explosion occurred. Safety devices were not furnished and installed as required by the labor safety law. The injured employee was paid compensation but sued the president of the corporation for failure to furnish the required safety devices. The suit was dismissed in that case, on the theory that the president was too far removed in the chain of authority, the employer being a large corporation.

In *Leidy* v. *Taliaferro,* 260 S.W. 2d 504, a corporate employee was riding in a corporation truck being driven by his father who was also an employee of the corporation. A suit against the corporate president and a corporate stockholder was permitted to go to the jury on the question as to whether plaintiff's father, at the time of the accident, was acting as the personal agent of the defendant corporate president. In that case the two employees were on a personal mission for the company president to pick up personal furniture belonging to the president.

In *Schumacher* v. *Leslie,* 232 S.W. 2d 913, an injured workman who had received workmen's compensation filed suit against the attending physician for alleged malpractice in connection with the industrial injury. In permitting the suit against the physician as a third party feasor, the Missouri Court said: "A third person is one with whom there is no master and servant relationship under the Act. * * * Section 3699, supra, recognizes common law rights against third persons and indicates an intention to preserve rather than abrogate such rights. No employer and employee or master and servant relationship existed between the instant plain-

tiff and defendant. The benefits of the Act accrue to those who share its burdens. Defendant did not share its burdens. He is not entitled to its benefits. Hence, we conclude he was a stranger under the Act, a 'third person.' "

In *Peet* v. *Mills,* 136 P. 685, an early Washington case, a workman was injured in a train collision which occurred in a fog. The railroad system was equipped with a block signal system for use in foggy weather, but when a new president of the company assumed control, the company ceased operating the block signal. Dismissal of the suit against the president was affirmed on appeal because the workman was covered by workmen's compensation.

In the case of *Rehn* v. *Bingaman,* 36 N.W. 2d 856, a Nebraska Workmen's Compensation Act had preserved to an injured employee his common law remedy and in holding that a fellow-employee was a third party within the meaning of the act, the court said:

> "We conclude that the employee's right of action against third persons for negligence proximately causing his injuries was a common-law right already existent outside of and notwithstanding the Workmen's Compensation Act. In other words, section 48-118, R.S. 1943, not only preserved the employee's common-law right to recover from third persons as it was before the act, but also, in the final analysis, simply gave the right of legal subrogation to his employer without depriving the employer of his right to equitable subrogation under circumstances requiring its application. *Burks* v. *Packer,* 143 Neb. 373, 9 N.W. 2d 471.
>
> * * * [I]t is generally the rule that a fellow employee would also be such person regardless of the capacity of his employment, *so long as he did not occupy the relationship of employer of plaintiff.*

57 C.J.S., Master and Servant, § 578, p. 348; 35 Am. Jur. Master and Servant, § 425, p. 954, and § 526, p. 955, Annotation, 99 A.L.R., page 422; *Hudson* v. *Moonnier,* 8 Cir. 94 F. 2d 132, Id., 8 Cir., 102 F. 2d 96." (Emphasis supplied).

Thus it is seen that a president or manager of a corporation or a business may or may not be a fellow-employee to others who are employed by the same corporation or in the same business, and he may or may not be personally liable for his tort causing injury to a fellow-employee, depending on the nature of the tort in some states and the scope of his duties and authority in others. None of the cited cases quite reach the problem presented in the case at bar. They all deal with situations where the fellow-employee tort feasor is something less than the employer also.

The appellant has cited no case, and we have found none, where the owner and president of a family corporation who hires, fires and directs his employees and who has provided them workmen's compensation insurance coverage, has been held personally liable in tort for injuries sustained by negligently maintained equipment or unsafe working conditions under a workmen's compensation statute similar to our own. Under compensation coverage the employer gives up the defense of contributory negligence and the injured employee is relieved of the burden of proving negligence but he gives up the right to sue his employer in a court of law.

A president of a corporation or the owner of a business may or may not be an employee of the corporation, or in the business, for the purpose of determining liability for compensation benefits under the Workmen's Compensation Law. That would depend on what he does. *Brooks* v. *Claywell, supra.*

In the case at bar Mr. and Mrs. Oliver owned the corporate business and they, as well as the corporation, were the employers.

Arkansas Statutes Annotated § 81-1338 (c) (Repl. 1960) provides as follows:

> "No policy of insurance shall be issued against liability under this act [§§ 81-1301—81-1349] unless such policy cover the entire liability of the employer as to the business or businesses identified in the policy. As to any questions of liability between the employer and the insurer the terms of the policy shall govern."

Arkansas Statutes Annotated § 81-1339 (Repl. 1960) provides as follows:

> "Any employer required to secure the payment of compensation under this act [§§ 81-1301—81-1349] who fails to secure such compensation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred ($500.00) dollars, or by imprisonment for not more than one [1] year, or by both such fine and imprisonment. This section shall not affect any other liability of the employer under this act."

The Olivers procured workmen's compensation insurance for the benefit of their employees, including the appellant, and the appellant was paid the full compensation benefits under the compensation act and the insurance so procured. The appellant was not injured by a direct negligent act of Oliver, he wasn't even on the premises when the appellant was injured. The negligence the appellant complains of is Oliver's failure to provide a safe place for her to work as required by state law. Certainly the safety requirements under the labor laws should be enforced in this state and their violation should not go unpunished, but if Oliver was merely a third party fellow-employee, he had no duty to furnish a place for appellant to work—safe or otherwise. If the corporation was the employer and Oliver was the mere president, he was not personally liable in tort or

under the compensation act for injuries sustained by corporate employees who are injured on defective corporate owned and maintained machines and equipment. If Oliver was the actual employer, his corporate title made no difference. His business was within the provisions of the Workmen's Compensation Law, the appellant's injury was compensable under the compensation law, and her rights thereunder are exclusive.

We hold that an employer-employee relationship existed between Oliver and the appellant at the time of her injury. We conclude that in no event could Oliver have been a "third party" within the meaning of Ark. Stat. Ann. § 81-1340 (a), supra, under the pleadings and facts of this case, and that the judgment of the trial court should be affirmed.

Affirmed.

FOGLEMAN and BYRD, JJ., dissent.

JOHN A. FOGLEMAN, Justice. I respectfully dissent. I agree with the majority in many particulars. I agree that the question presented is as narrow as the majority state it to be. I would keep it just that narrow.[1] In order to do so, and to put the question in proper perspective, it is necessary that more of the background on which the summary judgment was granted be disclosed. It was alleged in the complaint that Oliver had actual knowledge of the lack of the proper safety guard required by the safety code on a machine operated by appellant. It was also alleged that Oliver specifically assigned appellant to the operation of this machine without remedying the defect or warning appellant. It was further alleged that Oliver had twice previously been warned by the Department of Labor of this deficiency and of the clear and present danger posed to the safety of employees required to operate it. These

[1]In this respect it should be made clear that there is no appeal from the summary judgment in favor of Mrs. Oliver.

allegations were not controverted by the affidavit in support of Oliver's motion for summary judgment.

I also agree that a "third party" is an *entity* other than the employer and employee.

I further agree that most of the cases cited in the majority opinion really fail to reach the issue here. It seems to me that at least one of them lends more support to my position than to that of the majority, as will presently be demonstrated.

I do not agree that appellant is asking us to pierce the corporate veil. Actually the reverse is true. Appellee, the majority stockholder in a family corporation, has asked that the corporate veil hung by him and his family for their personal protection against business creditors be pierced for his own benefit when recognition of the separate entity would subject him to liability in a personal capacity as an employee of the corporate structure erected by him. Arkansas is quite liberal in affording corporate protection to a business enterprise. We have even permitted the formation of one-man corporations. Both the legislative and judicial branches have generally required a corporate status more similar to the leopard than to the chameleon. The holding of the majority would let appellee change his protective coloration as the mood strikes him.

The rule announced by the majority in this case is this: if a majority stockholder of a family corporation, who also manages the business and supervises the employees, is sued as a "third party" tort-feasor by an employee of the corporation he may, at his option, disregard the corporate fiction he created and seek the immunity from common law tort liability he would have had as an individual employer under the Workmen's Compensation Law. Such a result allows the appellee to "eat his cake and have it too" and is patently inconsistent with the rules heretofore announced by this court pertaining to "piercing the corporate veil."

In *Rounds & Porter Lbr. Co.* v. *Burns,* 216 Ark. 288, 225 S.W. 2d 1, this court said, "It is only when the privilege of transacting business in corporate form has been illegally abused to the injury of a third person that the corporate entities should be disregarded." This decision was followed by *Plant* v. *Cameron Feed Mills;* 228 Ark. 607, 309 S.W. 2d 312. There the corporate veil was pierced in an equity action to enforce a labor and materialman's lien on a building. The defendant corporations were a parent and a subsidiary which the court said were identical for the purposes of the suit. We held that even though the corporations were legally separate entities, it would constitute a constructive fraud on the lien claimant to allow them to claim entirely separate existences. Although we said that justice required the piercing of the fiction of the corporate entity, we added that the rule should be applied with great caution.

In *Black and White* v. *Love,* 236 Ark. 529, 367 S.W. 2d 427, we reaffirmed our conclusions as set out in *Round & Porter Lbr. Co.* v. *Burns,* supra, and pierced the veil of a corporation to prevent, "putting fiction above right and justice." Finally, in *Banks* v. *Jones,* 239 Ark. 396, 390 S.W. 2d 108, we refused to pierce the corporate veil, saying, "We agree with the chancellor that the evidence in the instant case does not support a finding that there was an illegal abuse of the corporate form to the injury of the appellant."

Thus the majority of the court have for the first time permitted the corporate fiction to be disregarded at the option of the incorporaters for their own benefit and not for the benefit of one injured by the illegal abuse by another of the privilege of transacting business as a separate corporate entity. This holding is not only inconsistent with our previous decisions with reference to the equitable rule permitting the piercing of the corporate veil, but it is inconsistent with our holding in *Brooks* v. *Claywell,* 215 Ark. 913, 224 S.W. 2d 37. There we

held that the managing officer of a corporation, owned by him, his sister and brother-in-law, from which he took all the profits and of which he was in absolute control, was an employee of the company for the purpose of determining whether that company was subject to the Workmen's Compensation Act.

My position is not unprecedented. In *Adams* v. *Fidelity and Casualty Co. of New York,* 107 So. 2d 496 (La. App. 1958), the Louisiana court had before it a case which is closely analogous to this one. In that case plaintiff employee sought to sue several high-ranking corporate officers and stockholder directors of the corporation employer as a "third party" under a workmen's compensation statute similar to our own. The defendants contended that because the complaint alleged that they failed to perform duties which arose out of their position as officers and directors of the corporation they were therefore liable only to their corporate employer and not to a third party such as an employee. This contention was rejected. It is strikingly similar to the majority's assertion that if the corporation were the employer and Oliver were the mere president he was not liable in tort or under the compensation act for injuries sustained by corporate employees who are injured on defective corporate owned and maintained machines and equipment.

The *Adams* case has been followed in *Travelers Ins. Co.* v. *Brown,* 338 F. 2d 229 (5th Cir. 1965) and *Herbert* v. *Blankenship,* 187 So. 2d 798 (La. App. 1966). In the latter case two of the defendants were officers and the stockholders of the employer corporation. The court there said that officers or agents of corporate employers may themselves be liable in part insofar as their own personal negligence contributed to the accident causing injury to an employee even though the exclusive remedy against the corporation itself for the workman's injuries was in compensation. Other cases in which suits by injured employees against officers, directors and

stockholders of a corporation as "third parties" have been permitted include *Webster* v. *Stewart,* 210 Mich. 13, 177 N.W. 230 (1920); *Witherspoon* v. *Salm,* Ind. App., 237 N.E. 2d 116 (1967).

In *Echols* v. *Chattooga Mercantile Co.,* 74 Ga. App. 18, 38 S.E. 2d 675 (1946), cited by the majority, the defense of the general manager of the corporation against a tort action by an employee was that the manager was the alter ego of the corporation. The court rejected this defense. In *Evans* v. *Rohrbach,* 35 N.J. Super. 260, 113 A. 2d 838 (1955), also cited by the majority, the court indicated that a director or officer who committed a tort or directed a tortious act to be done or who participated or cooperated therein was liable to third persons injured thereby, even though liability might also attach to the corporation.

I should point out that the decision in *Peet* v. *Mills,* 76 Wash. 437, 136 P. 685 (1913) might appear to give some support to the position of the majority were it not for the fact that the Workmen's Compensation statute involved abolished all civil actions arising out of an employment except those expressly saved by the act. The only actions saved were those for injuries caused by the act of a third party not in the same employ as the injured workman.

I cannot sanction the misuse of the equitable device of piercing the corporate veil to arrive at a desired result under the Workmen's Compensation Law. It is, perhaps, a hard rule of law that would require the court to acknowledge the separate legal existence of 7-11 Laundry Cleaners, Inc. from appellee J. P. Oliver who is the principal stockholder and manager. However, it is my view that this problem addresses itself to the legislature, not the courts. I would reverse.

BYRD, J., joins in this dissent.

J. C. McCaa, Jr. v. Norma P. McCaa

5-4850 438 S.W. 2d 325

Opinion Delivered March 17, 1969

A. Jan Thomas, Jr. for appellant.

Vincent E. Skillman, Jr. for appellee.

Conley Byrd, Justice. This messy divorce case arises out of the stormy marriage between appellant J. C. McCaa, Jr. and appellee Norma P. McCaa. The parties were married on July 12, 1964, following a divorce between J. C. and his first wife Madeline in which Norma was named corespondent. Following a separation on Feb. 21, 1965, Norma filed suit for separate maintenance and J. C. counterclaimed for divorce. At a hearing on Sept. 8th 1965, the trial court found that neither party was entitled to the relief prayed for, each being found equally guilty. In that decree the trial court also found, "that all rights to possession of property as between the parties are hereby adjudicated, it being the finding of this court that neither of the parties should take any interest or share in the property of the other; that this property right adjudication should be res judicata in any divorce action or litigation that may occur hereafter between the parties on the grounds of three years separation . . ."

The present action was instituted on May 25, 1967, by Norma who alleged a resumption of marital relations following the 1965 decree and sought a divorce upon the ground of personal indignities and adultery allegedly committed with a Miss Arnold. Mr. McCaa counterclaimed for divorce upon the grounds of three years separation. The trial court found that the parties had resumed their marital relations following the Sept. 8, 1965, decree; denied Mr. McCaa his divorce upon the grounds of three years separation; and awarded a divorce to Norma upon the grounds of adultery. In so doing the court recognized that by operation of law Norma would be entitled to 1/3 interest for life in any real estate and 1/3 interest in any personal property of McCaa. Mr. McCaa has appealed contending that the trial court failed to give full faith and credit to the 1965 decree; that Norma's testimony and that of her witnesses failed to meet the requirements of corroboration in order to sustain a divorce for adultery; and that the Chancellor abused his discretion in granting the divorce—*i.e.,* his findings are contrary to preponderance of the evidence.

We find appellant's contentions to be without merit. Norma, her daughter, her mother and Joe Russell all testified that McCaa and Norma purchased a house from Joe Russell on Cranford Street in Memphis into which they moved during September 1966, and in which they lived and cohabitated until November 12th or 13th of 1966. In fact Joe Russell testified that Mr. and Mrs. McCaa spent one night at the house before it was purchased and that he and his wife served them brunch the next morning.

Norma testified that following the last separation she found her husband at Pete's and Sam's Restaurant in Memphis with two women and that when she started checking on the girls, that she ran across Miss Arnold's name, whom she met in January 1967. That in January 1967, she and Miss Arnold went to Mr. McCaa's home

in West Memphis about 8:30 A.M. and observed one Mrs. Hart in the middle of Mr. McCaa's bed with only a pajama shirt on.

Miss Arnold, age 25, testified that she met Mr. McCaa in January in 1966 while living in Osceola. That in March 1966, she moved to an apartment in Memphis which she and Mr. McCaa had picked out together and that their intimate relationship continued for approximately one year until she became aware of his interest in Mrs. Hart.

Mr. McCaa denies that he resumed his marital relationship with Norma; denies his adulterous relationship with Miss Arnold; and asserts that Mrs. Hart was at his house in January 1967 only to make some telephone calls while she was waiting on her automobile to be repaired. On cross examination he admitted having been out to dinner with Mrs. Hart and having been to Kentucky to visit with Mrs. Hart and her children. He also explained that Mrs. Hart at the time of trial was in Kentucky with her parents and that he wouldn't involve her in this "mess".

The 1965 decree is obviously not res judicata of the cause of action herein proved. We held in *McKay* v. *McKay*, 172 Ark. 918, 290 S.W. 951 (1927), that a decree denying a divorce was not res judicata of a cause of action not then in existence. The same rule is here applicable.

It is true that in *Payne* v. *Payne*, 42 Ark. 235 (1883), we pointed out that courts are reluctant to grant a divorce upon the uncorroborated testimony of a *particeps criminis*. However in a case such as this where one *particeps criminis* openly admits the adulterous relationship and another woman is found in the husband's boudoir clad only in a pajama top, we are unwilling to say there is insufficient evidence to sustain the trial court's finding of adultery.

Neither can we say that the trial court's finding upon the whole case is contrary to a preponderance of the evidence.

Affirmed.

FOGLEMAN, J., disqualified.

NORMAN LEONARD v. FAY DOWNING

5-4813 438 S.W. 2d 327

Opinion Delivered March 17, 1969

W. B. Howard and *Jack Segars* for appellant.

Penix & Penix and *Holland & Erwin* for appellee.

FRANK HOLT, Justice. The appellee brought this action to recover the down payment on a house. The chancellor found there had been a mutual agreement to rescind the oral contract of purchase and awarded ap-

pellee the sum of $1,860.00, together with interest from the date of the alleged rescission. For reversal, appellant primarily contends that the evidence offered by appellee on rescission was insufficient as a matter of law in that the alleged agreement for refund was indefinite and uncertain as to terms and time of payment.

Appellee paid appellant $2,000 as a down payment on the purchase price of a house. The balance of $12,-025 was to be paid at the rate of $80 per month with interest. According to appellee, her ability to purchase was dependent upon her securing a Veterans Administration loan for the balance of the purchase price. With that understanding, she moved into the house. A few days later she went to a real estate office where she was advised that she would not be able to secure the VA loan. Appellant was then called to the office and acquainted with this fact. Appellee testified that appellant agreed he would refund the $2,000 down payment, less $100 for damage to the floor in the house and $40 for two weeks' rent. Thus, the net refund of $1,860 was agreed upon. Appellee's version was corroborated by her daughter and the real estate agent. Appellant testified that a refund was discussed but he made no oral agreement and refused to sign a written one. Further, that he could not make a refund until he had discussed it with his partner. According to appellee, the terms of the rescission and contract were definite and certain that he would refund $1,860 of the $2,000 deposit. She testified:

"Q. What did he say about returning your money?

A. I don't remember what he had, $1,600 or $1,700 and I said I would wait on the balance.

Q. What was his response to that?

A. He said he would give it back the next day."

Before appellee moved, appellant furnished the material to repair the floor and never sent her a bill. There was evidence that after the appellee moved out of the house, appellant showed it to prospective purchasers and placed a "For Sale" sign on the premises. According to appellant, he advised any prospective purchaser that the house would be for resale when it was settled in court.

It is well settled that parties to an executory contract may rescind or modify it by mutual agreement. *Elkins* v. *Aliceville,* 170 Ark. 195, 279 S.W. 379 (1926); *Morgan* v. *Shackleford,* 174 Ark. 337, 295 S.W. 46 (1927); *Swift* v. *Lovegrove,* 237 Ark. 43, 371 S.W. 2d 129 (1963); 17A C.J.S., Contracts § 387. It is true, as urged by appellant, that time, place and amount are usually considered indispensable terms to a definite contract. *Crawford* v. *General Contract Corp.,* 174 F. Supp. 283. However, the general rule is that a promise to perform within a reasonable time is sufficient. 17 Am. Jur. 2d., Contracts, §§ 80, 82.

In the case at bar we cannot say that the finding of the chancellor that the appellant and appellee mutually agreed to rescind the contract of purchase is against the preponderance of the evidence. We think the terms and time of payment are reasonably certain and definite and meet the usual standards where two laymen attempt a mutual understanding under the circumstances that are here presented.

Since there exists a mutual agreement to rescind the original purchase agreement, it becomes unnecessary to consider appellant's contentions that appellee was never refused a VA loan and that he is willing to perform the original purchase agreement.

Affirmed.

NINETEEN CORP. v. GUARANTY FINANCIAL CORP.

5-4697 438 S.W. 2d 685

Opinion Delivered March 17, 1969

[Rehearing denied April 21, 1969.]

[redacted]

John Harris Jones for appellant.

Coleman, Gantt, Ramsay & Cox for appellee.

EMON A. MAHONY, Special Justice. This litigation originated in the Chancery Court of Jefferson County, Arkansas. The appellee was the plaintiff in the lower court. The complaint alleges that Guaranty Financial Corporation, the plaintiff, was the owner of all of the outstanding capital stock of Universal Insurance Company. That on or about October 1, 1967, it entered into a written contract with the defendant, Nineteen Corporation, a corporation organized and existing under and by virtue of the laws of Texas, whereby the plaintiff agreed to sell and the defendant agreed to purchase all of the outstanding common stock of the Universal Insurance Corporation pursuant to a written contract, a copy of which was attached to the complaint. The contract recites a cash consideration of $141,000 and a further consideration of the transfer of $175,000 in principal amount of first real estate mortgage loans qualifying as investments under the insurance laws of the State of Arkansas. The total consideration was therefore $316,000. The execution of this contract is admitted by the defendant, Nineteen Corporation.

The first sentence of paragraph 3 of the complaint reads as follows: "Subsequent to the execution of the contract for the sale of stock between the parties made Exhibit 'A' to this complaint, H. M. Weisenbaker, president of the defendant, requested the plaintiff to conclude the sale of the stock of Universal Insurance Company (which will hereafter be referred to for simplicity as 'Universal') by the exchange of a promissory note of Nineteen Corporation to be secured by a collateral pledge of the stock being purchased from Universal Insurance Company and a first mortgage lien upon certain real estate in Oklahoma City in lieu of the amount to have been paid in cash under the said contract for sale of stock." This sentence was also admitted to be true by defendant.

The next sentence of paragraph 3 of the complaint, that is, the second sentence, alleges as follows: "In

addition he requested that the amount of the qualifying first real estate mortgage loans to be transferred by the defendant to the plaintiff under the contract for sale of stock be reduced from $175,000 as therein provided to $147,557.24, which was the principal balance of first real estate mortgage loans held by Universal on October 23, 1967." The defendant denied the allegations of said second sentence of said paragraph 3 but admitted as alleged by the complaint that on October 23 it made, executed and delivered to the plaintiff its collateral promissory note and pledge agreement in the sum of $145,772.27 as described in the third sentence of said third paragraph. This new note was secured by a pledge agreement in which the 150,000 shares of common stock of the insurance company were pledged and there was also mortgaged an interest in certain real property in Oklahoma.

The original written contract of sale which provided for a consideration of $141,000 in cash and $175,000 in mortgage loans further provided that the $175,000 worth of mortgage loans paid as a portion of the consideration would be transferred by Guaranty Financial Corporation to the insurance company in exchange for first mortgage loans then on hand in the insurance company. No cash consideration was ever paid. A note in the sum of $145,772.27 was delivered on October 23rd to plaintiff, Guaranty Financial Corporation. On the same date, pursuant to the contract of sale, the then existing officers and directors of the insurance company resigned and the new stockholder, Nineteen Corporation, elected new officers and directors. The new officers and directors then transferred to Guaranty Financial Corporation the notes and mortgages held by the insurance company which had a principal amount of $147,557.24. Nineteen Corporation, however, never transferred any mortgage notes to Guaranty Financial Corporation which might be exchanged for the mortgage notes of the insurance company as contemplated by the contract of sale.

The complainant then sued and asked judgment for the amount of the note with interest and for the principal value of the mortgages, making a total amount of $293,329.51 plus interest and attorneys fees. It requests foreclosure of the pledge on the common stock of the corporation.

The defendant's original answer alleged a mutual rescission of the sale and note on or about October 26, 1967. It appears that on or about said date the officers of the insurance company, who had been elected by the defendant Nineteen Corporation, resigned. Guaranty Financial Corporation then nominated and elected new directors and officers of the insurance company and the mortgage notes which had been transferred from the insurance company to Guaranty Financial Corporation were retransferred by Guaranty Financial Corporation to the insurance company. Defendant Nineteen Corporation then filed its amended and substituted answer and counterclaim and in this answer made the admissions and denials above referred to. The defendant also pleaded that the note and mortgage described in paragraph 3 of the complaint were usurious and void and pled usury as a full and complete defense. Defendant prayed that the complaint be dismissed, that plaintiff be ordered to surrender to defendant the stock of the insurance company, that the collateral promissory note, pledge agreement and real estate mortgage be cancelled and annulled, and all other proper relief.

At the time of the trial only one witness testified for the plaintiff. This witness was Mr. McCarty, who was the president of Guaranty Financial Corporation. The original contract of sale was introduced. The testimony then was that there were various negotiations for the amendment of the contract whereby in lieu of the $141,000 cash payment the note, pledge agreement and real estate mortgage were executed.

In response to the question of usury, the plaintiff offered a balance sheet which reflected that the net

worth of the company on October 23, 1967, was $272,-392.64. The witness testified that the value of the charter was $22,000, or at least that was the value which the defendant agreed to pay. These 2 figures he testtified added together, less the amount of the mortgage notes on hand on October 23, 1967, were equal to the amount of the note which was executed by defendant, Nineteen Corporation. He further testified that between October 1 and October 23 three of the mortgages owned by the insurance company had been sold and there had been various payments on the mortgage indebtedness. Defendant objected to this testimony under the parol evidence rule and on the grounds further that it was at variance with the terms of the complaint. Plaintiff then rested.

The defendant offered only one witness, Joe B. Bernard. Mr. Bernard's testimony was to the effect that he lived at Amarillo, Texas, and he had executed a subordination agreement which subordinated the lien of his second mortgage on the lands lying in Oklahoma to a new mortgage which might be executed by Nineteen Corporation to the insurance company, Universal Insurance Company. Defendant offered no other testimony.

The complaint in the case was filed on December 20, 1967. The Chancellor issued his opinion on April 29, 1968. The Chancellor issued findings of fact in which he found that there was a new agreement, that instead of a cash payment as provided for in the written contract the defendant was to execute its promissory note to be secured by a collateral pledge of the Universal stock and a first mortgage lien upon certain real property in Oklahoma City, Oklahoma. The new agreement provided further that the defendant was to transfer to the plaintiff its own first real estate mortgage loan with a principal balance of $147,557.24. He further found that even though Mr. McCarty's testimony is not uncontradicted as a matter of law, nevertheless, no witness took the stand to contradict Mr. McCarty's testi-

mony and held against the defendant on its contention of usury. The Court held that the plaintiff is entitled to a judgment in the sum of $293,329.51 with interest plus a $10,000 attorney's fee and that the property should be offered for sale at a public sale to the highest bidder for cash. A decree was entered pursuant to this opinion and in due course this appeal ensued.

We hold that the findings of the Chancellor were not against the weight of the evidence on the question of usury. The defendant-appellant has not carried the burden of proving usury which is upon the party who asserts it. *Carter* v. *Zachary,* 243 Ark. 104, 418 S.W. 2d 787; *Wallace* v. *Hamilton,* 238 Ark. 406, 382 S.W. 2d 363. The complaint alleged that a new agreement was entered into. This was admitted in the answer. The Court found that a new agreement was entered into. Obviously the new agreement could be supported by a new consideration. We think that evidence was admissible to show that there had been a change in the assets of the company whose stock was being transferred. We further think that evidence is admissible to show the relationship between this new consideration and this change in assets. Certainly there is no contention that there was usury in the original agreement, that is, the written agreement, and we hold that usury in the new agreement was not established by defendant-appellant, who had the burden of proof. In reaching this conclusion we have taken due note of appellant's contention that the first sentence in paragraph 3 of the complaint, which is quoted above, establishes that the new agreement was usurious. We do not agree with this contention. However, if appellant's interpretation of the conclusion that should be reached with respect to this sentence is correct, then certainly the burden would be on the creditor to show that the contract was not usurious and oral testimony is admissible for this purpose. *Andrews* v. *Martin,* 245 Ark. 1010, 436 S.W. 2d 285; *Peoples Loan and Investment Co.* v. *Booth,* 245 Ark. 144, 431 S.W. 2d 472; *Universal C.I.T. Credit Cor-*

poration v. *Lackey,* 228 Ark. 101, 305 S.W. 2d 858.

Appellant also attacks the provisions of the decree as to the application of the proceeds. However, the pledge agreement authorized the application of the proceeds on any of the liabilities secured by the pledge agreement and the pledge agreement secures the original note and all other liabilities, direct or indirect, absolute or contingent, due or to become due to the appellee. We do not find the directions of the decree with reference to the application of the proceeds are inequitable, that is, that the proceeds of the aforesaid sale of the common stock shall be applied first against the portion of the judgment obtained by the plaintiff by virtue of defendant's failure to cause the plaintiff to receive real estate mortgage loans in the principal sum of $147,-557.24, together with the interest accruing thereon.

Appellant next states that the decree is in error for the reason that it ordered a sale of the property for cash contrary to *Ark. Stat. Ann.* 51-1109 which reads, "Sales of personal property made by order of the court shall be on a credit of three months; * * *"

We agree with appellee that this litigation involved a foreclosure of a pledge by court action and that pledges are governed by the Uniform Commercial Code. If the sale had not been made by order of the court the collateral might have been disposed of in any way that was commercially reasonable but, since the foreclosure was by judicial action, then the requirements of *Ark. Stat. Ann.* 51-1109 govern and by the direct terms of the statute, sales by order of the court must be on a credit of three months. *Turner* v. *Ironside,* 208 Ark. 17, 184 S.W. 2d 810; *De Yampert* v. *Manley,* 127 Ark. 153, 191 S.W. 905.

We also agree with the appellant that the decree is in error insofar as it attempts to fix a lien on lands lying in Oklahoma.

For the reasons stated the decree is reversed and remanded with instructions to enter a decree in accordance herewith.

FOGLEMAN, J., disqualified.

HAROLD KIMBLE v. THE STATE OF ARKANSAS

5-5401 438 S.W. 2d 705

Opinion Delivered March 24, 1969

Phillip Carroll for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

CARLETON HARRIS, Chief Justice. On June 27, 1967, appellant, Harold Kimble, was tried by the Circuit Court of Pulaski County (First Division) sitting as a jury, convicted of the crime of assault with intent to kill, and sentenced to five years in the penitentiary. He remained in the penitentiary until May 16, 1968, when the conviction was set aside by the court after a hearing under a Criminal Procedure Rule 1 petition. The court found that, at the original trial, no witnesses were called on appellant's behalf, though Kimble had furnished his then attorney with the names of four or five persons, who appellant stated would testify to the effect that he was acting in self-defense. Appellant was again tried on June 12, 1968, by a jury, again found guilty, and the verdict fixed his punishment at nine years' imprison-

ment in the penitentiary. From the judgment entered in accord with this verdict, Kimble brings this appeal. For reversal, five points are urged, as follows:

I. *The Arkansas jury selection system and its application by the Commissioners in this instance deprived the defendant of a fair cross-section of the community to pass judgment on his life and liberty.*

II. *Appellant's confession was taken in violation of his constitutional rights and should not have been admitted in evidence.*

III. *Admissible evidence on an important issue was wrongfully excluded by the Court.*

IV. *The Trial Judge wrongfully expressed his opinion of defendant's guilt in the presence of the jury.*

V. *Appellant's period of confinement should be reduced by the period of confinement under the former void conviction.*

We proceed to a discussion of these contentions in the order listed.

I.

It is forcefully argued that the composition of the jury panel precluded Kimble from being tried by a jury of his peers. The argument is directed, not particularly to the fact that there was discrimination against members of the Negro race, but a discrimination occasioned by the selection of a particular group of persons, rather than a cross-section of the entire community. There were six Negroes on the jury panel, and actually four of these were selected as members of the twelve-person jury which convicted Kimble. As expressed by appellant, the jury commissioners picked the "blue ribbon" class of jurors, *i.e.*, businessmen, school principles, teachers, etc., and completely ignored day laborers, me-

chanics, and other wage earners. In other words, it is the contention of appellant that he was deprived of a jury composed of his economic and social peers.

Appellant's attack is made upon the system of selection of jury panels, and he says that it is only natural that jury commissioners will select persons for jury service composed of their neighbors, friends, acquaintances, *i.e.*, persons that they know, and the selection of businessmen for jury commissioners, necessarily means that the same members of that classification only will be selected for jury service. It is pointed out that the three jury commissioners were respectively the owner of an exclusive men's store, an owner and operator of several florist shops in Little Rock, and the assistant controller of a dairy. Five of the six Negro personnel selected for jury service were school (high school or college) personnel, and the other was a self-employed sign painter. Appellant states:

> "* * * The Commissioners cannot really be blamed when the panel is unconstitutionally constituted, for it is inherent in the system that they will choose their neighbors, friends, acquaintances, or persons who have reputations as substantial citizens in the community."

The attack is actually on the Arkansas statutes[1] providing for the selection of jurors, which appellant says violates his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The case of *Thiel* v. *Southern Pacific Company,* 328 U.S. 217, is cited by appellant, but we do not agree that this case affords support to appellant's position. There, the court pointed out that the American tradition of trial by jury necessarily contemplates an impartial jury, drawn from a cross-section of the community. The court, however, stated:

[1]Ark. Stat. Ann. § 39-201, § 39-205, § 39-208, and § 39-215 (Repl. 1962).

"* * * This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups."

The court reversed the judgment because wage earners were systematically and ordinarily excluded, but, in *Thiel,* the court made this pertinent finding:

"The undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection. Both the clerk of the court and the jury commissioner testified that they deliberately and intentionally excluded from the jury lists all persons who work for a daily wage."

In the case before us, all jury commissioners testified; it is true that one testified that he partly took into consideration whether the selection of certain jurors would cause a hardship, but the panel was picked by all three commissioners, and there is no evidence that the other two considered possible inconvenience to any particular group. It certainly cannot be said that the jury was made up of owners or heads of businesses for the record reflects that employees heavily predominated the composition of the panel; nor was there any evidence that prior jury panels had been limited to any particular class of persons. There is no showing, nor it is argued, that there was any systematic exclusion of any group, racial, economic, social or religious.

As far as the statutory method of selecting jurors is concerned, this is the responsibility of the General Assembly, and not of this court. The United States Supreme Court has never declared this method of selection to be violative of any constitutional requirement;

and until that is done, it is our view that any change can only properly be consummated by legislative act.

II.

We do not agree that appellant's confession was taken in violation of his constitutional rights. It is first mentioned that the Little Rock Municipal Court was in session in the same building in which Kimble was questioned by two Little Rock detectives on February 17, and it is argued that appellant should have been taken to the chambers of the Municipal Judge so that the prisoner's rights could be properly protected. The fact that the court was in session at the time does not, in our view, strengthen appellant's case, for certainly a judge, with a set docket of cases to be heard, would not have been expected to adjourn court, and proceed to chambers with the officers and Kimble. We have made it clear, on numerous occasions, that the failure to take an arrested person before a Magistrate does not vitiate his confession. In *Paschal* v. *State,* 243 Ark. 329 (1967), 420 S.W. 2d 73, we said:

> "Counsel for the appellant, citing *McNabb* v. *United States,* 318 U.S. 332 (1943), insist that the confession was inadmissible because Paschal had not been taken before a magistrate for commitment, as the statute requires. Ark. Stat. Ann. § 43-601. The McNabb case, however, involved the interpretation of federal statutes that do not apply to the states. *State* v. *Browning,* 206 Ark. 791, 178 S.W. 2d 77 (1944). Under our statute the failure to take an arrested person before a magistrate does not vitiate a confession, because the statute is construed to be directory only. *State* v. *Browning, supra; Moore* v. *State,* 229 Ark. 335, 315 S.W. 2d 907 (1958).

The important consideration is whether Kimble was advised of his constitutional rights, and whether the procedure followed was in line with the United States Supreme Court decision in *Miranda* v. *Arizona,* 384 U.S.

436. Before this statement was introduced, the court went into chambers with counsel for the purpose of holding a hearing on the question of whether the statement was voluntarily made. Detective Bob Moore of the Little Rock Police Department testified that he first talked with Kimble about 8:30 A.M. on the morning after appellant's arrest. The detective stated that he and officer Pete Evans advised Kimble that he had the right to remain silent; the right to talk with an attorney before giving a statement; the right to have an attorney present when answering any questions; that any statement that he gave would be used in a court of law, and that, if he waived these rights, he had the right to stop the interrogation at any time. He then gave Kimble a waiver to read and sign, and testified that he did not make any promises or threats to induce appellant to make a statement. Kimble signed the waiver, and the officer said that appellant was very cooperative in telling about the shooting. Moore stated that he wrote the statement as Kimble related the facts. Appellant said that he started giving the statement when first brought to the jail, then went to sleep, and finished giving it the next morning. He said that he gave the statement, stopping at times to give Moore an opportunity to write what was said. He added that he initialed it in places at the request of the officer, but he really did not know whether the officer wrote everything, word for word, that he said. He never did answer the question as to whether he read it over before signing it. The court held that the statement was voluntarily made, and the weight of the evidence appears to be to that effect. The officer testified emphatically that the *Miranda* warnings were given, that Kimble waived his right to an attorney at that time, and voluntarily made the statement. Appellant answered, "No," to his attorney's question relative to whether he had had an opportunity to confer with a lawyer, but, though represented at the second trial by able and competent counsel, he never did state that he was not offered an attorney, nor did he deny that he was told he had the

right to remain silent. He only said that he was confused and upset. There is no contention of threats, force, or duress. Actually, the statement does not conflict with appellant's defense at the trial, since Kimble pleaded self-defense, and the court instructed the jury on self-defense. In his statement, Kimble said that he was accosted by Columbus Collins (victim of the shooting), who was quite belligerent, and that he shot Collins after the latter started toward him with his hand in his pocket.[2] Kimble's testimony at the trial, with reference to the shooting, reiterated that the shooting was in self-defense; that Collins came toward appellant with his hand in his pocket, and Kimble pulled out his pistol and shot Collins. In describing the shooting, the only difference was that on trial, Kimble stated that he fired the first shot in the air, and fired the second shot at Collins. Appellant said that he only fired twice. In his statement, he did not mention firing the first shot in the air, and said, "I think I shot three times." We hold that the statement was voluntarily made, after Kimble had been advised of his constitutional rights, heretofore enumerated.

III.

Collins was only struck by one bullet. Appellant says that the most important issue in the case was whether he had the intent to kill when pulling the trigger. He was asked the question by his attorney, "If you had wanted to, would you have had any difficulty in shooting him more than once?" The state objected to the question on the basis that it called for a conclusion

[2]Collins testified in an unusual manner for a prosecuting witness, in that he admitted having his hand in his pocket: "I have my hand in my pocket all the time. I've got in trouble in the Army about that. I walk down the road with my hands in my pocket, or with one hand in my pocket. I do that all the time, and I have got in trouble about that. * * * I have change in my pocket and I just play with it, just running the change through my fingers. * * * When I went outside I had one hand in my pocket. I always keep one hand in my pocket. I always keep it that way."

on the part of the witness, and this objection was sustained.

Of course, the question did call for a conclusion, inasmuch as Kimble was saying that any shots fired would have struck Collins, and this would seem problematical, since according to Kimble's own testimony, Collins turned and fled down an alley after the second shot. However, we agree that appellant had the right to testify as to his intention when he shot Collins, but we find no prejudicial error in the court's ruling. It appears that the point that he was trying to get over to the jury was that he had bullets left in his pistol, and could have fired them had he wanted to. He had already testified that he did not aim the first shot at Collins, and had already testified that he did not want to kill his victim. From the record:

> "I fired directly in the air to get him to stop running his hand in his pocket. I didn't want to hurt him, and I didn't want him to hurt me."

Also, when asked if he had the gun in his pocket when the incident arose in the shine parlor, and if he "pulled" the gun, appellant answered:

> "No, I didn't. I didn't want any trouble. *I could have shot him then,* but I tried to get away from him. I tried to withdraw from him so there wouldn't be any trouble, and then he followed me outside. After he came up to the front, *I could have shot him then if I had wanted to. I could have shot him then when we came from the back to the front,*[3] but I withdrew from him again and tried to avoid all that, but he kept pressing and kept pressing, and then he ran his hand in his pocket, and I warned him not to put his hand in his pocket. and he kept on, and that is when I shot him, and

[3]All italicized statements in this paragraph denote our emphasis.

Andrew Carey hollered to him that I had a gun, and told him to run * * *."

He said that "when he ran down the alley, I put my gun back in my pocket, and there was no more shots fired, just those two shots."

After the court ruled the question improper, Kimble testified in chambers that he had four more bullets in his pistol, but he didn't fire them, because he "was just trying to stop him from doing something to me, and that is just why I shot him one time." After Kimble returned to the witness stand, the record reveals the following:

"Q. (Mr. Carroll, continuing) You testified you fired two shots, and the first one did not strike Mr. Collins, but the second one did. After you fired those two shots, did you fire any additional shots?

A. No, sir, not after I fired those two shots. After I fired those two shots, I put my gun back in my pocket.

Q. Did you have any more bullets left in your revolver after those two shots?

A. Yes, sir, I had four.

Q. And you did not fire them?

A. No, sir."

It is difficult to see, from these quoted portions of the transcript, how appellant could have conveyed more clearly to the jury that he had no desire to kill Collins; that he was only trying to scare his adversary from making an attack on him (appellant), and that he had plenty of ammunition in his pistol to continue firing if he desired to do so.

IV.

During the closing argument to the jury, counsel for appellant asked the jury to take into consideration the fact that Kimble had already served four hundred and seventy-nine days in jail, and in the penitentiary. The court instructed the jury that it could not take this into consideration, stating:

> "The man was tried in this Court and this Court thought he was guilty and sentenced him to the Penitentiary. He later was brought in under Rule I, a new rule of the Supreme Court, because of the fact that certain witnesses weren't called in his behalf and, for that reason, I set the judgment aside so he could have the opportunity to get these witnesses in that he wanted to testify, and, also, to try it before a jury if he liked."

Appellant argues that the court's statement that it "thought he was guilty" (at the first trial) was a prejudicial comment made in the presence of the jury, and calls for a reversal. We do not discuss this asserted error for the reason that no motion for a mistrial was made; nor, for that matter, was any objection made or exception saved. See *Randall* v. *State,* 239 Ark. 312, 389 S.W. 2d 229.

V.

The record reflects that Kimble was in jail one hundred and twenty-five days before the first trial. After the first conviction was set aside, he was returned from the penitentiary, and placed in the county jail until making bond twenty-six days later. He also apparently served a total of three hundred and thirty days in the penitentiary between the time of the first conviction and the order setting the same aside.

Appellant argues that he should have been given credit on the present sentence for this amount of time.

As to the days served in jail, we do not agree, for we have no statute permitting this to be done. It is not shown why appellant did not make bond before the first trial; certainly, the alleged offense was bailable, and, as mentioned, bond was made subsequent to the prisoner's being returned to the jail after the judgment was vacated. As to the time served in the penitentiary, we think appellant is due to have deducted the number of days served after the first conviction. Ark. Stat. Ann. §§ 43-2726 through 43-2728 (Repl. 1964) deals with the confinement of a prisoner in the penitentiary where an appeal is taken, and the judgment reversed by the Supreme Court. The first two sections set out that upon a reversal, if a new trial is ordered, the defendant shall be removed from the penitentiary back to the county jail. Ark. Stat. Ann. § 43-2728 provides that, if a defendant, upon a new trial, "is again convicted, the period of his former confinement in the penitentiary shall be deducted by the court from the period of confinement fixed in the last verdict of conviction."

The state argues that these statutes have no application to a situation where the trial court itself sets aside the first conviction, and appellant is, accordingly, not entitled to this relief. The state is technically correct in that the statutes refer to a reversal by the Supreme Court, but we do not think the General Assembly particularly intended a distinction between convictions reversed by the Supreme Court, and convictions vacated by the Circuit Court. Rather, the only logical conclusion is that the General Assembly intended for a convicted person who obtained a new trial, and was again convicted, to receive credit for the amount of time already served for the same offense.

The record reveals that Kimble received a fair trial, and was found guilty by the jury. We find no reversible error, and the cause is remanded to the Pulaski County Circuit Court, First Division, with instructions to amend the judgment, crediting the second sentence of

appellant with the amount of time served for this offense in the state penitentiary between the first and second convictions.

It is so ordered.

BROWN and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice. I agree with the majority opinion in every particular except one. That has to do with appellant's Point III. I do not agree that excluding the testimony of appellant with reference to his intention on the occasion of the alleged offense was not prejudicial. In order that the matter be put in proper perspective, I deem it necessary to refer to a portion of the record not mentioned in the majority opinion.

After the court's ruling on the original question propounded by appellant's attorney, he asked to be permitted to make a record on his proffer of proof in chambers. Thereupon, the judge, the defendant, and counsel for the state and defendant's attorney retired to chambers, where the following occurred:

Q. (by Mr. Carroll) Mr. Kimball, if you had wanted to shoot Columbus Collins more than once, was there anything that would have prevented you from doing so?

A. No, sir, there wasn't.

Q. Why didn't you shoot him more than once?

MR. ROBINSON:

Objection. That calls for a conclusion.

THE COURT:

You can move to strike it after he is through testifying.

A. I didn't shoot no more than just the one time, because, in the first place, I didn't want to have any quarrel with him. I didn't want to shoot him. In the first place, I didn't want to shoot him, and I was just trying to stop him from doing something to me, and that is just why I shot him one time.

Q. Now, after you shot this first shot, that did not strike him, and did he keep coming?

A. I fired the first shot in the air. I shot a warning shot, and he made a couple more steps, and I hollered at him not to open up on me, and then I shot him.

Q. Did he have his hands in his pocket?

A. He had his hand in his pocket at that time.

Q. Did you have any more bullets in your gun after you shot him?

A. Yes, sir, four more.

MR. CARROLL:

Your Honor, I want to offer that evidence to the jury.

MR. ROBINSON:

It is repetitive and conclusionary. It is not proper redirect anyway. This has nothing to do with what I went into on cross examination. I don't think it is proper.

THE COURT:

I don't think it is. The other witness testified four or five shots were fired, and this man said he shot some in the air.

MR. CARROLL:

One, Your Honor.

THE COURT:

One shot in the air, and the other witness said he heard three or four while running away from him. It is up to the jury to decide whether or not he wanted to kill him. The jury has to conclude that from the evidence before them, not by what he says he had in mind at the time.

MR. CARROLL:

He knows better than anybody else.

THE COURT:

That's right, but it is up to the jury to decide from the evidence.

MR. CARROLL:

Note my exceptions to the ruling of the Court. Now, specifically, I want to ask him back on the stand if there were any bullets left in his gun.

THE COURT:

You may do that. That is admissible and you may do that.

(THEREUPON, the Court, the defendant and counsel for the State and the defendant returned to the courtroom and the following proceedings occurred:)

The point that appellant was trying to get over to the jury was not that he had bullets left in his pistol; rather, it was that he had no intention to kill Collins, the critical point in the trial. Thus by refusing the appellant's offer of proof, he was deprived of his right to state categorically why he did not shoot more than once. It can well be imagined that an aggressive and alert prosecuting attorney might make a vigorous argu-

ment that the jury should draw the inference from the testimony that appellant did intend to kill Collins because, even though appellant elected to take the witness stand, he never stated his own intentions or state of mind.

I think that prejudice is clearly demonstrated and is not removed by reason of the fact that the appellant may have stated that he did not want to hurt Collins when he fired the shot into the air. Nor is it sufficient that he stated that he could have shot Collins, if he had wanted to, after Collins came up to the front or when he and Collins came from the back to the front. Nor is it sufficient that appellant testified that he put his gun back in his pocket and fired no more shots when Collins ran down the alley. The proffered testimony had to do with direct statements of his intentions at the time that he fired the shot which struck Collins and thereafter. This was the real issue in the case.

I think that the proper rule to be applied by us is that it is prejudicial error to exclude direct testimony of an accused as to his intent, motive, reason or beliefs whenever that intention, motive, reason or belief is an essential element of the crime or is an issue in the case —particularly when the only other evidence on that element relates to acts from which the intention of the accused can only be inferred. See *Cummins* v. *United States,* 232 F. 844 (8th Cir. 1916); 22A C.J.S. Criminal Law § 647; 29 Am. Jur. 2d 413, Evidence 364; *Miller* v. *State,* 230 Ark. 352, 322 S.W. 2d 685.

While the authorities cited above have not been determined on the basis of prejudice, or lack thereof, there is a clear inference in *Cummins* v. *United States,* supra, that the exclusion of a question calling for a direct statement of intent by the defendant is prejudicial unless questions of substantially the same character and of the same full import had been answered. It seems to me that the great weight of authority would support that position.

In *People* v. *Levan,* 295 N.Y. 26, 64 N.E. 2d 341 (1945), the state took the position that there was harmless error in excluding a direct statement by a defendant in a murder case as to his intention because the jury might have inferred from evidence already in the case that the defendant's intent was not to commit a robbery, in the course of which the victim was killed. There the court held that when a defendant would otherwise have to depend upon inferences from the evidence to establish his lack of the essential intention, it was not harmless error to exclude his direct denial of the requisite intent.

In *Cain* v. *State,* 112 Ga. App. 646, 145 S.E. 2d 773 (1965), the appellant was charged with larceny of an automobile. The evidence showed that the defendant had taken the vehicle, driven it from Carrollton to Atlanta and back. Even though he had testified that he was returning the car to the place from which he had stolen it when the police apprehended him, refusal to permit him to state whether it had been his intention not to return it and to state what he would have done with the car if he had not been apprehended was held reversible error. The court held the error prejudicial in spite of the fact that it stated that the evidence strongly indicated that he intended to return the automobile to the place from which it had been taken and that there was no intent permanently to deprive the owner of it.

In *Smith* v. *State,* 38 Okla. Cr. 416, 262 P. 507 (1928), it was said:

> "It is well established that a defendant charged with a crime which has as one of its ingredients an unlawful intent may explain his intent and mental purpose, and may deny the specific intent required to constitute the offense. Wigmore § 581, says, with the exception of Alabama, the rule is absolute in the United States. See *Snow* v. *State,* 3 Okl. Cr. 291, 105 P. 572 [575]; *Cosby* v. *State,* [30 Okl. Cr.

294,] 236 P. 51; 8 R.C.L. § 174, p. 181, authorities cited."

In *Haigler* v. *United States,* 172 F. 2d 986 (10th Cir. 1949), reversible error was found in the sustaining of objections to testimony by one charged with violation of the income tax laws concerning his understanding of the law applicable to his income tax liability on the grounds that his intent would be judged by his acts and not by what he understood to be their consequences. This result was reached in spite of the fact that the appellant was permitted, indirectly, to adduce the theory of his defense by stating what he had told the investigators in explanation of his acts.

I would reverse and remand this case for a new trial.

BROWN, J., joins in this dissent.

HOWARD K. PHARR v. STATE OF ARKANSAS

5-405 438 S.W. 2d 461

Opinion Delivered March 24, 1969

John O. Moore for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

GEORGE ROSE SMITH, Justice. The appellant, tried before a jury, appeals from a judgment sentencing him to three years imprisonment for having taken $209.57 that had come into his possession as an employee of L. F. Snodgrass, the operator of a service station in Texarkana. Ark. Stat. Ann. § 41-3927 (Repl. 1964). Pharr contends only that the evidence is not sufficient to support the conviction.

On the night of the crime, August 8, 1968, Pharr was in his second week as the night attendant at the station, working alone on a 12-hour shift that began at 6:00 p.m. Snodgrass had assigned a separate drawer in the cash register to each of his employees, providing each man with a key to his assigned drawer. Every day when Snodgrass checked out the receipts he put $50 in each man's drawer to enable him to begin business on his shift.

At about 4:00 on the night in question Snodgrass was called by telephone to the station. The police had also been summoned, because a passing prospective customer had found the station open and unattended. A day attendant had apparently forgotten to take his drawer key with him; it was still in the lock. Both that drawer and Pharr's drawer were empty, except for a few cents. Snodgrass determined from the cash register tapes and the credit card slips that about $209 was missing.

During the same night police officers in the city of Hope, about 32 miles from Texarkana, saw a man

that proved to be Pharr arrive in an out-of-town taxicab and alight at a motel. Finding the motel full, Pharr asked the officers to assist him in obtaining a room for the night. As Pharr appeared to be drunk, the officers took him to the police station, where a test confirmed his intoxication. Pharr was booked and was found to have $183.13 in his possession, of which at least $100 was in silver. The next day Pharr, who still showed signs of intoxication, was turned over to the Texarkana police. Snodgrass and officers from both cities testified at the trial, narrating the facts essentially as we have summarized them.

We find the proof abundantly sufficient to support the conviction. The jury was warranted in believing from the proof that Pharr had taken the money from both cash drawers, had left the station unattended without notifying his employer, and had embarked upon an apparently pointless trip to Hope to spend the night. When Pharr was arrested he was still in possession of almost all the missing money. At least $100 of it was in silver, which in itself is enough to arouse suspicion. Absent an eyewitness, the State's proof is fully as strong as could be expected in such a case.

The appellant hinges his argument principally upon the matter of reasonable doubt. That issue does not arise on appeal, for as we said in *Graves* v. *State*, 236 Ark. 936, 370 S.W. 2d 806 (1963): "The jury must be convinced 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." In the case at hand we hardly see how the verdict could have been other than that of guilty.

Affirmed.

LORINE ANDREWS SMITH, ADM'X v. NOEL W. PERKINS, ET AL

5-4843 439 S.W. 2d 275

Opinion Delivered March 24, 1969

[Rehearing denied May 5, 1969.]

Shelby R. Blackmon and *Billy B. Bowe* for appellant.

Wright, Lindsey & Jennings by *William R. Overton* for appellees.

LYLE BROWN, Justice. The parties in interest on appeal are the appellant, Lorine Andrews Smith, Administratrix, and Chicago, R.I. & P.R.R. Co., an appellee. Russell C. Smith was fatally injured in a crossing accident at Carlisle. His administratrix brought suit against the railroad company, Noel Perkins, and Harold Snyder. A verdict was directed in favor of Snyder and Perkins was found to be free of negligence. The jury apportioned the negligence, 70% to the deceased, Smith, and 30% to the railroad company, which of course resulted in a judgment for the railroad. The sole contention on appeal is that there was a colloquy between the trial judge and the jury foreman which con-

fused the jurors to the prejudice of plaintiff administratrix.

The certified transcript shows that the jury executed six interrogatories but before announcing the findings this conversation transpired:

FOREMAN:

We have a question, we don't know if it should be asked in secret.

THE COURT:

No sir. There is nothing in secret, it should be in open court.

FOREMAN:

It has to do with the amount. We have figures, we are not sure whether this figure is supposed to correspond with some figure, the way we understand it you just want the dollar figure.

THE COURT:

What one do you refer to?

FOREMAN:

Number Six.

THE COURT:

I think that would be just dollars.

FOREMAN:

That is what we thought. We wanted to be sure.

The conversation was there ended and the record recites that the foreman thereupon read "in the presence of the other members of the jury, the parties and their attorneys and the court the interrogatories agreed

upon by the jury." The interrogatories were handed to the judge and the jury was discharged. Interrogatory number one found Russell C. Smith guilty of negligence. Number two found Noel Perkins free of negligence. Number three found the railroad guilty of negligence. Number four fixed Smith's negligence at 70% and the railroad's at 30%. Number five fixed damages to the estate at $900. Number six found that Lorine Smith and the next of kin sustained damages of $25,000.

The foreman did not designate the figures to which he referred when he said, "we have figures, we are not sure whether this figure is supposed to correspond with some figure." Surely he must have been referring to various dollar figures that had been introduced in evidence or suggested in closing arguments. That conclusion is more logical than the novel reasoning advanced by appellant, namely that the answer given by the judge to the jury affected their answers to the interrogatory concerning percentages of negligence. In fact, the record reflects that at the time of the conversation between the judge and the jury foreman, the interrogatories had already been executed. In oral argument, appellant's counsel contends that the jury returned for further deliberation after questioning the trial judge, but that assertion is contrary to the record.

It is undisputed that no objection was made to the completed interrogatories or to the conversation between judge and jury until days after the jury had been discharged. Before the discharge of the jury appellant had a right to have the jurors polled. She had a right to call for corrective measures to cure any apparent confusion caused by remarks of the trial judge. Further she had a right, and duty, to then and there call any irregularities to the attention of the trial court. *Southern Cotton Oil Co.* v. *Campbell,* 106 Ark. 379, 153 S.W. 256 (1913).

Three days after the trial the administratrix secured from each of the jurors an identical affidavit. Those affidavits stated that the jurors were misled by the responses made by the trial judge to the questions asked by their foreman. The affidavits were filed with the trial court in support of a motion for new trial. The trial court, and properly so, apparently gave no consideration to the affidavits. Nor do we consider them on appeal. Testimony or affidavits of jurors cannot be used to impeach a verdict except in instances where the verdict was reached by lot. *Strahan* v. *Webb*, 231 Ark. 426, 330 S.W. 2d 291 (1959); *Pleasants* v. *Heard*, 15 Ark. 403 (1855); Ark. Stat. Ann. § 43-2204 (Repl. 1964).

Affirmed.

JONES, J., not participating.

BOBBY PAYNE v. STATE OF ARKANSAS

5-5407 438 S.W. 2d 462

Opinion Delivered March 24, 1969

Fitton, Meadows & Adams for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

LYLE BROWN, Justice. Appellant Bobby Payne was tried by a jury, convicted and sentenced to one year in the penitentiary on a charge of abetting an arson. Appellant challenges the sufficiency of the evidence and asserts error in the giving of an instruction.

The only question which is properly before us is the sufficiency of the evidence to support the verdict. On the night of December 28, 1967, one of three barns owned by Edwin McClellan burned; it was filled with dry hay; the night was clear and cold; and the owner, who lived on the farm, discovered the fire a few minutes after it ignited. Lynn Beavers testified that he helped burn the barn and had pleaded guilty; that he was sixteen years of age and a cousin of the defendant; that a few days before Christmas, Payne drove him to the farm and showed him the barn; and that Payne told him he could make $25 by burning it. Beavers further testified that on the night the barn was burned he drove to the Riverside Cafe at Calico Rock in company with Richard Flock; and that Beavers and his companion Flock there met Bobby Payne, who advised Beavers that he (Payne) would pay $50 for the burning of the barn. According to Beavers, he was advised that one Gene Fields, a neighbor of the prosecuting witness, would pay the money to Payne, who would in turn compensate the boys for the burning. Both Beavers and Flock testi-

fied that after the conversation with Payne, they headed for Calico Rock and after driving a few miles turned back, went to the barn, and burned it.

The fourth and last witness for the State was not an accomplice. He was fifteen-year-old Sonny Chaffin. His testimony was to the effect that Bobby Payne approached him about a week before Christmas 1967; that Payne inquired of Chaffin if he wanted to make some money; that when Chaffin inquired of the nature of the work, Payne invited Chaffin for a ride; that they drove out of Norfork and to the McClellan farm where Payne pointed out a barn and said he would give Chaffin $50 to burn it; and that Chaffin advised Payne he would have nothing to do with it.

Bobby Payne was the only witness for the defense. He testified that he was twenty-seven years old and lived at Calico Rock. He related that Gene Fields had offered him $50 to burn the McClellan barn; and that he had recounted the conversation at different times to Beavers, Chaffin, and others, but not with the intention of encouraging them to do the burning. He denied having pointed out the barn to any of the State's witnesses. On the night of December 28 he says he was sitting in a truck at the Riverside Cafe with Don Lackey, a merchant at Norfork; that Beavers and Flock drove on the parking lot and called Payne to their car; that Beavers "asked me if they would go do it if I would get the money for them"; that Payne started talking to them but Beavers interrupted the conversation and drove off, making the statement as he left that "we are going to go do it." Shortly thereafter the barn burned.

If the testimony of Sonny Chaffin, independent of the testimony of Beavers and Flock, tended to connect Payne with the commission of the crime charged, it is sufficient corroboration of the accomplices. *Smith* v. *State,* 199 Ark. 900, 136 S.W. 2d 673 (1940). Of course, Chaffin's testimony is required to be of substantive

character. *Yates* v. *State,* 182 Ark. 179, 31 S.W. 2d 295 (1930). If an accomplice is corroborated as to some particular fact or facts, the jury is authorized to infer that the accomplice speaks the truth as to all. 2 Wharton's Criminal Evidence, § 469 (1955).

The testimony of Chaffin convinced the jury that appellant was shopping for a prospective arsonist within a matter of days before the fire. From that testimony we think the jury was authorized to reasonably infer that the accomplice Beavers was telling the truth when he testified that appellant proposed that Beavers set the fire. A very similar situation is to be found in the recent case of *State* v. *Dills,* 416 P. 2d 651 (Oregon 1966). Oregon's statute comports with our statute prohibiting a conviction on the uncorroborated testimony of an accomplice. There an accomplice testified for the State. Another witness, not an accomplice, testified that the defendant offered the witness $500 to burn the house. He did not accept the offer. Three days later the house burned. The Court held that the testimony of the latter witness corroborated the accomplice and upheld the conviction. Also, it could here have been of some significance to the jury, and properly so, that appellant met with Beavers and Flock shortly before the latter set the fire. Again, the jury may have attached some importance to the fact that Don Lackey was not called as a witness by appellant, nor was Lackey's absence explained. Lackey was said to be present at the Riverside Cafe in company with appellant at the time Beavers and Flock drove up before the fire. If appellant was testifying truthfully then Lackey's testimony could have corroborated appellant to some extent.

The other point advanced for reversal is that one of the instructions given by the court was incomplete. The challenge comes too late. No objection was made to that instruction at the time it was given, nor did the defendant incorporate the alleged error in his motion for new trial. It was his duty to object, except to an

overruling of the objection, and carry the assignment of error forward in his motion for new trial.[1] *Randall* v. *State*, 239 Ark. 312, 389 S.W. 2d 229 (1965).

Affirmed.

NICHOLAS W. RIEGLER, JR. v. MARY MILLER RIEGLER

5-4804 438 S.W. 2d 468

Opinion Delivered March 24, 1969

[1]Appellant's counsel on appeal did not participate in the trial.

Howell, Price & Worsham for appellant.

H. B. Stubblefield for appellee.

JOHN A. FOGLEMAN, Justice. This is the third appeal involving these parties to reach this court in litigation ensuing after the fracture of a 21-year marriage. See 243 Ark. 113, 419 S.W. 2d 311 and 244 Ark. 483, 426 S.W. 2d 789. This appeal and cross-appeal come from a decree of the chancery court entered July 25, 1968, after a hearing on motions of the respective parties relating to alimony and child support.

Dr. Riegler, the appellant, first filed a petition for a reduction of child support and alimony. He also sought relief from the payment of child support during visitation periods when he would have custody of the children of the marriage. Mrs. Riegler, the appellee, filed a motion alleging that appellant was in arrears in the payment of alimony and child support pursuant to the court's earlier decree. She asked that appellant be punished for contempt of court. Appellant then filed an amendment to his petition alleging that appellee's circumstances had so materially changed that the

court should abolish the alimony allowed her. The original decree of divorce affirmed by this court provided that Mrs. Riegler be paid $250 per month as alimony and $550 per month as maintenance for the three minor children whose custody had been awarded her. This decree specifically provided for automatic increases of $100 in both alimony and child support "when the jointly owned residence . . . is sold and possession thereof surrendered by plaintiff."[1] The decree provided that until this property was sold, Mrs. Riegler should have exclusive possession of the house and furnishings. Upon consummation of the sale the net proceeds were to be divided equally between the parties. This decree also provided for a commissioner's sale of the property in the event it was not sold at a price mutually acceptable to the parties by January 1, 1967. Dr. Riegler was required to pay the monthly payments on the indebtedness against the property.

The chancellor decreed, after hearing the respective motions, that appellee have judgment against appellant for $600 in arrearages in alimony and $150 for attorney's fees. He also ordered that appellant pay $450 per month for child support of the two children who were still minor and $350 per month as alimony.

Appellant contends that there was error in this decree in the court's refusal to reduce the alimony and child support and in the increase of alimony and child support. He also asserts that the chancellor abused his discretion in awarding attorney's fees.

Mrs. Riegler asserts that she was entitled to judgment for $1,484.88 for arrearages and that the allowance of child support and attorney's fees were both inadequate.

Rebecca Riegler, one of the three minor daughters, reached her majority on January 23, 1968. The other

[1]Mrs. Riegler was plaintiff in the action.

two are 13 and 11 years of age. Rebecca had lived with her father for about a year at the time of the hearing and is now living with him and his present wife, whom he married October 18, 1967. Appellee did not object to this daughter living with her father and has paid none of this daughter's living expenses. In spite of this, Dr. Riegler continued to pay what he considered to be the full amount of child support.

Three of appellant's present wife's children, the oldest of whom is 22, are living with him and he claims to be supporting them. He professes not to know the extent of his present wife's property or whether her children have any separate property. Dr. Riegler purchased the home in which he is now living on March 1, 1968.

Appellant claims that appellee has inherited a substantial amount of money. The value of this inheritance from an aunt who died August 8, 1963, is no more accurately shown than in the original appeal in this case. Appellant contends that it amounted to $113,220.68. Appellee denies that the total amounted to as much as $100,000. She states that the total consisted of $61,-524.83 plus certain stocks, the value of which she professed not to know.

The parties reached an agreement under which appellant paid appellee $37,000 in settlement of all of her claims under previous decrees of the court, exclusive of alimony and child support. As a part of this settlement appellee conveyed her equity in the residence by deed dated January 11, 1968. She testified that she vacated the premises on January 30, 1968, and moved to an apartment for which she paid $230 a month rent. Dr. Riegler testified that he had been unable to sell this house and will have to pay monthly payments of $257 on the mortgage indebtedness thereon, insurance, taxes, and utilities bills until he can sell it. The property is vacant, and he receives no income from it.

Appellee has purchased a home for which she paid $28,000, $13,000 of which was in cash. The balance is payable in monthly installments of $143.80. She also bought draperies, furniture, and appliances for this residence. Dr. Riegler paid her $800 a month beginning February 8 until June 8 when he paid $689.45. He paid her $616.67 on July 8. Based on the assumption that the payments should have been $1,000 per month beginning February 8, the arrearage amounted to $1,-484.88.

She also testified, in substance, as follows: Her cost of living has increased tremendously. Her cost for utilities for herself and two children is the same and for food practically the same as it would be if she had three children. She paid her attorneys in the divorce case $5,500 in excess of the amount allowed by the courts. She sold stock from her inheritance to pay attorneys' fees in litigation she had with her sister over their aunt's estate. She has not attempted to obtain employment, having figured that, on the basis of the minimum wage scale, her expenses would be such that she couldn't be profitably employed. She is a member of Riverdale Country Club. She has done without a maid for about three months but planned on rehiring one last fall. She paid appellant approximately $2,600 as a result of the judgment affirmed by this court in 244 Ark. 483, 426 S.W. 2d 789. She owns an automobile, a lot she acquired in 1965 for $7,900, and has a savings account of $6,900. She paid $790 as a down payment on the lot and is paying the balance at the rate of $79 per month.

It was shown that Federal Reserve Bulletins showed a rise of 9.1 percent in the Consumer Price Index from April 1966 to April 1968.

We are unable to say that the finding of the chancellor relative to the amount of alimony and child support to be paid after rendition of the decree was erroneous. The burden was on the appellant to show such a

change in circumstances as would justify a reduction in these amounts. See *O'Kane* v. *Lyle,* 123 Ark. 242, 185 S.W. 281. While appellant has assumed the support of his current wife and her children, he has not shown that this burden renders him unable to make the payments originally decreed by the court or to make those he is now directed to pay. A husband's remarriage is a matter that may be considered in weighing the equities of the situation, but this fact alone is ordinarily not a ground for reducing the amount of child support or alimony. *McCutcheon* v. *McCutcheon,* 226 Ark. 276, 289 S.W. 2d 521. There is no evidence whatever as to the present income of appellant. Neither the obligation nor the necessity for his supporting his current wife's children can be said to have been established. Nor can we determine the extent of this wife's property even though the inference that she has assets of her own is clear. Actually there is nothing to indicate the difference in Dr. Riegler's cost of living before and after the second marriage. The allowance for child support was not reduced pro rata because of Rebecca's obtaining her majority, but the court's action can be justified by reference to the increase in the cost of living and the inescapable conclusion that the cost of food and shelter is not in direct proportion to the number of people involved.

One of appellant's contentions with reference to the amounts he is required to pay by the court's latest decree is that the residence has not been sold as contemplated by the first decree. On this point we agree with the chancellor, who found that the alimony payments should have been $350 per month and the child support $650 per month beginning on the first payment date after the vacation of the residence by appellee. While the terms of the agreement under which the deed to appellant was executed are not shown in detail, it seems obvious that it was the intention of the court in the original decree that the lesser amounts be paid to appellee so long as she was permitted to occupy the house. When

we consider that the agreement between the parties concluded all rights of the appellee under the original decree except for alimony and child support, this conclusion seems even more obvious. As soon as Mrs. Riegler vacated this house, her cost of living was increased by $230 per month for rent. Although Dr. Riegler will be required to continue the monthly house payments until he has sold the property, he will not be required to account to appellee for any of the proceeds of the sale.

One of the bases for determination of alimony and child support is the manner and style of living to which the wife and children have been accustomed. *Lewis* v. *Lewis,* 202 Ark. 740, 151 S.W. 2d 998. The present manner and style of their living is not shown to be materially different from that enjoyed by them before the dissolution of the marriage.

We cannot say that there was any abuse of discretion in the allowance of attorney's fees in the lower court. It was appropriate for the trial court to consider the financial abilities of both parties and to weigh the allowance in the light of other factors concluded by the decree. We are quite sure that no greater fee was allowed because of Mrs. Riegler's financial ability.

We cannot say that there was error in denying appellant's plea for remission of child support during summer vacation visits of the children with him. The trial court may well have taken this into consideration in fixing the amount of the monthly payments.

There is one respect in which we find error in the decree. The chancellor stated that the equities of the case were such that appellant should not be required to pay any part of arrearages in excess of $600. He arrived at the latter amount by saying that the alimony paid should have been $100 more for each month after appellee vacated the house. Apparently the chancellor thought that the fact that the 18-year-old daughter had

lived with her father for a year warranted his relief from the remaining arrearages of $884.88. This view was considered and rejected in *Sage* v. *Sage,* 219 Ark. 853, 245 S.W. 2d 398. Under the rule announced in that case and followed in *Brun* v. *Rembert,* 227 Ark. 241, 297 S.W. 2d 940, the chancery court had no power to remit accumulated payments which became vested in appellee as they became due under the circumstances of this case. A modifying decree can relate to the future only.

In view of Mrs. Riegler's apparent ability to pay, we deem an allowance of $250 for attorney's fees on this appeal to be adequate.

The decree is affirmed as to the allowance of alimony, child support, and attorney's fees for services in the lower court and modified as to the judgment for arrearages by an increase from $600 to $1,484.88.

BYRD, J., not participating.

ELLSWORTH BROTHERS TRUCK LINES, ET AL v. S. HUBERT MAYES, JR., ADMR., ET AL

5-4817 438 S.W. 2d 724

Opinion Delivered March 24, 1969

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

McMath, Leatherman, Woods & Youngdahl for appellees (*Mayes & Wise Co. Bank*)

Cockrill, Laser, McGehee, Sharp & Boswell for appellee (*Heaggan*).

J. Fred Jones, Justice. This is an appeal by Ellsworth Brothers Truck Lines and its truck driver, Herbert Roberts, from portions of an adverse judgment in an action for wrongful death brought in the Faulkner County Circuit Court by the personal representatives of Malloy and Adkins, who died instantly on April 10, 1967, in a highway collision in Faulkner County.

The facts revealed by the record are briefly these: Before daylight on April 10, 1967, the appellants' truck and trailer overtook a Plymouth automobile owned and being driven by Mrs. Willie Jean Heaggan. Rain was falling and the blacktop highway was wet and slick. Both vehicles were traveling about forty-five miles per hour with the truck and trailer about two hundred feet behind the Heaggan vehicle. The two vehicles had traveled in this manner for a distance of about two miles when the Heaggan vehicle, in negotiating a curve in the highway, skidded on the wet pavement and Mrs. Heaggan lost control of her automobile. The Heaggan vehicle skidded off the highway and into a ditch on its righthand side of the highway. It came to rest bogged down in mud but still headed in the same direction it was originally traveling. Appellant Roberts testified that the Heaggan automobile skidded across the center line of the highway at least twice before it finally left the highway, but Mrs. Heaggan denied that her automobile ever skidded across the center line of the highway.

While the Heaggan automobile was skidding from the highway, a Comet automobile belonging to, and being driven by, the decedent Malloy, approached the scene from the opposite direction and crashed into the left rear tandem wheels of appellants' trailer. The decedent Adkins was a hitchhiking passenger in the Malloy automobile and both Malloy and Adkins were killed instantly by the impact. The air lines to the brakes on the trailer were broken by the impact, thus locking the wheels on the trailer. After the impact the tractor and trailer continued approximately eighty feet on its proper side of the highway with the tractor portion remaining in its proper lane on the pavement, and with the damaged rear portion of the trailer skidding along the shoulder and ditch on its right-hand side of the highway. The truck and trailer came to rest with the tractor in its proper lane on the blacktop, but with the rear-end of the trailer in the ditch with its right front wheel of the rear tandem against the left rear bumper of the Heaggan

automobile. The left rear tail light lens on the Heaggan vehicle was broken and that was the extent of the damage to the rear of the Heaggan vehicle.

Hubert Mayes, Jr., administrator of the estate of Charles Malloy, and Wise County National Bank, administrator of the estate of Buddy F. Adkins, sued Ellsworth Brothers Truck Lines, Inc., Herbert F. Roberts and Willie Jean Heaggan. The suit by Malloy's representative was for property damage and funeral expenses on behalf of the estate and for mental anguish on behalf of three surviving children. The suit by Adkin's representative was for funeral expenses on behalf of the estate, and for mental anguish on behalf of the surviving mother and father and five brothers and one sister. Roberts and Ellsworth filed a cross-complaint against Mrs. Heaggan for contribution on any judgment which the administrators might obtain against them, and Mrs. Heaggan filed a cross-complaint against Roberts and Ellsworth for personal injuries, as well as for contribution, on any judgment which the administrators might obtain against her.

The trial court directed a verdict for Mrs. Heaggan on the complaint of the administrators and also on the cross-complaint for contribution filed by Roberts and Ellsworth. The jury found in favor of the administrators against Roberts and Ellsworth and for Roberts and Ellsworth on the Heaggan cross-complaint. In other words, the trial court held *as a matter of law,* that Mrs. Heaggan contributed no negligence at all to the proximate cause of the collision and resulting deaths of Malloy and Adkins and the jury found *as a matter of fact,* that the appellants contributed no negligence to the proximate cause of Mrs. Heaggan's injuries.

Judgment was entered on the verdict as follows:

"IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the plaintiff, Wise

County Bank of Wise County, Virginia, administrator of the estate of Buddy F. Adkins, deceased, do have and recover from Ellsworth Brothers Truck Lines, Inc. and Herbert F. Roberts the sum of $10,000 each for the use and benefit of Aaron Adkins and Ada Adkins and the sum of $500 each for the use and benefit of Clifford Adkins, Garland Adkins, Donnie Adkins, Emory Adkins, Elsie Adkins, and Raymond Adkins, and the sum of $350 for the use and benefit of the estate of Buddy F. Adkins, deceased. In sum total it is considered, ordered and adjudged that the said administrator recover from the defendants Ellsworth Brothers Truck Line, Inc. and Herbert F. Roberts the sum of $23,350 for the above beneficiaries.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that the plaintiff S. Hubert Mayes, Jr., Administrator of the estate of Charles Maloy do have and recover the sum of $1,500 for the use and benefit of Patrick Malloy and the sum of $1,000 each for the use and benefit of Charles Maloy and Shannon Cannopash and the sum of $1,750 for the use and benefit of the estate of Charles Maloy, deceased. In sum total it is considered, ordered and adjudged that the said administrator recover from the defendants Ellsworth Brothers Truck Line, Inc. and Herbert F. Roberts the sum of $5,250 for the above beneficiaries.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that by direction of the court the plaintiffs take nothing from Willie Jean Heaggan on their complaint against her and that the defendants Ellsworth Brothers Truck Line and Herbert F. Roberts take nothing by virtue of their claim for contribution and that both the complaint of the plaintiffs and the cross-complaint of the defendants Ellsworth Brothers Truck Line, Inc. and Herbert F. Roberts against Willie Jean Heaggan

is hereby dismissed, to which action the plaintiffs and the defendants Ellsworth Brothers Truck Line, Inc. and Herbert F. Roberts duly note their exceptions.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that Willie Jean Heaggan take nothing by virtue of her cross-complaint for damages against Ellsworth Brothers Truck Line, Inc. and Herbert F. Roberts."

The appellants paid part of the judgment in favor of the estate of Adkins, including funeral expenses and damages for mental anguish to the parents and a brother, Clifford, who testified at the trial. The appellants also paid part of the judgment in favor of the estate of Malloy, including funeral expenses and $1,500.00 damages for mental anguish to a son, Patrick, who testified at the trial. The verdict was rendered and the judgment was dated May 14, 1968. On June 12, 1968, motion to vacate judgment was filed by Heaggan as follows:

"Comes Willie Jean Heaggan by her attorney, Felver A. Rowell, Jr., and moves the Court to set aside the Judgment of the Court rendered in this cause and grant her a new trial for the following reasons:

(1)—That the Judgment is contrary to the law.

(2)—That the Judgment is contrary to the evidence.

(3)—That the Judgment is contrary to the law and evidence.

(4)—That the verdict of the jury is inadequate in that the damage does not equal the actual pecuniary injuries sustained.

(5)—That the verdict is not sustained by sufficient evidence and is contrary to law.

WHEREFORE, PREMISES CONSIDERED the defendant and counter-claimant prays that this Court set aside the Judgment of this Court and that a new trial be granted, or in the alternative, that the Judgment be set aside and Judgment entered in favor of this party, notwithstanding the Judgment and for any and all other relief to which she may be entitled in a court of law."

On August 5, 1968, the trial court granted the motion as follows:

"On this 5th day of August, 1968, there is presented to the Court the Motion of defendant Willie Jean Heaggan to set aside the verdict of the jury finding in favor of Herbert F. Roberts and Ellsworth Brothers Truck Lines, Inc. on her Cross-Claim against them and to vacate that part of the Judgment based thereon and to grant her a new trial, and said defendant appears by her attorney, Felver A. Rowell, Jr., and Ellsworth Brothers Truck Lines, Inc. and Herbert F. Roberts appear by their attorney, J. W. Barron, and the Court being well and sufficiently advised is of the opinion that said Motion should be granted.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the verdict of the jury herein finding in favor of Herbert F. Roberts and Ellsworth Brothers Truck Lines, Inc. on the Cross-Claim of Willie Jean Heaggan, and that part of the Judgment rendered in favor of Herbert F. Roberts and Ellsworth Brothers Truck Lines, Inc. on the Cross-Claim of Willie Jean Heaggan, be, and the same are hereby, vacated and set aside and that Willie Jean Heaggan be, and she is hereby granted a new trial on her Cross-Claim against Herbert F. Roberts and Ellsworth Brothers Truck

Lines, Inc. to all of which the defendants Herbert F. Roberts and Ellsworth Brothers Truck Lines, Inc. object."

On appeal to this court the appellants designate the following points for reversal:

"The court erred in directing a verdict for Willie Jean Heaggan on appellants' cross-complaint against her for contribution.

The court erred in granting the Heaggan motion for a new trial.

A. The motion was not presented within the time required by law.

B. The granting of the motion for a new trial was a clear abuse of discretion.

The four brothers and the sister of the deceased Adkins who did not testify and the two children of the deceased Malloy who did not testify are not entitled to damages for mental anguish."

In support of their first point the appellants argue that there was sufficient proof of Heaggan's negligence to make a question for the jury, and we agree. Willie Jean Heaggan testified that she had just rounded a curve to the right at about 40 miles per hour and her car began to skid. She testified on deposition that she was familiar with the highway and knew that it was slick when wet; that when her automobile started skidding, she just decided to let the car go on to the right and into the ditch. She testified on deposition that just before the accident, and before her automobile started slipping, she noticed a car passing her and going in the opposite direction pretty fast. The appellant truck driver, Roberts, testified that as he followed the Heaggan vehicle, he observed it go out of control as

it rounded a curve; that he immediately touched his brakes and shifted to a lower gear and slowed down. He says that his truck responded to the application of the brakes and did not swerve any and he had no sensation of the trailer being out of control. He testified that the Heaggan vehicle began to fishtail back and forth across the highway and finally wound up in the ditch on the right side of the highway. He testified that he saw the lights of an oncoming car and immediately thereafter felt something hit his trailer. He testified that he had his truck and trailer under control and in its proper lane on its proper side of the highway when it was struck by the Malloy vehicle. Mr. Roberts testified, in part, as follows:

"Q. Mr. Roberts, you heard portions of your deposition read in evidence by Mr. Woods with reference to your testimony that the Heaggan vehicle crossed the center line of the highway?

A. Yes, sir.

Q. Now, how many times do you say that the Heaggan vehicle crossed the center line of the highway and got in the left-hand lane?

A. I would say more than once. I wouldn't say any particular number.

Q. More than once. Then you would have to say twice?

A. Twice or more, yes, sir.

Q. All right. Twice or more. If that's true, Mr. Roberts, can you explain to the ladies and gentlemen of the jury why there was no collision between the Comet automobile and the Heaggan automobile?

A. They just managed to miss one another is all I can say.

* * *

Q. All right. Did the Heaggan automobile going out of control or fishtail, or whatever you want to call it, cause you to do anything in this accident?

A. It caused me to be involved, yes, sir.

Q. But how? What's [sic] what I want to know. How? Mr. Roberts, tell us how.

A. I think Mr. Malloy lost control of his car, because he thought the Plymouth was going to hit him.

Q. All right. You think that the Comet crossed the center line and hit your truck?

A. Yes, sir.

Q. All right. Do you know whether or not—Your tractor was on the proper side of the road when it passed the Comet?

A. Yes, sir.

Q. It was?

A. Yes, sir."

The rule governing directed verdicts which has been consistently followed by this court, is set out in *Hawkins* v. *Missouri Pacific Railroad Company, Thompson, Trustee,* 217 Ark. 42, 228 S.W. 2d 642, as follows:

> "A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men could possibly find the issues for the plaintiff. In such circumstances the trial judge must give to the plaintiff's evidence its highest probative value, taking into account all reasonable inferences that may sensibly be deduced from it, and may grant the motion only if the evidence viewed in that light would be so in-

substantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury."

Also in *Smith* v. *McEachin,* 186 Ark. 1132, 57 S.W. 2d 1043, we said:

> "In testing whether or not there is any substantial evidence in a given case, the evidence and all reasonable inferences deducible therefrom should be viewed in the light most favorable to the party against whom the verdict is directed, and, if there is any conflict in the evidence, or where the evidence is not in dispute but is in such a state that fairminded men might draw different conclusions therefrom, it is error to direct a verdict."

We are of the opinion that the jury could have logically concluded from the proof, including the circumstantial evidence in this case, that Mrs. Heaggan's speed was such on the wet and slippery highway that she was unable to keep her automobile under control and as a result it slid back and forth across the center line of the highway, thus confusing the driver of the oncoming automobile causing him to lose control of his automobile in an effort to avoid colliding with her skidding vehicle, and causing the oncoming Malloy automobile to cross the center line of the highway and collide with the appellants' truck trailer. We, therefore, hold that the trial court erred in directing a verdict for Mrs. Heaggan on the complaint and appellants' cross-complaint.

As to the appellants' second point, we certainly agree that the trial court erred in granting the Heaggan motion for a new trial. Arkansas Statutes Annotated § 27-1904 (Repl. 1962) provides as follows:

> "The application for a new trial, except for the cause mentioned in subdivision 7 of section

> 1536 [§ 27-1901]* shall be made within fifteen [15] days after the verdict or decision was rendered, unless unavoidably delayed; provided, that if the time thus allowed for making such application expires after adjournment or expiration of the term, a motion for a new trial with an alternative prayer for an appeal to the Supreme Court in case it is overruled, may be presented upon reasonable notice to the opposing party or his attorney of record, to the Judge presiding when the verdict or decision was rendered, or his successor in office, wherever found, at any time within thirty [30] days from the day the verdict or decision was rendered . . ."

The verdict was rendered in this case on May 14, 1968, the motion for a new trial was filed on June 12, 1968, the motion was argued and granted on August 5, 1968, approximately three months after the verdict was rendered and over one month after the judgment thereon was filed for record and partially satisfied. At the hearing on the motion for a new trial, Mrs. Heaggan's attorney simply argued that the verdict was against the preponderance of the evidence and that if the original plaintiffs were entitled to recover against the appellants, then Mrs. Heaggan was entitled to recover also. The trial court gave no better reason for granting the motion, but simply stated: "Motion sustained, and I am setting the verdict aside."

The evidence, as presented to the jury from blackboard drawings not of record before us, may have convinced the jury that the truck trailer was on its wrong side of the center line of the highway where it was struck by the Malloy automobile. But be that as it may, the verdict in favor of the original plaintiffs against the appellants did not entitle Mrs. Heaggan to a favorable verdict on her cross-complaint. The rec-

*Arkansas Statutes Annotated § 27-1901, subdivision 7 pertains to newly discovered evidence.

ord reveals no reason for granting the Heaggan motion for a new trial, except that the jury found against her.

It is true that Dr. Hickey testified that Mrs. Heaggan had suffered a 7½% permanent partial disability because of strained neck muscles and a bruised chest, and the record reveals that he administered to her thirty-one OV injections at $8.00 each. Mrs. Heaggan's X-ray findings were all negative, she had fully recovered from an identical neck injury sustained about one year earlier, and she lost no time at all from her employment because of her last injuries. Mrs. Heaggan was not entitled to a verdict in her favor simply because she was injured; she was not entitled to a verdict in her favor simply because the original plaintiffs obtained one, and she was not entitled to a new trial unless the adverse verdict she received was against the preponderance of the evidence. A trial court has a great deal of discretion in controlling its judgments and in directing new trials, but has no authority to set aside a jury verdict arbitrarily and without reasonable cause. *Big Rock Stone & Material Co.* v. *Hoffman,* 233 Ark. 342, 344 S.W. 2d 585. The evidence is undisputed that the truck and trailer came to rest with the rear wheel of the trailer touching the rear of Heaggan's vehicle. The only damage to the rear of Heaggan's vehicle was a broken lens in one of the three left tail lights. Her doctor testified that her injuries included a bruise over the anterior chest wall and the front of her chest. His testimony as to the cause of appellee's injuries was as follows:

> "Q. Doctor, I believe the testimony will be that Mrs. Heaggan was driving down the highway, that she was going 45-50 MPH and lost control of her car and ran off in the ditch on the right side of the road. Could that accident account for the injuries you found in this case?

A. Yes, sir, it could.

* * *

Q. And this injury to the chest, that had to be from a forward motion of body?

A. Yes, that was where her body struck something in front of her.

Q. And went forward?

A. Yes, sir.

* * *

Q. . . . [C]ould you say with a reasonable degree of medical certainty that this accident could have occurred either when she lost control of her car at 40 to 50 miles an hour, got off in the ditch, joustled around in the car, or she was hit from the rear, could you say with a reasonable degree of certainty either way?

A. It could have happened either way.

Q. You would just have to guess between the two possibilities to say which one in your opinion caused it?

A. Yes, sir."

On the basis of the testimony the trial court denied the appellants' motion for a directed verdict and presented the question to the jury, whose verdict was in favor of appellants. If the verdict had been returned otherwise, under the evidence presented, it would have been incumbent upon the trial court to then set it aside and enter a judgment for the appellants. This court has taken judicial notice of the physical facts based on common knowledge, that when an automobile is struck from the rear, the occupants are thrown backward instead of forward. *Ellsworth Brothers Truck Lines* v.

Canady, 245 Ark. 1055, 437 S.W. 2d 243. We hold that the trial court clearly abused its discretion in granting Mrs. Heaggan's motion for a new trial.

For their third point appellants assert that the evidence was not sufficient to allow the jury to consider damages for mental anguish for the four brothers and the sister of Adkins and the two children of the deceased Malloy who did not testify. We agree with the appellants on this point, not because these next of kin did not testify, but simply because there was no evidence on which a verdict for mental anguish could be permitted to stand.

In *Peugh* v. *Oliger, Admx.,* 233 Ark. 281, 345 S.W. 2d 610, this court said:

> "In *Hancock* v. *Western Tel. Co.,* 137 N.C. 497, 49 S.E. 952, 69 L.R.A. 403, the North Carolina Supreme Court said that there is a very material difference between disappointment and regret and that keen and poignant mental suffering signified by the words, 'mental anguish.' In short, the Legislature in allowing recovery for mental anguish, meant something more than recovery for the normal grief occasioned by the loss of a loved one. To be aggrieved or to be shocked by the death of a loved one is natural, but in order to recover under the Act No. 255, one must suffer more than the normal grief."

Mr. Malloy was apparently divorced from the mother of his children and the Malloy children had not seen their father but had completely lost contact with him for more than eight years prior to his death. We will not prolong this opinion by reciting the testimony pertaining to mental anguish, but suffice it to say there is absolutely no evidence in the record before us to indicate that appellees experienced more than normal grief in the loss of a loved one, and the appellees have

totally failed in the proof of such mental anguish as is compensable under the statutory and case law of this state. The judgment of the trial court is reversed and this cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MATTIE DOTSON v. MAE ALDRIDGE, ET AL

5-4837 438 S.W. 2d 464

Opinion Delivered March 24, 1969

Harold C. Rains, Jr., for appellant.

David O. Partain, for minor defendants.

Franklin Wilder for appellees.

CONLEY BYRD, Justice. The common source of title to the 10 acres of land involved in this litigation was Nancy P. Foster. The record shows that she lived on the land until her death, June 12, 1951. She was survived by Mae Aldridge, Troy Foster, Wilburn Foster, Lela F. Hunter, George Foster, Frank Foster, Jr., Roosevelt Foster, Ellen Thacker and Melvin Foster. All of the foregoing children except Melvin Foster, who died in 1953, are appellees.

This suit was commenced by Mattie Dotson, a sister of Nancy P. Foster, as an action to quiet title. Mattie alleged that on Nov. 24, 1945, Nancy P. Foster conveyed ten acres to Melvin Foster and his wife, Eddye; that after Melvin's death, Eddye mortgaged the lands, on Sept. 13, 1955, to the Peoples Bank & Trust Co. to secure $69.00; that Eddye was unable to repay Peoples Bank & Trust Company and made an agreement with Mattie that if Mattie would pay off the mortgage and back taxes, she could take the lands; that pursuant to such agreement, Mattie repaid the mortgage and back taxes in the amount of $101.29 and entered into possession of the lands; and that Mattie has been in possession adversely to the rights of all others and has paid taxes thereon since 1954. Named as defendants in Mattie's petition were Donald R. Gordey, formerly Foster, Carolyn Jane Foster, Delores Ann Gordey, formerly Foster, Jimmy Dale Gordey, formerly Foster, and Diann Schrider—the first four named defendants were children of Melvin and Eddye Foster and the latter, Diann Schrider, is a daughter of Eddye Foster by another marriage.

The children of Eddye Foster, answering through their guardians and next friends, denied that Eddye had made any agreement with Mattie as alleged, and asserted that they were the owners of the 10 acres of land involved.

The appellees, all of the children of Nancy P. Foster except Melvin Foster, intervened. They alleged

that the deed dated Nov. 24, 1945, from Nancy P. Foster to Melvin and Eddye Foster was a forgery, and that Mattie Dotson had been in possession of the 10 acres with the intervenors' permission.

The trial court found that the deed from Nancy to Melvin and Eddye was a forgery, that Mattie had been in possession of the lands with the permission of the appellees and entered a decree in accordance with their prayer for partition sale of the lands. Both Mattie and the children of Eddye have appealed raising the issues hereinafter discussed.

THE DEED

The notary public who took the acknowledgment testified that she knew Nancy P. Foster, her son Melvin, and Melvin's wife Eddye, that Nancy Foster and one of her daughters came to her office to make the deed, that she typed the deed in accordance with Nancy's instructions and that it was signed at Mrs. Foster's request. Since Mrs. Foster couldn't write, she had Mrs. Foster touch the pen before she took the acknowledgment. The deed was not delivered to Melvin in her presence.

Cora Gordey, the mother of Eddye Foster, testified that during "hog killing" time in 1945, Nancy Foster and Melvin came by her house and declined to stay for dinner because they were going to have a deed made to Melvin. They came by her house to pick up a sausage grinder. Eddye was not with them and she is fairly certain Eddye was at home that day.

Pearl Foster, wife of Wilburn Foster, testified that in November 1945, she went with Nancy Foster to the notary public's office about drawing up a deed. The others there were Melvin Foster, Eddye Foster and Pearl's husband, Wilburn Foster. When she went in, the notary public had started to type and asked whose name Nancy wanted on the deed. When Nancy

Foster said that she wanted Melvin and Ellen's name on the deed (Ellen is Nancy Foster's baby daughter), Melvin's wife spoke up and said it should be made to Melvin and her, and then to Ellen. That after the matter went back and forth between Nancy and Eddye, Nancy Foster said, "If I can't have it like that, I will just let it go and they can fight over it." Thereafter, the notary gave the paper she had started to Nancy Foster and everybody left. Pearl never saw the deed again after that.

Mae Aldridge, Nancy's oldest daughter, lived about a mile from her mother. She testified that shortly before her mother's death on June 12, 1951, she went to the Citizens Bank in Van Buren to pay off a note that her mother owed and while there she got all of her mother's papers at the bank, including the deed. She says that the deed was not signed and did not have her mother's mark on it. She had possession of these papers until two weeks after her mother's death. When asked how Melvin got the deed she stated, "He asked me, he wanted to see the deeds, and wanted to see the mortgage after I picked them all up. I showed them to him. He looked at them, and then just stuck them in his pocket and walked off." She first found out about the deed here involved in 1952 when she heard that Melvin was mortgaging the land. At that time she went to the bank and was shown the deed. She told the bank not to let Melvin make any more mortgages on the property.

The record shows that Nancy P. Foster mortgaged the lands on Nov. 19, 1947, on Dec. 4, 1948, and again on Feb. 19, 1950. In each instance the mortgages executed by Nancy Foster during her lifetime and subsequent to the date of the alleged deed were signed by mark and witnessed in accordance with Ark. Stat. Ann. § 27-109 (Repl. 1962). There was ample other evidence also showing that Nancy Foster always affixed her signature in this manner. In view of the testimony and

the recorded documents, among which is the recordation of the alleged deed on July 5, following the mother's death on June 12, 1951, we hold that a preponderance of the evidence supports the Chancellor's findings that the deed was a forgery.

STATUTE OF LIMITATIONS

Appellants argue that all the appellees were put on notice of the deed from Nancy Foster to Melvin and Eddye Foster in 1952 and that consequently their cause of action to cancel the forged deed is barred by the seven year statute of limitations, Ark. Stat. Ann. § 37-101 (Repl. 1962). Assuming without deciding that appellees were put on notice of the forged deed in 1952, we do not agree that the statute of limitations prohibits a person in possession from suing to remove a cloud upon his title even though the cloud had been in existence and within the knowledge of the possessor for more than seven years. The rule is that there is no necessity for resorting to legal remedies until there is an interference with possession, *Penrose* v. *Doherty,* 70 Ark. 256, 67 S.W. 398 (1902). There is no showing here that either Melvin or Eddye took possession of the premises during their lifetimes and, as will be shown, Mattie Dotson at all times held the lands with permission of appellees.

ADVERSE POSSESSION

The evidence in the record shows that Lela F. Hunter and her husband, Virgil, went into possession of the lands following Nancy Foster's death and remained there for two or three years. Thereafter the land was vacant until Mattie Dotson took possession sometime after Dec. 18, 1957. On that date she paid off the mortgage that Eddye Schrider, formerly Eddye Foster, had executed to the People's Bank & Trust Company on Sept. 13, 1955, and at the same time paid the money for the back taxes from 1952 to the date of her transaction with the bank. She has had continuous posses-

sion of the property since that time and paid all taxes as they accrued up to and through 1966. On direct examination she was asked:

"Q. Now, Mattie, have you at all times occupied the land? By that, I mean had control of it and exercised control over it, and did these people know that you were claiming the land all these years?

A. There wasn't nobody, I never did say anything about claiming the land until I brought them papers up there to you."

Again, on cross examination she was asked:

"Q. Did you think that Melvin's brothers and sisters had some interest in this property?

A. I thought that they just had as much interest in it as Melvin did."

In addition to the above, the record shows that Mattie Dotson did not pay the mortgage or take possession of the land until after the death of both Melvin and Eddye Foster.

On Nov. 16, 1966, Mattie sold ½ acre of the land for $300.00 to Eugene O'Bar. O'Bar had erected a building on the half acre prior to trial. The trial court awarded the half acre to O'Bar in its decree and no appeal has been taken therefrom by any of the parties.

Mattie Dotson readily admits that she talked to Wilburn about taking possession of the lands before she paid off the mortgage at the bank. Wilburn testified that Mattie Dotson asked him about working the place and that they arrived at an agreement whereby she could work the place for three years if she would pay off the mortgage and the taxes. Thereafter she kept the taxes paid and no mention was made that the character of her possession was not permissive. The

testimony of Wilburn is substantiated by the testimony of Lela Hunter and Mae Aldridge, both of whom testified that Mattie asked them for permission to enter into possession of the lands.

Thus when we read the whole record, together with the damaging admissions made by Mattie Dotson, we must find that a preponderance of the evidence fully supports the Chancellor's finding that Mattie Dotson entered into possession of the lands with the permission of the children of Nancy Foster. Since there is argument that the Chancellor's opinion and the decree were erroneous because he considered Mattie Dotson as a child of Nancy Foster, instead of a sister, we have reviewed the record and find that a preponderance of the evidence would support no other conclusion on the issue of adverse possession.

CONCLUSION

From the foregoing it is seen that the children of Eddye Foster (Schrider) are foreclosed from claiming the land because the alleged deed from Nancy Foster to Melvin and Eddye Foster is a forgery. Since Mattie Dotson went into possession of the lands with the permission of Nancy Foster's children, it obviously follows that her claim of adverse possession is without merit, *Still* v. *Still,* 239 Ark. 865, 394 S.W. 2d 733 (1965).

In view of the fact that both appellants claim the decree is erroneous in that it classifies Mattie Dotson as an heir of Nancy P. Foster, we are remanding the case to the trial court with directions to clarify the decree to correct this erroneous impression.

Affirmed as modified.

L. A. GREEN SEED COMPANY OF ARKANSAS v.
MOSES WILLIAMS

5-4859 438 S.W. 2d 717

Opinion Delivered March 24, 1969

Arnold, Hamilton & Streetman for appellant.

Paul K. Roberts for appellee.

FRANK HOLT, Justice. Appellee is a commercial grower of tomatoes and appellant is a distributor and seller of tomato seed. Appellee brought this action to recover damages for breach of warranty by appellant in the sale of tomato seed. When the trial court overruled appellant's demurrer to appellee's complaint, as amended, the appellant refused to plead further. Thereupon the trial court, sitting as a jury, proceeded to award damages to the appellee, after taking evidence upon this issue.

The appellant first contends that it was error for the trial court to overrule its demurrer to the complaint as amended. This contention is based upon the premise that appellee did not purchase a product sold by the appellant. In his complaint appellee asserts that appellant packaged, labeled and sold tomato seed as "Green's Pink Shipper" variety, knowing the seed would be purchased by the public to raise and sell "Pink Shipper Tomatoes" for a profit; that this seed was so represented and sold to Brown Seed Store, which retailer then so represented and sold the seed to Guy Jones (who is engaged in the business of growing tomato seedlings and selling the plants to commercial

tomato growers); that appellee purchased, from Jones, plants grown from this particular seed, transplanted and raised them "in accordance with accepted standards of farming" on three-fourths of an acre of his farm; that appellant represented and warranted the seed from which the tomato plants were grown as being "Green's Pink Shipper" tomato seed, when, in fact, it was some unknown variety of tomato seed which produced an inferior tomato; that appellant expressly and impliedly warranted to appellee, through Brown and Jones, that its product was "Pink Shipper" variety of merchantable quality and fit for intended purposes; and that because of breach of warranty, the appellee was unable to market his tomatoes which spoiled in the field, resulting in a crop loss of $900 caused by the alleged breach of warranty.

In testing the sufficiency of a complaint against a general demurrer, all well pleaded allegations and all inferences that can be reasonably drawn therefrom are admitted to be true. *United Interchange, Inc.* v. *Rowe,* 230 Ark. 905, 327 S.W. 2d 547 (1959). Every reasonable intendment and presumption is to be made in favor of the complaint and a general demurrer should be overruled if the facts stated, together with every reasonable inference, constitute a cause of action. *Donham, Commissioner* v. *Neely Co.,* 235 Ark. 710, 361 S.W. 2d 650 (1962); *U. S. F. & G. Co.* v. *Moore,* 233 Ark. 703, 346 S.W. 2d 524 (1961).

A cause of action exists, based upon a breach of warranty, where one sells seed to an immediate purchaser upon a misrepresentation of a certain variety and fitness, and the purchaser, who relied upon the warranty, is entitled to recover damages from the seller for the breach of warranty. *Earle* v. *Boyer,* 172 Ark. 534, 289 S.W. 490 (1927). And the same is true where inferior plants are sold and the purchaser relies upon a warranty of fitness. *Smeltzer* v. *Tippin,* 109 Ark. 275, 160 S.W. 221 (1913).

Appellant, however, argues that appellee's cause of action, if any, is against the seller of the tomato plants and cannot reach the appellant because it sold appellee nothing. Appellant contends that it has made no warranty, express or implied, with respect to the tomato plants purchased by appellee and that its warranty, with respect to the seed, does not extend to and reach appellee, a remote purchaser, because appellee is a purchaser of the tomato plant and not the seed which was distributed by the appellant. We think appellant's argument is without merit.

The defense or shield of lack of privity is now removed where an action is brought against a seller of goods to recover damages for breach of warranty. Ark. Stat. Ann. § 85-2-318.1 (Supp. 1967). That statute reads:

> "The lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer or seller of goods to recover damages for breach of warranty, express or implied, or for negligence, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods."

Plainly, a seller of tomato seed might reasonably expect a commercial grower of tomatoes (as appellee in the case at bar) to use or be affected by the seeds distributed and sold on the market by the seller. The appellee is an integral part of the distributive chain for production purposes.

According to the allegations, which are admitted as being true, appellee purchased tomato plants and raised tomatoes from plants which were grown from the very seed distributed, warranted and sold by appellant as "Green's Pink Shipper" variety, when, in fact, the

seed was of an inferior and unknown variety. To be sure, the seed changed in natural form into plants after appellant placed it into channels of commerce. Yet, such transformation was an expected result by the laws of nature and not by the hand of man. We hold that when a seller of tomato seed warrants it to be of particular fitness and variety, the warranty extends in the distributive chain to a purchaser of tomato plants which are grown from the seed for commercial purposes.

Appellant next asserts that the complaint is defective because it does not contain an allegation of notice to the appellant with respect to the claimed breach of warranty. This contention is based upon Ark. Stat. Ann. § 85-2-607(3)(a) (Add. 1961) which requires a buyer to give notice of a breach of warranty to the seller within a reasonable time after the buyer discovers, or should have discovered, the alleged breach. We must agree with the appellant that the appellee's complaint is subject to a demurrer since it does not contain an allegation of notice.

The issue of allegation of notice, under this section, seems to be one of first impression in our state. However, it appears that in jurisdictions which have had occasion to interpret this section, the giving of notice must be pleaded as a condition precedent to recovery. See *Avant Garde, Inc.* v. *Armtex, Inc.*, 4 UCC Rep. Serv. 949 (1967), a decision of a New York Supreme Court; *Nolowka* v. *York Farm Bureau Coop. Assn.*, 2 UCC Rep. Serv. 445 (1963), a decision by a Pennsylvania trial court. In *Avant Garde* the court said: * * * While plaintiff alleges unfitness, there is no allegation of notice of defect given within a reasonable time or at any time (Uniform Commercial Code, § 2-607[3][a]).'' The court held the complaint failed to state a cause of action for failure to allege notice. The pleading of notice was required in *United States* v. *American Radiator & Stan. San. Corp.*, 115 F. Supp. 422 (Dist. Ct. Minn. 1953) in an action for breach of

implied warranty brought by the United States against suppliers of a subcontractor on a construction project. Further, this requirement appears to be the majority view under the Uniform Sales Act, or where there is a statutory requirement of notice. *Smith* v. *Pizitz of Bessemer, Inc.,* 122 So. 2d 591 (Ala. 1960). There the court said:

> "* * * it appears that a majority of the American courts which have considered the problem have held the notice requirement applicable in a case of the nature now before this court and that such notice should be alleged in the complaint as a condition precedent to recovery. [citing cases]"

See, also, *Maxwell Co.* v. *Southern Oregon Gas Corp.,* 158 Ore. 168, 74 P. 2d 594, 114 A.L.R. 697 (1937); *Mawhinney* v. *Jensen,* 120 Utah 142, 232 P. 2d 769 (1951); *Sweetheart Baby Needs* v. *Texilon Co.,* 166 N.Y.S. 2d 838 (1957); *Hellenbrand* v. *Bowar,* 16 Wis. 2d 264, 114 N.W. 2d 418 (1962); *Nekuda* v. *Allis-Chalmers Mfg. Co.,* 175 Neb. 396, 121 N.W. 2d 819 (1963); *Salecki* v. *Coca Cola Bottling Co. of Hartford,* 20 Conn. Supp. 143, 127 A. 2d 497 (1956); *Title Ins. & Trust Co.* v. *Affiliated Gas Equipment,* 12 Cal. Rptr. 729 (1961); *Faucette* v. *Lucky Stores, Inc.,* 33 Cal. Rptr. 215 (1963).

The Committee Comment following § 85-2-607 reflects that it also intended that notice be a condition precedent to any recovery since it refers to the notice as the "notification which saves the buyer's rights." The purpose of the statutory requirement of notice to the seller of breach of warranty is to enable the seller to minimize damages in some manner, such as correcting the defect, and also to give the seller some immunity against stale claims. Of course, the sufficiency of notice and what is considered to be a reasonable time within which to give notice of breach of warranty are ordinarily questions of fact for the jury, based upon the circumstances in each case. See Committee Com-

ment, UCC § 85-2-607 and Uniform Laws, Annotated (UCC) § 2-607.

The appellee relies upon *Donham, Commissioner* v. *Neely Co., supra,* where we said that a complaint was not fatally defective because it did not specifically allege that a taxpayer had complied with certain rules and regulations of our statutes and that any noncompliance was a question of fact and an affirmative defense which could be raised by proper plea or answer. We do not consider this case applicable. The case at bar is a breach of warranty action. We have held, in an action based upon a breach of warranty, that where a notice of defect is required, it is necessary for a buyer to allege and prove, as a condition precedent to a recovery, that there was compliance with the requirement of notice. *Williams* v. *Newkirk,* 121 Ark. 439, 181 S.W. 304 (1915). See, also, *Carle* v. *Avery Power Machinery Co.*, 185 Ark. 799, 49 S.W. 2d 599 (1932).

We hold that the giving of reasonable notice is a condition precedent to recovery in this action and that the giving of notice must be alleged in the complaint in order to state a cause of action.

Next appellant argues that the damages [$746.16] allowed to the appellee by the court, sitting as a jury, are excessive and unwarranted by the evidence. We do not agree. Inasmuch as we find it necessary to reverse this case for failure to allege notice of breach of warranty, we deem it unnecessary to discuss this point. However, we think it proper to observe that Ark. Stat. Ann. §§ 85-2-714 and 85-2-715 provide for the recovery of damages, including consequential damages, resulting from a seller's breach of warranty. In a Committee Comment on our Uniform Commercial Code (§ 85-2-715) we find:

> "4. The burden of proving the extent of loss incurred by way of consequential damage is on the

> buyer, but the section on liberal administration of remedies rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances."

The judgment is reversed and the cause remanded with the right of the appellee to amend his complaint to contain the allegation of notice. Otherwise, the demurrer will be sustained.

FOGLEMAN and JONES, JJ., concur.

JOHN A. FOGLEMAN, Justice. I concur. I agree with the result of that part of the majority opinion which holds that the complaint was not demurrable because appellee bought plants from Jones rather than the tomato seed sold by appellant. I would not base that holding on the statute eliminating lack of privity as a defense, however, nor would I hold that the warranty of fitness and variety extends to a remote purchaser of tomato plants which are grown from the seed for commercial purposes, as a matter of law.

I think, for example, that it is necessary that this remote purchaser buy the seed in reliance on the warranties. Under the liberal construction that we give pleadings in testing them on demurrer, I feel that the allegations are broad enough to suggest that appellant did rely on the warranties, and to raise a fact issue as to the extension of warranties.

The statute eliminating the defense of privity [Ark. Stat. Ann. § 85-2-318.1 (Supp. 1967)] is actually an amendment of the Uniform Commercial Code as adopted in Arkansas. It eliminates lack of privity as a defense by the manufacturer or seller of goods. The word "goods" is defined [Ark. Stat. Ann. § 85-2-105 (Add. 1961)] to mean all things which are movable at

the time of identification to the contract for sale other than money in which the price is to be paid, investment securities and things in action. While the definition also includes the unborn young of animals, and growing crops, it is not broad enough to include something changed in form from a seed to a plant.

Yet, I believe that the principles of the common law discussed in *Buckbee* v. *P. Hohenadel, Jr., Co.,* 224 F. 14, (7th Cir. 1915) would support appellee's cause of action here. It was held in that case that:

> "Where seed is sold to a dealer under a warranty that it is of a special variety, and the dealer in turn sends it to a grower, the warranty is carried forward to the ultimate purchaser, if it appears that such understanding was part of the first sale, and the measure of damages for breach of warranty is the difference in market value between the crop produced and such crop as the specified variety of seed would have produced under like conditions." (Quoting syllabus.)

In so holding, the court used the following language:

> "* * * The seller who gathers and packs the seed for sale is necessarily required to know its variety for the intended use by growers, and his warranty thereof, whether directly made to the grower or to the intermediate dealer for resale to growers, may justly render him chargeable for the damages suffered by the growers, when the circumstances of his sale authorize the inference that the warranty was to be thus carried forward to the growers. Indemnity for misrepresentations so carried forward is within the contemplation of his contract of sale to the dealer, and allowance thereof is not open to the objection of remote or speculative damages."

It would not be logical to say appellee had a cause of action against Jones that Jones might assert against Brown Seed Store and Brown Seed Store against appellant but that appellee could not recover from appellant. In effect, we avoided such a circuity of action in *Ford Motor Co.* v. *Tritt,* 244 Ark. 883, 430 S.W. 2d 778. I think that it should also be rejected under the facts in this case, but I do not think that the common law rule could be further extended in the distributive chain, that is, I do not believe that a supermarket or canning factory which purchased the tomatoes from appellee should be permitted to recover from appellant.

JONES, J., joins in this concurrence.

ARKANSAS STATE HIGHWAY COMMISSION v. ANNA WAHLGREEN, ET AL

5-4846 438 S.W. 2d 694

Opinion Delivered April 1, 1969

Thomas B. Keys and *Kenneth R. Brock* for appellant.

Philip H. Loh and *George J. Cambiano* for appellees.

CARLETON HARRIS, Chief Justice. This is a highway condemnation case. The Arkansas Highway Department filed a complaint and declaration of taking of certain lands owned by appellees, consisting of Tract No. 512, containing 27.73 acres (this tract being taken in fee simple), and Tract No. 512E, consisting of .58 acres (condemned as a temporary construction easement). The entire property owned by appellees prior to condemnation consisted of 83 acres lying along the west side of State Highway No. 95 for approximately 1150 feet, and extending westward from said highway for ½ mile. The lands are located ½ mile north of the Morrilton city limits. On trial, the jury returned a verdict in the amount of $60,000.00 as just compensation to appellees, and from the judgment so entered, the Highway Department brings this appeal. For reversal, it is asserted that the verdict is excessive in that it is not supported by substantial evidence, and it is also contended that the trial court erred in instructing the jury on a question of fact.

As to the first point, in *Arkansas State Highway Commission* v. *Kennedy,* 233 Ark. 844, 349 S.W. 2d 133, we said:

> "Where there is any evidence of a substantial nature, which, by positive statement or reasonable inference, when given its strongest probative value, to support the finding of the jury, the verdict then will be sustained, although from the record presented to this court, it might seem to be against the preponderance of the credible evidence."

Accordingly, we are only concerned with whether there was substantial evidence to sustain the award. The landowners offered the testimony of four witnesses. The first was Lloyd Pearce, a licensed real estate broker, consultant, and appraiser, of Little Rock. Mr. Pearce has testified as an expert appraiser in numerous instances in state and federal courts, and is admittedly an expert in this field. In the case before us, he described the study he had made in making his appraisal, including the strip maps and construction plans of the highway department, quad sheets showing the topography of the land, aerial photographs from the Soil Conservation Service, 150 sales of real estate in and near the city of Morrilton, and a physical inspection of the property. He said he took into consideration the close proximity of the lands to the city of Morrilton, the type of road serving the property, the frontage on the road, the neighborhood surrounding the property, the proximity to commercial and industrial areas, topography, elevation, drainage, the distance from schools and churches, and the location of utilities. Pearce testified that growth of the city of Morrilton will naturally extend to the north. The testimony reflects, and the maps also to some degree, that the growth of the city to the south is blocked by the Arkansas River. To the west, growth is hampered by Point Remove Creek, and the area east of the city is taken over mostly by highway commercial development.

The witness was rather thorough in explaining how he reached his appraisal figures, but we see no need of a detailed discussion. Maps were used to show the strip of land taken. The strip bisects Tract 512 diagonally in a southeasterly to northwesterly direction, said strip being approximately 2,550 feet long, and varying in width from about 250 to 1300 feet, severing Tract 512, leaving 39.31 acres south of Interstate 40, with no access from Highway 95, and no vehicular access from the west, and 15.96 acres remaining on the north and isolated from Morrilton by the interstate highway. Water and

sewer are located 1,000 feet south of the property along Highway 95, and the area immediately south has been platted as Hart and Welter's Subdivision. The witness said that the area south of Interstate 40 is landlocked after the taking. He estimated the value of the 83 acres before the taking at $73,700.00, representing the fair market value of the property as of August 2, 1967. He estimated the value after the taking at $8,-700.00, thus leaving the damage at $66,000.00.

In reaching his figure of market value before the taking, Pearce mentioned a number of sales that he considered comparable, and he concluded the 39.31 acres which lie south of the interstate after the taking to have been damaged $800.00 per acre; the damage to the 15.97 acres north of the interstate was placed at approximately $600.00 per acre. There is access to this last area at the northeast corner of the property which is located near the interchange. The appraiser felt that the highest and best use of the property before the taking would have been a residential subdivision. After the taking, he considered the area south of the interstate to have no value, because of being landlocked, and he was of the view that the highest and best use of the property north of the interstate would be for a rural homesite.

Charles D. Owens of Morrilton, engaged in the insurance and real estate business, placed a before taking value on the property of $66,400.00, and an after taking value of $7,800.00, or a difference of $58,600.00.

Gene Hewitt, engaged in the insurance and real estate business in Morrilton, testified that the before taking value was $70,000.00 to $83,000.00, and the after taking value was $13,000.00. The witness said that it was near enough to utilities in Morrilton that he considered the highest and best use before the taking to be for subdivision. Joe Wahlgreen, one of the owners, testified that the land was worth $83,000.00 prior to the taking, and nothing after the taking.

W. E. Hayes of Hartman, Arkansas, an appraiser of 6 years' service with the Highway Department, and who had appraised property for the Farm Security Administration, testified that the soil was of a very thin type, a light whitish clay of poor fertility, and that the utilities available were rural utilities, though there is natural gas. He stated that the west property line is Cedar Street, an old roadway which has not been closed, and he considered that this roadway gave access to the acreage south of the interstate, thereby preventing it from being landlocked. However, the witness stated that this was "potential" access to the property, and no one testified that a motor vehicle can be driven to this land at the present time. Hayes said that the property at the northeast corner would be enhanced by the taking, and would make a good location for a service station. This was contrary to the opinion of Pearce, who earlier testified that the southeast corner of the interchange (not owned by appellees) would be most valuable for such a purpose.[1] Hayes considered the highest and best use for the 83 acres to be agriculture, with highway frontage influence, and he estimated the market value of the whole property prior to the taking to be $20,000.00. He gave the after value as $11,000.00, or a difference of $9,000.00.

K. D. Suthmer, a real estate appraiser employed by the Highway Department for the last 7½ years, although testifying that he was not "too familiar" with Hayes' appraisal, reached the identical damage figure, *i.e.*, $9,000.00, Suthmer giving the property a before taking

[1]This opinion was based on Pearce's view that the southeast corner is a "swing corner." He testified: "For oil companies the sites, the primary corner to this interchange would be the southeast corner of the interchange, since most tourists or people traveling, going on a trip, fill up before they leave, any traffic out of the City of Morrilton would naturally fill up here. If they're going north, they would go on across and then fill up, and on out. Any traffic to the east would fill up at this point and go east. That is called a swing corner is the description that oil companies give it."

value of $20,250.00, and an after taking value of $11,-250.00.[2] He too said that the acre in the northeast corner of the property had been enhanced because of the interstate; that it now had a more valuable use than formerly, in that it could be used for most any type of commercial use, particularly a service station. He compared the value of this corner to two similar (in his view) pieces of property at Pottsville and Atkins that had been sold to oil companies, the former sale bringing $20,000.00 for one acre, and the latter sale, $30,000.00 for 1.3 acres.[3] Suthmer also agreed with the other highway appraiser that the south residual of 31.39 acres had not been damaged because of being landlocked. To the contrary, he stated:

> "There is a road that leads down to it and through it * * * it is not the best in the world, but it has access. It could be a good access, except for one little culvert that has rotted out. It could be put into shape very easily."

There is simply no way to reconcile expert opinions relative to land values where the difference in the testimony varies from $9,000.00 to $70,000.00. All gave some basis for their opinions.

Of course, the jury is the trier of the facts. They heard the witnesses on both sides testify. They saw the aerial photographs and exhibits. Possibly many were already familiar with the area. They evidently concluded that appellees' testimony was correct in that there was no access to the south 39 acres, and no enhancement of the land in the northeast corner. It is possible that they were somewhat dubious of the testimony presented by the state's witnesses, since, though the testimony reflects that the appraisals were independently made, the two witnesses came up with an

[2]Suthmer said independent appraisals were made.

[3]It developed that both of these locations were on "swing corners."

identical figure on damage. Be that as it may, we are certainly unable to say that there was no substantial evidence to support the award of $60,000.00. To take appellant's view, it would be necessary that we arbitrarily decide from the printed record that appellees' witnesses were wrong, and appellant's witnesses were right. Such action would be contrary to our case law.

Among other instructions given by the court to the jury was the following:

> "You are further instructed that it is *undisputed* that the Arkansas State Highway Department *took from* and *out of* the 83 acres owned by the defendant, *a strip of land* for the purpose of construction of Interstate 40. The compensation, or damage, to which the defendant is entitled is the difference in the fair market value of the whole 83 acres considered as a unit before the taking, and the fair market value of the remainder immediately after the taking."[4]

Appellant says that it was prejudiced by the italicized language, wherein the court said that it was undisputed that the strip of land was taken from, and out of, the total 83 acres. The department says that this charge to the jury gave rise to the implication of severance damages, and that one of its witnesses made no such allowance because he felt that enhancement offset any damage suffered.

We find no merit in this allegation. The jury had viewed all maps, these exhibits showing the exact land taken, and the exact land remaining. The exhibits clearly show that the strip contained was taken from and out of the 83 acres, and there can be no dispute of this fact. There is nothing in the instruction which says that the jury must award severance damage. No language is used which precludes the jury from finding that the

[4]Language italicized denotes our emphasis.

remainder was enhanced in an amount sufficient to offset damages. The giving of the instruction did not constitute error. On the whole case, we find no reversible error, and the judgment is affirmed.

It is so ordered.

BILL STOUT v. THE STATE OF ARKANSAS

5-5379 438 S.W. 2d 698

Opinion Delivered April 1, 1969

Sexton & Wiggins for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

CARLETON HARRIS, Chief Justice. This is the second appeal in this case. Bill Stout was charged with the crime of murder in the first degree for the killing of Winfred Lee Jones on March 27, 1967. On the first trial, he was found guilty of manslaughter, and given a sentence of two years in the state penitentiary. This court reversed the judgment specifically because the trial court did not require the Prosecuting Attorney to produce a written statement of Stout and another witness, although in cross-examining defendant, the prosecutor made frequent references to the purported state-

ment made by Stout in writing which conflicted with defendant's testimony. This court also, though finding that the defendant was not entitled to an instruction on self-defense, held that he would have been entitled to an instruction covering excusable homicide, and an instruction was suggested in line with that in the case of *Curry* v. *State,* 97 S.E. 529 (Georgia, 1918). On the second trial, Stout was again convicted of manslaughter, but, instead of receiving a two-year sentence, was given a five-year sentence. From the judgment entered in accord with the jury verdict, appellant brings this appeal. Five points are urged for reversal, which we proceed to discuss, though not in the order listed by appellant.

It is asserted that the evidence is insufficient to support the verdict, and appellant's motion for a directed verdict should have been granted. This point is the last raised by appellant, and less than two pages of the brief are devoted to it. It is apparently recognized that this contention is difficult to support, and we quickly find it to be without merit. The facts in this case are fully set out in our opinion on the first appeal, *Stout* v. *State,* 244 Ark. 676, 426 S.W. 2d 800, and there is no need to detail them again. Suffice it to say that appellant shot and killed Jones with a pistol at the former's home, Stout testifying at the first trial that Jones arose from a couch and "went to his left hand pocket again," and that he (Stout), thinking Jones might have a pistol, then fired, though he had no intention of hurting Jones. He said that his only purpose in firing was to shoot over the victim's head and frighten him into leaving the house. At the second trial, Stout did not take the witness stand; the state's case was based on the testimony of officers, who testified relative to conditions found at the house when they arrived,[1] and also to appellant's statements with regard

[1]They were notified of the shooting by telephone from Stout.

to the shooting.[2] In his brief, appellant, in referring to the statements made to officers, says:

> "* * * Through these statements there is one consistent dominant theme. Stout claimed that he did not intend to harm or injure Jones. * * *
>
> "How can Stout's statements that he did not intend to harm Jones be separated from his statement that he pulled the trigger. It seems to us that the jury was not at liberty to pick and choose. If they believe he did the shooting, could they logically reject for no reason whatever, his statement that he did not intend to hit Jones.
>
> "This is not the case where the jury actually heard Stout and could determine what to believe and not to believe. All the Jury heard was the officers repetition of what Stout said to the officers."

Appellant overlooks the fact that one of the officers (John Ames) testified that appellant, upon being asked why he shot Jones, replied, "Oh, Ames, it was just jealously, I guess." For that matter, the jury, of course, did not have to accept as the full truth everything told the officers by appellant. They had the right, in viewing all the circumstances, to find the statement that he did not intend to hurt Jones, to be entirely self-serving.

The majority of the court is of the view that this judgment should be reversed, but the opinion in this case cannot serve as a precedent for future cases, because no four members agree on any one ground of reversal. The writer, together with Justices Brown and Holt, thinks error was committed as asserted in appellant's Point 3, said point stating that the court erred in

[2]These statements were held valid on the first appeal, and not controlled by **Miranda v. Arizona**, 384 U.S. 436, as urged by appellant at that time.

instructing the jury that Stout could be sentenced to a greater period of imprisonment than two years. The penalty for voluntary manslaughter is imprisonment for a period of not less than two, nor more than seven years. Ark. Stat. Ann. § 41-2229 (Repl. 1964). As stated, Stout only received a two-year sentence at the first trial, but was given a five-year sentence on the second occasion. It is the position of the state that, since this sentence is within the term prescribed for the offence of voluntary manslaughter, the judgment is entirely legal and valid. All agree that a defendant cannot be re-tried for a higher degree of homicide than that in the first trial. See *Johnson* v. *State,* 29 Ark. 32. The state courts of the several jurisdictions are not in agreement as to the proper rule. Even the federal courts have disagreed. For instance, in *Patton* v. *State of North Carolina,* 381 F. 2d 636 (1967), the facts reveal that Patton, in October, 1960, was convicted of armed robbery after a plea of *nolo contendere,* and sentenced to twenty years' imprisonment. No appeal was taken, but in 1964, Patton applied for a state post-conviction hearing, and on the basis of the decision in *Gideon* v. *Wainwright,* 372 U.S. 335,[3] was awarded a new trial. He pleaded not guilty, but was convicted by the jury on the original indictment. It was brought to the attention of the court that Patton had already served nearly five years for the offense. The judge imposed a sentence of twenty-five years, and then deducted five years for the amount of time served. The United States Court of Appeals for the Fourth Circuit affirmed the holding of the Federal District Court (Western District) of North Carolina that the sentence was so fundamentally unfair as to constitute violation of the due process and equal protection clauses of the Fourteenth Amendment. In doing so, the court said:

> "* * * Although the trial judge paid lip service to the idea of crediting Patton with that portion of the initial twenty-year sentence already served, he

[3]Patton entered the plea without benefit of counsel.

actually increased Patton's punishment by imposing, in effect, a twenty-five-year sentence and then deducting five years for the time served. Thus, as a result of seeking and obtaining a new trial, the prisoner, who originally would have been eligible for parole in October 1965, now, it is agreed, will not become eligible until February 1970.

"Regardless of whether the action of the sentencing judge is verbalized as a twenty-year sentence without credit for the five years already served, or as a twenty-five-year sentence with credit, the sentence is to compel the defendant to serve five years longer to become eligible for parole, than he would have been required to serve had he not asserted his constitutional right to a fair trial.

* * *

"* * * In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial—that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the *appearance* of improper motivation is a disservice to the administration of justice."

The court also held that the constitutional protection against double jeopardy is violated if an increased sentence, or a denial of credit, is permitted on re-trial, stating:

"Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules, prohibiting (1) reprosecution for the same offense following acquittal, (2) reprosecution for the same offense following convic-

tion, and (3) multiple punishment for the same offense."

Pointing out that the Supreme Court has said in *Green* v. *United States,* 355 U.S. 184,[4] that an accused may not be reprosecuted for the offense of which he was acquitted at the first trial, the Circuit Court then held that a penalty at the second trial, more harsh than the one received at the first trial, had the effect of placing him twice in jeopardy of punishment for the same offense. This holding was based partly on the "implied acquittal" doctrine, and in part on a different aspect of double jeopardy—the prohibition against multiple punishment. *Ex Parte Lange,* 85 U. S. (18 Wall.) 163. See also *Kennedy* v. *U. S.,* 330 F 2d 26 (1964).

To the contrary, the United States Court of Appeals for the Third Circuit held in *United States* v. *Russell,* 378 F. 2d 808 (1967), that constitutional standards of due process were not violated though Russell received a more severe sentence when he was sentenced the second time.[5] The court said:

> "* * * Accordingly, it can be said the later sentence imposed by Judge Shugart was well within the limits fixed by the law, as the petitioner could have been sentenced for a period up to ten years on each count. Here, the decision to impose the sentence given within the discretion of the trial judge who had an opportunity to see and hear the accused and his witnesses."

Still, a third view was taken by the United States Court of Appeals for the First Circuit, wherein it was held that the sentencing court should be permitted to

[4]Green had first been convicted of second degree murder. and the court held that he could not be retried for first degree murder for the reason that the jury in the first trial impliedly acquitted him of the charge of first degree murder.

[5]Russell had pleaded guilty originally, but, under **Gideon v. Wainwright**, **supra**, was awarded a new trial.

impose a greater sentence upon retrial if circumstances disclosed in a pre-sentencing report warranted such a step.[6] *Marano* v. *U. S.*, 374 F. 2d 583 (1967). It is interesting to note, however, that the court of appeals held that the trial court is not justified in increasing a sentence, following a successful appeal, on the basis of additional evidence offered at the second trial. The Supreme Court of Wisconsin, in *State* v. *Leonard,* 159 N. W. 2d 577 (1968), held that on retrial, if there is a second conviction, a trial court is barred from imposing an increased sentence, unless events occur subsequent to the first imposition of sentence which warrant an increased penalty; even then, the court is required to affirmatively state its grounds for increasing the sentence.[7] The opinion points out, however, that a numerical majority of the decisions from other jurisdictions support the position that upon reconviction and resentencing for the same crime, the trial court may increase the sentence, and, in fact, may assess any sentence it believes appropriate within the maximum set by statute; it is stated that these courts have primarily premised this holding on the theory that, in appealing from a conviction, a defendant assumes the risk of a more severe sentence, and he must accept the hazards, as well as the benefits, that could result therefrom.

In the case before us, in taking the view that Stout could not receive a greater sentence upon the second conviction than was given him at the first trial, the three justices heretofore mentioned are not particularly persuaded by *Patton* v. *State of North Carolina, supra. State* v. *Leonard, supra,* or the views of any court, state or federal, which has held an increased sentence on a second trial to be a violation of constitutional standards.

[6]We have no provision for a "pre-sentencing report" in this state. This report advises the court of events that have occurred subsequent to the first sentence, both good and bad, which the court may take into consideration in fixing the second sentence.

[7]The court majority was not convinced that the trial court relied solely on new information obtained subsequent to the first trial, and held that the increase in penalty was not justified.

Rather, we take this view because we feel that this question has already been passed upon by our own court. In the case of *Sneed* v. *State,* 143 Ark. 178, 219 S.W. 1019, the defendant was convicted of the crime of murder in the first degree, it being charged that he had poisoned his wife, and the jury fixed his punishment at life imprisonment. This conviction was reversed, and Sneed was again tried, and again convicted of first degree murder. *Sneed* v. *State,* 159 Ark. 65, 255 S.W. 895. During the second trial, several references were made to the first trial, and the court instructed the jury that the former trial of the case and the result were not to be considered by the jury in reaching a verdict, except that, if the jury should find the defendant guilty of first degree murder, they could only fix his punishment at imprisonment in the state penitentiary for life. The appellant complained that this instruction was error, and that the jury should have been told that they could not consider the former verdict for any purpose. In holding that no error had been committed, this court said:

> "* * * There was no error in the instruction, and it was a proper one to give. References to the former trial had been made throughout this trial, during the selection of the jury, the opening statement of counsel, the taking of testimony, and the arguments of counsel before the cause was finally submitted. The instruction therefore was proper, and, if any prejudice had been lodged in the minds of the jury by these references, this instruction had the effect to remove it. The instruction was tantamount to telling the jury that they could not consider the former trial or verdict as evidence in the cause, and thus fully met appellant's objection in this respect. The effect of the instruction was to tell the jury that, as appellant had once been put upon trial for murder in the first degree and the punishment in that case fixed at life imprisonment, if they should return a verdict of guilty they could not punish him by death. *It was proper for the*

court to instruct the jury as to the form of its verdict and as to the punishment, in case they should return a verdict of guilty, so that they might not be misled and possibly return a verdict in a form that would result in a mistrial because of former jeopardy."[8]

The above italicized language, as far as the three justices who adhere to this view are concerned, is conclusive. Article 2, Section 8, of the Arkansas Constitution, cited in *Sneed,* provides, *inter alia,* that "no person, for the same offense, shall be twice put in jeopardy of life or liberty." It is true that in *Sneed* the result of our decision was that a man could not be twice placed in jeopardy of losing his life; of course, it is generally considered that losing one's life is a greater punishment than imprisonment, but we see no legal distinction, nor does our Constitution make any such distinction. The quoted portion of Article 2 says that one shall not be twice placed in jeopardy of "life *or* liberty."[9] The fact remains that the holding in the second appeal, *Sneed* v. *State, supra,* was that Sneed could not be given a greater punishment on the second trial than he received at the first trial—even though he was tried the second time for the *same degree* of murder— identically the *same offense*—for which he had originally been tried.

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[8]Emphasis supplied.

[9]Of course, unless a greater sentence is received on a second trial, double jeopardy is not involved simply because a criminal case is retried after reversal. In **Johnson v. The State,** 29 Ark. 31, Chief Justice English, speaking for the court, said:

"It is very well settled that where a defendant is tried and convicted of a criminal offense, and a new trial is granted him on his own motion, he may be tried again for the same offense.

"It is true that, by a constitutional provision as well as by the common law, no man can be twice put in jeopardy of life or limb for the same offense; but, where the first jeopardy has resulted in his conviction, it is rather a merciful interposition of the court, than any invasion of his rights, to set aside the conviction upon his own application in order to afford him the opportunity of another trial."

As stated, the view expressed herein is that of only three justices, but even though a majority of the court agreed, such an error would not call for a reversal, for it could be remedied by reducing the prison sentence to two years.

Justices FOGLEMAN, BYRD, and HOLT, are of the opinion that appellant's requested instruction No. 2 should have been given. This instruction told the jury that, if it found that Jones was intoxicated and engaged in such actions as constituted an apparent threat to Stout and his family, and that Stout was endeavoring to remove Jones from his home; that Stout reasonably believed that Jones was armed with a knife and might do him bodily harm; and that Stout fired the fatal shot for the purpose of attempting to scare or frighten Jones, then the killing did amount to excusible homicide, and Stout should be acquitted. It is the writer's view, along with that of Justices SMITH, BROWN and JONES, that any possible error in failing to give this instruction was cured by the giving of appellant's requested instruction No. 5, which told the jury that acts committed by misfortune or accident should not be deemed criminal where it appeared there was no evil design, intention or culpable negligence, and that, if the jury believed that the death of Jones was the result of an accident, free from the elements mentioned, Stout should be acquitted. A concurring opinion setting out the views of the aforementioned justices, who feel that the failure to give the instruction constituted reversible error, is handed down on this date.

Certain remarks were made to the jury by the attorney for the state, which appellant contends constituted a comment by that official on the failure of appellant to testify. The writer, and Justices BYRD and HOLT are of the opinion that there is merit in this contention. This finding of error is principally based on the fact that the state's attorney repeatedly made statements which could well impress the jury with the fact

that there was some reason why appellant did not testify. Some of the statements made were as follows:

> "* * * I want to call your attention to this one thing. Whatever evidence was offered here was offered by the State of Arkansas. The lips of the Jones boy are sealed. They are sealed in death, and he cannot come here to tell you the story that he knows and the story that happened out at the Bill Stout home on this particular day. We can't bring him back here to testify; but I want to say to you, Ladies and Gentlemen of the Jury, that there was a house full of people there, and *how many of them has the defendant brought to you* - - -"

> "* * * Now then in the other trial the defense was self-defense—"

> "* * * The defendant in this case does not even claim that he was about to do him bodily harm or that there was anything that he was afraid of—"

In *Perry* v. *State,* 188 Ark. 133, 64 S.W. 2d 328, the prosecuting attorney commented to the jury:

> "In fact, the defendant has not denied a single, solitary iota of evidence that has been given against him from the stand here today."

We held that the effect of this language was to call to the jury's attention the failure of the defendant to testify, and reversed the conviction.

Another suggested error relates to the fact that the record reflects that the court told the jury that appellant was being tried on a charge of involuntary manslaughter. This obviously was a typographical error, but there is no reason to discuss the contention, since it is not likely to arise on another trial.

The next asserted error deals with opening remarks of the state's attorney; though no objection was made, we discuss the contention, since the case is being remanded and likely will be tried again.

In his opening statement, the prosecutor mentioned the fact that written statements taken from witnesses would be introduced in evidence, and he added, "those statements will be here, and you all may look at them. There is going to be some deviation from those statements, at least by the defendant." Actually, none of the statements were introduced for any purpose, and, as previously stated, the appellant did not take the stand. Further, the prosecutor said:

> "* * * that there was no effort made at all by the deceased to try to harm Mr. Stout, and you will be confronted with the fact that it is pure fabrication for him to come in here and tell you that he was being attacked with a knife in order to make you believe his side of the story."

The purpose of an opening statement is to inform the jury of the evidence that will be offered on behalf of the party represented, and, of course, the state's attorney should not refer to evidence that he has no intention of offering. For that matter, we do not know just how the statements from the witnesses could have been referred to unless a witness testified contrary to his or her original statement, and the prosecutor had claimed surprise and obtained the permission of the court to cross-examine the witness with regard to the inconsistency. In *Shands* v. *State,* 118 Ark. 460, 177 S.W. 18, we said:

> "* * * The affidavit and the letter set out in the statement of facts were not competent as affirmative matter tending to show the guilt of the accused, but they became competent for the purpose of contradicting and impeaching the prosecuting witness when she testified that appellant had never

at any time had intercourse with her. But for this denial they would not have been competent. But the denial made them admissible, as the party producing a witness, when surprised by adverse testimony, may show, for the purpose of impeachment by contradiction, that the witness has made prior statements inconsistent with the one made on the stand."

There is no reason for the attorney representing the state to comment upon the evidence that will be offered by the defense—for the very simple reason that he does not know what evidence will be offered. This is made obvious by the fact that the prosecutor made reference to what the defendant (appellant) would say in testifying, when in fact, it developed that the defendant did not testify at all.

In view of a retrial, a similar matter should be mentioned. It is claimed that error was committed during the testimony of Jannie Medlock Chambers, a stepdaughter of appellant, who was placed on the witness stand by the state. The alleged error relates to the prosecutor's reference to a purported conflicting written statement made by the witness following the shooting. We have just pointed out that it is permissible to cross-examine one's own witness when one is genuinely surprised by the testimony given, and states that fact immediately to the court; also when a witness is known to be hostile, the court has discretion to allow latitude in the examination of such a witness. *Ward* v. *State,* 85 Ark. 179, 107 S.W. 677. Otherwise, the reference is error.

One other alleged error refers to the fact that a small son of the deceased commenced to cry and left the courtroom in tears while the prosecuting attorney was making his argument. There is nothing in the record to reflect that this was "staged," and the trial court admonished the jury to disregard the incident.

Reversed and remanded.

FOGLEMAN, BYRD & HOLT, JJ., concur.

GEORGE ROSE SMITH and JONES, JJ., would affirm.

JOHN A. FOGLEMAN, Justice. Judges BYRD, HOLT and I are of the opinion that the trial court's failure to give appellant's requested instruction No. 2 constituted reversible error. This instruction is strikingly similar to one approved by this court in *Maddox* v. *State,* 217 Ark. 849, 233 S.W. 2d 542. That one was held to be sufficient to justify the refusal of self-defense instructions because it was responsive to the appellant's theory of the case. The instruction there told the jury that if it should find from the evidence" '* * * that the deceased, in a violent, riotous and turbulent manner undertook to force his way into the restaurant of the defendant, then the defendant would have a right to use a show of force to prevent such forcible entry by the deceased, and if the deceased did so undertake to force his way into the restaurant and the defendant presented a pistol in order to prevent his act of forcibly entering, and a scuffle ensued over the pistol and the pistol was accidentally fired and [Sheppard] was killed, you will acquit the defendant.' " It is consonant with the instruction suggested in *Curry* v. *State,* 148 Ga. 559, 97 S.E. 529 (1918), to which we said, on the former appeal in this case, appellant would have been entitled. See *Stout* v. *State,* 244 Ark. 676, 426 S.W. 2d 800. Even though self-defense is not now asserted, the principle involved is the same.

There is no doubt that the instruction requested was a correct one. One has the right to eject another from his home, whether trespasser or invitee, and to use force to do so when quiet means fail. *McCoy* v. *State,* 8 Ark. 451; See Annot., 67 L.R.A. 544, 25 A.L.R. 523, 32 A.L.R. 1541, 34 A.L.R. 1488. The failure to give a correct instruction must be presumed to be prejudicial error un-

less it otherwise appears. *Beevers* v. *Miller,* 242 Ark. 541, 414 S.W. 2d 603. The majority hold that the giving of appellant's requested instruction No. 5 was sufficient to cure any error. We do not feel that this position is tenable.

Excusable homicide is homicide by misadventure, i.e., where a person in doing a lawful act, without any intention of killing, unfortunately kills another. Ark. Stat. Ann. § 41-2243. *Stout* v. *State,* supra. Nowhere in any instruction given did the court indicate to the jury that, if they found appellant's theory of the case to be correct, he was doing a lawful act. Appellant was entitled to have the jury so advised. Under similar circumstances, we have held that one who contended that a weapon was accidentally discharged, while he was engaged in lawful acts of self-defense, was entitled to an instruction on justifiable homicide even though an instruction on accident was given. *Jordon* v. *State,* 238 Ark. 398, 382 S.W. 2d 185. The same principle applied here would require a reversal of this case.

Even if the court's instructions could be said technically to cover the matter in a general way, the defendant was entitled to have the court correctly and clearly apply the law to the facts of the case, unless it appears that prejudice has not resulted. *Beevers* v. *Miller,* 242 Ark. 541, 414 S.W. 2d 603. We do not see how we can say there is no prejudice here, because of the deficiency above stated.

ALICE BACK v. MARIE DUNCAN

5-4822 438 S.W. 2d 690

Opinion Delivered April 1, 1969

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

Willis V. Lewis for appellee.

GEORGE ROSE SMITH, Justice. This is an action for personal injuries sustained by the appellee when her car was struck from the rear by a car being driven by the appellant. There was no serious question about liability, for both parties testified that Mrs. Duncan's car was struck while it was standing still in a line of traffic in downtown Little Rock. The jury fixed the damages at $13,040.

There is really only one point for reversal, though the appellant subdivides it for the purpose of argument.

During the trial the court admitted in evidence a letter written by Dr. Wade. A few minutes later the judge decided that he had made an error and instructed the jury to completely disregard the letter. It is now insisted that the error was so prejudicial that the defendant's request for a mistrial should have been granted.

Mrs. Duncan testified that she suffered severe injuries to her neck and shoulders. About two months after the accident she obtained a part-time job in the offices of Drs. Flack, Hedges & Wade. Some three months later Dr. Flack discharged her. Mrs. Duncan testified that she was not physically able to do the work and that the doctors were justified in letting her go.

Before the plaintiff rested her case the court allowed the defendant to call Dr. Flack out of turn. He contradicted Mrs. Duncan's testimony, saying that she was discharged not for physicial inability to do the work but for other reasons that are now unimportant. On cross-examination the plaintiff's attorney unsuccessfully attempted to have Dr. Flack identify the letter from Dr. Wade.

Later in the trial Mrs. Duncan's attorney recalled her to the stand and succeeded in introducing the letter from Dr. Wade, which reads as follows:

8/16/67

To whom it may concern:

Marie Duncan has had persistant neck and back aches. She is also in the middle of a law suit and has had some trouble with a family problem.

It was our decision that Marie should not be working and trying to do her housework at the same time until she has gotten over some of her physical complaints.

> We are very sorry to loose [sic] her and in the future hope to be able to rehire her. She is very good with patients and also good lab work.
>
> W. I. Wade, M.D.

As we have said, the judge soon withdrew the letter from the case and instructed the jury to disregard it.

Counsel for the appellant cite our rule that an error is presumed to be prejudicial unless the contrary affirmatively appears. *Safeway Stores* v. *Gross,* 240 Ark. 206, 398 S.W. 2d 669 (1966). In the nature of things, however, that rule does not apply when the trial judge has undertaken to correct an apparent error by instructing the jury to disregard it. In that situation we accord much latitude to the trial court and reverse the judgment only if there is an abuse of discretion involving manifest prejudice to the complaining party. *Briley* v. *White,* 209 Ark. 941, 193 S.W. 2d 326 (1946). Thus in effect we sustain the trial court unless prejudice affirmatively appears.

Here we find no reversible error. An award of a mistrial is a step so drastic as to be the exception rather than the rule as a means of correcting an error. For such a step to be warranted it must be apparent that justice cannot be served by a continuation of the trial. Perhaps the best illustration of such an extreme error is the deliberate introduction by a litigant of proof that conveys information which the law excludes as a matter of policy. In that vein we have held that a mere admonition to the jury cannot correct flagrant misconduct of counsel such as inexcusable references to a "rapsheet" supposedly involving a witness on the stand, *Shroeder* v. *Johnson,* 234 Ark. 443, 352 S.W. 2d 570 (1962), or a deliberate and gratuitous reference to insurance coverage having no permissible bearing upon the issues in the case. *Ward* v. *Haralson,* 196 Ark. 785, 120 S.W. 2d 322 (1938).

This case does not present such a situation. Dr. Wade's letter was confined to commonplace matters such as Mrs. Duncan's injuries, which the jurors had already heard about, a family problem about which the letter supplied no information at all, a suggested connection between Mrs. Duncan's physical condition and her discharge, and the firm's apparent satisfaction with Mrs. Duncan's services. Had counsel for the plaintiff eliminated any possible infraction of the hearsay rule by putting Dr. Wade himself on the witness stand, every statement in the letter might have been repeated for the jury's consideration. In the circumstances we have no hesitancy in saying that the court's admonition to the jury was amply sufficient to nullify any prejudicial effect the introduction of the letter might have had.

Affirmed.

J. C. FRENCH, ET UX v. KERMIT L. RICHARDSON, ET AL

5-4855 438 S.W. 2d 714

Opinion Delivered April 1, 1969

Wright, Lindsey & Jennings for appellants.

Lawson E. Glover for appellee.

LYLE BROWN, Justice. This is an action in trespass instituted by J. C. French and wife, appellants here, against Kermit L. Richardson and Malvern Broadcasting Company. Richardson and wife own the broadcasting Company. The station is located on the Richardson lands, while the broadcasting tower is situated on adjacent lands belonging to appellants. Plaintiffs below sought the removal of transmission wires running over their lands and connecting with the broadcasting station tower; they also sought damages allegedly caused by continuous trips across the French lands in servicing the lines and tower. The chancellor held that the Frenches knew of the existence of the transmission wires and tower at the time they bought the lands and he declined to disturb the broadcasting company's use of that equipment and access thereto. In so holding, the court rejected plaintiffs' theory that they were bona fide purchasers without notice of the broadcasting company's unrecorded easement lease covering the French lands.

In 1963 Mr. and Mrs. French acquired a twenty-five acre tract from Builders' Lumber & Supply Co., Inc. The deed contained the regular warranties, the only exception being this recitation: "Subject to any and all rights, easements and privileges now existing." Five years previously, Builders executed a conveyance to Malvern Broadcasting, granting an easement lease over, across, and on the lands subsequently deeded to the Frenches. The easement covered a transmission tower already located thereon. It was for the stated purpose of "keeping, maintaining, and using its tower and transmission line." Those facilities served the broadcasting station located a short distance away and on land not the subject of this litigation. The easement lease was for a ten-year period with a ten-year option to renew. The recited consideration was one dollar. The instrument was not recorded until after the Frenches purchased the lands on which the tower is located.

Here we have the Frenches purchasing a tract of land which at the time of their purchase was burdened with a servitude represented by an unrecorded easement lease. The law governing the respective rights of the parties in that situation is well settled. The prevailing rule is found in Am. Jur., Easements, § 156 (1957):

> It has often been said that in order to affect the purchaser of a servient estate the easement if unrecorded, must be one that is apparent as well as necessary and continuous, or the marks of the servitude must be open and visible. Accordingly, it is held that if the servitude cannot be discovered by an inspection of the premises, the purchaser is not charged with notice of its existence, except in so far as he may be charged with constructive notice under the recording laws. On the other hand, the proposition that a purchaser of real estate is charged with notice of an easement where the existence of the servitude is apparent upon an ordinary inspection of the premises is sound beyond question.

A case in point is *Hannah* v. *Daniel,* 221 Ark. 105, 252 S.W. 2d 548 (1952). Hannah and Daniel purchased adjoining lots from J. C. King. Daniel's purchase was prior to that of Hannah. Shortly after Hannah moved upon his lot he observed his neighbor Daniel constructing a pond which overlapped on the Hannah property. Daniel was proceeding on the strength of an oral easement allegedly obtained from King before Hannah's purchase. In deciding for Hannah, this Court quoted the rule found in *Waller* v. *Dansby,* 145 Ark. 306, 224 S.W. 615 (1920):

> The general rule is, that whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty as in the case of vendor and purchaser, and would lead to the knowledge of the requisite fact, by the exercise of

> ordinary diligence and understanding. Or, as the rule has been expressed more briefly, where a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it.

An examination of the evidence in *Hannah* v. *Daniel* convinced this Court that at the time Hannah purchased his property there was no physical improvement located on that property which would reasonably make it apparent that a servitude existed. In the case at bar the evidence is clearly to the contrary, as will shortly be revealed.

The tower and transmission lines supported by poles were erected in 1958 on what was to become the French property. The tower is over 200 feet in height and the poles are similar to ordinary public utility poles. J. C. French, a Malvern business man, conceded that he was fully cognizant of the tower and poles being on the land which he proposed to and did purchase. He explained that he contemplated possibly moving his LP gas business from downtown and constructing a new building on the property purchased; that the new building would be located some distance south and east of the tower and on highway frontage; that the tower and lines would not interfere with his LP gas operation; and consequently he made no inquiry about an outstanding easement. He frankly stated his disappointment to be that he was not able, as he anticipated, to draw lease rent from appellees. Some sixty days after the purchase, Mr. French's son-in-law, who was pasturing cattle on the land, noticed an employee of the broadcasting company mowing a narrow strip to the tower and also mowing around it. It was at that point that French inquired and was advised of the easement lease.

Mr. French's purchase of the property with full knowledge of the existence of the tower and transmission lines was sufficient to put him on notice of the existence of a servitude. Had he exercised his duty to make

inquiry he would have easily discovered the existence and conditions of the lease easement. He is therefore charged, under our settled law, with notice of the easement.

Appellant argues that it would be inequitable to burden the French property with a "no-rent easement lease." Malvern Broadcasting actually paid a substantial consideration for the easement and improvements thereon. The tower was erected at a cost of some $5000. Appellee Richardson paid $42,500 to become the sole owner of the station and the evidence is convincing that the value of the easement, with the improvements thereon, figured substantially in the purchase price paid. Finally, Richardson might have been derelict in not recording the lease easement; and the real estate broker who handled the sale, and who had knowledge of the outstanding easement, might have avoided this litigation had he informed Mr. French of that instrument. Yet there was a combination of two factors which should have aroused inquiry on the part of French. First, his deed recited that it was subject to any easements and privileges then existing. Secondly, the improvements made under the easement were in notoriously open view and their existence was well known to French. He admittedly never discussed the transaction with his vendor, nor did he make any inquiry of the real estate broker about the significance of the quoted restriction in the deed.

Affirmed.

FLORENCE CAROLYN BALCH MONTGOMERY v.
THE FIRST NATIONAL BANK OF NEWPORT, ARKANSAS,
AS ADM., ET AL

5-4778 439 S.W. 2d 299

Opinion Delivered April 1, 1969

Lee Ward for appellant.

Pickens, Pickens & Boyce by *Kenneth H. Castleberry* for appellees.

JOHN A. FOGLEMAN, Justice. This appeal is a sequel to *Montgomery* v. *First National Bank of Newport*, 242 Ark. 329, 414 S.W. 2d 109. The substance of the complaint of appellant is stated there. We held that it stated a cause of action against the administrator of the estate of Lucas G. Balch, appellant's father and her legal guardian, and the surety on his bond as guardian. We held that a demurrer contained in an amended answer filed by appellees did not properly raise the defenses of limitations and laches because the complaint contained allegations that Balch concealed the fraud charged by his daughter in her complaint and because the statute of limitations did not begin to run until Balch, as a fiduciary, had repudiated his trust.

On remand the cause was tried on the pleadings filed prior to the first appeal. The defenses raised by the answers of appellees were the statute of limitations, a release of Balch and his surety by receipt executed by appellant, a general denial, and laches. The latter defense was based upon allegations that appellant's action was brought after the death of her father, the only witness familiar with the entire matter. It was also alleged that virtually six years intervened between the close of the guardianship on which appellant based her

cause of action and the filing of this suit. It appears to be undisputed that the assets of the guardianship consisted of a $10,000 savings and loan certificate issued by Newport Federal Savings and Loan Association on November 28, 1951, United States Savings Bonds having a maturity value of $2,900, and a bank account amounting to $882.58. Most of these assets were investments of proceeds from National Service Life Insurance on her brother. After a trial on the merits, appellant's complaint was found to be without merit by the chancery court and was dismissed with prejudice.

Appellant relies on two points for reversal. They are:

I. *Alleged error in allowing attorney Fred M. Pickens, Jr., to testify for appellees;*

II. *The trial court's finding the appellant's claim was without merit is against the preponderance of the evidence.*

We shall discuss these points in the order listed.

I.

Lucas G. Balch was appointed legal guardian of appellant, his daughter, in the probate court of Jackson County in 1951. Appellant became 18 years of age on August 15, 1959. Balch died about November 21, 1965, in Jackson County. At all times during the guardianship, the guardian was represented by the law firm of Pickens, Pickens and Boyce, or its predecessor. Fred M. Pickens, Jr., was the attorney in this firm who actually represented and advised Balch. He assisted Mr. Balch in the preparation of the guardian's final accounting and all matters pertaining to the termination of this guardianship. He obtained an order on October 27, 1959, vesting the assets of the guardianship in appellant. He also drafted a receipt, waiver of notice

and entry of appearance for the signature of Florence C. Balch. This instrument, in which appellant acknowledged receipt of all moneys and property due her and consented to the entry of an order in the probate court confirming the final accounting of the guardian, was purportedly executed in his presence. Appellant denied executing this instrument. The order confirming the final settlement and discharging the guardian and his surety was obtained by this attorney.

Appellant alleged that she never received any of the money or property of the guardianship and that she was unaware of the existence of this receipt until January 12, 1966. Although her name was signed to a request for payment endorsed on the United States Savings Bonds and dated October 29, 1959, she testified that she did not sign the bonds or receive any of the proceeds. According to Pickens, the bonds and savings and loan certificate were kept in his safe until appellant and her father came to his office after the entry of the order vesting the assets in her. He testified that the savings and loan certificate was delivered on the same date that appellant signed the bonds and that a new certificate dated November 1, 1959, issued to appellant was placed in his custody and put in his safe. He also testified that this certificate was delivered by him to Mr. Balch on January 26, 1960, when Balch advised Pickens that appellant and her husband wanted to use it to buy a motel owned by Balch.

The record indicates that Pickens did not participate in any of the proceedings in this case except as a witness. All of the pleadings on behalf of appellees are signed by either Wayne Boyce or Kenneth H. Castleberry, both connected with the law firm. No appearance by Pickens as an attorney is noted in any part of the record. When the trial commenced, it was noted that appellees appeared by attorney Kenneth Castleberry of Pickens, Pickens and Boyce. While appellant argues that Pickens gave instructions to his associate,

Castleberry, while on the witness stand, she bases this contention upon statements in the record that Pickens offered suggestions to Castleberry as to methods of preserving the record. We deem this to be too insignificant to constitute an actual participation in the trial of the case.

Appellant relies upon Canons 6 and 19 of the Canons of Ethics promulgated by the American Bar Association and adopted by this court and upon our holding in *Rushton* v. *First National Bank,* 244 Ark. 503, 426 S.W. 2d 378. We do not find reversible error on this point.

At the outset, it should be noted that the trial of this case was had on January 16, 1968, some ten weeks prior to our decision in the *Rushton* case. It was also about thirteen weeks prior to the delivery of our opinion in *Old American Life Insurance Co.* v. *Taylor,* 244 Ark. 709, 427 S.W. 2d 23, wherein we reiterated the admonition that neither the partner nor other members of the firm should participate in the trial of the case when one of them was a witness therein. There had been a widely held opinion that the requirements of Canon 19 were met when the testifying partner left the trial of the case to other members of his firm. See Formal Opinion 220 reproduced as an Addendum to the *Rushton* opinion at page 517.

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.' "

The *Rushton* case was the first case in this state in which reversible error was based upon a violation of

the Canons of Ethics. Prior to that decision, it had never been held in Arkansas that the testimony of a lawyer was incompetent or inadmissible merely because he or a member of his firm participated in the trial. See *Hutchinson* v. *Phillips,* 11 Ark. 270; *Milan* v. *State,* 24 Ark. 346; 97 C.J.S. Witnesses § 71, p. 456 et seq.; 58 Am. Jur. 110, Witnesses, §§ 152, 153. Our reversal in the *Rushton* case was not based solely upon a violation of Canon 19. The primary basis of the reversal of the case was the abuse of discretion by the trial court in permitting an attorney for one of the parties to testify even though he had remained in the courtroom during the entire proceedings prior to his being called as a witness, in spite of the fact that the witnesses had been excluded from the courtroom under Ark. Stat. Ann. § 28-702 (Repl. 1962) at the request of the opposing counsel.

When Pickens was called as a witness in this case, appellant promptly objected. The objection was that his testimony would be in violation of Canon 19 and, because he had represented the appellant in two other "items" of litigation,[1] in violation of canon 6.[2] The chancellor ruled that a blanket objection was not appropriate and overruled the objection. Although a substantial part of the testimony of Pickens was directed to matters pertaining to the attestation, custody and delivery of certain instruments, no further objection to any of his testimony was made by appellant until the conclusion of his testimony. After extensive cross-examination about the matters testified by him on direct examination, appellant's attorney made the following motion:

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[1]These were divorce suits by appellant against her first two husbands.

[2]Insofar as pertinent, this canon reads: "The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

"If the Court please, the plaintiff renews her motion to strike the testimony because the witness obviously served as legal adviser to the plaintiff. Any information he has is privileged."

Although privileged communications cannot be disclosed through the testimony of an attorney, the failure of the beneficiary of the privilege to object to the admissibility of the questioned testimony renders it competent. *Maloney* v. *Maryland, Casualty Co.*, 113 Ark. 174, 167 S.W. 845. A motion to strike all of a witness' testimony is properly denied where any of the testimony is admissible. *Young* v. *Arkansas State Highway Commission,* 242 Ark. 812, 415 S.W. 2d 575. The testimony of Pickens as to the attestation, custody and delivery of the bonds, the savings and loan certificate and the receipt of appellant was admissible under any view. Even if some part of the testimony of Pickens which appellant contends was in violation of the attorney-client privilege was inadmissible, the denial of the motion to strike all his testimony was proper. Furthermore, a motion to exclude testimony comes too late when it is made after cross-examination of the witness by the moving party without objection having been made when the particular testimony was offered. Otherwise, one could speculate on eliciting favorable answers on cross-examination and then have the testimony excluded if they turned out to be unsatisfactory. *Poinsett Lumber & Mfg. Co.* v. *Traxler*, 118 Ark. 128, 175 S.W. 522. It should be noted that the motion to strike was in no way related to Canon 19.

The court also properly overruled the blanket objection made by appellant before Pickens ever was asked a question. As above pointed out, the major portion of his testimony was admissible and he was a competent witness. Until the exact nature of the testimony to be elicited from Pickens could be ascertained, the court could not possibly know whether all or any part of it was inadmissible or, as a matter of fact,

whether all or any part of it was actually in violation of either of the canons.

We have not yet held that testimony by an attorney in violation of Canon 19 is, standing alone, a basis for holding the testimony inadmissible. Yet, we are not in any manner diluting the effect of the decision in the *Rushton* case or the caveat in the *Taylor* case. We did not, in either of these cases, and we do not now, hold that an attorney is incompetent as witness or his testimony inadmissible only because of a violation of Canon 19, although disciplinary procedures might be appropriate. Any doubts about the application of these canons should be resolved by a declination of employment by any member of a law firm when a partner or associate may become a witness or by withdrawal of the firm from the representation when it becomes apparent that the testimony of a member or associate on behalf of a client will become necessary. We recognize, however, that there will be cases in which the necessity for a lawyer testifying cannot be anticipated until a stage of the trial at which his withdrawal, or that of his firm, would be impossible without serious injustice to his client. In such a case withdrawal should not be expected, but it should be clear that the necessity for the lawyer's testimony could not have been anticipated.

II.

Appellant relied entirely upon her own testimony to establish her contention that she was defrauded by her father. Even if we exclude the testimony of the attorney in the case and ignore contradictions, vacillations and equivocations in appellant's testimony, so that it is given the strongest probative force, we cannot say that the finding of the chancellor was against the preponderance of the evidence.

Appellant, now 26 years of age, had lived in Newport in her father's home all her life until her maturity.

Her mother died when appellant was born. She and her father were living at a motel owned by him and called Cherokee Courts when she became 18. This motel had 12 units, one of which was used for an office and three for home of the father and daughter. She stated that her father had a drinking habit and would become cruel when drinking. Because of this, she said that she was afraid of him.

According to her, she went to Memphis just a few days after she was 18. Her father did not see her for about three weeks. She claimed that she then returned to Newport because her father wanted to talk to her about the "probate business" and about "getting the bond deal settled and coming home." She talked with her father and returned to Memphis for another two weeks, after which she returned to Newport because her father called and said he wanted to talk to her. She said that, on the occasion of the second return to Newport, she talked with Mr. Pickens about the bonds at his office and asked him when everything would be settled. She only stayed one day, after which she returned to Memphis. She was in Newport, in October, at her father's request. On this occasion she stated that her father loaned her around $3,000, partly in cash and the balance in checks her father said she could write. She also stated that she was in Newport in November, 1959. Sometime during that month, she married a man named Higginbotham, although her father did not approve.

She denied having signed her name to request payment of the United States Savings Bonds or knowing the person whose name is signed as a witness to her signature. She denied getting any of the proceeds of these bonds. She denied any knowledge of a bank account in the First National Bank of Newport opened about the time of the closing of the guardianship and carried in the name of Carolyn Balch Higginbotham, with the name Higginbotham having been added in pencil and with her correct addresses shown on the ledger sheet.

She did admit that her father told her that he had opened a bank account for her in the First National Bank but that he did not tell her how to write checks. She signed checks using the name "Carolyn Balch Higginbotham," the exact designation of the account on the bank's books. She claimed to have been unaware that any of the proceeds of the savings bonds went into that account but admits having written checks on the account for more than $3,000 over a period of less than three months. She admitted that she used the money for her own purposes but claims that it was the money loaned her by her father. The bank records show that this bank account was opened by the transfer of $530.08 on October 5 from the guardian's account. Other items drawn on the latter account closed it on October 12. These items were court costs. The bank's records show the deposit of $2,650.04 to her account on November 5 as the proceeds of the bonds. The date of redemption shown on the bonds is November 4. Mrs. Montgomery testified that she opened no account in that bank.

Appellant also denied having received the proceeds of the savings and loan certificate. She denied the endorsement of her name thereon. She admitted having gone to the Newport Federal Savings and Loan Association in 1960 and having talked to one Don Smith and a Mr. White while there. She stated that she was asking Don Smith about papers she had signed when they showed her a bond with her father's name on it and opened up the books. She denied ever having seen the certificates issued in her name in lieu of the certificate held by the guardian. Mrs. Montgomery left Higginbotham in November of 1960 and came back to Newport to live with her father. She had bought a Chrysler Imperial, for which she paid cash in November 1959, wrecked it in December 1959, then bought a '57 Buick traded it in on a '57 Pontiac, paying for both, and bought a 1956 Ford or Chevrolet on November 16, 1960. She said that she used her own money in these purchases, except for one occasion when the money was furnished by

her father-in-law.

She was not divorced from Higginbotham until July 1962. She lived with her father most of the intervening time. Mrs. Montgomery admitted that she wrote the Veterans' Administration asking an investigation about the proceeds of the estate several years before her father's death. Although she stated in a letter written to the same agency after her father's death that she had dropped the matter on the advice of her father's attorney, she testified that she dropped the claim because she was told to do so by her father. She says that she thought that her father would give her the money. She offered no other excuse for her delay in asserting the fraud she now claims.

It is significant that on January 26, 1960, Mr. Balch executed a deed to the Cherokee Courts to appellant. On the same date, appellant admits having executed a mortgage on the property for $12,000. The mortgage contained a recitation that the debt was a part of the purchase money for the property. Both instruments were acknowledged before Donald E. Smith. The records of the Newport Federal Savings and Loan Association showed that Certificate No. 476 was issued to Balch as guardian of his daughter on November 28, 1951. The ledger sheet on that certificate showed that it was surrendered on November 1, 1959. These records further reflected that Certificate No. 1543 for the sum of $10,000 was issued to Florence Carolyn Balch on November 1, 1959, and canceled on January 26, 1960. On the same date Certificate No. 1622 was issued to L. G. Balch and canceled on July 1, 1960. On April 5, 1960, appellant deeded the Cherokee Courts property to E. L. and Maurice McCarty. The deed stated the assumption of the mortgage to L. G. Balch for $12,000 by the McCartys. On the same date, the McCartys conveyed certain property in Mississippi County, Arkansas, to appellant. This transaction was pursuant to a contract of March 5, 1960, between appellant and E. L. McCarty. This agreement

provided for the conveyance of a theater, cafe and apartment building in Mississippi County to appellant and the payment by McCarty of a total of $14,000, of which $12,000 was to be by assumption of the Balch mortgage on the Cherokee Courts. The consideration for this agreement by McCarty was the conveyance of the Cherokee Courts property to McCarty.

Appellant's explanation of these transactions is that her father asked her and Higginbotham to take over the Cherokee Courts and operate them for him. She stated that he told her he would forgive their payment of the loan if she would do him this favor. She admitted having executed the instruments in January of 1960 before Don Smith at the Cherokee Courts, but said that she was ill, had been taking shots for pain, and had been asleep when Mr. Smith brought the papers to the Cherokee Courts. She stated that no one explained the papers to her and that she thought that they were simply for the purpose of her running the courts while her father was gone to aid her brother in a business in St. Louis. Although the bank account for this business was carried in the name of Cherokee Courts and checks drawn by appellant and her husband, her explanation was that her father told her to deposit money in the bank, draw on it for bills and for her living and to send him money when he called. She claimed that she did send him money in bills or by money order. She testified that, after payment of costs, her living expenses, and sending money to her father, there was no money left. She also claimed that the sale of the courts to McCarty and the purchase of the cafe and other properties in Mississippi County were made by her father. She admitted having called on McCarty, but said that she quoted no price or terms to him and told him that her father would contact him. Later, she said that her father called and told her to execute the papers for the transaction. Her father then asked her if she would run the cafe, as she had the motel, according to her version. Later she went to Mississippi with her husband,

where they bought some real property. She said that she paid somewhere between one and two thousand dollars for this real estate, by use of her husband's military allotment. She admitted on cross-examination that she received a check for $2,000 from McCarty for the cash payment in the transaction, but on redirect examination her memory of this payment was faulty. She said that she did go to Mississippi County and operate the cafe business but that her father sold it.

Donald E. Smith testified that he went to the motel on January 26, 1960. He said that Mr. Balch gave him the deed, mortgage and certificate of deposit and that he presented them to appellant. According to him, he handed her the savings and loan certificate and told her she was to endorse it and he was to witness it. The deed and mortgage had been prepared by Ben H. White, an officer of the savings and loan association.

It is obvious that all of the facts were well known to her or could have been ascertained many years before her father's death. Long ago, this court held in *Walker* v. *Norton,* 199 Ark. 593, 135 S.W. 2d 315, that an accounting by a personal representative would not be ordered where the complainant was guilty of laches, especially where the difficulty of doing entire justice arises through the death of principal participants or of witnesses or lapse of time. Clearly this is a case which calls for the invocation of this rule. Certainly this appellant was mature enough and far enough removed from the influences of her father during the six-year period that he lived after the closing of the guardianship to have asserted the fraud she now claims. During this period of time she had been married three times and on at least one occasion lived with her husband's parents. It seems obvious to us that this action was motivated because her father was silenced by death. Under these circumstances we find that she was not entitled to any equitable relief. See *George* v. *Serrett,* 207 Ark. 568, 182 S.W. 2d 198. To grant her relief would require that

we disregard the solemn orders of the probate court and every written record involving transactions between appellant and her father.

It would unduly extend this opinion to outline evidence not hereinabove mentioned. It is sufficient to say, however, that the preponderance of the evidence is against a finding of fraud in this case, even if we should disregard the defense of laches.

The decree is affirmed.

CLARA MAE CARTER, ET AL v. WARD BODY WORKS, INC.

5-4862 439 S.W. 2d 286

Opinion Delivered April 1, 1969
[Rehearing denied May 5, 1969.]

Alonzo D. Camp for appellants.

Terral, Rawlings, Matthews & Purtle for appellee.

J. Fred Jones, Justice. This is a workmen's compensation case involving two consolidated claims for death benefits brought by the widows of the two decedents. The question before the Commission was whether the decedents were in the course of their employment as employees of Ward Body Works at the time of their injuries and resulting deaths. The question before us on appeal is whether there was any substantial evidence to sustain the findings and orders of the Commission.

The Workmen's Compensation Commission found that the decedents were independent contractors and denied the widows' claims for compensation death benefits on that basis. On appeal to the circuit court the findings and orders of the Commission were affirmed. The widows of the decedents have appealed to this court and designate the following points for reversal:

> "That Mr. Sallis and Mr. Carter were employees of Ward Body Works at the time of their deaths, and not independent contractors.
>
> Death of the two men arose out of and in the course of their employment, and the Commission's decision otherwise is not supported by substantial evidence."

The decedents, Richard Sallis and Milton Carter, along with two vacationing Arkansas State Policemen, entered into verbal arrangements with Ward Body Works at Conway, Arkansas, to deliver four new buses to purchasers in and near Los Angeles, California. Each individual was to drive a bus and the drivers were paid

in advance 14 cents per mile for driving the buses to California. They were to be reimbursed the actual cost of gas and oil and any other actual expenses on the buses in transporting them to California. Upon delivery of the buses to the consignees in California, they were to obtain receipts which were to be returned to Ward along with their receipts for gas and oil and any breakdown repairs, or other bus expenses incurred on the trip. After delivery of the buses in California, the drivers were on their own and under no direction or control whatever by Ward.

All four drivers, including the decedents, left Conway on October 9, 1967, and each drove a bus to California, reaching their destination and delivering the buses on October 12, 1967. After delivering the buses in California, the decedents went by plane from Los Angeles to San Francisco where they both visited with Mr. Sallis' son for a couple of days. By prior arrangement the son had purchased a Renault automobile for Mr. Sallis and both decedents were on their way back to Arkansas from San Francisco when they both died as a result of injuries sustained in an automobile accident near Seligman, Arizona.

The question before us on appeal is whether there was any substantial evidence to sustain the Commission and the circuit court in holding that the decedents were independent contractors and not employees of Ward.

The usual test in distinguishing an employee from an independent contractor is set out in *Ozan Lumber Co. v. Tidwell,* 210 Ark. 942, 198 S.W. 2d 182, as follows:

> "It has been said in many cases that the vital test in determining whether a person employed to do certain work is an independent contractor, or a mere servant, is the control over the work which is reserved by the employer. Broadly stated the rule is that, if the contractor is under the control of

the employer, he is a servant; if not under such control, he is an independent contractor."

Quoting from 31 C.J. 473, 474, in the *Tidwell* case, this court continued:

"It is impossible to lay down a rule by which the status of men working and contracting together can be definitely defined in all cases as employees or independant contractors. Each case must depend on its own facts, and ordinarily no one feature of the relation is determinative, but all must be considered together. Ordinarily the question is one of fact."

In 99 C.J.S., § 92 is found the following:

"In determining whether a person doing work for another is an employee, within a compensation act, or an independent contractor, although the actual exercise of control is a factor to be considered, the significant or ultimate question is not whether the party for whom the work is being done actually exercises control over the worker, the work, or the manner or method of doing it, or actually directs, instructs, or supervises, but the real question is whether such party has the right, or power, to control, direct, or supervise.

Actual interference by the employer with the work or control is not the test, nor is actual regulation of the details of the work, or the giving of instructions; it is the right to interfere that determines."

In the case of *Moaten* v. *Columbia Cotton Oil Co.*, 193 Ark. 97, 97 S.W. 2d 629, this court said:

"This court held, in the case of *Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, 279 S.W. 4, that the

vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor. An independent contractor is one who, exercising an independent employment, contracts to do a certain piece of work according to his own methods, and without being subject to the control of his employer, except as to the result of the work."

In the case of *Moore and Chicago Mill & Lumber Co.* v. *Phillips,* 197 Ark. 131, 120 S.W. 2d 722, holding logging contractors to be independent contractors, this court said:

> "By a long line of decisions this court is committed to the universal rule that, where the contractor is to produce a certain result, according to specific and definite contractual directions, agreed upon and made a part of the contract, and the duty of the contractor is to produce the net result by means and methods of his own choice, and the owner is not concerned with the physical conduct of either the contractor or his employees, then the contract does not create the relation of master and servant. This court has consistently accepted and stated the settled rule that even though control and direction be retained by the owner, the relation of master and servant is not thereby created unless such control and direction relate to the physical conduct of the contractor in the performance of the work with respect to the details thereof. *St. Louis, I.M.&S. Ry. Co.* v. *Gillihan,* 77 Ark. 551, 92 S.W. 793; *Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, 279 S.W. 4."

The arrangements made between Ward and the decedents are evidenced by the following testimony. Mr.

Coy McCaskill, transportation manager of Ward, testified as follows:

"Q. Were you contacted . . . by a Mr. Sallis with reference to driving a bus to California . . .?

A. . . . [H]e came up there about October the 7th about two days before they went to California. Said he had a son in California and if we had some buses—

* * *

He said he had a son that lived in California and if we had some buses going out there, he'd like to deliver one and visit him a few days.

I told him, I said, 'Yeah, you can stay as long as you want to if we have some more going in the next short time, why, we'll notify you.' And I said 'After you get the bus delivered, why, you're on your own and you can stay as long as you want to stay.'

* * *

. . . Mr. Sallis came up with those two State Troopers and I had an extra bus going and he called Mr. Carter back from Little Rock . . . he was to come on up to [sic] Little Rock and carry the fourth bus."

An employee of the Arkansas State Police Department, Richard Howard, was the driver of one of the four buses and testified as follows:

"Q. . . . what were you to do with the papers that you were given [with the bus]?

A. . . . we were to get them signed and bring one of them back to the Ward Body Works in Conway.

Q. ... was there any work which you were to perform at Ward Body Works after you returned back from California?

A. No, ... I was doing this on my vacation.

Q. Did Ward ... give you any instruction about what time the bus was to be delivered in California?

A. No ...

Q. Did they tell you what highways to travel?

A. They suggested what highways we should travel, because we did ask them what route would be the best out there.

Q. Did they give you any certain speeds to drive at?

A. Well, the buses were governed, I believe, at sixty miles an hour.

* * *

Q. ... Did they tell you where you were to stop along the way?

A. No ...

Q. Did they tell you where you should eat?

A. No ...

Q. Were you reimbursed for any food expenses or lodging expenses on the way out there, or on the way back?

A. No ...

Q. Did Ward Body Works give you any instructions about what to do after the bus was delivered in San Diego?

A. No . . .

Q. Did they tell you when to return to Arkansas?

A. No . . .

Q. Did they tell you how to return to Arkansas?

A. No . . .

* * *

Q. And how did you return to Arkansas?

A. On the Continental Trailway bus.

Q. And when did you arrive in Little Rock?

A. . . . on the 14th . . .

Q. When were you reimbursed?

A. . . . I believe it was almost a week before I went up there because I met my wife and we left to finish my vacation out.

* * *

Q. Did you deliver any papers to the Ward Body Works at that time with reference to your trip?

A. . . . my gasoline and oil receipts and then a form they had sent out there for me to have signed . . . and return to them."

The record in the case at bar indicates that the decedents were regularly employed by a screen door company in North Little Rock prior to making the trip to California. Mr. Sallis had his former employer wire $75.00 to him in San Francisco before starting on his return trip to Arkansas. The record is not clear as to the decedents' exact employment status when they agreed to drive the buses to California, but the record is clear that they had not worked for Ward at any time

prior to this one trip and that no future work for Ward was contemplated. The record is also clear that the decedents were employed to deliver the buses to consignee in California and that Ward was only interested in, and concerned with, the results.

. . .

It is true that the decedents were required to return to Ward, the receipted copy of invoices for the buses delivered, but this was permitted to be done by mail and personal delivery was not required. We conclude that there was substantial evidence that the decedents were independent contractors and not employees of Ward at the time of their injuries and resulting deaths. Even if the decedents had been employees of Ward within the meaning of the Workmen's Compensation Law, they had gone to San Francisco on personal missions of their own and had not returned within the course of their employment when the accident occurred. The judgment of the circuit court must be affirmed.

Affirmed.

CALVIN LYNN KNIGHTON, ET AL v.
INTERNATIONAL PAPER CO., ET AL

5-4842 438 S.W. 2d 721

Opinion Delivered April 1, 1969

Bernard Whetstone and *Chambers & Chambers* for appellant.

Graham, Laney, Barnes & Roberts for appellee (Int. Paper Co.).

Smith, Williams, Friday & Bowen by *William H. Sutton* for appellee (Ward).

CONLEY BYRD, Justice. This appeal by Calvin Lynn Knighton and Calvin S. Knighton and Lloyd R. Nix individually and as father of Jan Nix, a minor, questions the ruling of the trial court upon the summary judgment dismissing appellees R. E. Ward and International Paper Co. as parties defendant from the lawsuit. The injuries herein complained of were sustained about 7:30 P.M. Friday, January 28, 1966, on Highway 82 just west of Stamps, Arkansas. The allegations are that a pulpwood producer, Claud King, negligently parked his unlighted vehicle on the paved portion of the highway in such manner that it was struck from the rear by the Knighton automobile in which Jan Nix was a passenger. Appellees R. E. Ward and International Paper Co. were made parties defendant along with Claud King on the theory that King was an agent and servant of R. E. Ward and International Paper Company. King is not not a party to the appeal, the cause not having been dismissed as to him.

Appellants list three points for reversal. These points have to do with the burden of proof when the defense of independent contractor is pled, the existence of

non-ownership liability or workmen's compensation insurance policies on the status of an alleged independent contractor, and error of the court in granting summary judgment. Since we find that the trial court was correct in rendering summary judgment upon the basis that Claud King, even if he were an employee, was not within the scope of his employment, we do not reach the other arguments listed by appellant.

The record shows that appellee International Paper Co. is engaged in the manufacture of wood products which necessitates its procuring vast amounts of pulpwood. To accomplish this, International has numerous stations in a network of towns staffed by its own salaried employees who receive pulpwood hauled to them by persons such as Claud King. To procure the pulpwood in the species and quantity desired, International issues a purchase order to persons such as R. E. Ward, whom International describes as wood dealers (described by Ward as "wood shipper" and described by appellants as "procurement officer"). The persons in appellee Ward's position in turn notify the wood producers, such as Claud King, of the species and quantity desired. The producers in turn either cut the pulpwood from timber purchased by the wood shipper or, as in this instance, make their own arrangements with a landowner to cut pulpwood.

Claud King testified in the case at bar that he had made arrangements with Doyce Byrd to cut pulpwood on Byrd's land. On the day before, his truck had reached International's wood yard too late to be unloaded. He had parked the truck and left it over night. On the day of the accident King drove his personal automobile from his home to International's yard, unloaded his truck and returned to the woods where he cut and hauled to International's pulpwood yard a load of pulpwood. His truck was unloaded at 2:30 P.M. At that time International issued him a slip of paper showing the amount and species of wood hauled, which he took

to Ward's office, at a location away from the yard, to receive his pay. At King's direction Ward made one check to him and another check to Doyce Byrd for the amount that King had agreed to pay Byrd. King's testimony as to his intention thereafter is set out in appellants' abstract as follows:

> "On the afternoon of the collision I wasn't planning to do anything after I left Stamps and before my vehicle broke down. I didn't plan to go back to Byrd's. I usually give him his check at the end of the week. On that particular day I wasn't going to take the check to him because I was trying to get home out of the snow and rain. If I had seen him I would have given him the check. I did not plan making a special trip to carry it to him that day. I had no arrangement about when I was going to deliver it to him."

The time from 2:30 until 7:30 is accounted for by trouble King was having with his truck. The truck was pulled into a shop by wrecker sometime around 6:00. After some work on the truck, King started home but again parked the truck because of mechanical difficulties. It was after this that the accident occurred.

In addition to King's testimony that the truck belonged to him, appellants, in answer to a request for admissions, admitted that King was paid on a unit basis for the pulpwood cut and hauled by him and admitted that King started home at 2:30 on the date of the accident and that his truck stalled a few miles west of Stamps.

It is the general rule that an employee traveling from his place of work to his home or other personal destination after completing his day's work cannot ordinarily be regarded as acting in the scope of his employment so as to charge the employer for the employee's

negligence in the operation of his own vehicle. We recognized this rule in *Frank Lyon Company* v. *Oats*, 225 Ark. 682, 284 S.W. 2d 637 (1955), and noted four of the exceptions to the rule. To avoid the application of this rule appellants rely upon *Phillips Cooperative Gin Co.* v. *Toll,* 228 Ark. 891, 311 S.W. 2d 171 (1958), and contend that King's testimony that he was not on his way to take the check to Byrd cannot be regarded as undisputed or uncontradicted since King is a party to the law suit.

It is true that in many of our cases can be found statements to the effect that the testimony of a party never stands uncontradicted. A review of our cases however, shows that we have not literally applied the statement but that in fact we have followed what is known as the more flexible view—*i.e.,* where the uncontradicted testimony of an interested witness is unaffected by any conflicting inferences to be drawn from it and is not improbable, extraordinary, or surprising in its nature, or there is no other ground for hesitating to accept it as a truth, there is no reason for denying the finding of verity dictated by such evidence. See *Kansas City Southern R. Co.* v. *Lewis,* 80 Ark. 396, 97 S.W. 56 (1906), and *Jolley* v. *Meek,* 185 Ark. 393, 47 S.W. 2d 43 (1932). Of course in this instance, in addition to the testimony of King, there is the outright admission of appellants that King had started home at 2:30 on the date of the accident and that his truck stalled a few miles west of Stamps. Consequently we find no fact issue to be submitted to the jury as to whether King had a duty to perform for his employer while enroute to his home and appellants were not entitled to go to the jury on this exception to the general rule.

Neither do we find anything in *Phillips Cooperative Gin Co.* v. *Toll, supra,* contrary to the general rule. There W. T. Jackson was not driving his own vehicle but the vehicle of his father who was also the president of the board of directors of the gin company and the

check allegedly due him for hauling was made out to the manager of the gin company and bore only the notation "W. T. Jackson Trucking". The check was endorsed by the manager and never received by Jackson. Furthermore, there the only issue was whether Jackson was an independent contractor. The issue of the scope of employment was not raised.

As we view the record here it shows that Claud King, working on a unit basis, had delivered the fruits of his labor to the pulpwood yard, received his pay and was on his way home in his own vehicle. The only conclusion we can draw from this testimony is that when King drew his pay and started home in his own vehicle, he was no longer under the control of any alleged employer. Consequently we find the trial court properly held that King was not in the scope of his employment at the time of the collision.

We wish to make it clear that we have only assumed that he was an employee and that the issue of whether he was or was not an employee has not been adjudicated.

Affirmed.

LARRY KILBURY v. CLYDE MCCONNELL

5-4839 438 S.W. 2d 692

Opinion Delivered April 1, 1969

Lesly W. Mattingly for appellant.

Wright, Lindsey & Jennings for appellee.

FRANK HOLT, Justice. This is an action by a tenant against his landlord to recover damages for personal injuries. The tenant, who is the appellant, slipped and fell when he stepped on some ice at the bottom of an outside stairway. Appellant's complaint asserts that appellee, the landlord, was negligent in that the appellee failed to correct an unsafe condition which he knew to exist, or would have known to exist in the exercise of reasonable care. After appellant presented his evidence and rested his case, the court directed a verdict in favor of the appellee. This appeal comes from the judgment based on the directed verdict.

For reversal the appellant contends that the trial court erred in granting appellee's motion for a directed verdict on the basis that the appellee (landlord) had no duty to the appellant (tenant) to remove a natural accumulation of ice and snow from a common stairway or passageway.

The appellee's two-story apartment building consists of eight apartments, with four units on the ground level and four units on the second floor. The sole means of ingress and egress from appellant's second-floor apartment was a common stairway in the middle of the building from the second floor down to the main landing where the stairway splits to the left and right into separate stairways. The incident occurred in February of 1966. On the day before the accident there was a heavy

snowfall, however, it seems it had not snowed on the day appellant slipped and fell. At approximately 8 p.m. appellant, accompanied by a friend, proceeded down the first flight of stairs to the main landing. The stairway on the right, which appellant had traversed on three separate occasions following the snowfall, appeared to have retained the most snow on it so appellant decided to try the stairway on the left. According to appellant, as he stepped from the bottom step onto the landing he slipped on some ice causing him to fall which resulted in injuries to his neck, back and right elbow. Appellant testified that he descended the stairway very cautiously. Appellant's version of the conditions and the cause of the accident was corroborated by the friend who was accompanying him. Appellant made no effort to remove the natural accumulation of snow and ice, nor did he acquaint the appellee with the existence of this temporary hazard. In fact, appellee was first notified of the accident in July of 1966.

It is the contention of appellant that his landlord, the appellee, had a duty to remove the natural accumulation of snow and ice from the stairway which was for the common use of all the tenants and, this being true, there was substantial evidence, when viewed most favorably to the appellant, to make a jury question of negligence and constructive notice of the hazardous condition.

The courts which have considered the issue in the case at bar are divided. One line of authorities supports what is known as the Massachusetts rule which holds that a landlord is under no obligation to remove a natural accumulation of ice and snow from common passageways or areas retained in the landlord's control for the common use of his tenants. *Woods* v. *Naumkeag Steam Cotton Co.*, 134 Mass. 357, 45 Am. Rep. 344 (1883), and reiterated in *Spack* v. *Longwood Apartments, Inc.* 338 Mass. 518, 155 N.E. 2d 873 (1959). The reasoning is that there is no duty on the part of the land-

lord to the tenant to remove a temporary hazard such as ice and snow from common passageways. This common law, or Massachusetts rule, is based upon the premise that a duty to remove snow and ice from common passageways would subject the landlord to an unreasonable burden of vigilance and care and a landlord should not be responsible for such temporary natural hazards as the expected acts of nature over which he has no control and it would be unreasonable to require the landlord to be subjected to the duty of keeping a janitor on the premises at all times merely to insure the immediate removal of snow and ice.

The appellant ably and forcefully argues that we should adopt the Connecticut rule which he contends is the more modern and enlightened approach to this issue. Many courts have found favor with this rule which imposes upon the landlord the duty to exercise reasonable care with respect to keeping the premises free from accumulations of ice and snow. This duty of reasonable care is imposed upon the landlord where he had notice, actual or constructive, of such a temporary hazard and reasonable opportunity to correct it. *Reardon* v. *Shimelman,* 102 Conn. 383, 128 A. 705, 39 A.L.R. 287 (1925). The Massachusetts rule is expressly rejected by this case. See, also, Harper & James, Law of Torts, Vol. 2, § 27.17; Prosser, Law of Torts (2d Ed.) § 80; 32 Am. Jur., Landlord & Tenant, § 696.

In the recent case of *Pomfret* v. *Fletcher,* 208 A. 2d 743 (1965) the Supreme Court of Rhode Island considered the general or common law rule and the Connecticut rule and stated:

> "After consideration of the authorities on both sides of the question, we are of the opinion that the Massachusetts rule [common law rule] is preferable to the contrary rule in certain other jurisdictions regardless of numerical weight. We realize that it has met with sharp criticism in *Reardon* v. *Shi-*

> *melman,* 102 Conn. 383, 128 A. 705, 39 A.L.R. 287, and *United Shoe Machinery Corp.* v. *Paine,* 1 Cir., 26 F. 2d 594, but we are not persuaded that such criticism has destroyed or seriously impaired the reasoning upon which the Massachusetts cases rest."

See, also, *Durkin* v. *Lewitz,* 3 Ill. App. 2d 481, 123 N.E. 2d 151 (1954); 25 A.L.R. 2d 367, 446; 26 A.L.R. 2d 613; 25 A.L.R. 1301.

We have had occasion to consider the duty that a landlord owes to his lessee to keep the common passageway properly lighted on the premises. *Joseph* v. *Riffel,* 186 Ark. 418, 53 S.W. 2d 987 (1932). There a tenant sought to recover for damages suffered when he fell down an elevator shaft from an unlighted corridor. It was urged that this was a contributing factor to the tenant's injuries. We said:

> "As between a landlord and tenant, the general rule is that, 'in the absence of statute or agreement, the landlord is under no legal obligation to light common passageways for the benefit of tenants.' 36 C.J., § 891, p. 214. In § 893 of the same work, it is stated: 'On the analogy of a lack of duty on the part of the landlord to light common passageways, it has been held that a landlord is not liable for injuries received by a tenant through the failure of the landlord to supply rails or guards when the condition was the same at the time of the letting.' "

The appellant forcefully argues that we should now reject the import of this case and subscribe to the Connecticut view. Having previously held that a landlord is not obligated to light that portion of the premises reserved for common use, we cannot say that a landlord owes the duty to remove such temporary hazards as a natural accumulation of ice and snow from a common stairway. Such a distinction could not be supported

by logic or reason. There is no evidence in the case at bar of any agreement or assumption of duty that removes the appellant from the general rule to which we are committed.

Affirmed.

FRANK GORDON, ET AL v. RUSSELL H. MATSON, JR., ET AL

5-4646 439 S.W. 2d 627

Opinion Delivered April 1, 1969
[Rehearing denied May 12, 1969.]

Travis Mathis and *McMillan, McMillan & Turner* for appellants.

Wright, Lindsey & Jennings for appellees.

WILLIAM S. ARNOLD, Special Justice. This case comes on appeal from an order of the circuit court granting summary judgment to the appellee pursuant to a motion for summary judgment filed.

The complaint was filed in November 1965 and amended in March 1966. The original defendant, Matson, filed a general denial and the intervenor, Travelers Insurance Company, filed motion to make more definite and certain.

The defendant responded to the intervention and propounded interrogatories to which Travelers responded. The plaintiff also propounded interrogatories to which responses were made and the defendant interrogated the plaintiff and the complaint was again amended, this last amendment setting forth certain specific allegations of alleged noncompliance by the defendant with provisions of Act No. 161 of 1937 and the Safety Code promulgated pursuant to the Act.

A pretrial order was entered by the trial court, which order found that certain facts were undisputed and set forth the claims of the parties and enumerated the legal issues and fact issues, this order being entered July 11, 1967.

Subsequent to entry of the pretrial order the defendant moved for a summary judgment and the plaintiff and intervenor responded denying that there was no genuine issue as to material fact. On September 21, 1967, the trial court entered its order granting the motion for summary judgment from which comes this appeal.

The undisputed facts, as found in the pretrial order, indicate that the defendant, Matson, contracted with Trustees of Henderson State College to construct a

building and subcontracted to Cook & Sons (whose Workmen's Compensation Carrier is the intervenor, Travelers) the masonry work and the plaintiff, Gordon, was an employee of Cook and injured in the scope of his employment on August 22, 1963, while engaged in removing materials in a buggy from the floor of a portable hoist device known as a "lad-E-vator" owned, maintained, erected, positioned and operated by Cook. The exhibits include the prime contract to Matson and subcontract with Cook. The prime contract is in AIA standard form and contains provisions regarding compliance with safety codes. The subcontract obligates the subcontractor to discharge the provisions of the prime contract as it relates to the work of the subcontractor.

The amended complaint alleges that the defendant, Matson, was obligated to provide to employees of Cook a safe place to work and to respond in damages if, as is alleged, there was noncompliance with the provisions of the Safety Code promulgated under Arkansas Statutes 81-101 on theory that responsibility ultimately rests on the prime contractor for assuring compliance with the Code by subcontractors in order to satisfy the obligation of the prime contractor to provide a safe place to work and further alleges that this responsibility included providing stationary platform, toe boards and guard rails and that these safety devices did not exist at the place of employment of the plaintiff and that his injuries resulted from their absence, or would not have occurred had they been present. Specifically it is also alleged that the space between the building under construction and the elevator hoist was spanned by a removable plyboard slab and the absence of a fixed, stationery platform at this construction level was the responsibility of the defendant, Matson, and that its absence caused or contributed to cause the injuries.

The undisputed facts as shown by the pretrial order are to the effect that the plaintiff, employee of the sub-

contractor, sustained injuries in a fall from the third floor level, that the space between the construction and the hoist was bridged by a plywood board and that the hoist had been located and was under the exclusive control of the subcontractor in its operation and had been provided by him. It is conceded that the prime contractor did not exercise any supervision or control of any of these activities by the subcontractor or his employees.

We are therefore forced to the conclusion that unless the trial court has erred in its legal conclusion based upon the undisputed facts established by the pretrial order then the order granting summary judgment must be affirmed. *Epps* v. *Remmel* 237 Ark. 391, 373 S.W. 2d 141; *Jones* v. *Comer,* 237 Ark. 500, 374 S.W. 2d 465.

It appears to be the general rule that the responsibilities of the prime contractor to employees of the subcontractor on the job are comparable to the duties of the owner of the premises. This is a duty to exercise ordinary care and to warn in the event there are any unusually hazardous conditions existing which might affect the welfare of the employees. The recognized exception occurs if the prime contractor has undertaken to perform certain duties or activities and negligently fails to perform them thereafter or perform them in a negligent manner. *Aluminum Ore Co.* v. *George,* 208 Ark. 419 186 S.W. 2d 656.

Then unless the Legislative enactments, Arkansas Statutes Section 81-101 et seq or the contract with the owner create liability to the plaintiff under the particular circumstances existing here it does not appear that there is liability on the part of the prime contractor.

Section 81-120 contains provisions for penalties resulting from violation of the Act or rules issued by the Commissioner of Labor and provides for recovery of these penalties in criminal proceedings or by a civil ac-

tion brought in the name of the State. The Act being penal in nature should be strictly construed. The Act contains no language indicating any intent on the part of the Legislature to alter the existing law with respect to division of duties and responsibilities between prime and subcontractors and we therefore conclude that Section 81-101 does not arbitrarily place responsibility for compliance upon the prime contractor.

We find no basis for holding that the defendant, Matson, by contracting with the owner for construction of the improvements and to protect the owner from liability arising from the work thereby also assumed the position of an insurer of the safety of employees of a subcontractor where his own employer is legally and contractually obligated in these matters by provision of the Statute, Section 81-101, and the contract with Matson. To hold the prime contractor responsible to assure compliance by all subcontractors by actual physical inspection and direction would be to write for the parties a contract different from that into which they entered and would destroy the relationship of independent contractor existing between them.

We therefore conclude no error occurred and the judgment ought to be affirmed.

BROWN, J., disqualified.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice. I respectfully dissent because I think that the trial court and the majority have misapplied the summary judgment statute.

Summary judgments are not the favorites of the courts and in determining whether such a judgment should be granted, all pleadings must be liberally construed in favor of the party against whom the judgment would be granted. *White River Limestone Products*

Co. v. *Missouri-Pacific R. Co.,* 228 Ark. 697, 310 S.W. 2d 3. This extreme remedy should be granted only in the absence of any genuine issue as to any material fact. *Wirges* v. *Hawkins,* 238 Ark. 100, 378 S.W. 2d 646; *Kealy* v. *Lumbermen's Mutual Ins. Co.,* 239 Ark. 766, 394 S.W. 2d 629. The burden of demonstrating nonexistence of a genuine fact issue is upon the moving party. *Deltic Farm & Timber Co.* v. *Manning,* 239 Ark. 264, 389 S.W. 2d 435. If any vital and material fact issue is presented, a summary judgment should be refused. *Douthit* v. *Arkansas Power & Light Co.,* 240 Ark. 153, 398 S.W. 2d 521. In considering a motion for a summary judgment all reasonable inferences must be considered in the light most favorable to the party against whom the judgment would go. *Evers* v. *Guaranty Investment Co.,* 244 Ark. 925, 428 S.W. 2d 68. I submit that there is a genuine issue of fact to be determined in this case.

In order to illustrate the existence of this issue, attention must be given to a legal basis of liability urged by appellants but ignored by the majority. Appellants' argument with reference to the application of the safety code is not restricted to their contention that compliance with standards therein set out is a nondelegable duty of the general contractor. I will agree that, generally speaking, the general contractor is not the employer under those statutes, insofar as employees of a subcontractor are concerned. Appellants argue, also, that the general contractor was not at liberty to stand by with knowledge of violation of the safety code by his subcontractor and escape liability merely because the actual work was being done by an independent contractor. I submit that appellants are correct in this contention. Although I am unaware of any Arkansas decision on this point, I am convinced that the better rule is that a general contractor who knows that a subcontractor is doing his work in an unlawful and dangerous manner and fails to take any steps to remedy the situation is liable for any injury resulting directly to a third person for such unlawful and negligent conduct. See 2 Shearman Red-

field on Negligence 685, § 276; *Rosenberg* v. *Schwartz*, 260 N.Y. 162, 183 N.E. 282 (1932); *Delaney* v. *Philhern Realty Holding Corp.*, 280 N.Y. 461, 21 N.E. 2d 507 (1939); *Schwartz* v. *Merola Bros. Constr. Corp.*, 290 N.Y. 145, 48 N.E. 2d 299 (1943); *Gardner* v. *Stonestown Corp.*, 145 Cal. App. 2d 405, 302 P. 2d 674 (1956); *Waterway Terminals Co.* v. *P. S. Lord Mechanical Con.*, 242 Ore. 1, 406 P. 2d 556 (1965); *Peairs* v. *Florida Publishing Co.*, 132 So. 2d 561, (Fla. App. 1961). While some of these cases involve an owner rather than a general contractor, the principle of law applied is the same.

There is clearly an inference from the record considered by the trial court that the general contractor knew the condition which existed, or was aware that it existed, and took no steps to cause corrections to be made even though the dangerous condition was created by a failure of the subcontractor to comply with the safety code.

In order to illustrate that there is a genuine issue on this point, it is necessary to refer to the pretrial order which was the basis of the motion on which summary judgment was granted. In setting out the appellants' claim, the court stated that the appellants contended that the hoist was located at such a distance from the edge of the building that the space had to be spanned in order to permit the wheelbarrows and buggies with material to be moved from the hoist to the building; that the space was spanned with a plywood board slab which was moved back and forth from time to time; that there were no other safety devices or precautions and specifically no fixed stationary platform at the level where the deceased was working, nor were there any guardrails, scaffoldings, toeboards or anything else surrounding the hoist which would protect a person who might fall when the hoist suddenly descended. It was also stated that appellants contended that the contractor had the authority to shut down the hoist if it did not comply with the safety code. According to this

order, appellants also contended that the general contractor was negligent in permitting the subcontractor to span the space between the building and the hoist with a movable plywood board instead of a permanent stationary platform firmly fixed to the building, in permitting the subcontractor to operate the hoist at such a distance away from the building as to require that distance to be spanned and in failing to surround the hoist with scaffolding, guardrails and other safety devices which would protect a workman from falling in case the hoist descended without warning. Certain photographs were made exhibits to the pretrial order. These photographs give various views of the building under construction and the Matson hoist. If the conditions were as appellants contend, an inference might well be drawn that the subcontractor could not have utilized this hoist without the required safety appliances or equipment without the knowledge of the general contractor. In contending that the contractor *permitted* these deficiencies, the appellants necessarily contend that the contractor had knowledge thereof. One cannot permit something of which he has no knowledge.

The *Rosenberg* case is a leading case on the general contractor's liability in such circumstances. It is typical and particularly applicable here. In that case, the general contractor was building a church. He sublet the brickwork to brick masons. The brick masons were laying brick at a height of 30 or 35 feet from a scaffold built on the outside of the wall. The scaffold was not guarded in any way. There was no rail or screen as required by the building code of the city of New York. A 12-year-old boy on an adjoining lot was injured by a piece of brick which fell from the place where the subcontractor's workmen were breaking brick on the scaffold. The New York Court of Appeals reversed the judgment of the trial court dismissing the complaint against the general contractor and remanded the case for trial.

This exception to the rule of nonliability of a general contractor is premised upon the assumption that the contractor knows of the unlawful and dangerous condition and fails to exercise any right of control by which he could have caused changes or corrections to be made. It seems to me that these questions of fact remain to be resolved and that they are an issue in this case.

I would reverse the summary judgment and remand the case for further proceedings.

JOE MALLETT, ET AL v. SARA BRANNON, ET AL

5-4805 439 S.W. 2d 32

Opinion Delivered April 7, 1969

Douglas Bradley for appellant.

Gordon, Gordon & Eddy for appellees.

CARLETON HARRIS, Chief Justice. This is the second appeal of this case. In *Mallett, et al* v. *Brannon,*

et al, 243 Ark. 898, 423 S.W. 2d 880, a judgment for appellee was reversed when this court held that the trial court had abused its discretion in denying appellants' motion to require a further medical examination of appellee Sara Brannon,[1] appellee's doctor having failed to mention in his report findings relative to nerve damage. On this last trial, the jury again found for appellee, and fixed her damages at $38,000.00. From the judgment so entered, Joe Mallett, a driver for Save-A-Stop, Inc., together with said employer, brings this appeal.

On the first appeal, the question of appellants' liability for alleged negligence was at issue, but that point is not raised in the present instance. Rather, it is asserted that the trial court abused its discretion by not allowing a continuance to permit appellants to take the discovery deposition of Dr. Joe Lester; that there was no substantial evidence of permanent injury, and the court erred in submitting this issue to the jury; and that the judgment was excessive.

Following the reversal, appellants took the evidence deposition of Dr. William H. Jordan, a neurologist of Little Rock, and the evidence deposition of Dr. John H. Adametz, a neurosurgeon of Little Rock; thereafter, Mrs. Brannon was, at the request of appellants, examined by Dr. Larry Mahon, an orthopedic surgeon of Little Rock, and his evidence deposition was taken. This was done on May 21, 1968. Following the taking of this deposition, counsel for appellee, who stated that he did not receive a copy of the deposition until May 25, felt that he also wanted Mrs. Brannon examined by an orthopedic surgeon, and arrangements were made to

[1]Actually, the suit was filed by Mrs. Brannon and her husband, but Mr. Brannon received a judgment for $2,000.00 at the first trial, which was paid, and he is no longer a party to the suit. Accordingly, there is only one appellee, Mrs. Brannon, involved in this litigation at the present time.

have this examination made by Dr. Joe K. Lester, an orthopedic surgeon of North Little Rock. This examination was conducted on Tuesday, May 28, and on Wednesday, the 29th, appellee's counsel notified appellants' counsel that Dr. Lester had examined Mrs. Brannon, and that a copy of the report of the examination would be sent. On Friday, May 31, a copy of Dr. Lester's report was delivered to a Morrilton attorney, associated with appellants' chief counsel, and the latter received a copy of the report on Saturday, June 1. The trial had been previously set for Monday, June 3, and appellants' attorney filed a motion asking that the case be continued until he had the opportunity to take the discovery deposition of Dr. Lester. In his report, Dr. Lester said:

> "X-rays were taken of the cervical spine including AP, lateral, oblique and open mouth projections. Films were also obtained of the lumbar spine. Oblique films reveal some evidence of foraminal encroachment on the left between C5 and C6 and to a lesser degree between C4 and C5. The foraminal encroachment is associated with the fifth cervical vertebra. Oblique films reveal straightening of the cervical lordotic curve. There is definite straightening and a tendency toward reversal of the normal cervical lordotic curve in the neutral lateral view between C4 and C5."

Appellant says that this condition did not appear on the x-rays taken by his expert witnesses, and he desired the opportunity to interrogate Dr. Lester by discovery deposition,[2] and to have the x-rays examined by an expert x-ray technician. This motion was denied, and appellants contend that this action on the part of the court was an abuse of discretion. We do not agree, for it is our view that sufficient expert opinion had al-

[2]On trial, Dr. Lester testified that Mrs. Brannon sustained an injury which occurs in rear end automobile accidents called a hyperextension flexion injury. His testimony will be subsequently discussed in more detail.

ready been obtained from other sources, and there was no urgent need that this discovery deposition be taken.

Between the first and second trials, appellee had presented herself for examination, at the request of appellants, to Dr. Jordan, neurologist, and Dr. Mahon, an orthopedic suregon.[3] In addition, at the trial itself, appellants offered the deposition of Dr. Adametz, the neurosurgeon, who had examined Mrs. Brannon at the request of appellee's family physician, Dr. Hickey. All three of these doctors testified that they could find nothing in their examination to account for appellee's continued alleged disability. Dr. Adametz stated:

> "I was unable to find anything on her detailed neurological examination to account for this patient's continued alleged disability and I feel that she is definitely exaggerating her symptomatology during the course of my examination. I was convinced that she was not being completely honest with me, especially concerning her sensory examination, but was obviously exaggerating this. I cannot help to feel that she was magnifying all of her symptoms and definitely is alleging disability for which I could find no actual objective clinical neurological elements."

Dr. Jordan found no sign of permanent injury in the neurological area, though he did state that her complaints were consistent with a cervical spine injury.[4]

Dr. Mahon, the orthopedic surgeon, testified by deposition, and mentioned in detail his findings. X-rays

[3]Prior to the first trial, Mrs. Brannon had been examined by Dr. J. J. Magie, a Morrilton physician, and it was his findings that prompted this court to hold that appellant was entitled to have appellee examined by a neurologist. For a full summary of Dr. Magie's findings, see **Mallett v. Brannon**, supra.

[4]The doctor's actual examination, however, was limited to determination of whether there was any nerve damage.

were taken by the doctor of the cervical spine in the AP, lateral, oblique, and flexion-extension views, and all were within normal limits. He stated that her complaints were exaggerated, and he could find no evidence of permanent injury. Though he said that he could not rule out the possibility of disk protrusion, he found no evidence of it. We will not set out the testimony of these three experts in full, since there is no occasion to do so, but each supports the conclusion reached with pertinent facts, and it is thus clear that appellant was able to present substantial testimony that Mrs. Brannon's complaints were not attributable to, nor the result of, negligence of appellants.

The point is that appellants were not caught, so to speak, "empty handed," *i.e.*, they presented evidence contrary to Lester's findings. Our statutes relating to discovery depositions, and physical and mental examinations, Ark. Stat. Ann. §§ 28-348 and 28-357 (Repl. 1962), respectively, are taken practically verbatim from Rules 26 and 35 of the Federal Rules of Civil Procedure. This question is discussed in 23 Am. Jur. 2d, § 199, p. 556. After pointing out that, in federal cases, pretrial deposition discovery of the opposing party's expert opinion may, in a proper case, be authorized, it is then stated:

> "* * * Such discovery ordinarily will not be permitted except in instances of extreme need thereof by the examining party and inability on his part to obtain expert opinion on the same matter from other sources. Such a pretrial discovery, it is indicated, will not be permitted except under special circumstances deemed to constitute good cause for allowing it, and a similar view has been taken in cases involving state counterparts to the federal rules."

Similar language is used in 86 A.L.R. 2d 145. In *United Airlines, Inc.* v. *United States,* 26 F.R.D. 213 (1960), the court emphasized the underlying reason for the rule:

> "Discovery of opinions or conclusions, however, furthers these goals in only a tangential manner, for while a witness to a physical occurrence is relatively unique, and, therefore, relatively indispensable, opinions are obtainable from many sources. This leads to the notion that since the party seeking discovery can obtain opinions without difficulty elsewhere, there is usually little need for him to seek them from experts associated with his adversary."

Appellants' contention is without merit.

It is next urged that there was no substantial evidence of permanent injury to justify submitting this issue to the jury. We are unable to agree with this assertion. Even though we might feel that the strongest evidence on this issue was offered by appellants, this fact, of course, would not justify a reversal, for we are only permitted under the law to determine whether there was any substantial evidence to support the view of the prevailing litigant. In most instances there is substantial evidence on both sides, and we consider that to be likewise true in the case before us.

Briefly, Dr. Thomas H. Hickey of Morrilton, Mrs. Brannon's doctor for a long number of years, testified that he found a straightening of the normal curve of the cervical spine, which usually indicates injury to that portion of the spine, and he was of the opinion that she had received a severe sprain of the cervical and dorsal spine. He testified that he found severe contusions to the anterior chest wall, and multiple contusions and abrasions. The doctor testified that she still had pain and soreness in her neck, and pain, soreness, and swelling in the left upper extremity; also some flebitis in the left upper extremity, which the witness stated could be caused by trauma. Dr. Hickey said that he had been her physician for many years, and she had never made complaints of pain in the areas examined, prior to the accident. It was his view that soft tissue damage was

causing the pain radiating from the neck into the left shoulder, the pain in the back of the neck, and the feeling of numbness and weakness in the left arm, about which Mrs. Brannon continued to complain. He said that this type of injury was very painful, and that usually arthritis follows. It was his view that appellee would continue to have pain and suffering, and her injury would be permanent. The doctor testified to a 15% permanent partial disability as a result of injuries received when her automobile was struck from the rear by the tractor trailer.

Dr. Lester found a 10° restriction in the left lateral motion of the neck, and some curvature present in the low back, with slight accentuation of the lumbosacral angle. Further, there was a slight loss of sensation on the outside of the left foot, being the area supplied by the sural nerve, which emerges from the last disk, this being (according to the witness) evidence of injury to the fifth lumbar vertebra. The doctor said that the x-rays reflected she had a straightening and a tendency toward reversal of the normal cervical curve, and on the oblique view, there was evidence of change on the left, which was compatible with the type of injury that she sustained. He found a roughness in the area above and below the fourth vertebra on the left, and there was reflected some small early bone formation compatible with injuries occurring from this kind of accident. He was of the opinion that Mrs. Brannon would need to continue using traction at home on her neck, and back exercises, and he said that she probably has some permanent disability. The doctor was reluctant to set a degree of permanent disability after one examination, but it was his view that findings reflected enough objective x-ray evidence to support Dr. Hickey's opinion.

Of course, though Dr. Hickey was not a specialist, there is significance in the fact that this doctor had known appellee for years, and had treated her prior to the injury. We conclude that there was sufficient evi-

dence of permanent injury to justify the submission of this issue to the jury.

Finally, it is argued that the verdict is excessive.

Mrs. Brannon was 32 years of age at the time of this trial, and had a life expectancy of 44½ years. While she and her husband lived in California for a period of six years, she managed a trailer park, and on moving to Conway County, worked part time at a drug store. She said that she had not worked for about four years, because of her school age children. Appellee related her difficulties following the accident, stating that she does not have her former ability to work in her garden, cannot perform many household functions, cannot drive an automobile for more than 30 minutes at a time, and has difficulty in holding objects in her left hand. She complained of severe headaches, which she said still continued, though not as bad as formerly, and she said that the pain in her neck, though still present, seems to be better. However, Mrs. Brannon stated that the pain in her low back and left leg was worse than it was a year earlier, and that her left arm tingles as though asleep; the arm hurts from her elbow to the shoulder when she is working, and frequently swells and stays sore for two or three days. According to the witness, she had difficulty in sleeping or resting for a long period of time. Of course, appellee's evidence shows that she has a 15% permanent partial disability, and testimony of her doctors was to the effect that she will continue to suffer pain. Dr. Hickey was also of the view that she will develop arthritis. According to the evidence, she had suffered pain and mental anguish for close to 27 months before trial, and of course, future pain and anguish is also compensable. Though she has not been employed for four years, she testified that it had been her intent to again seek employment when her children were older. Because of her injuries, the positions that she could hold would seem to be somewhat limited. The question of determining whether a given award for damages is ex-

cessive is one of the most difficult questions that confronts an appellate court, and it is only where there is no evidence on which the amount allowed could properly have been awarded that there is justification for reducing a judgment. While the judgment herein rendered is rather generous, we are not able to say, under all the facts and circumstances, that it is excessive.

Affirmed.

ARKANSAS STATE HIGHWAY COMM. v.
ROY CARRUTHERS, ET UX

5-4844 439 S.W. 2d 40

Opinion Delivered April 7, 1969

Thomas B. Keys and *Hubert E. Graves* for appellant.

Gordon, Gordon & Eddy for appellees.

CARLETON HARRIS, Chief Justice. This appeal relates to an eminent domain action brought by the Arkan-

sas State Highway Commission against Roy Carruthers and wife for the acquisition of lands needed for the construction of Interstate Highway 40, and its facilities in Conway County. On trial, the jury returned a verdict in the amount of $45,000.00 in favor of appellees, and from the judgment so entered, appellant brings this appeal. For reversal, two points are urged. It is first asserted that the trial court erred in allowing the landowner to testify to the amount of an estimate by a contractor as to the cost of building a necessary bridge, following the taking, for access to a portion of the remaining land. It is also contended that the trial court erred in refusing to strike the testimony of two of appellees' witnesses with respect to damage to an airstrip, this portion of land having been leased by Carruthers, and the lessee not being a party to the action.

We agree that there is merit in appellant's first contention. During examination of Mr. Carruther's, he was asked if he would have any problem getting to a certain portion of his land, and he replied that he would not, if he could construct a bridge across a canal. The witness was then asked if he knew what that would cost, and he replied, "I am not familiar with the building of roads. I have an estimate from a contractor." He then said that he asked the contractor what it would cost to build the bridge, and received a reply. Counsel for the department objected to the use of the estimate, or to any testimony to be given on the basis of same, stating, "That is hearsay testimony. He has no personal knowledge, it is what someone else told him." Over these objections, the court permitted Carruthers to testify, and the witness stated, "I believe it was $24,300.00 or $24,400.00." This ruling by the court constituted error. As early as 1896, this court, in *Little Rock and Ft. S. Ry. Co.* v. *Alister,* 62 Ark. 1, 34 S.W. 82, said:

> "There was error also in admitting the testimony of West, which was only the opinion of a nonexpert, whose testimony shows that he was guess-

ing merely at what he testified to, and that his opinion was based upon hearsay, and that he really knew nothing about what he was testifying."

Likewise, in *J. F. Beasley Lumber Company* v. *Sparks,* 169 Ark. 640, 276 S.W. 582, we stated:

"It is first contended that the court erred in permitting appellee to testify concerning statements made to her by a certain building contractor as to the estimated cost of completing the building. She was permitted to testify, over objections of appellant, that a Mr. Finn had figured up for her the cost of completing the building and informed her that it would amount to the sum of $4,600. This testimony was purely hearsay, and we are of the opinion that the court erred in admitting it."

In *Arkansas State Highway Commission* v. *Speck,* 230 Ark. 712, 324 S.W. 2d 796, we held that the contemplated costs of restoration, including the cost of bridges necessary to the ingress and egress of the landowner, though not the actual measure of damages, may be offered into evidence as a fact for the jury to consider, along with other facts, in arriving at the difference between the market value of the property before and after condemnation. In the case before us, the figure testified to by Carruthers was over 50% of the award of damages, and we are unable to say that this testimony did not influence the jury, *i.e.,* we are not able to say that the appellant was not prejudiced by this evidence.

As to the second alleged error, we merely point out that, where property is under a lease at the time of the condemnation, the owner is only entitled to damages to the reversion, after the determination of that estate. Appellant says that some of appellees' witnesses, in reaching their conclusions on damages, considered the value of the leasehold estate, while appellees assert that this was not done. Actually, the testimony is not entirely

clear on that point, but since the case will be retried, there is no need to discuss the evidence.

Because of the error heretofore pointed out, the judgment is reversed, and the cause remanded to the Conway County Circuit Court.

WILBURN W. MILLER v. HERSCHEL GOODWIN AND DOROTHY BEEVERS, ADMINISTRATRIX

5-4825 439 S.W. 2d 308

Opinion Delivered April 7, 1969
[Rehearing denied May 5, 1969.]

Shaver, Tackett & Jones by *Nicholas H. Patton* for appellant.

Chambers & Chambers and *McKay, Anderson & Crumpler* for appellees.

George Rose Smith, Justice. This case has been in litigation for more than four and a half years, with four jury trials. On July 17, 1964, a heavy truck, described as a derrick-type rig used in the oil fields, swerved suddenly off the Warnock Springs Road in Columbia County, overturned, and caught on fire. The appellee Herschel Goodwin, who was driving the truck, was badly burned. Goodwin's employer, Robert Beevers, who was riding with him, was even more severely burned and died less than ten hours later.

The original suit was for the wrongful death only. Beevers' administratrix, the plaintiff, charged Wilburn W. Miller, the defendant, with having caused the accident by driving a pickup truck down the center of the road and thereby forcing Goodwin to swerve to his right to avoid a head-on collision. The first trial ended in a hung jury. On the appeal from the second trial we reversed a judgment for the defendant because of an error in the instructions. *Beevers* v. *Miller,* 242 Ark. 541, 414 S.W. 2d 603 (1967). Goodwin then sued Miller

for personal injuries. After a consolidation of the cases a third trial also ended in a hung jury. At the fourth trial, now on review, the jury attributed 90% of the negligence to Miller and 10% to Goodwin. Both plaintiffs recovered substantial damages.

The appellant urges three points for reversal. First, it is contended that the court allowed the plaintiffs' attorney to go too far in questioning a juror about his possible bias toward insurance companies. In response to a question to the whole panel the juror Lindsey stated that he was an insurance agent representing companies writing automobile liability insurance. The plaintiffs' challenge for cause was denied. Counsel was then allowed to put the following two questions—or perhaps more accurately, the following question and restated question, as Lindsey did not answer the first inquiry:

MR. CRUMPLER:

Would the fact, Mr. Lindsey, that you sell liability insurance in any way prejudice you, or have you acquired a habit, that is, by aligning yourself with an insurance company, would you in any way side with the defendant just because you're usually on the defense side?

MR. TACKETT:

Now just a minute, Your Honor, we object and we ask for a mistrial.

THE COURT:

It will be overruled.

MR. TACKETT:

Save our exceptions.

MR. CRUMPLER:

In other words, Mr. Lindsey, in this particular case you feel like you can sit on this jury and give

the plaintiff free and clear consideration just as though you never had sold any liability insurance?

MR. TACKETT:

We object again, Your Honor, and ask for a mistrial.

THE COURT:

It will be overruled. [Exceptions.]

It is contended that the questions had the effect of informing the panel that the defendant had liability insurance. We do not agree with that view, for we find no reason to believe that the inquiries were not made in good faith for a permissible purpose. In a similar situation, except that the trial court refused to allow any questions on the subject of insurance, we said in *Dedmon* v. *Thalheimer,* 226 Ark. 402, 290 S.W. 2d 16 (1956): "A person may have connections with an insurance company that would cause him to be biased in favor of such companies . . . A lawyer trying a case would be rather careless if he failed to ascertain as well as possible if any one on the venire was biased or prejudiced on a question involved in the litigation, even though such question would be only indirectly involved."

Here counsel challenged Lindsey for cause when he revealed his connection with liability insurance companies. That move failed. It was then advisable for the attorney, before deciding whether to challenge Lindsey peremptorily, to try to find out if his insurance ties would cause him to favor the defensive side of the lawsuit.

Counsel also cite *Armstrong* v. *Lloyd,* 234 Ark. 233, 352 S.W. 2d 84 (1961), to support the argument that in any event the further interrogation of Mr. Lindsey

should have been conducted in chambers, outside the hearing of the rest of the panel. Perhaps that procedure would have been desirable, but the issue was not raised in the court below, for no such request for an in-chambers hearing was made. We find no merit in the appellant's first point.

Second, counsel for the appellant, without questioning the integrity either of the jury commissioners or of the jury itself, filed a motion to set aside the verdict on the ground that two of the jury commissioners had served in that same capacity within the preceding four years, contrary to Ark. Stat. Ann. § 39-202 (Repl. 1962). The trial court correctly denied the motion. The proof is not entirely clear, but even if it be assumed that the objection would have been valid if made to the panel as a whole, it came too late after the jury had been sworn and had returned its verdict. *Brown* v. *State,* 12 Ark. 623 (1852). The prior service of the jury commissioners was a matter of public record that could have been raised by a challenge to the panel. The appellant cannot be permitted to speculate upon the chance of a favorable verdict and then belatedly raise the point after the verdict proved to be in favor of his adversary.

Finally, it is insisted that the court should have excluded proof of a purported dying declaration by which Beevers told a nurse at the hospital that "a butane truck ran them off the road." The identification of the truck was important, because that was the most sharply disputed point of fact at the trial. Many witnesses saw Goodwin's rig soon after it left the road and caught on fire, but Goodwin was the only eyewitness who described the particular pickup truck that later proved, according to Goodwin, to have been driven by Miller. Miller admitted that he was driving a butane truck in the vicinity at about the time of the accident, but he positively denied that it was his truck that caused Goodwin to leave the road. Inasmuch as Goodwin's original statement describing Miller's truck contained an inaccuracy, Beev-

ers' dying declaration emerged as corroborating proof that may have tipped the scales in favor of the plaintiffs.

It is first argued that Beevers' declaration was inadmissible because he was not under a sense of impending death. We do not find that argument convincing. The accident happened soon after 7:00 a.m. Beevers' clothing was burned off, the burns covering 85 to 90 percent of his body. At the scene he made the statement: "I'm completely burned up." He also said: "The good Lord's let me live this long, and I appreciate it." There is no indication that Beevers' state of mind changed during the short interval between the accident and his statement to the nurse. Rather to the contrary, owing to his condition he asked at the hospital that his wife not be permitted to see him. Beevers was conscious until about noon and unquestionably knew that he had been very severely burned. He died at about five o'clock that same afternoon.

Under our practice the trial judge first determines whether a proffered dying declaration was made under such circumstances as to be competent evidence. If so, the judge admits it, as was done here. In reviewing his decision on the preliminary question of admissibility we treat it as an issue of fact, to be determined by the test of substantial evidence. *Fogg* v. *State,* 81 Ark. 417, 99 S.W. 537 (1907). In our opinion the testimony that we have mentioned is substantial proof that Beevers spoke under the requisite belief that his death was impending. At that point our review ends.

Counsel also insist that the statement, "A butane truck ran us off the road," is merely a conclusion and is therefore inadmissible. It is true, of course, that more details would have been elicited from a living witness testifying in the courtroom, but allowances must be made in the case of a declaration made by a person now dead. In fact, Dean Wigmore took the position that the

rule against opinion evidence (one aspect of which is the ban against conclusions) ought not to be applicable to dying declarations, because under the law it is necessarily true that the declarant cannot be called to narrate the facts in detail. Wigmore, Evidence, § 1447 (3d Ed. 1940). Wigmore conceded, however, that the majority view is against the admission of dying declarations that are merely statements of opinion, and that is the view that we have taken. *Rhea* v. *State,* 104 Ark. 162, 147 S.W. 463 (1912).

Even so, when as here the dying declaration is partly an assertion of an admissible fact and only partly a conclusion constituting the dying man's spontaneous statement of what happened, we are not inclined to apply the exclusionary rule quite as strictly as might be fair and just if the declarant were on the witness stand and available for further questioning. In this instance the most important part of Beevers' statement—his description of the offending vehicle as "a butane truck"—was *not* a conclusion. To the contrary, it was an unequivocal statement of fact. We are not willing to say that the jury should have been deprived of that vital information merely because Beevers coupled it with the assertion that the butane truck in question had "run us off the road." In a situation of this kind the trial court must exercise its sound judgment in ruling upon the admissibility of the declaration as a whole. Here we think the court rightly concluded that the desirability of admitting the vitally important factual part of Beevers' statement outweighed the slight possibility that the jury might have been unfairly influenced by Beevers' understandable failure to narrate all the facts that led him to say that he and his companion had been run off the road.

We have held that the trial court has some discretion in refusing to exclude a witness' answer which contains both competent and incompetent matter. *Arkadelphia Lbr. Co.* v. *Asman,* 85 Ark. 568, 107 S.W. 1171 (1907). Moreover, such a situation can be handled by an admonition to the jury, limiting the purpose for

which the testimony is admitted. The burden, however, is upon the objecting party to request such an admonition, a mere general objection being "wholly unavailing." *Wood* v. *Burris,* 241 Ark. 118, 406 S.W. 2d 381 (1966). Here no such request was made. Hence we are unable to say, considering the record as a whole, that the court erred in admitting the dying declaration.

Affirmed.

HARRIS, C.J., and JONES, J., think the dying declaration to be inadmissible.

PAUL HARDEMAN, INC., ET AL v. J. I. HASS CO., INC., ET AL

5-4852 439 S.W. 2d 281

Opinion Delivered April 7, 1969
[Rehearing denied May 5, 1969.]

Wright, Lindsey & Jennings for appellants.

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

LYLE BROWN, Justice. Plaintiffs below were Paul Hardeman, Inc., Fischbach and Moore, Inc., and Morrison-Knudsen, Inc., prime contractors under a joint venture in the construction of missile launch facilities in White County. The defendant J. I. Hass Company, Inc. was a painting subcontractor for the joint venture or prime contractor. William Turpin, an employee of Hass, was injured when he fell while painting near the top of a vent pipe. The prime contractor admitted negligence in not properly securing the vent pipe at its base and paid Turpin $50,000. Plaintiffs sued Hass under a contract of indemnity for the amount paid Turpin. (The Uniform Joint Tortfeasors Act is not involved.) Employers Mutual Liability Insurance Company of Wisconsin paid Turpin workmen's compensation and it intervened, seeking recoupment from the prime contractor; Turpin's release to the prime contractor reserved intervenor's right to maintain such an action. The trial court held (1) that Hass was free of any negligence contributing to cause Turpin's injuries, (2) that the contract of indemnity did not obligate Hass under the circum-

stances to indemnify the prime contractor, and (3) that the stipulated amount due Employers Mutual would bear interest from the date of entry of judgment and not from an earlier date when the debt was stipulated to be owed. Plaintiffs appeal on the first two holdings and Employers Mutual appeals with respect to the date interest should have started.

The prime contract held by the joint venture called for its installation of a three-inch vent pipe to be set vertically in a concrete pad or base. When the concrete was poured the three-inch pipe was not available; so, with the approval of the United States Corps of Engineers, a four-inch sleeve or collar was placed in the concrete base. It was agreed that the three-inch pipe would be inserted in the sleeve to a depth of eighteen inches and welded. When the three-inch pipe arrived it was inserted but only to a depth of a few inches. Instead of welding the two pipes a type of caulking material was inserted in the space between the pipes. The pipe was 27' 10'' in height above the pad. The prime contractor awarded J. I. Hass Company a painting contract which included this particular pipe. Hass furnished its painter, William Turpin, the equipment with which to do the painting. In the painting trade that equipment is called stirrup and saddle. Two buckles are tied on the ends of a rope and are used for foot stirrups. That rope is placed around the center of the pipe. Another rope is tied to a two-by-twelve board and it is used for a saddle. That rope is likewise attached to the pole and is thrown and tied off at a point some four feet from the top of the pole. The top four feet is painted by the use of a long brush so the painter never climbs higher than the tie-off. Turpin had painted approximately four feet when the pipe came loose at the base and he fell to the ground.

That the prime contractor was negligent in the erection of the pipe is not here questioned. This suit was instituted on the theory that as a matter of law the con-

tract of indemnity executed by Hass obligated it to reimburse the prime contractor in full for the latter's payment to Turpin. In the alternative it was asserted that Hass would unquestionably be liable in proportion to its negligence in allegedly failing to provide Turpin with safe equipment for the performance of his task. Both sides presented their evidence on the alleged negligence of Hass. The trial court concluded that Hass was entitled to an instructed verdict. Secondly, it was held that Hass was not obligated to reimburse the prime contractor for sums it was forced to pay as a result of an accident caused solely by the prime contractor's negligence. We proceed to examine the propriety of the court's holdings on those two points.

In testing the granting of a directed verdict the rule has been many times stated and ofttimes with a slight variation. A typical statement of the rule is found in *Barrentine* v. *The Henry Wrape Co.*, 120 Ark. 206, 179 S.W. 328 (1915):

> In determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence that is most favorable to the party against whom the verdict is directed, and where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury.

We have no intention of deviating from the rule just stated; however, it has been some time since we have pointed up the meaning of the term "any evidence." The term has long been recognized to mean "evidence legally sufficient to warrant a verdict." *Catlett* v. *Railway Company,* 57 Ark. 461, 21 S.W. 1062 (1893). To be legally sufficient it must be substantial; and substantiality is a question of law. *St. Louis S.W. Ry. Co.* v. *Braswell,* 198 Ark. 143, 127 S.W. 2d 637 (1939).

The only witness offered by the prime contractor was Ben Hopkins. His qualifications in the field of

structural engineering were admitted. We summarize the significant portions of his direct testimony in the following paragraph:

A procedural method of painting a pipe of three inches or less, over 24 feet high is to place a painter's extension ladder on each side of the pole. A lock is placed at the top section of the extension ladders, locking them together. There is no contact between the pole and the ladders. The bottom of the ladders is placed four feet from the bottom of the pole. Another method is to drop a painter by a swing that is hung from a crane lift. That is not as economical as the ladder method. With the stirrup and saddle method, the weight and movement of the painter creates a stress at the point of anchorage. If a painter and his rig weigh 200 pounds and he is at the top of a pole 27' 10'' in height, is suspended outside the pipe and some twelve inches away from it, with his legs not wrapped around the pipe, he would create a "live and dead load of 19,-082 pounds per square inch" on a three-inch pipe. Pipe of the type at hand is not used by engineers for building purposes past a criteron of 18,000 pounds of stress per square inch. Actually the yield point of that type pipe is set by manufacturers between forty-five and sixty thousand pounds. Design engineers use the eighteen thousand pound criteron as a cushion for safety. He asserted that any unusual movements made by Turpin while in the painting process would be a critical factor.

On cross-examination it was brought out that Mr. Hopkins was not aware that the three-inch pipe was inserted from two to three inches into the four-inch pipe, that the pipes were not welded, and that caulking material was placed in the space between the pipes. When advised of that situation he conceded that Turpin was bound to fall because of the faulty installation. And, although he did not deviate from his opinion that the saddle and stirrup method is poor procedure, he concluded that he had no criticism of Hass for permitting Turpin to climb the pole with that method. In reaching

that conclusion he considered the fact that other poles properly constructed had been climbed by the same method and without incident.

Hopkins' opinion that the stirrup and saddle method was unsafe in this situation is fatally weakened by some of his assumptions which are not supported by the record. He conceded that the strength of the pipe was on a "hairline" between being safe and hazardous. For that reason his assumptions become all the more important. Hopkins calculated the stress at the anchor point from the very top of the pole; the uncontradicted proof showed that the painter tied off his climbing rope from three to four feet below the top. In computing the stress at the anchor point, Hopkins assumed that Turpin and his rig created a weight of 200 pounds; there is no evidence in the record to support that assumption. He assumed that the painter was suspended some twelve inches from the pole with his legs dropped downward; the evidence showed that the saddle was against the pole and the painter's legs were wrapped around the pole. Added to the unsupported assumptions is the fact that there was no proof of any unusual movements by Turpin, which it is admitted would have been significant. Another factor which the trial court probably considered of some importance is that Hopkins revealed that the yield point set by manufacturers is from forty-five to sixty thousand pounds, as opposed to his estimated stress load placed on the pipe by Turpin of 19,082 pounds.

Of course any negligence on the part of Hass in furnishing Turpin with what Hopkins considered to be an improper set of equipment would not be enough to make Hass liable. The second and vital step in the chain of proof would be a showing preponderantly that the equipment used was a proximate cause of the fall. In that respect we consider the proof to be entirely lacking. In fact Hopkins stated that the pipe fell because of defective installation.

Secondly, the prime contractor claims a right to judgment against J. I. Hass Company as a matter of law. That is on the theory that under the terms of the subcontract, Hass agreed unconditionally to indemnify the prime contractor for any and all liabilities owed by the prime contractor arising out of any accident occurring as a result of the subcontractor's activities; and that the obligation was undertaken by the agreement irrespective of fault. The indemnity provision of the subcontract is as follows:

> 9. Subcontractor agrees to save and indemnify and keep harmless Contractor, Owner and Architect-Engineer against all liability, claims, demands or judgments for damages arising from accidents to persons or property occasioned by Subcontractor, his agents or employees, and against all claims or demands for damages arising from accidents to Subcontractor, his agents or employees, whether occasioned by Subcontractor or his agents or his employees; and Subcontractor will defend any and all suits brought against Contractor, Owner, or Architect-Engineer, and all of them, on account of any such accidents, and will pay any judgments rendered in such suits, and will reimburse and indemnify Contractor, Owner or Architect-Engineer and any of them, for all expenditures, or expenses, including attorney fees and court costs, had or incurred by reason of such accidents. Contractor shall, at its option, have full control of any defense of any such suits, and contractor shall at all times have the option of choosing the attorney or attorneys to perform the professional services involved.

On the question of indemnity we are cited one case from our jurisdiction, *C & L Rural Elec. Coop. Corp.* v. *Kincaid*, 221 Ark. 450, 256 S.W. 2d 337 (1953). There the indemnity provision is so different from the one at bar that *Kincaid* is of no aid. Many decisions are cited by appellants and appellees from other jurisdictions supporting their respective theories. The decided

weight of authority favors appellees. The precise question is whether this indemnity provision obligates the subcontractor to indemnify the prime contractor for damages arising out of the negligence of prime contractor which was the proximate cause of Turpin's injuries. The intention of Hass to so obligate itself must be expressed in clear and unequivocal terms and to the extent that no other meaning can be ascribed. 41 Am. Jur. 2d, Indemnity § 15. Where an injury is caused by the sole negligence of the indemnitee many courts, in interpreting the indemnity contract, predicate their interpretation on the theory that such a liability would be unusual and harsh; consequently, the courts endeavor to relieve the indemnitor of liability to the negligent indemnitee. 175 ALR, p. 32, § 18.

We examine the provisions of the indemnity paragraph. There are three areas in which liability is imposed on the subcontractor:

1. He is liable for damages arising from accidents to persons or property *occasioned* by him, his agents or employees;

2. He must indemnify for damages chargeable to the prime contractor as a result of injury or damage to the subcontractor, his agents or employees, whether *occasioned* by the subcontractor, or his agents or employees; and

3. The subcontractor must at his expense defend any suits brought against the prime contractor as the result of any accident *occasioned* by the subcontractor, his agents or employees.

The meaning of the words "occasioned by" holds the key to a proper interpretation of the contract.

As used in this contract the verb "occasioned" could have had one of two meanings. In a number of instances it is said that the cause of an injury is that which

actually produces it, whereas the occasion is that which provides an opportunity for the casual agency to act. *Merlo* v. *Public Service Co.*, 45 N.E. 2d 665 (Ill. 1942); *Barney* v. *Adcock*, 75 N.W. 2d 683 (Neb. 1956). On the other hand most dictionaries list "caused" as a synonym for "occasioned" and there are those cases in which the two words are said to be synonymous. For example, *Union Gold Mining Co.* v. *Crawford*, 69 P. 600 (Colo. 1902); *People* v. *Halbert*, 248 P. 969 (Calif. 1926); and *Smart* v. *Raymond*, 142 S.W. 2d 100 (Mo. 1940).

In view of the uncertainty of the manner in which "occasioned by" was used in this contract, we cannot say the subcontractor expressed an intent, in words clear and unequivocal, to bind itself for the negligence of the prime contractor. That is especially true in face of the fact that it would require no extraordinary skill in draftsmanship to so bind the subcontractor in words and phrases of absolute certainty.

There remains for consideration the cross-appeal of Employers Mutual. At the trial on October 26, 1965, the prime contractor stipulated its liability to Employers Mutual for workmen's compensation benefits paid Turpin. Through no fault of the parties or the court the formal judgment was not entered until August 3, 1967. That judgment allowed interest to Employers Mutual from the latter date. The carrier is entitled to interest from the date of the stipulation. *Kincade* v. *C. & L. Rural Elec. Coop.*, 227 Ark. 321, 299 S.W. 2d 67 (1957).

Affirmed on direct appeal; reversed and remanded on cross-appeal.

FOGLEMAN, J., disqualified and not participating.

FRATERNAL ORDER OF EAGLES v. STATE OF ARKANSAS

5-4901 439 S.W. 2d 36

Opinion Delivered April 7, 1969

[redacted]

Fitton, Meadows & Adams for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

LYLE BROWN, Justice. This is an appeal from a permanent injunction issued against the Fraternal Order of Eagles, Aerie 3183, Baxter County, at the instance of the prosecuting attorney on behalf of the State. The subject of the injunction was the sale of alcoholic beverages by the club. Appellant here contends that the dispensing of mixed drinks to members of a non-profit club in a "dry" county does not constitute a sale of alcoholic beverages. Alternatively, it is insisted that the dispensing of drinks by a private club to its members, even if considered illegal, does not constitute a public nuisance within the meaning of Ark. Stat. Ann. § 34-101 (Repl. 1962).[1]

The facts on appeal are stipulated. A lawful search of the lodge in July 1967 resulted in the confiscation of 250 cases of intoxicants and six slot machines. The lodge was operating a bar from which mixed drinks

[1]It is not contended that appellant possessed any type of permit which purportedly would have authorized it to dispense intoxicants in a dry county.

were served to members and guests for cash. A few days thereafter the prosecuting attorney filed a petition against the lodge to abate a nuisance, proceeding under Ark. Stat. Ann. §§ 34-101, 110. A temporary order was entered closing the building pending a final hearing, as authorized by § 34-104. At the final hearing the injunction was made permanent pursuant to § 34-106. The legal effect of that order was to enjoin the defendants from engaging in unlawful activities forming the basis of the nuisance.

Section 34-101 declares the unlawful sale of liquors "in any building, structure, or place in this State" to constitute a public nuisance. The recited statute authorizes the abatement to go against the premises from which the violator is operating. Baxter County is legally a dry county. Ark. Stat. Ann. § 48-811 (Repl. 1964) makes it unlawful to "sell, barter, or loan, directly or indirectly any beverage containing alcohol" in a dry county.

The court made a finding that the sale of alcoholic beverages had been actively carried on under the direction of the lodge officers. There was ample evidence to justify that conclusion. The volume of business was such that an inventory of 250 cases of intoxicants was on hand at the time of the raid. The number of members of the order is not in the record but the utilization of six slot machines is indicative of substantial patronage. Also, the club was enjoying sufficient profits from its "projects" to finance a new lodge and golf course.

We have no hesitancy in sustaining the trial court's ruling that the substantial sale of intoxicants from the lodge building by its operating officers brought appellant within the practice condemned as a nuisance by the provisions of § 34-101.

Affirmed.

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE v. RONALD NICHOLSON

5-4854 439 S.W. 2d 648

Opinion Delivered April 7, 1969
[Rehearing denied May 12, 1969.]

Chowning, Mitchell, Hamilton & Burrow for appellant.

Wilton E. Steed for appellee.

JOHN A. FOGLEMAN, Justice. This appeal is taken from a judgment rendered in favor of the mother of appellee, as his guardian. It was rendered in a suit brought by appellee upon an industrial accident insurance policy issued by appellant on April 4, 1949. The application for the policy was signed by the mother. The losses insured against were death by accidental means and losses of sight or limb. The face amount of the

policy became $2,000 after it had been in force for 10 years. The suit was for the loss of the sight of appellee's right eye, for which the benefit payable was one-half the face amount of the policy. In order for the benefit for loss of sight or limb to become payable, the loss was required to have been suffered solely as "a direct and proximate result of diseases contracted after or injuries sustained after the effective date of this policy."

One of the defenses made by appellant was the contention that appellee's loss was the result of a disease which pre-existed the effective date of the policy. After hearing the testimony, the circuit judge, sitting without a jury by stipulation of the parties, made the following findings.

"THE COURT:

> I rather think we should pay this policy Mr. Selig under the proof. The boy apparently is blind, they insured him, he was carrying it on for years, accepting the premiums. I realize there are a lots of little technicalities in those policies, there are also lots of technicalities in the taking of a man's money off of him and then when you get ready and he is blind and you say he is blind, admit it, admit the policy says that, you say he isn't I believe. Well, Dr. Glasscock I rather think is a reputable physician, his qualifications were admitted. I don't know how to examine a fellow to tell you that properly about it except to go to doctors. I think he has waived, they waived it, whatever they might have there under the proof and I think it should be paid."

Appellant urges two grounds for reversal. The first is that the undisputed evidence shows that appellee's loss of sight in his right eye was not suffered as a result of a disease contracted or injury sustained after the effective date of the policy, but that it preexisted and manifested itself before the policy became effective.

The second ground is a contention that the court erred in holding that appellant waived the defense of noncoverage for losses suffered as a result of conditions which pre-existed the effective date of the policy. We agree with appellant on both points. We shall discuss them in the order set out.

In attempting to sustain his complaint, appellee offered two witnesses, Dr. Robert Earl Glasscock, an ophthalmologist and otolaryngologist, and appellee's mother. Dr. Glasscock examined appellee November 11, 1966. His examination disclosed that appellee's visual acuity in his eye was such as to indicate industrial, but not medical, blindness. He did not find anything physically wrong with either of appellee's eyes. He felt that the visual loss was connected in origin to appellee's central system, i.e., with whatever was causing a convulsive disorder suffered by appellee and his obvious retardation. Dr. Glasscock took a medical history from appellee's mother. She told him that appellee was cross-eyed in his right eye since he was about five or six years old and that he had had some type of convulsive disorder since that time. Dr. Glasscock stated that such a condition remains more or less stable because the damage causing the condition does not progress. He stated that this condition would stay approximately the same if it existed in 1944 or 1945 when appellee was five or six years of age. He did not believe that either a layman or a doctor could have glanced at appellee in 1944 and said that he was mentally deficient, but stated that, on the basis of the history given by appellee's mother, the condition was diagnosable in 1944 or 1945.

Mrs. Ness, appellee's mother, stated that she advised the agent from whom she took the policy that her son, Ronald, had seizures for which he took mylantin sodium.[1] She said that she told the agent that these

[1]She testified that she later learned that this medication was for epilepsy.

sudden seizures had been diagnosed as acute indigestion, and that Ronald would sometimes have convulsions and she would have to get the doctor to give him a shot. She admitted that the first time she saw her son's eyes show a cross was when he was about five or six years of age and asserted that she advised the agent of this. She testified that she first took her son to an eye doctor upon the recommendation of a school nurse. This doctor was identified as Dr. Louise McCammon Henry.

On the written claim submitted for this loss, the nature and cause of appellee's disability was described as epilepsy and the date disability became total was given as "lifetime."

Appellant offered the deposition of Dr. Henry, an ophthalmologist. She testified that she examined appellee on March 21, 1951, when he was thirteen years of age. The medical history for this examination was given by appellee's mother. According to Dr. Henry, the mother stated that her son had convulsions as a baby and that the crossing of his eyes began between the ages of five and six. This doctor diagnosed the condition which affected appellee's vision in his right eye as a muscular defect which generally actively manifests itself in early childhood. It was her opinion, based upon her examination, that this condition existed in appellee from early childhood, that the degree of crossing would have been obvious to her and that, assuming the medical history to be correct, an accurate diagnosis could have been made of his condition when he was five or six years of age.

We find no substantial evidence here to support appellee's claim that his loss of sight is within the coverage of the insurance policy.

Appellee relies upon the cases of *Home Mutual Benefit Association* v. *Mayfield,* 142 Ark. 240, 218 S.W. 371; *State National Life Insurance Co.* v. *Stamper,* 228 Ark. 1128, 312 S.W. 2d 441; *United Insurance Co. of*

America v. *Wall,* 233 Ark. 554, 345 S.W. 2d 1927; *American Insurance Co. of Texas* v. *Neal,* 234 Ark. 784, 354 S.W. 2d 741; *Old Equity Life Insurance Co.* v. *Crumby,* 241 Ark. 982, 411 S.W. 2d 292; and *Lincoln Income Life Insurance Company* v. *Milton,* 242 Ark. 124, 412 S.W. 2d 291. These cases establish the proposition that a disease has its inception at the time it manifests itself or becomes active or when it is of such nature that a reasonably accurate diagnosis could have been made before the policy was issued. Even so, we cannot come to any conclusion in this case except that the disease which caused appellee's loss of sight had been sufficiently manifested before the issuance of the policy to cause a diagnosis to have been sought and that it was of such a nature as to have permitted a reasonably accurate diagnosis to have been made with reasonable medical certainty.

It should be noted that the clause in question in *Home Mutual Benefit Association* v. *Mayfield,* supra, was quite different from the one involved here. The clause there required that the loss be from "disease resulting hereafter."

The findings of the circuit court here seem to have been based principally upon waiver by appellant, purportedly by reason of the acceptance of the premiums for the policy ever since its issuance. There is also testimony by appellee's mother that the soliciting agent saw appellee both when the application was made for the policy and when the policy was delivered. She also testified that she told the agent all she knew about her son's condition. We find no waiver under the facts in this case. Appellee apparently agrees with us, because he does not argue this point, nor does he rely on waiver for an affirmance.

It is well settled in this state that the doctrines of waiver and estoppel, based upon the conduct or action of the insurer, cannot be used to extend the coverage of an insurance policy to a risk not covered by its terms or expressly excluded therefrom. *Hartford Fire Insurance*

Co. v. *Smith,* 200 Ark. 508, 139 S.W. 2d 411; *Metropolitan Life Insurance Company* v. *Stagg,* 215 Ark. 456, 221 S.W. 2d 29; *Bankers Nat. Ins. Co.* v. *Hemby,* 217 Ark. 749, 233 S.W. 2d 637. This is not a case where a forfeiture is attempted by the insurance company but is a question as to the extent of the coverage of the policy. Consequently, there is no support for a finding of waiver. The result is not changed by reason of the fact that appellant accepted the payment of a premium after this claim was asserted. To have done otherwise would have been inconsistent with the contention made by appellant. Under the terms of the policy, it expires upon the occurrence of any loss covered and the payment of the amount provided by the policy for such a loss. Appellant contended that the loss suffered by appellee was not within the coverage of the policy. Consequently, if it was right in its contention the policy continued in force as to the risks of accidental death, loss of limbs and loss of sight of the left eye.

The judgment is reversed and the cause dismissed.

HAZZLE PAULINE RAY, EMPLOYEE v.
SHELNUTT NURSING HOME, EMPLOYER, ET AL

5-4863 439 S.W. 2d 41

Opinion Delivered April 7, 1969

McMath, Leatherman, Woods & Youngdahl and *Silas H. Brewer, Jr.*, for appellant.

Terral, Rawlings, Matthews & Purtle for appellees.

J. Fred Jones, Justice. This is a workmen's compensation case and the extent of permanent partial disability to the body as a whole is the question involved.

The facts very briefly are these: On November 24, 1965, Mrs. Pauline Ray injured her back while in the course of her employment as a practical nurse by the Shelnutt Nursing Home. The injury occurred when Mrs. Ray fell partially to the floor while attempting to assist an aged patient into a wheel chair. The injury resulted in the surgical removal of an intervertebral disc at the lumbosacral angle followed by a spinal fusion from the fifth lumbar vertebra to the sacrum on December 21, 1965. Mrs. Ray was paid compensation benefits for temporary total disability from the date of her injury until the end of her healing period on March 3, 1967. The claim before the Workmen's Compensation Commission was for a determination of the extent or percentage of permanent partial disability.

The employer and its compensation insurance carrier controverted the claim for any permanent partial disability in excess of 20%. The Commission awarded 40% permanent partial disability to the body as a whole and the employer and compensation insurance carrier appealed to the Saline County Circuit Court. The circuit judge held that there was no substantial evidence to sus-

tain the Commission in awarding more than 20% permanent partial disability and Mrs. Ray brings this appeal, relying upon the following point for reversal:

> "There is substantial evidence to support the award of the Workmen's Compensation Commission, and the Circuit Court therefore erred in modifying that award."

We agree with the circuit court that there was no substantial evidence to sustain the Commission's award of more than 20%.

We recognize the controlling legal standards expressed by this court in all the cases cited by the appellant. We recognize that evidence in a compensation case should be given its strongest probative force in favor of the action of the Commission. We recognize the responsibility of the Commission in drawing inferences from testimony open to more than a single interpretation. We recognize that the determination of the percentage of permanent disability in a workmen's compensation case is a function of the Commission not to be disturbed on appeal if supported by substantial evidence, and we also recognize that the degree of disability suffered by an injured employee is a factual question to be determined by the Commission as stated in *Caddo Quicksilver Corporation* v. *Barber,* 204 Ark. 985, 166 S.W. 2d 1, cited by the appellant.

The appellant cites the cases of *Glass* v. *Edens,* 233 Ark. 786, 346 S.W. 2d 685, and *Wilson & Company, Inc.* v. *Christman,* 244 Ark. 132, 424 S.W. 2d 863, in support of her contention, but those cases are clearly distinguishable from the case at bar.

The appellant argues in her brief that "the landmark decision in *Glass* v. *Edens* . . .firmly established the doctrine that the Commission must consider numerous factors, in addition to functional or anatomical impairment in determining an injured workmen's permanent

partial disability." If such doctrine was firmly established in *Edens,* it only applies when such additional factors pertain to disability and are presented to the Commission by competent evidence.

In the *Edens* case the Full Commission affirmed a referee's finding of a 40% permanent partial disability to the body as a whole based entirely on a medical rating of 40% under the erroneous assumption by the referee, that he was dealing only with scheduled injury and was limited to the consideration of medical evidence only under a former decision of the Full Commission. The referee in the *Edens* case said:

> " '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.' " (Emphasis supplied.)

In remanding the *Edens* case for further consideration, this court said:

> "... Ark. Stats., § 81-1313 (d), provides:
>
> '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.'
>
> Appellees contend that this amended section of the Workmen's Compensation Act makes all injuries scheduled injuries and that an injured employee should only be paid for functional loss of use of his body.
>
> We feel the Legislature's use of the term 'loss of use of the body as a whole' in Ark. Stats., § 81-

> 1313 (d), when read in the light of other sections of the Workmen's Compensation Law, which are not in conflict therewith, does not mean merely functional disability but includes, in varying degrees in each instance, loss of use of the body to earn substantial wages."

There is nothing startling or so unusual about the decision of this court in the *Edens* case that marks it as a "landmark decision." That decision would have *really* been a landmark decision had we agreed with the referee, and held that evidence other than clinical findings could not be considered in determining the extent of permanent partial disability and that only the medical rating of functional disability could be considered for that purpose. If such had been our holding, we would have eliminated the need for a referee or a Commission in determining extent of permanent partial disability. While in so holding we would have greatly lightened our own task in determining the substantial nature of evidence submitted in a permanent disability case, we would have practically repealed the "other sections of the Workmen's Compensation Law," referred to in the *Edens* decision, including the statutory definition of disability. Only one disability, in all its degrees as to partial, total, temporary and permanent, is defined in Ark. Stat. Ann. § 81-1302 (e) (Repl. 1960) 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."

Our decision in the *Edens* case did not establish the doctrine that the Commission *must consider* numerous factors in addition to functional or anatomical impairment, in determining an injured workmen's permanent partial disability. We did not say in that case that the Commission *must* do anything. What we did say was that the Commission is not confined, in its consideration, to clinical proof or medical evidence alone, in

arriving at the extent of permanent disability suffered by an injured employee under the Workmen's Compensation Law. In *Edens* we simply held, in effect, that the legislature had not placed the Commission in a medical strait jacket in determining disability as defined in the act, permanent or otherwise.

We did not know then, and we do not know now, what substantial evidence, other than the medical evidence, was before the Commission and available for its consideration in the *Edens* case. If there was other evidence before the Commission, it erroneously failed to consider it. The purpose in sending that case back to the Commission was for consideration of such other evidence as may have been before the Commission in that case, but which the Commission concluded it had no right to consider. The substantial nature of the evidence other than medical, marks the distinction between *Wilson & Company, Inc.* v. *Christman, supra,* and the case at bar.

In the *Christman* case, Christman sustained a similar injury and had a similar education as the appellant in the case at bar. In that case 30% permanent partial disability was the highest amount by medical evidence and we affirmed the Commission's award of 60%. Two of Christman's former employers, for whom he had performed his lightest tasks, testified that they would not re-employ him on the basis of the medical reports. Aside from Christman's own testimony as to his constant pain, the medical evidence, with emphasis supplied, was as follows:

> Dr. Tom P. Cocker: "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%."

Dr. William G. Lockhart, a neurosurgeon of the Holt-Krock Clinic in Fort Smith, who performed the surgery on Christman, 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.

* * *

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." (Emphasis supplied.)

In the *Christman* case we quoted from Larson's Workmen's Compensation Law, § 42.22, as follows:

> "... [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 compensable. Dozens of cases, involving almost every conceivable kind of neurotic, psychotic, depressive, or hysterical symptom or personality disorder have accepted this rule." (Emphasis supplied.)

We also pointed out in the *Christman* case "there is evidence in the record that appellee suffered poor eyesight as an additional handicap to some types of employment."

Now turning to the case at bar, the members of the Full Commission examined the record for the preponderance of the evidence whereas, this court, as well as a circuit court on appeal, must examine the record for substantial evidence to support the finding of the Commission.

The referee, who heard the witnesses and observed their demeanor while testifying, summed up his impression of the appellant in the following language:

"The claimant is a young woman who has proven herself to be adaptable in that she has learned the nursing profession as well as having been a saleslady and floor walker and an employee of a furniture company. The claimant impressed the Referee as being an articulate and knowledgeable lady, and the fact that she is only 39 years of age makes her a good candidate for rehabilitation."

There is nothing in the record to refute the referee's impression of the appellant, and therein lies part of the distinction between the case before us and the *Christman* case. Hysterical paralysis and partial blindness, as was evident in the *Christman* case, were not even suggested in the case at bar, and appellant agreed in oral argument that traumatic neurosis is not contended as a contributing factor.

On direct examination the appellant gave her work history prior to her injury, but gave no testimony as to work history, attempts to work, or ability or inability to work since her injury and surgery. On cross-examination the appellant testified as follows:

"Q. Have you done any work since November 24, 1965 at all, anywhere?

A. No, sir.

Q. Have you done any work that you didn't get paid for?

A. No, sir.

Q. Have you tried to get a job anywhere?

A. No, sir.

Q. Have you registered with the employment office?

A. No, sir.

Q. Or gone to any places of business—

A. No, sir.

Q. —to see if they have any type of work? What hobbies do you have?

A. Reading, watching television.

Q. Are you still able to do that?

A. Yes, sir, I have to lay down an awful lot so that passes the time for me.

Q. All right. Do you drive a car?

A. On occasion, yes, sir.

Q. Have you been driving a car since your injury on November 24, 1965?

A. Yes, sir."

Appellant testified as to what the doctors had told her relative to the work she could do and what she should avoid, and she testified as to the types of work she had done prior to her injury. She offered no testimony at all, of a substantial nature, pertaining to her ability to earn in the same or other employment, the wages she was receiving at the time of her injury.

Dr. McKenzie, one of the orthopedic surgeons who performed appellant's spinal fusion, testified as follows:

"Q. Now I'll ask you if you had occasion to see her and make another report on March 3rd?

A. Yes, sir.

Q. I'll ask you if the patient was dismissed at that time with a disability rating?

A. At that time she said she was having some pain, but this wasn't too much. Then that she had diffuse tenderness; that there was no muscle guarding at this time. There was some restriction in the motion of the spine. The x-rays, including the bending films, revealed that the fusion was radiographically solid and at that time we felt that she could return to work which did not require heavy lifting. And as a matter of fact, I think we sent a copy of this information, at this time, to the rehabilitation people so that they could make a contract with her to maybe start trying to train her in some activity which did not require heavy lifting, and she was dismissed at that time with 15 per cent permanent disability.

Q. Is it your opinion, based upon reasonable medical information that this is the disability this woman has?

A. Yes.

Q. Now with reference to work that she could not do heavy lifting, could you tell us what type of work that she might be able to do?

A. I think she could perform activities, most any activity which required use of her upper extremities. Activities in which a person is allowed to change position infrequently [sic] from a sitting to a standing position, or some type of work that she can get up and move about, providing she didn't have to manipulate patients she could resume nursing, particularly as a medication nurse, or working in allied areas which the lifting was not required because this would allow her to change—

Q. Dr. McKenzie, the lady has testified that she has done work I believe as a floor lady and as

a clerk in TG&Y store, which if I'm correct is a dime store—

A. Uh-huh.

Q. —or something of that—Do you think she'd be able to do clerical work in a dime store or department store or something of that nature or be a floor lady?

A. Well, I don't know what a floor lady is. I think that she might have difficulty. Some of the dime stores require when a girl is on the floor that they start standing until they sit down which would be—It is a pretty good chore for anybody and she would have difficulty doing that.

Q. If this floor lady is kind of a supervisory job where she could sit down sometimes and stand up part of the time, do you think she could do that?

A. I think so."

Dr. McKenzie re-examined appellant in October 1967, and as to this examination, he testified as follows:

"Q. I believe at this time you stated 15 to 20 per cent, not to exceed 20 per cent and this would include anticipated changes that may occur following this sort of procedure. Is that correct?

A. Yes, sir.

Q. Anticipating the things that might happen to her why it was still in that range of 15 to 20 percent?

A. (Nods affirmatively).

* * *

Q. I believe you mentioned that such things as diminished sensation or reflexes in the lower extremities and the sciatic notch tenderness would not, in and of themselves suggest disability, but I believe you used the term 'physical impairment.' Would you outline what impairment is involved? What you meant by impairment if you recall that portion of your testimony or if I'm stating it correctly?

A. Well, a physical impairment is—it's an impairment of her physical ability to perform the normal activities that the body was designed for.

Q. Such as what? Walking?

A. Walking, sitting, holding it together—I mean there are just numerous functions. Now then her impairment is that in her particular situation that she's got a fused lumbosacral joint which in turn takes away a little bit of the motion of the lumbar spine. The lumbosacral joint normally has less motion than the other lumbar joints and so the amount of lost motion insofar as that joint is concerned is decreased. The fact that her ankle jerk in itself is not perfect is not an impairment. It is a sign that there is some disturbance in the reflex arc but we will see some people who normally at times will not show a reflex at all and they've never had anything wrong with them. So, I mean this is not a valid criterion for impairment and she has shown on up until later in her course that she has some atrophy of her right calf compared to left and this is a good objective finding that there has been impairment of the nerve function to the leg. Now this has come back within an eighth of an inch which means that *so far as function is concerned there is very*

little functional impairment, in that sense." (Emphasis supplied.)

Dr. R. H. Whitehead, a specialist in psychiatry, testified as to neurotic overlay in appellant's condition upon his one examination. His testimony was not considered by the referee and it was stated in oral argument in answer to specific questions, that no claim was made for traumatic neurosis.

Several medical reports were accepted in evidence, but they were all progress reports and contribute nothing of a substantial nature to the evidence relative to permanent disability. Dr. Horace Murphy, an orthopedic surgeon, examined the appellant and although his x-ray examination failed to reveal the fusion between the fifth lumbar vertebra and the sacrum, his testimony on permanent partial disability is as follows:

"Q. After that examination, did you conclude that the woman had any permanent disability and, if so, how much?

A. In my report of May 23rd, I felt as though the patient had twenty per cent disability as related to the body as a whole.

Q. Dr. Murphy, is that rating addressed to the amount of permanent, physical impairment she has? Does it include anything other than physical impairment? This figure, this twenty per cent that you just mentioned.

A. The figure is the disability which is associated with the patient's having restriction of motion, having had a disc operation, presumably, at the L-5, S-1 level; and absent ankle jerk; limited bilateral straight leg raising. These are the physical impairments which I think dictate this extent of disability.

Q. Mrs. Ray, as you know, was at the time she was injured a practical nurse, and her duties in-

volved a certain amount of lifting and the supporting of elderly patients in the nursing home where she worked. In your opinion, on the occasion of your last examination of Mrs. Ray, could she return to those duties with the expectation that she could perform them successfully?

A. All I can say is that by the examination which I conducted of Mrs. Ray, with the stiffness in her back and her inability to bend, associated with the discomfort of straight leg raising, I don't think she could do this type of work which, from my own patients, whom I have examined, have told me that it is a difficult job."

On cross-examination, Dr. Murphy testified as follows:

"Q. Dr. Murphy, along that line, of course, as a practical nurse doing the type of work she would be required to do in lifting patients, would it be fair to say that that would be classified as heavy lifting?

A. I think it really is, yes.

Q. But, by the same token, there would be certain employment in her condition and with the disability rating which she had which she would be able to perform.

A. Yes. Let me see if I can clarify this. There are various functions involved. For example, a woman who is going to, perhaps, sit at a desk and do certain paper work which is necessary, who is going to bring water to the patients, or who is going to give them their baths—this type of thing, I think she could do. Now, conversely, if she is required to lift the patient to the

standing position and then sit him on the bedroom commode; if she is supposed to put him in his wheel chair; these are a strain on a good back and this she cannot do.

Q. Let me ask you this. Here is a statement that Dr. McKenzie made at the hearing with reference to what we are talking about, and this was his answer:

> 'I think she could perform activities, most any activities which requires use of her upper extremities, activities in which a person is allowed to change position frequently—' they've got 'infrequently' but I think they meant 'frequently'—'from a sitting to a standing position or some type of work that she can get up and move about, providing she didn't have to manipulate patients, she could resume nursing, particularly as a medications nurse or working in allied areas in which the lifting was not required, because this would allow her to change.'

A. I think we have said almost identically the same thing.

Q. Both of you have said the same thing.

A. Yes, both of us have said the same thing."

Dr. Murphy sums up as follows:

"Q. Now that you have all of the information that Mr. Rawlings has so comprehensively developed, are any of your opinions and conclusions as to the extent of this woman's permanent physical impairment in the activities in which she can now engage, that is those opinions and conclusions which you expressed earlier today, are they changed in any way or altered?

A. No. I have simply evaluated this patient on the basis of what I saw in her—the stiffness in the back, the change in the reflexes and sensation, and the effect of straight leg raising on her back—and I have stated before and outlined what I thought she could and couldn't do; and I still think her disability is as reported, twenty per cent of the body as a whole.

Q. But, medically, if she fell in 1963 and had been having back trouble since 1956, and if she fell again around June of '66, medically you couldn't divide it up and say how much of this twenty per cent is attributable to one thing—to the fall in '63, or the back trouble in '56—could you, Doctor?

A. I don't think Solomon could, so far as that is concerned. All I say is that when I saw her and examined her, what I saw was a woman twenty per cent disabled."

The appellee earnestly contends that a substantial portion of such residual disability as appellant does have, is a result of disease and accidental injuries suffered and sustained by the appellant prior and subsequent to the injury sustained in the course of her employment by the appellee. Dr. Murphy answers that argument with the observation that even Solomon could not differentiate one from the other.

The record indicates that the appellant was doing her work in a satisfactory manner while employed by the appellee prior to her injury. As to prior injury resulting in noncompensated disability, industry takes an employee as is. Regardless of other falls or injuries subsequent to surgery in this case, the defective disc was removed by surgery, the defective disc space was spanned by surgical fusion and the fusion was found to be solid upon final examination and discharge by the at-

tending physicians. One disc and one fusion were all that was involved in this case.

There is considerable controversy between the parties in this case as to whether the medical testimony pertaining to a 20% permanent partial disability relates to functional disability consisting only of physical limitation in the normal functional use of the body, or whether the doctors considered, and were also talking about, the statutory definition of disability pertaining to loss in ability to earn in the same or other employment the amount of wages the appellant was receiving at the time of her injury.

Be that as it may, the medical evidence was the only evidence the referee or the Commission had to go on in arriving at their conclusions in this case. We recognize, as we did in *Wilson & Co.* v. *Christman, supra,* that the Commission is in a better position than is the doctor, to evaluate a claimant's ability to earn in the same or other employment the same wages received at the time of injury. When the Commission once has before it firm medical evidence of physical impairment and functional limitations within the peculiar knowledge and specialty of the examining physician, the Commission then has the advantage of its own superior knowledge of industrial demands, limitations, and requirements, in weighing the medical evidence of functional limitations together with *any other evidence* of how the functional disability will affect the ability of the injured employee to obtain or hold a job and thereby arrive at a reasonably accurate conclusion as to the extent of permanent partial disability as related to the body as a whole. As an example, in the case at bar, Dr. McKenzie testified "well I don't know what a floor lady is."

The Commission's knowledge and experience, however, is not evidence, and the Commission can only apply its own knowledge and experience of industrial requirements as a jury might do in weighing all the competent evidence pertaining to handicaps suffered by each in-

dividual claimant as a result of compensable injury, in arriving at the amount or percentage of overall permanent disability that individual has suffered as a result of the injury.

There is substantial evidence in the record before us, that the appellant's physical condition was still improving when last examined by the doctors, and there is nothing in the record to contradict the referee's finding that the appellant was a good candidate for rehabilitation. Regardless of whether the 20% permanent partial disability established by the medical evidence pertained to loss of physical function, or pertained to the appellant's loss in wage earning capacity, there is no substantial evidence in the record that appellant's permanent partial disability exceeds the 20% estimate contained in the medical evidence. The evidence of permanent partial disability in this case, aside from medical evidence on limitation of motion, boils down to appellant's own testimony that she has to lie down a lot, and the doctors' testimony that she cannot lift heavy objects in general and bed ridden or elderly rest home or hospital patients in particular.

While it is true that over $7,000.00 was spent in medical treatments for the appellant while she was receiving less than $2,000.00 in compensation payments, the amount and duration of compensation payments are limited by statute and medical expenses are not. Unless we could say as a matter of law, that in any industrial injury case a permanent loss in ability to earn must always follow, and exceed at least in some degree, the permanent loss in the functional use of the body as a whole, we must hold under the evidence in the case before us, that the judgment of the trial court must be affirmed. We are unable to announce such rule of law, so the judgment of the circuit court is affirmed.

Affirmed.

NOEL COCKRUM v. CHARLES PATTILLO

5-4682 439 S.W. 2d 632

Opinion Delivered April 7, 1969
[Rehearing denied May 12, 1969.]

[redacted]

Spitzberg, Mitchell & Hays for appellant.

Virgil Moncrief and *John Harris Jones* for appellee.

CONLEY BYRD, Justice. This action was commenced in the trial court by appellant Noel Cockrum to recover the balance due on a contract for the sale of used cars, furniture, fixtures, office equipment, parts, and signs, comprising Cockrum Motor Company, together with $235 rent per month accruing on a building. Appellee Charles Pattillo answered admitting the contract. He counterclaimed alleging that Cockrum fraudulently misrepresented the past income of the business and the value of the used cars, equipment, etc., resulting in overpay-

ment and losses for which Pattillo was entitled to recover from Cockrum. The trial court found for Pattillo and awarded him judgment against Cockrum for $20,-603.24. For reversal Cockrum relies upon the following four points:

1. The court erred in finding that the transaction was tainted with fraud and in failing to award the appellant a judgment on the contract.

2. The court erred in failing to hold that the appellee had waived the alleged fraud and ratified the contract.

3. The court erred in cancelling the rental portion of the contract between appellant and appellee by reason of fraud.

4. The court erred in awarding damages to the appellee upon the evidence introduced by the appellee.

The facts shown in the record and the issues raised here are set forth in an opinion filed by the trial court. The trial court's opinion is as follows:

"The pleadings consist of a complaint by Noel Cockrum, hereafter referred to as plaintiff, with an attached contract and supplemental sales contract signed by plaintiff and defendant, Charles Pattillo, hereafter referred to as defendant, an amendment to the contract signed by plaintiff and defendant, the date of which is not shown, a receipt dated May 6th for $2,661.50 paid by defendant to plaintiff and a receipt dated May 18, 1964 for $2,317.93 paid by defendant; and answer and cross-complaint was filed by defendant in due time. A motion to strike answer and cross-complaint was filed by the plaintiff to which defendant filed a response. Plaintiff filed his answer to cross-complaint in which plaintiff admitted he agreed to charge defendant one half of the cost of office fixtures and equipment, denied the

other allegations, pleaded that there was an account stated between the parties and that the defendant was barred by laches from alleging fraud. The defendant filed an amendment to the answer and cross-complaint and likewise amendment was filed to the complaint reducing the amount due under the contract from $12,713.64 to $10,000. That a motion to require production of records was necessary to be heard and plaintiff required to submit to the defendant the said record. A second amendment to answer and cross-complaint was filed by the defendant. Likewise amendment to the motion to require production of certain documents was filed by defendant. The plaintiff propounded 27 interrogatories to defendant which were duly answered. John Harris Jones, one of the attorneys for the defendant filed an affidavit for the production of certain records prior to trial which had been ordered by the court at a pretrial hearing.

"The contract in question was drawn personally by the defendant. Exhibits upon which the contract was based, i.e., inventory of furniture and fixtures, shop equipment and automobiles were prepared by the plaintiff or at his direction. Contract as signed called for the payment of $30,000 at the time of the execution but was amended apparently on the same day by the parties and $20,000 was paid by defendant to plaintiff and an agreement to pay the balance as set forth in the amendment to the contract. Defendant was obligated to pay for second-hand cars and to rent from the plaintiff the building and grounds for the sum of $235 monthly for a period of five years with certain options in the contract. Defendant paid $2,661.50 on May 6, 1964 and May 18, 1964, $2,317.93.

"PARTIES

"The parties later agreed that the inventory of used cars supplied by the plaintiff to the defendant were overpriced and jointly agreed to a reduction of $4,928.78. The parties were negotiating for a settlement of other

features of the contract which the defendant claimed was improper when negotiations were broken off and this action was filed. Plaintiff Noel Cockrum sued for the amount due under the contract as amended and for the rent on the building that had accrued.

"Defendant in his answer and cross-complaint alleged fraud in the execution of the contract and concealment of the facts and prayed for a judgment in damages of $78,577.57, for the cancellation of the lease agreement. The claimed damages consisted of the following items, to-wit: The repayment of $8,877.57 alleged overpayment and for damages $39,800 actual loss and $30,000 loss of profits.

"The proof was intricate and voluminous. By stipulation in open court at the conclusion of the testimony a transcript of the evidence was to be made by the court reporter and a copy furnished to each side and the expense thereof to be charged equally, provided in the event of an appeal by either side the amount so paid the reporter would be credited upon the appellant's cost.

"Excellent briefs have been filed by both sides.

"There is no dispute about the execution of the sale contract or the adjustment that was agreed upon by the parties and the amount due thereunder if there be no fraud.

"Defendant claims that he was fraudulently induced to sign the contract through misrepresentation of some facts and concealment of other facts.

"Plaintiff denies fraud. 342 pages were required to record the testimony taken at the trial. During the trial when it developed that the many secondhand cars which were sold, resold, repossessed, 'traded down' etc., produced a volume of detail that was more than should be heard by a court with a full docket without benefit of a master, the court offered, if agreeable to both counsel

to appoint a master and let him pursue all of the involved and intricate matters and make a record of his investigations, submit the same to the court along with his recommendation. This offer was refused and the court did the best possible under the circumstances to get at the facts involved in this intricate transaction in the time available.

"It appears that plaintiff was a second hand car dealer for a few years and then secured the franchise for the sale of Ramblers and other cars made by the American Motor Company. The Rambler operation was not successful for the first couple of years. Then for two years the income returns of the corporation showed a substantial profit.

"The plaintiff owns extensive farming interests from which at times he received excellent returns. The income tax records of the farm as well as the motor company are in this record. They show that the first years when the Cockrum Motor Company, hereafter referred to as the motor company, lost money, the farm income was quite substantial and in the two years that the motor company paid tax upon its profits the farm income was markedly reduced. The tax return for the final year of the motor company which was filed after the sale was consummated showed a loss of $26,519.50. The plaintiff's counsel explained in the brief that this loss was a result of inflation of the value of the assets at the time the corporation was formed and could not be considered in determining whether or not the corporation was operating profitably.

"The plaintiff decided to dispose of the motor business and negotiated with several people, one of whom testified—Mr. Ray Crosby of Stuttgart.

"Defendant testified that the plaintiff told him the business was making from $10,000 to $15,000 per year. The plaintiff admitted on the stand that he had told de-

fendant that the business would make a thousand dollars per month.

"The defendant testified that the plaintiff knew the defendant was ignorant of the automobile business and told the defendant that the plaintiff had a sufficiently well trained organization to permit the business to operate itself with but little supervision. Plaintiff testified that he never told anyone that an unsupervised business would run itself.

"This and other testimony about negotiations and so forth prior to the signing of the contract by both parties was admitted under the rule laid down in *Arkansas Amusement Corporation* v. *Kempner,* 182 Ark. 897, 33 S.W. 2d 42, (1930), where it was held,

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

"This rule was discussed and approved in the recent case of *Jefferson Square* v. *Hart Shoes, Inc.,* 239 Ark. 129, 388 S.W. 2d 902 (1965), where it was said,

> " 'In reaching the result * * * that where there is any doubt or ambiguity about the meaning of a contract it will be resolved against the party who prepared it—and it is conceded that appellant prepared the lease contract here under consideration. However the rule just mentioned is not to be applied until and unless a "doubt" exists after the court has given consideration to the parol evidence referred to in the Kempner case, supra.'

"CAN DEFENDANT RECOVER DAMAGES?

"Where fraud or deceit exists in a transaction the one who is deceived must act promptly to have the contract set aside or he will have waived his right. The defendant did not act promptly in this transaction after he discovered the fraud so the original contract cannot at this time be revoked.

"Does that mean that the defendant is not entitled to damages suffered by the fraud? The answer is found in *McCormick* v. *Daggett,* 162 Ark. 16, 257 S.W. 358 (1924), quoting from headnote,

> " 'It does not follow that because purchaser of land loeses his right of rescission for fraud by failure to diligently disaffirm, that he has no right or recoupment for damages for deceit.'

"The late case of *Kotz* v. *Rush,* 218 Ark. 692, 238 S.W. 2d 634 (1951), contains similar facts.

"In that case the buyer bought a business on the White River in Carroll County located on U. S. Highway 62 which had cabins and a store and various paraphernalia used in operating a fishing camp. The seller represented that the business was making $6500 per year. The plaintiff attempted to foreclose his mortgage and the buyer, defendant, cross-complained for damages for deceit and fraud. The defendant had not sought a rescission of the contract.

"The Chancellor found for the defendant in the sum of $8,000 and directed it be credited on the mortgage. In affirming the trial court the opinion states:

> " 'The authorities generally seem to recognize the rule that false representations by the seller as to present or past income of the property sold or conveyed will, if relied upon by the purchaser, constitute actionable fraud. The following statement

is found in 23 Am. Jur., Fraud and Deceit, § 68: "A false representation by an owner of land, or his agent, seeking to dispose of the property commercially, as to the present or past income, profits, or produce thereof or as to the amount of rent received therefor is regarded as a statement of fact upon which fraud may be predicated if it is false, since these are matters within the representor's own knowledge. The same is true of an assertion that the profits of a business are or have been a certain sum annually, or a false statement as to what a business now earns." See also, Williston on Contracts, § 1492; 55 Am. Jur., Vendor and Purchaser, § 84; *Hecht* v. *Metzler,* 14 Utah 408, 48 P. 37; *Whitney* v. *Bissell,* 75 Ark. 28, 146 P. 141, L.R.A. 1915D, 257; *Cross* v. *Bouch,* 175 Cal. 253, 165 P. 702; *Hogan* v. *McCombs Bros.,* 190 Iowa 650, 180 N.W. 770; *Vouros* v. *Pierce,* 226 Mass. 175, 115 N.E. 297.'

"The opinion further states:

" 'The remedies of a purchaser in cases of this kind are set forth in *Danielson et al* v. *Skidmore, et al,* 125 Ark. 572, 189 S.W. 57, 58 as follows: "He may rescind the contract, and by returning or offering to return the property purchased within a reasonable time entitle himself to recover whatever he had paid upon the contract. Again, he may elect to retain the property and sue for the damages he has sustained by reason of the false and fraudulent representations, and in this event the measure of his damages would be the difference between the real value of the property in its true condition and the price at which he purchased it. Lastly, to avoid circuity of action and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped from the price he agree to pay. *Matlock* v. *Reppy,* 47 Ark. 148, 14 SS 546; *Fort*

Smith Lumber Co. v. *Baker,* 123 Ark. 275, 185 S.W. 277.'

"'Appellee chose the last remedy mentioned above and the only issue is whether the chancellor's findings are against the preponderance of the evidence.''

"DID PLAINTIFF COCKRUM FRAUDULENTLY INDUCE DEFENDANT PATTILLO TO SIGN THE CONTRACT?

"Each of the parties were sui generis. Each of them is an intelligent and successful business man in his own field. The defendant operated two insurance agencies, one in DeWitt and one in Stuttgart successfully. The plaintiff was a second hand car dealer before he secured the automobile agency. And in addition he had a good sized farm. Neither had any legal assistance so far as the record shows. These parties had been friends for more than ten years prior to the execution of the contract sued upon. Defendant handled most of the insurance business of the plaintiff, he claims 80% and plaintiff did not deny it. They drank coffee together often, went to football games together and visited in their respective homes at various times. DeWitt is a small city where most of the knowledgeable people know most of the details about the people with whom they associate. Plaintiff should have known that defendant was uninformed about the automobile business, that defendant was in the business of writing hazard insurance. After operating the used car business for several years plaintiff secured the Rambler franchise. He organized Cockrum Motors, Inc. with assets capitalized at $50,000.

"The Rambler operation was not successful for its first two years. The explanation for this, offered by the plaintiff is that all automobile companies have good and bad years. His farming operation was profitable. The two years immediately before the sale of the busi-

ness to the defendant, Cockrum Motors Inc., hereafter referred to as the motor company, paid substantial income taxes. The returns showed it was making a substantial profit.

"It is a coincidence that when the motor company made the profit, farm income fell off remarkably. The plaintiff was in an advantageous position of being able if he wished, to transfer funds from farm to company and back. He admitted he had followed this practice in his testimony. The results of this practice would be that if he chose to pay the income tax due, through the motor company it would mean but little change in his overall tax liability for the farm income would be reduced.

"If a man wished to dispose of a business, it would be advisable for him to show that it was earning a profit. The most convincing way would be to pay income taxes to the government.

"It is in the record that the plaintiff wished to sell the business; he approached several persons, one of whom, Mr. Ray Crosby of Stuttgart, testified that plaintiff tried to sell it to him.

"The defendant testified that the plaintiff told him that the business was making from $10,000 to $15,000 per year; that the organization he had needed little supervision to run the business. Plaintiff admitted telling the defendant that the business would need but little supervision. If there was no other testimony on this point then the court must find for the plaintiff because fraud is never presumed and of course the one alleging it has the burden of proving it to the court's satisfaction. In the case of *Rose* v. *Moore,* 196 Ark. 527, 118 S.W. 2d 870 (1938), the court said,

> "Fraud is never presumed, and the burden is upon the party alleging fraud, to prove it by pre-

ponderance of evidence.' See also, the following cases to the same effect, to-wit: *Green* v. *Bush,* 203 Ark. 883, 159 S.W. 2d 458; *Biddle* v. *Biddle,* 206 Ark. 623, 177 S.W. 2d 32; *Ellis* v. *Ellis,* 220 Ark. 639, 249 S.W. 2d 302, and many other cases.

"To support his allegations the defendant called Mr. Ray Crosby of Stuttgart, a heavy machinery contractor, who testified that the plaintiff had tried to sell the business to him; that plaintiff had stated the business was making from $10,000 to $15,000 annually; that the manager or bookkeeper and crew that plaintiff had were capable of operating the business. Crosby was interested in acquiring a business because he had two boys for whom he wished to provide a business and he thought this would be ideal for that. He even discussed with plaintiff, the idea of fixing a place for him to rest because Crosby wanted him to look after the business if he bought it, while his boys would be learning how to operate it.

"This to some degree substantiated the defendant's testimony on this line. The strange see-saw effect between the farm income and the income of the motor company is another circumstance, when one was down the other was up and vice versa. Plaintiff was asked on cross-examination to explain this. He did not refer to poor crop years, to storm damage, to insect loss, to adverse weather condition, such as being too dry or too wet, or raining at the wrong time which ordinarily farmers use to explain their failure to make good crops. The only explanation that plaintiff gave was lack of management of the farm.

"That plaintiff knew something was wrong is shown by the fact that when challenged by defendant about the list of cars given to him as the basis of the contract price and that it was not the list of cars that plaintiff and his manager had used and priced out plaintiff agreed to a reduction of almost $5,000 and was very careful to include in the statement signed by both of them that this

was to rectify 'an honest mistake made in computing the value of the used cars sold * * *'. It is most praiseworthy to correct mistakes, honest or otherwise, but it is evident that the plaintiff was anxious to have the record show that it was 'an honest mistake.' It is seldom necessary for an honest man to proclaim his honesty.

"THE DEFENDANT

"It was the plaintiff's manager who had been retained by the defendant who called defendant's attention to the fact that the list of cars had been overpriced and was not the list that manager and plaintiff had gotten up according to defendant's testimony. There were other items which defendant claimed were overpriced according to the agreement that he had with plaintiff and about which the plaintiff had said that he would do 'the right thing.' One of these overpriced items was the following example. Proof showed that the building and equipment were acquired by plaintiff for $8,000. Two hydraulic hoists and a wheel aligning machine which were acquired by plaintiff with purchase of the building were attached to the building and were retained by plaintiff. Plaintiff set original cost of building in his depreciation schedule in the U. S. Income Tax Return at $6,359.46 with addition of $2,900.00 at total of $9,159.46.

"The machine shop equipment original cost was shown as being $3,823.77.

"On lists from which contract was drawn the cost of the equipment is shown so much higher that the agreed 50% was much greater than the original reported to the Internal Revenue Service. Negotiations for an adjustment of these items were carried on for some time but broken off before they were concluded.

"It is probable that no one circumstance by itself would be sufficient to sustain the allegation of fraud. But all of these circumstances taken together with the admitted fact that plaintiff wanted to sell and was try-

ing to sell the business to others and to at least one other person had made some or similar allegation about the amount the business was earning and the operating crew's ability to run the business without much supervision, coupled with the fact that the parties had been friends for more than ten years prior to the sale and the further fact that plaintiff knew that the defendant had no knowledge of the automobile business and the further fact that the plaintiff had lost money in the business for two consecutive years and only did show a profit in the business when his farm income went down materially leads the court to believe that plaintiff deliberately overreached in his dealing with his friend, the defendant.

> " 'While fraud need not be shown by direct or positive evidence but may be proven by circumstances, it must reasonably follow from the circumstances proved.' *Biddle* v. *Biddle, supra.*
>
> " 'Fraud may be proved by circumstantial evidence, if it affords clear inference of fraud and more than a mere suspicion or conjecture.' *Renn* v. *Renn,* 207 Ark. 147, 179 S.W. 2d 657.

"The court finds that the contract and amendment attached to it are tainted with fraud.

"The contract was executed in December of 1963 and two payments totaling the sum of $4,979.43 were made by defendant on or before May 18, 1964. If those payments were made by defendant after he knew or should have known that his contract was fraudulent his action in making the payment would have validated the contract.

"On the stand defendant said when asked about the fact that he had signed a statement rectifying the 'honest mistake' about the valuation of cars and the payments of these two amounts, 'I still thought that Cockrum was honest and would do the right thing.' It was the manager, defendant claimed who called his attention

to the overpricing of the cars. It was not discovered by defendant. (It seems that the defendant was still ignorant about the automobile business.) No evidence was offered to contradict this by the plaintiff, that the defendant still considered plaintiff honest with him. The court finds that the payment by defendant of the two payments in May of '64 and the signing of the writing reducing the amount due on the used cars did not waive or ratify the fraudulent character of the original contract.

"The defendant in his cross complaint asked for $8,777.57 for alleged overpayment and $39,900 for actual damages or a total of $48,577.57. In addition the defendant asked for $30,000 for loss of profit.

"The court disallows claim for any loss of profit and finds that the defendant has suffered damages in the sum of $25,000. Said sum shall bear interest at the rate of 6% per annum from this date until paid.

"RENT

"The contract provided the defendant should rent the building and premises from the plaintiff for $235 per month for a minimum of five years with certain options of renewal and purchase granted to the defendant. There is no evidence that the defendant has surrendered the premises to the plaintiff. Defendant claims to have stopped paying rent in August of '66 and plaintiff says defendant stopped paying rent in June of the same year. No evidence is offered that the rent is too high or out of line with rent being charged for like buildings and premises similarly located. The court finds the defendant to be liable for the monthly rental at said rate from July 3, 1966 until this date on a quantum meruit basis. That a judgment for said rent shall be offset against defendant's judgment.

"The contract being tainted with fraud the obligation for further rentals from the defendant to the plaintiff are hereby cancelled and set aside."

POINT 1. In arguing that the trial court erred in finding the transaction was tainted with fraud, Cockrum says that Pattillo simply bought a business that he was indisposed to oversee, made very little attempt to manage and after losing money attempted three years later to charge Cockrum with the folly of his own mismanagement and then only after Cockrum had sued for the balance due on the contract. We find appellant's assertion to be without merit.

In addition to the testimony recited in the trial court's opinion there are many instances in which Cockrum's testimony, in itself, supports the trial court's finding of fraud. For instance, it was shown that on Oct. 6, 1961, he made a $4,000 deposit from himself to the Motor Company. His explanation was that the $4,000 was for a combine traded for a car valued at $1500, an International truck valued at $1000, a Chevrolet truck valued at $850 and one International truck valued at $650, all of which equipment went to the farm. However, notwithstanding Cockrum's assertion that the equipment went to the farm, he was unable to explain why no depreciation for the equipment was shown on his income tax returns.

At the trial, Cockrum testified that the May adjustment, resulting in the $5,000 deduction from the original contract price, occurred when he and Wayne Fisher adjusted the inventory of used automobiles down to the black book average wholesale price. According to Cockrum the valuation after this adjustment would have been $20,885. However Felix Stephenson, a Ford dealer, applying black book values to the same inventory, arrived at a value of $10,465, less the cost of repairs to the vehicles involved. Thus in addition to the facts related in the trial court's opinion, there is much in the record which adversely reflects on the credibility of Cockrum's testimony. Without elaborating further, we are convinced that the trial court correctly found that Cockrum induced Pattillo to enter into the contract by falsely rep-

resenting that the motor company had been making a profit of $10,000 to $15,000 per year.

POINT 2. It is true that on May 3, 1964, and again on May 18, 1964, Pattillo made two installment payments totalling about $5,000, and at the same time an adjustment of approximately $5,000 was made in the total contract price by Cockrum with Pattillo's consent. It is also true that Pattillo for a number of months made the $235 monthly rental payments due under the contract. Based upon these payments Cockrum argued that Pattillo has waived the fraud.

We cannot agree with Cockrum's contention. The authorities make clear that before such payments will constitute a waiver it is essential that the victim have full knowledge of the fraud practiced upon him, that he intend to affirm the contract, and abandon his right to recover damages for the loss resulting from the fraud, *Southark* v. *Pesses,* 221 Ark. 612, 254 S.W. 2d 954 (1953). Pattillo's testimony was that he knew nothing about Cockrum's fraud when he made the May 3rd and May 18th, 1964, payments. In fact he said he did not know what was really happening until two years later. Further, Mrs. Wilson testified that she worked for Pattillo Motor Co. from Sept. 1964 through Feb. 1967 and was present during the discussions between Mr. Pattillo and Mr. Cockrum about adjustments. Therefore under the circumstances the record does not support Cockrum's contention that Pattillo made the payments with full knowledge of the misrepresentations. See *Parker* v. *Johnston,* 244 Ark. 355, 426 S.W. 2d 155 (1968).

POINTS 3 & 4. On the damage issues, Cockrum alleges that Arkansas is committed to the so-called "out of pocket" measure of damages in fraud cases, that there is no testimony as to the true value of the properties Pattillo acquired from Cockrum, and that the trial court erred in cancelling the balance of the rental contract.

We do not agree with Cockrum that this court is committed to the "out of pocket" measure of damages in fraud cases. In *Union Motors Inc.* v. *Phillips,* 241 Ark. 857, 410 S.W. 2d 747 (1967), and in *Greiner Motor Co.* v. *Sumpter,* 244 Ark. 736, 427 S.W. 2d 8 (1968), we recognize the so-called "benefit of the bargain" rule of damages in fraud cases. In the early case of *Morton* v. *Scull,* 23 Ark. 289 (1861), we specifically held that one damaged because of fraudulent representations about the qualities of a slave was entitled to recover not only the difference between the value of the slave as he was addicted to running away, and as he would have been, free from that vice, at the time and place where he was bought, but also to the damages caused by the Negro's habit of running away, such as expenses incurred by his capture.

Thudium v. *Dickson,* 218 Ark. 1, 235 S.W. 2d 53 (1950), involved a fraudulent misrepresentation relative to the water supply to irrigate a rice crop. We there permitted the tenant to recover the difference between what the land produced and what the land would have produced if water had been available, less the cost of production and marketing,—i.e. the same damages that would have been recovered upon a breach of contract, citing and relying upon *Gibson* v. *Lee Wilson & Co.,* 211 Ark. 300, 200 S.W. 2d 497 (1947).

In *Miles* v. *American Railway Express Co.,* 150 Ark. 114, 233 S.W. 930 (1921), Miles shipped a dog's head packed in ice from Bald Knob to Little Rock for examination to determine whether the dog had rabies. Miles alleged that he told the railroad agent the dog had bitten his daughter and the specific purpose for which the head was being shipped to Little Rock. We held the Express Company was liable for the expenses incurred in giving Miles' daughter the Pasteur treatment for rabies because the company might have reasonably anticipated that Miles would be put to that expense if the package

containing the dog's head should not be promptly delivered to its destination.

In 37 Am. Jur. 2d, *Fraud and Deceit* § 362, p. 490, it is pointed out that in fraud cases, in addition to general damages, a purchaser may be entitled to recover special or consequential damages which are the natural or proximate result of the seller's fraud. We believe that this rule is supported by our cases cited above. The purchaser in the Morton case (above, certainly would not have been made whole by recovering the difference in the value between the slave as he was and as he would have been made whole by recovering the difference in i.e., the expense incurred in the capture of the runaway slave may have exceeded his value as was. For cases from other jurisdictions applying the same rules see *McInnis & Co.* v. *Western Tractor & Equipment Co.,* 67 Wash. 2d 965, 410 P. 2d 908 (1966). When we apply this rule to the facts here under consideration we find that there is ample evidence to sustain the damage award and the cancellation of the lease contract for the balance of the term.

From the testimony of Noel Bates and Felix Stephenson, together with the exibited "black book", it is obvious that the wholesale value of the used cars was not correctly represented to Mr. Pattillo at the time of their transaction or at the time of the adjustment some six months later. Furthermore, from Mr. Cockrum's own records and admissions in his pleadings about the method of fixing the purchase price of shop equipment and office equipment, it is obvious that the price with which Mr. Pattillo was originally charged is not based on the cost price to Mr. Cockrum. When all of these adjustments are taken into consideration a preponderance of the evidence shows that the total value of the items purchased by Mr. Pattillo could not have exceeded $16,222.43. Since Mr. Pattillo had already paid Mr. Cockrum $25,000 it follows that he had overpaid, because of the false representations, the sum of $8,777.57.

Since the contract between Mr. Pattillo and Mr. Cockrum obviously contemplated that Mr. Pattillo would operate the automobile business in Mr. Cockrum's building for which Cockrum would collect a monthly rental, it obviously follows that Mr. Pattillo would have to supply working capital for day to day operation, including payroll. In this connection, Mr. Pattillo, his accountant and secretary testified that he had plowed in excess of $30,000 into the business for operating capital which he had lost at the time of trial. The only criterion for allowance of such damages is that they not be speculative. Here again we find that Cockrum's own records remove the speculative nature of the losses sustained by Pattillo, particularly within the limits found by the Chancellor. Cockrum's records show that before he began pumping farm income into the motor company, the motor company was losing about $7,500 each year. When we take from the $25,000 damages allowed by the Chancellor the $8,777.57 overpayment, we find that the difference does not exceed the $7500 annual loss sustained by Cockrum when multiplied by the two and half years Patillo was in business. On this basis we find that the damage allowance was proper, as the natural and proximate result of Mr. Cockrum's fraud.

What we have heretofore said about operating losses holds true with respect to the balance of the rental contract. The rental contract was tied to the purchase and operation of the automobile business. Since any liability of Pattillo for subsequent rental under the rent contract would be consequential damage proximately resulting from Cockrum's fraud, it follows that the two items offset each other and that trial court was right in cancelling the balance of the rent contract.

Affirmed.

Brown and Fogleman, JJ., dissent.

John A. Fogleman, Justice. I concur in all of the majority opinion except that part having to do with the

rental contract for the building and premises. The chancellor found that there was no evidence that appellee had surrendered the premises to appellant, even though he stopped paying rent sometime in 1966. As stated by the chancellor, no evidence was offered that the rent was too high or out of line with rent being charged for like buildings and premises similarly located. The only reason for cancellation of this rental contract was the statement of the trial judge that it was tainted with fraud.

The trial court and the majority have given appellee his full measure of damages for fraud. In addition, they are allowing him to have a partial rescission of the contract. That the rental contract was part of the whole contract is a matter not open to question. Thus, he has been fully compensated in damages on a recoupment and thereafter given a part of the remedy of cancellation as if he had sought rescission. Appellee had the choice of remedies.[1] He chose recoupment which entitled him only to recover damages. The rule is well stated in *Danielson* v. *Skidmore,* 125 Ark. 572, 189 S.W. 57 and quoted in *Held* v. *Mansur,* 181 Ark. 876, 28 S.W. 2d 704, where the court said:

> "A person who has been induced to enter into a contract for the purchase of property by the false representations of the vendor concerning its quantity or quality may, at his election, pursue one of three remedies. First, he may cancel the contract and, by returning or offering to return the property purchased within a reasonable time, entitle himself to recover whatever he had paid upon the contract. In the second place, he may elect to retain the property and sue for the damages he has sustained by

[1]The general rule in regard to the effect of this election of remedies in a case like this is stated in **Lacey v. Edmunds Motor Company,** 269 Ala. 398, 113 So. 2d 507 (1959). There it was said the buyer must elect between his remedies and may not combine them.

reason of the false representations of the vendor as to the land; and in this event the measure of the damages would be the difference between the real value of the property in its true condition and the price at which he purchased it. In the third place, to avoid a circuity of actions and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped against the sum he had paid for the land."

The rental for which appellee would subsequently become liable could not in any sense of the word be consequential damages for fraudulent inducement. In the absence of evidence to the contrary, it must be assumed that the contract was for the rental value of the property. Thus, there is nothing against which liability for rent can be offset, since the appellee has been awarded the full measure of his damages under the remedy he elected.

I would modify the decree by disallowing the cancellation of the rental contract but would affirm it in all other respects.

BROWN, J., joins in this dissent.

HUBERT A. GILMORE, ET AL v. LAWRENCE COUNTY, ARK.

5-4718 439 S.W. 2d 643

Opinion Delivered April 7, 1969

[Rehearing denied May 12, 1969.]

Hodges, Hodges & Hodges for appellants.

D. Leonard Lingo and *Harry L. Ponder* for appellee.

CONLEY BYRD, Justice. Appellants Hubert A. Gilmore, et al, taxpayers of Lawrence County, appeal from the tax adjustments of the Lawrence County Board of equalization on rural farm lands for the year of 1966.

For reversal of the circuit court decree, appellants rely upon the following points:

1. The action taken by the Lawrence County Board of Equalization was the assessment of property instead of the equalization of property, and the board was without statutory authority to assess and its actions were therefore void.

2. The Board of Equalization of Lawrence County was without statutory authority for the action taken by it from January, 1966, to July 31st, 1966.

3. The County Clerk of Lawrence County failed to serve as secretary for the Board of Equalization of Lawrence County and did not keep a complete and accurate journal of its proceedings.

4. The Lawrence County Board of Equalization was not constituted according to law.

5. The Board of Equalization failed to follow the statutory procedure in notifying rural real property owners in Lawrence County of the raise of valuation of their property.

The record shows that prior to Aug. 1, 1965, the assessment coordination department, pursuant to Ark. Stat. Ann. § 84-477 (Repl. 1960), notified the proper county officials of Lawrence County that the county's ratio of total assessed value to market value was below the permissible limits—*i.e.,* the percentage valuation of all the property was 18.05 percent of value while the rural property was assessed at 13.27 percent of value. Being fearful the schools in the county would lose their state turnback funds, the equalization board immediately looked into the matter. After excluding a flat percentage raise of rural values and the calling in of professional appraisers, the board elected to set up a uniform standard of valuations based on soil types, which,

when applied to each tract of farm land, would result in each tract being assessed at 20% of its value. Since the tract by tract valuation according to soil types could not physically be done during the regular 1965 session it was decided to have a planning session in the early part of 1966.

Pursuant to plan, the equalization board met in late January or early February 1966, and began the tract by tract review of all assessed rural farm lands according to soil type. They fixed monetary values on various types of soil and arrived at the valuations which should be placed on each call by the total number of acres of each soil type. The number of acres of each type were generally arrived at by use of Soil Conservation maps showing soil types and ASC aerial photographs, together with the board's knowledge of the different areas in the county. Because of the volume of work involved, the board hired Mrs. Mildred Randolph to do the clerical work and caused her to prepare before Aug. 1, 1966, the notices required by Ark. Stat. Ann. § 84-707, (Repl. 1960). However the notices were not mailed until August 1, 1966, and at intervals thereafter.

The county assessor, independently of the board of equalization, completed an assessment book of all Lawrence County property upon essentially the same valuation used in 1965. This book was delivered in accordance with law to the board at its regular session commencing Aug. 1, 1966.

Point 1. To show that the action of the board was in reality assessment instead of equalization, appellants rely upon *Lyman* v. *Howe,* 64 Ark. 436, 42 S.W. 830 (1897). There the assessor's roll showed that there was no assessment of the lot mentioned. We held that the action of the equalization board in placing a valuation on the property was void since it amounted to an assessment. In doing so, however, we pointed out that once the assessor has placed a valuation thereon then the

board of equalization may equalize this valuation with the average valuation of other land, by raising or reducing same as the case may require, so as to fix its true value.

The record here shows that the August 1, 1965, official ratio study of assessed values for Lawrence County, prepared by the Assessment Coordination Department, showed all property was assessed at 18.05% market value, with various types of property being assessed as follows:

Residential	20.00%
Rural	13.27%
Commercial	18.62%
Industrial	20.38%
Personal Property	20.92%
Utility Property	20.00%

Thus it is seen that the rural lands were not carrying their proportionate share of the assessments according to value and that the burden was cast on someone to bring them into line with other properties in the county as well as in the State at large. That this duty was cast upon the equalization board was recognized in *Lyman* v. *Howe, supra.* See also *Pulaski County Board of Equalization cases,* 49 Ark. 518, 6 S.W. 1 (1887), where we held that county boards of equalization could proceed without complaint first being made against the assessor's returns and could act on evidence or on their own knowledge for the purpose of equalizing assessments. Consequently we find appellants' first point to be without merit.

Point 2. In arguing that there was no statutory authority for the action taken by the board between

January 1966 and July 31, 1966, appellants point out that the decision to send notice of increases in valuation pursuant to Ark. Stat. Ann. § 84-707 was made before the assessor's report of the 1966 assessments was filed with the board. We agree with appellants that the record does show that the board had reached a decision during its planning stage, and as far back as the regular 1965 session, to raise the valuations of rural property in Lawrence County prior to August 1, 1966. However we must point out that it is not decision making by an equalization board before August 1st that is prohibited, but the raising or lowering of valuations. There is no showing in the record that any valuations were increased until the time the notices thereof were mailed out by the board. We find that the legislature recognized that planning sessions at which tentative decisions could be made are a necessity. See Ark. Stat. Ann. § 84-721 (Repl. 1960), which specifically provides that, "Said board shall be vested and charged with all the powers and duties with which such board is vested and charged when meeting in regular session, . . ."

Point 3. We find nothing in the record to sustain appellants' contention that the county clerk of Lawrence County failed to serve as secretary for the board and did not keep a complete and accurate journal of each proceedings during its regular session. We know that Ark. Stat. Ann. § 84-703 (Repl. 1960), requiring the county clerk to serve as secretary of the equalization board, was passed in 1929, before the authorization for planning sessions was passed in 1955 (Ark. Stat. Ann. § 84-721). Under this circumstance we do not interpret Ark. Stat. Ann. § 84-703 as requiring the attendance of the county clerk at all special planning sessions of the equalization board. Otherwise it might become impossible for the county clerk to perform the other duties assigned to his office by law.

Point 4. The record shows that Lawrence County was divided into two districts until August 30, 1963, at which time it was consolidated. After that date the

county equalization board should have been composed of only three members instead of five. Ark. Stat. Ann. § 84-702 (Repl. 1960). However it was stipulated that there had been no action by the county judge, school officials or city officials in Lawrence County to select a new board of equalization after consolidation of the county. Under these circumstances it would appear that the existing five members remained on the board as hold-over members until their successors were duly selected or appointed and qualified, Ark. Stat. Ann. § 84-702. At any rate they were at least *de facto* officers. See *Pennington* v. *Oliver*, 245 Ark. 251, 431 S.W. 2d 843 (1968).

Point 5. Appellants' last attack on the equalization board is that it failed to literally follow the notice procedure required by Ark. Stat. Ann. § 84-707(2) & (3). Here the record shows that the board in sending out its notices to the landowners only showed the valuation fixed by the board—*i.e.*, the notices did not state the valuation returned by the assessor for the year 1966. While we think the better practice would have been for the notices to have complied with the statutes, under the circumstances we find that appellants are not in a position to allege error because all of them appeared in ample time before the board. Therefore even if it should be held that the notice was defective, any error in connection therewith is harmless as to the appellants.

Affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice. I disagree with the result reached by the majority because I do not see how the action of the board of equalization in this case can be taken to be an equalization of assessments made by the county assessor for 1966.

Our system of assessment of property for taxation requires that the primary valuation be made by the as-

sessor. *Pulaski County Equalization Board Cases,* 49 Ark. 518, 6 S.W. 1; *Lyman* v. *Howe,* 64 Ark. 436, 42 S.W. 830. Then, and only then, is the board of equalization authorized to raise or lower valuations placed on specific properties in order to equalize the valuations. See *Pulaski County Equalization Board Cases,* supra; *Lyman* v. *Howe,* supra.

That is not what took place here. The board of equalization actually made its own valuation of rural real estate without regard to the valuations made by the assessor on this or any other property.

H. L. Lady, a member of the board of equalization, testified that the board met in January or February 1966, after having been advised on August 1, 1965, that a school district in the county would lose state aid if the property valuations for tax purposes in rural areas were not increased; that the board met for a week in August 1965, and established a basis to work on toward a fair assessment and agreed on values for a certain type of land; that it reconvened in January 1966 for the purpose of finishing the job of land reappraisal commenced at the earlier meeting; that the value to be placed on each farm was determined by consideration of its location, land type, soil conservation maps and aerial photographs from the Arkansas Soil Conservation office, the personal knowledge of the board members and a chart they had; that the true value was not established until August 1, 1966; that the board remained in session for about two months and adjourned about April 1, 1966; that the valuation on each tract was placed on a card and transferred to a book which was delivered to either the assessor or county clerk on October 1, 1966; that they did not ever look at the assessor's abstract of assessments required by law to be filed by July 31, 1966, because they were working on their own plan; that the board had completed its "assessment" by July 31, and had caused some of the notices to affected property owners to be prepared, even though the valuations noted on

cards had not all been transferred to the book later filed; the raise in assessed values by the board was based on the values placed on the lands in the meetings of February and March 1966; the notices to the landowners did not include the values at which their respective lands had been previously assessed; the book the board prepared and filed was made up between May 1 and August 1.

The employee who made the book testified that it was prepared in April or May 1966. The notices to landowners were prepared by this employee in July, and she began mailing them in the latter part of July. They were notices that the "assessment appraisals" had been raised. The book prepared by the board of equalization was brought to the tax assessor sometime in August, according to his testimony.

The powers of the county board of equalization are special and limited. It can perform no act unless it is specially authorized so to do in express terms. *Lyman* v. *Howe,* 64 Ark. 436, 42 S.W. 830; *Pulaski County Equalization Board Cases,* 49 Ark. 518, 6 S.W. 1 The board was authorized to meet from the first of August 1966 through the third Monday in November of that year to *equalize* the assessed value of all property subject to local assessment Ark. Stat. Ann. § 84-706 (Repl. 1960). The reason for the beginning date of August 1 is that this is the final date for delivery of the tax assessment record to the board by the county assessor. Ark. Stat Ann. § 84-463.1 (Repl. 1960). Immediately after the filing of this report, the clerk of the county court is required to lay the report before the board. Then, and only then, is the board authorized to *equalize* assessed valuations *made* by the assessor. Ark. Stat. Ann. § 84-707 (Repl. 1960). It is true that special planning sessions are authorized by Ark. Stat. Ann. § 84-721 (Repl. 1960). This act, by its own terms, strictly limits the purpose of these meetings to planning. It is not nearly so broad as the limited quotation in the majority opinion would make it appear.

I submit that this board did far more than plan its work of equalization. It met in February and March of 1966 for the purpose of finishing its job of reappraisal of lands. It then determined values to be placed on farms by considering various factors none of which included the value placed on the lands by the assessor in 1966. It could not possibly have considered this valuation because the assessor was not required to complete his assessment of lands until July 1. Ark. Stat. Ann. § 84-415 (Repl. 1960). He was not required to complete his assessment of personal property until August 1. Ark. Stat. Ann. § 84-416 (Repl. 1960). His report was also due to be filed on August 1. Consequently, any assessment that he might have made in February or March would not have been final until his report was filed. The board certainly considered that it had made an assessment by the latter part of July when it commenced mailing out notices to landowners. These notices were only called for when the board had raised the valuation of any property. Ark. Stat. Ann. § 84-707. They were based upon a book of board valuations completed by June 1. It was impossible for it to have "equalized" assessments because it never saw the assessor's report. The chairman, when asked if the board ever saw the 1966 report, answered, "Well, we were done with our assessment July 31st in '66."

The conclusion that the board of equalization did not equalize valuations, but that it made an assessment of its own, seems inescapable to me. In view of the testimony of the chairman and the board's clerical employee, called by appellants as hostile witnesses, I do not see how it can possibly be said that the work of the board was "equalization," or that, prior to August 1, it was only planning.

GERTRUDE BARNES v. CHARLES H. BARNES

5-4851 439 S.W. 2d 37

Opinion Delivered April 7, 1969

Woodward & Kinard for appellant.

Brown, Compton, Prewett & Dickens for appellee.

FRANK HOLT, Justice. This is an appeal from a reduction of maintenance and child support payments. In 1964 the appellant was awarded $600 per month as alimony and child support in a separate maintenance action. In June 1967, the appellee was granted a divorce based upon three-years separation. The payment of

$600 alimony and child support was continued. In February 1968, the appellee petitioned for a modification of this monthly payment upon the assertion of a material change in circumstances during the preceding eight months. In July 1968, after a hearing upon appellee's petition to modify and appellant's petition for a citation for contempt, the chancellor ordered a reduction of the alimony and child support from $600 to $450 per month; that the stipulated arrearage of $2100 which had accumulated the past few months be paid by alternate monthly payments of $150 and that appellee would be in contempt of court until this arrearage was fully paid; and further ordered that the appellee pay the costs and an attorney's fee.

For reversal the appellant first contends there was insufficient evidence for the lower court to modify the decree of June 1967. Upon a trial de novo, we cannot agree.

A decree for maintenance and support is always subject to modification by application of either party upon a showing of change of circumstances. *Perry* v. *Perry,* 229 Ark. 202, 313 S.W. 2d 851 (1958); Ark. Stat. Ann. § 34-1213 (Repl. 1962).

We review the evidence of a change of circumstances since the June 1967 decree. A month later, appellee remarried and now has two stepchildren. The arrearage of $2,100 in appellee's monthly payments appears to have accumulated since that decree. The $600 monthly payment was based upon a gross annual income of approximately $11,200. There was evidence that appellee's gross income for the year 1967 was approximately $11,720 and a net taxable income (before exemptions) of $5,305.06. Appellee's indebtedness to his partners in the practice of medicine increased from $1,886.97 to $3,-564.34 and his partners are now requiring him to pay $175 per month on current joint expenses and not less than $125 per month to reduce the accumulated deficit.

This represents an increase in expenses of $125 per month. Before 1967, appellee had entered into an agreement with an estate to purchase the interest of a deceased partner at $200 per month. He is in arrears and offered evidence that this payment must now be increased to $400 per month to avoid eviction. According to him, since the 1967 decree it has become necessary to purchase new equipment at an expense of $2,300. He offered evidence that his net worth had been reduced to a deficit and that he had been unable to pay his 1967 federal income tax of $877.64 and state income tax of $161.90. Further, that he owes, a note for $1,100 which he borrowed to pay on his alimony and child support.

The appellant offered evidence to the effect that she has suffered hardship because of appellee's arrearage in payments and that she is delinquent with her obligations. In the 1967 divorce decree she received, in addition to the $600 support payment, a property settlement which included $2,200 in cash, the house in which she presently lives, a lot in El Dorado, and a rental house in Little Rock, all of which were encumbered. The $2,200 was applied on property indebtedness. The residence and lot are still mortgaged and she is delinquent in her payments. The rental property is now free of indebtedness. She testified that she is physically unable to work at the present time. She is 52 years of age and has not worked since she and appellee moved to El Dorado in 1962. She has experience as a medical stenographer and as a psychiatric technician. Their adopted child is now 15 years of age.

In ordering a reduction in payment, the chancellor said: "I've got to exercise some common sense. You kill the goose that laid the golden egg and everyone will suffer." He observed that it might become necessary for appellant to again become employed.

There was only so much income for a division between the support of these two families. We have held that it is only realistic that remarriages happen and such

an occurrence is a circumstance to be considered in determining a change in circumstances. *McCutcheon* v. *McCutcheon,* 226 Ark. 276, 289 S.W. 2d 521 (1956).

Nor can we agree with the appellant's contention that appellee's arrearage precluded any consideration of his petition for a modification. We think the court's order that the $2,100 in arrearage be paid at the rate of $150 on alternate months before the appellee is purged of contempt is reasonable in the circumstances. Further, we are of the view that the appellant has demonstrated no prejudice because of appellee's failure to answer certain interrogatories which were filed a few days before the trial. These interrogatories were subjects which were sifted on cross-examination of appellee when he was a witness.

According to this record, we are of the view, upon a trial de novo, that the chancellor was correct in making a reduction of appellee's payments based upon a showing of a change in circumstances.

The appellee is ordered to pay appellant the costs on this appeal and her attorneys a fee of $300 for their services.

Affirmed.

KIRBY C. SEAY, ET UX v. E. T. DAVIS, ET AL

5-4793 438 S.W. 2d 479

Supplemental Opinion on Denial of Rehearing
Delivered April 7, 1969

[Original opinion delivered February 24, 1969, p. 201.]

Supplemental opinion on rehearing; rehearing denied.

GEORGE ROSE SMITH, Justice, on rehearing. In our original opinion in this case, 246 Ark. 201, 438 S.W. 2d 479, we held that under the provisions of the Uniform Commercial Code the appellants were not entitled to accelerate the maturity of the note and mortgage, because the proof showed that they did not believe in good faith, as the statute requires, that the prospect of payment or performance had been impaired. Ark. Stat. Ann. § 85-1-208 (Add. 1961).

In a petition for rehearing the appellants insist that the Code applies only when the contract permits the creditor to accelerate the maturity "at will," or words to that effect, whereas here there is also a condition in the contract that the debtors must be in default. The Commissioners' Comment to the cited section of the Code lends support to the appellants' argument, for it refers to an acceleration "at the whim and caprice of one party." See also the Commissioners' Comment 4 to § 85-3-109.

We think it proper to modify our original opinion by leaving that question open for future decision, for even if the appellants are correct in their construction of the Code the decree must nevertheless be affirmed under our prior decisions. Apart from the Code, as indicated in our original opinion, a court of equity will protect a debtor against an inequitable acceleration of the maturity of the debt. We followed that course recently in *Crone* v. *Johnson,* 240 Ark. 1029, 403 S.W. 2d 738 (1966).

That rule is controlling. As stated in our original opinion, Davis assured Seay that if Davis' son allowed a delinquency to occur, the elder Davis would make it good within three hours, upon being notified. Seay promised to give such notice, but he failed to keep his

promise. Ever since Davis, Sr., learned of the delinquency he has stood ready to pay the arrearages, plus the court costs and an attorney's fee. It would be altogether inequitable to allow Seay to repudiate his own promise and thereby not only retake the property but also, according to the proof, bring financial ruin upon the older of the two debtors. Hence, without regard to the provisions of the Uniform Commercial Code, the decree of the trial court must be affirmed.

The petition for rehearing is accordingly denied.

U. S. F. & G. COMPANY v. HATTIE HAGAN

5-4871 439 S.W. 2d 915

Opinion Delivered April 14, 1969

[Rehearing denied May 26, 1969.]

Shackleford & Shackleford for appellant.

Spencer & *Spencer* for appellee.

CARLETON HARRIS, Chief Justice. On April 28, 1966, appellee, Hattie Hagan, was a passenger in an automobile operated by her sister, Lona Dennington, and being driven north on Highway 4, approaching the intersection at Cedar Street in downtown McGehee. Jerry Peacock was driving an automobile south on Highway 4 toward Cedar Street. The automobile driven by Mrs. Dennington slowed, and made a left turn into Cedar Street, and was struck by the Peacock vehicle at this intersection. Mrs. Dennington held a policy of liability insurance issued by appellant, United States Fidelity and Guaranty Company, which contained an uninsured motorist endorsement, and under its provisions, appellee Hagan was insured up to $10,000.00. This policy was in full force and effect at the time of the accident. Mrs. Hagan instituted suit against the company, alleging that she was painfully injured in the accident due to the negligence of Jerry Peacock, and that Peacock was operating an "uninsured automobile" as that term was defined in the policy. Judgment against appellant was sought in the amount of $9,500.00 ($500.00 having been previously paid under the medical coverage provision of the policy). On motion of appellant, Peacock was made a party defendant. Subsequently, Peacock answered, denying all material allegations of the complaint, and the company filed its separate answer denying that Peacock was legally obligated to Mrs. Hagan, though admitting that appellee had coverage under the uninsured motorist provision in the policy. On trial, the jury returned a verdict in favor of Peacock and the United States Fidelity and Guaranty Company, denying any recovery whatsoever to Mrs. Hagan. Thereafter, appellee filed a motion for a new trial, and the court granted this motion, finding "that the verdict of the jury is contrary to the preponderance of the evidence in this case, and should be set aside." From the judgment granting the new trial, both the company and Pea-

cock bring this appeal.[1] For reversal, it is first asserted that the jury verdict was reasonable, and the action of the trial court in granting a new trial on the ground that the verdict was contrary to a preponderance of the evidence, was an abuse of discretion by the court. It is then contended that there was a failure of proof that Peacock was an uninsured motorist.

The company argues that the verdict rendered by the jury was in line with the evidence, and that, there being a conflict in the testimony as to negligence, the jury properly passed upon this question; that a court is not authorized to set aside a verdict as being against the weight of the evidence, unless it clearly appears that the jury finding is not only contrary to the evidence, but so palpably wrong as to shock the sense of justice. In support of this argument, two cases are cited, *Vandever* v. *Wilson*, 5 Ark. 407, and *Singer Manufacturing Company* v. *Rogers* (1902), 70 Ark. 385, 67 S.W. 75. The first case, decided in 1843, deals with usury, and this court upheld the Circuit Court in *refusing* to grant a new trial. The second case concerns a contract between the Singer Company and one of its employees. Here again, the case does not deal with the propriety of the court's setting aside a verdict; rather, this court held that the Cirsuit Court *should have sustained the motion for new trial*, stating that the judgment against the company was clearly and palpably wrong.

We have pointed out in several recent cases that the only issue that arises on our review of the trial court's action in setting aside a verdict, is whether the trial judge abused his discretion. *Worth James Construction Company* v. *Fulk*, 241 Ark. 444, 409 S.W. 2d 320; *Bowman* v. *Gabel*, 243 Ark. 728, 421 S.W. 2d 898, and cases cited therein. We reiterate that we will not disturb the trial court's finding (that the verdict was against the weight of the evidence), unless it is evident that the court abused its discretion. In some instances, we have held that the trial court abused its discretion in

[1]No brief has been filed in this court by Peacock.

setting aside a jury verdict, the most recent holding being found in *Ellsworth Brothers* v. *Mayes, Admr.*, handed down March 24, 1969, where we found that the trial court clearly abused its discretion in granting a new trial.

But we find no abuse of discretion in the case before us. It was stipulated by the parties that the speed limit at the intersection where the accident occurred was 30 miles per hour. The locale of the collision was in downtown McGehee during the noon hour. One eye witness testified that his attention was attracted to the Peacock car when he heard Peacock spin the wheels about a block away from the scene of the accident. He said that the vehicle passed him at a speed of approximately 50 miles per hour. The wife of this witness testified that the Peacock car "was doing fifty or probably sixty." There was evidence by a passenger in the Peacock automobile that she observed the Dennington automobile a half block away, as it entered the intersection. It would appear that Peacock had at least 150 feet of space in which to bring his car under control. Of course, it was the theory of appellant that Mrs. Dennington proceeded into the intersection when she did not have time to get across, and was thus negligent. Let it be remembered, however, that this litigation does not involve the degree of negligence between Peacock and Mrs. Dennington. Rather, the suit was instituted by Mrs. Hagan, a passenger in the Dennington automobile. There was no contention by appellant that the two sisters were engaged in a joint venture, and the only evidence of possible negligence on Mrs. Hagan's part is that she failed to warn of the approach of the Peacock car, which she said she saw approximately a block away as Mrs. Dennington turned into the intersection. This failure to warn could not have been a proximate cause of her injuries, since Mrs. Dennington testified that she too saw the automobile, about the same distance away, as she made the turn into the intersection. Be that as it may, we certainly cannot say that this evidence was so cogent that the trial judge, in setting aside the verdict, abused his discretion.

Nor can we agree that there was a failure of proof that Peacock was uninsured for the reason that it appears that this matter was covered by stipulation in chambers. While various matters were being stipulated, counsel for Peacock stated:

> "While we are stipulating I would like to stipulate that the policy of insurance of USF&G was in full force and effect on the date of the accident and that Jerry Peacock was an uninsured motorist."

Though counsel for United States Fidelity and Guaranty was present, he made no comment, and it is now argued that this was only an offered stipulation, and that there was no response or agreement from counsel for the company. There are several reasons why this argument lacks merit. In the first place, it appears that appellant had already entered into a binding stipulation with regard to this fact. Prior to the quoted statement, counsel for the company had said:

> " * * * U.S.F.&G. declares, affirms and is willing to stipulate that it will pay all sums that the plaintiff shall be found to be legally entitled to recover as damages from the defendant, Jerry Peacock because of bodily injuries sustained by the plaintiff caused by the accident of April 28th, 1966, up to the sum of $9,500.00 which represents the limits of the policy of insurance."

Counsel for Peacock did not want the name of the insurance company mentioned in the presence of the jury, as he considered that this might be prejudicial to his client. In discussing the matter, counsel for the company again stated:

> "Judge, my stipulation and declaration goes to the fact that we agree that we are going to pay what sums that Mrs. Hagan is found to be entitled to recover as damages from Peacock, that therefore there is no issue of fact here as far as U.S.F.&G. is concerned in this case."

In a few moments, this position was repeated:

> "We are stating that whatever damages the jury finds that Mrs. Hagan is entitled to recover against Peacock we are going to pay it and we will authorize and declare that a judgment can be entered for that amount against U.S.F.&G."

Again, appellant's counsel stated:

> "Judge, what you have got, you have got a suit in tort and a suit in contract. The suit in tort is going to decide the issues of the suit in contract."

The court disagreed with the argument, and referred all issues to the jury.

It would certainly appear that counsel for appellee was justified in assuming that there was no necessity to offer proof that Peacock was an uninsured driver. Also, the trial judge gave the following instructions:

> "You are instructed that the plaintiff, Hattie Hagan, can recover from the defendant, United States Fidelity and Guaranty Company, only if she recovers from the defendant, Jerry Peacock.
>
> "If your verdict is for the plaintiff and against the defendant, Jerry Peacock, you will assess plaintiff's recovery in the amount you find from a preponderance of the evidence will reasonably and fairly compensate her for the damages sustained in accordance with these instructions. In such case you will also return a verdict against the defendant, United States Fidelity and Guaranty Company, for the amount of her damages, not to exceed, however, the policy limits of $9,500.00.
>
> "In other words, any verdict against defendant, Jerry Peacock, will be for the full amount of the damages, if any, sustained by plaintiff, Hattie Hagan, but any verdict against defendant, United States Fidelity and Guaranty Company cannot exceed $9,500.00."

Though an objection was made to the instruction by counsel for appellant on other grounds,[2] there was no complaint that the instruction was erroneous because of a lack of evidence that Peacock was an uninsured driver.

Affirmed.

SHIRLEY GRUMLIN v. JAMES GRAY, ET UX

5-4892 439 S.W. 2d 290

Opinion Delivered April 14, 1969

Franklin Wilder for appellant.

(No brief filed for appellees).

GEORGE ROSE SMITH, Justice. This is a petition filed by the appellant, Shirley Grumlin, against her former husband, the appellee James Gray, by which Mrs.

[2]United States Fidelity and Guaranty Company offered an amendment to the instruction as follows:

"* * * If your verdict is for the defendant Jerry Peacock then in that event you must return a verdict for the defendant United States Fidelity & Guaranty Company; and the court overurled the defendants' objections, and the defendants at the time asked that their exceptions be saved and duly noted of record, which is hereby accordingly done."

Grumlin seeks to regain the custody of their four children. Three of the children are girls, the oldest now being fourteen years old. The youngest child is a boy of seven. Mrs. Grumlin appeals from an order by which the chancellor refused to disturb an earlier order vesting custody in the father.

Our review of the record convinces us that the preponderance of the testimony is clearly in Mrs. Grumlin's favor. Inasmuch as our decision in this case is not apt to be of marked value as a precedent, no two child custody cases being alike, we shall not attempt to narrate all the facts in detail.

The original divorce decree is not in the record. It appears, however, that the appellant was awarded the divorce in the State of Texas in 1963. The decree vested the custody of all four children in the mother. The father, either then or later on, was directed to pay $25 a week for the support of the children.

After the divorce proceeding the appellant moved to California with the children. For some time she supported the children herself, with practically no assistance from the appellee. In December of 1965, however, the appellant was afflicted with a serious disease and was no longer able to work. She had no recourse except to send the children to their father in Fort Smith, Arkansas, but she explained in a letter to Gray that she was not giving up the children permanently and wanted to have them back if she should regain her health and be able to take care of them.

After the children arrived in Fort Smith the appellee went to the chancellor and obtained an order terminating his obligation to make support payments. In the same order the court, without notice to the mother, vested the custody of the children in the father. We mention the fact that there has apparently never been any judicial finding that Mrs. Grumlin is unfit to have the children in her care.

By 1967 Mrs. Grumlin had married her present husband, had completely recovered from her illness, and had begun her efforts to regain the children. For a year or so she lived in Ohio, but her former husband was not co-operative either in permitting her to communicate with the children or in facilitating her efforts to have them visit her. Eventually Mr. and Mrs. Grumlin moved to Fort Smith, where they apparently intend to make their permanent home. Upon the record there can be no serious suggestion that Mrs. Grumlin has abandoned her children or that her steadfast devotion to them has wavered.

At the hearing in the court below the proof indicated that it is to the best interest of the children that their custody be transferred to their mother. The children have not fared too well while they have lived with their father and his present wife. The home is cramped for space. Both Mr. and Mrs. Gray are employed. The four youngsters are looked after during the day by the present Mrs. Gray's two children by a former marriage, neither of whom seems to be an ideal person to stay with the young Grays. The Gray children are also decidedly in need of dental care, one of them having eleven cavities in her teeth at the time of the hearing.

Mrs. Grumlin lives with her mother in a home that appears to be a desirable place for the children to live. At the time of the trial Mrs. Grumlin was not working and was free to look after the children during the day. Grumlin is employed and is able to support his wife's family. The couple attend church regularly.

We are convinced by the record before us, as we said at the beginning, that custody should be vested in the mother. It should be added that in reviewing the case we have been greatly handicapped by having no information about the reasoning that led the chancellor to deny Mrs. Grumlin's petition. The chancellor stated his ultimate conclusions in a letter-opinion to counsel,

but he did not detail the factual basis for his decision. He did say—and this is perhaps a clue to his thinking—that he had talked with the children privately in chambers and had reviewed a Welfare Department report, which is not in the record. We can attach no weight, however, to undisclosed information that rests only in the breast of the trial judge. The difficulty is not only that the litigants have no opportunity to rebut such matters, but also that it is impossible for this court to review a case on any basis except the evidence in the record. *Walker* v. *Eldridge,* 219 Ark. 594, 243 S.W. 2d 638 (1951).

The decree must be reversed and the cause remanded for the entry of a decree vesting custody of the four children in Mrs. Grumlin, with reasonable visitation privileges in Mr. Gray, and for such further proceedings as may be appropriate.

JONES, J., dissents.

ROSE MARIE MCCLAIN v. GLENN ANDERSON
and
ROSE MARIE MCCLAIN v. BILL J. SHORT

5-4856 and 5-4857 439 S.W. 2d 296

Opinion Delivered April 14, 1969

Carl M. Harness for appellants.

Putman, Davis & Bassett for appellees.

LYLE BROWN, Justice. These are two separate slander actions instituted by Rose Marie McClain, appellant here, against appellees Glenn Anderson and Bill J. Short. The actions were consolidated on appeal. Appellant was a teacher and appellees were members of her school board. The allegedly slanderous remarks were made during the course of a meeting between the school board and appellant. The trial court granted appellees' motions for summary judgment on the grounds that the remarks in question were at least conditionally privileged and would require a showing of

malice as a basis for recovery; and that there was no evidence from which a jury could find malice. Appellant contends that any privilege which existed is shown by the record to have been abused and sufficiently to make a jury question.

In ascertaining whether there is a genuine issue as to any material fact we view the proof in the same light as if it were a motion for a directed verdict. *Russell* v. *City of Rogers*, 236 Ark. 713, 368 S.W. 2d 89 (1963). The deposition of Mrs. McClain was considered by the trial court and we summarize the essential contents in the light most favorable to her:

She is a graduate of the University of Arkansas and her five years teaching experience has been at Greenland, Washington County. She was discharged about April 15, 1967, and consequently missed the salary checks ordinarily due under her contract for the following three months. Superintendent Watson, Mr. McClain, and the members of the school board were present at the special meeting called for the purpose of giving appellant a hearing. There the superintendent made the statement that she was being discharged; and there followed a general discussion. Appellee Short stated Mrs. McClain had entered the superintendent's office under false pretenses and read the minutes of the previous board meeting. Appellee Anderson stated that appellant could not take orders and also caused dissension and uproar among the teachers. Both men appeared to be angry and upset when they made those statements. Sometime prior to April 15 appellant asked the superintendent to permit her to read the minutes of the previous board meeting. He refused but he discussed with her the contents of the minutes insofar as they related to her. Subsequently and at a time when the superintendent was out of town, she went to his office and asked the secretary's permission to use the telephone in Watson's private office. While using the telephone she noticed the minute book on a table and read the minutes

made of the March meeting. She subsequently discussed the contents with some of the teachers. It was not uncommon for teachers to read the minutes when a question of policy arose. The teachers often used the superintendent's telephone and Mrs. McClain stated that was her real reason for entry at the time mentioned. At the board meeting she asked to express her opinion as to her conduct. She concluded from the mannerisms of the board members that they did not care to hear from her. The tempers of the board members flared, as well as her own.

Other matters before the trial court on the motions for summary judgment were the pleadings in the case and the deposition of Bill Watson, the superintendent. The complaints alleged the statements of Short and Anderson to have been false and spoken with malice; and that they were uttered with the intent of impeaching Mrs. McClain's professional reputation and to expose her to public ridicule. She alleged compensatory and punitive damages. General denials were entered by both defendants; and thereafter each moved for summary judgment. The latter motions asserted that their statements were made during a regular meeting of the school board and were absolutely privileged, and further alleged that the statements as a matter of law did not contain slanderous words.

Superintendent Watson testified that he recommended appellant's discharge on grounds of insubordination and creating dissension among the teachers. He said the first charge was based on her having read the school board minutes after being instructed to the contrary; and the latter charge arose from appellant's revelation of the minutes to other teachers. It is evident that the superintendent discussed his information with the board members prior to the meeting. That fact gave rise to the statements made to Mrs. McClain by appellees. Watson conceded that the statements were made to Mrs. McClain in answer to her inquiry about the reasons for her discharge.

We agree with the trial court that the statements of the board members were conditionally privileged. They were discharging a public duty in a meeting to discuss reported incidents of misconduct by Mrs. McClain. The reported incidents were germane to a decision on the renewal of her teaching contract. The same setting is found in the facts of *Thiel* v. *Dove,* 229 Ark. 601, 317 S.W. 2d 121 (1958). *Thiel* points out that it is a condition of the privilege that a defamatory statement should not be made by one who knows it to be untrue; also, a speaker who is motivated by malice rather than by the public interest that calls the privilege into being loses the privilege. The privilege can also be lost if the speaker goes beyond what the occasion requires. *Bohlinger* v. *Germania Life Ins. Co.,* 100 Ark. 477, 140 S.W. 257 (1911) We must examine the depositions in light of those stated principles, resolving all reasonable inferences in favor of Mrs. McClain.

It certainly cannot be said of appellees that they made statements known by them to have been false. Mrs. McClain concededly entered the superintendent's private office in his absence; her stated purpose was to use the telephone; and she read the minutes notwithstanding Mr. Watson's orders to the contrary. It was not unreasonable for Mr. Short to conclude that she entered the office under a pretense of using the telephone. Mr. Anderson allegedly stated that Mrs. McClain could not take orders. The only conclusion we can reach from the evidence is that he was referring to her violation of the superintendent's direction not to examine the minutes. Anderson is said to have further stated that she "caused dissension and uproar among the teachers." Mrs. McClain conceded that she discussed the contents of the minute book in the teachers' lounge with other teachers and the record amply supports resulting dissension.

Whether the statements attributed to appellees were true in all respects is not controlling. It is not disputed

that the information they repeated had been conveyed to them in their capacities as school board members. Even had their informants been actuated by malice, such fact would not evidence that the board members were acting with malice. Odgers, Libel and Slander, 6th Ed., p. 282 (1929). If it be conceded that appellees showed indignation at the alleged misconduct, that fact would not be evidence that they were acting from spite or ill will. Rest., Torts, § 603 *a* (1938). The most that the record discloses is that Mrs. McClain disobeyed the order of the superintendent and read the minutes of the last board meeting. With the information there obtained she discussed personnel matters with other teachers and sufficient discord resulted to justify a special board meeting. The subject of that meeting was the alleged misconduct of appellant. Having given credence to the information they possessed, appellees adopted it in substance and repeated it as their opinion. The assertions having been made on a conditionally privileged occasion, appellant must then assume the burden of proving the occasion was abused. Rest., § 613 (1) (g), *f.;* Prosser, Torts 3d Ed. HB, p. 823.

Finally it is argued that malice should be inferred because Superintendent Watson denied appellant her rights under the Freedom of Information Act. Ark. Stat. Ann. §§ 12-2801-2807 (Repl. 1968). Assuming that the incident showed malice on the part of Watson, that assumption would not, as pointed out by Odgers, be evidence that the board members acted with malice.

When we consider the matter-of-fact statements alleged are shown to have been based on substantial facts, coupled with a showing of conditional privilege, we hold it then became incumbent on appellant to come forward with evidence of malice. The trial court held she failed in that respect and we agree.

Affirmed.

STATE OF ARKANSAS v. W. L. LAWRENCE

5-5394 439 S.W. 2d 819

Opinion Delivered April 14, 1969

[Rehearing denied May 19, 1969.]

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

Aubrey & Goodson for appellee.

JOHN A. FOGLEMAN, Justice. Appellee was convicted in Municipal Court of Texarkana, Arkansas, of the offense of selling beer to a minor and upon a plea of nolo contendere he was fined one hundred fifty dollars and costs. He appealed this conviction to the Circuit Court of Miller County. An additional count of selling beer to a minor was filed against him by information, in the Circuit Court of Miller County. These cases were consolidated for trial and appellee entered pleas of not guilty. Subsequently he withdrew the not guilty pleas and entered pleas of nolo contendere. The court found appellee guilty of both charges of selling beer to a minor but refused to assess any fine or imprisonment against him. The court also refused to suspend a beer license held by appellee but which was not involved in the circumstances which resulted in his convictions. The court's order in each case was:

> "It is therefore by the Court considered, ordered and adjudged that said defendant is guilty as charged and in view of the financial loss of Defendant's sale of liquor stores involved in this cause no fine, penalty or punishment is assessed by the Court in this cause."

This appeal by the state was prosecuted by authority of Ark. Stat. Ann. § 43-2733 (Repl. 1964) which provides the procedure for appeal by the state from a judgment involving a misdemeanor.

The appellant argues that the trial court erred in refusing to fine and sentence appellee and in refusing to revoke his permit to sell beer and intoxicating liquors after a finding of guilty on two charges of selling beer to a minor. The pertinent portions of the statutes involved are as follows:

> Ark. Stat. Ann. § 48-525 (Repl. 1964)—"It shall be unlawful for a licensee, or for any agent, servant or employee of a licensee . . . (c) to sell,

barter, furnish or give away to any minor under the age of twenty-one (21) years any wine or beer... Any violation of the provisions of this section shall constitute a misdemeanor and shall be punished by a fine of not more than five hundred ($500.00) dollars and not more than one (1) year in jail..."

Ark. Stat. Ann. § 48-525 (Repl. 1964)—"Any person convicted of the violation of any provision of this Act [§§ 48-501—48-527] which violation is by this Act, defined as a misdemeanor and for which no specific punishment is in this Act provided, shall upon conviction thereof be punished as otherwise provided by law. And if any person so convicted shall be the holder of any permit issued by the Commissioner of Revenues [Department of Alcoholic Beverage Control] under authority of this Act, such permit shall from and after date of such conviction be void and the holder thereof shall not thereafter for a period of one (1) year after the date of such conviction be entitled to any permit for any purpose authorized in this Act."

Appellant argues that upon a conviction for violation of § 48-524 the trial court is required, by virtue of § 48-525, to revoke any permit issued by the Department of Alcoholic Beverage Control to a person so convicted. Appellee argues that § 48-525 only applies to those violations of Act No. 7 of 1933 [Ark. Stat. Ann.§§ 48-501—48-527 (Repl. 1964)] for which no specific punishment is provided and this would not include § 48-524. We do not reach the merits of appellee's argument on this point, however, because we are of the view that the circuit court is without authority to revoke a beer permit issued by the Department of Alcoholic Beverage Control.

Act 159 of 1951 [Ark. Stat. Ann. §§ 48-1301—48-1321 (Repl. 1964)] created the Department of Alcoholic Beverage Control and enumerated its various powers and duties. Section 13 of that Act [Ark. Stat. Ann. § 48-1312 (Repl. 1964)] is as follows:

> "All proceedings for the suspension and revocation of licenses shall be before the Director, and the proceedings shall be in accordance with rules and regulations which shall be established by the Director and not inconsistent with law. No such license shall be revoked except after a hearing by the Director with reasonable notice to the licensee and an opportunity to appear and defend..."

The language of § 48-1312 is unmistakably clear, "*All* proceedings for the suspension and revocation of licenses *shall be before the Director... No such license shall be revoked* except after a hearing by the Director..." (emphasis supplied). It is apparent that § 48-1312, which gives the Director of the Department of Alcoholic Beverage Control the exclusive power to revoke or suspend beer licenses, is repugnant to § 48-525 which gives the circuit court the same power. We said in *Hickey* v. *State*, 114 Ark. 526, 170 S.W. 562, "It is a cardinal rule of statutory construction that where two legislative acts relating to the same subject are necessarily repugnant to and in conflict with each other, the later act controls, and, to the extent of such repugnance or conflict, repeals the earlier act whether expressly so declared or not." We therefore hold that Ark. Stat. Ann. § 48-1312 (Repl. 1964) repeals, by implication, that portion of Ark. Stat. Ann. § 48-525 (Repl. 1964) which gives the convicting court the power to revoke a permit issued by the Department of Alcoholic Beverage Control to sell beer upon a conviction of the crime of selling beer to a minor. The circuit court, therefore, did not commit error when it refused to revoke the appellee's beer permit, and in this respect the cases will be affirmed.

We feel, however, that the circuit court was in error when it refused to assess any punishment against appellee upon a judgment of guilty. Ark. Stat. Ann. § 43-2324 (Repl. 1964) allows a judge, upon a verdict of guilty, to postpone the pronouncement of sentence if he deems it best for the defendant and not harmful to soc-

iety. Ark. Stat. Ann. § 43-2326 (Repl. 1964) gives the court the authority to suspend the execution of jail sentences or the imposition of fines or both in all criminal cases. However, it is beyond the authority of a trial judge, upon a judgment of guilty, to simply refuse to assess any punishment. *Graham* v. *State*, 1 Ark. 171; *Lindquist* v. *State*, 213 Ark. 903, 213 S.W. 2d 895. Since this is the effect of the court's judgments and there was no attempt to either suspend or postpone the sentence, they are reversed.

Since the errors asserted on this appeal are apparent on the face of the record, no objection, exceptions or motion for new trial was required before they could be reviewed here. *Williams* v. *State*, 47 Ark. 230, 1 S.W. 149; *Hayes* v. *Hargus*, 127 Ark. 22, 191 S.W. 408; *Percifull and Wife* v. *Platt*, 36 Ark. 456; *Wells* v. *State*, 193 Ark. 1092, 104 S.W. 2d 451. See also *Williams* v. *City of Malvern*, 222 Ark. 432, 261 S.W. 2d 6; *Thomas* v. *State*, 243 Ark. 147, 418 S.W. 2d 792.

The judgments are reversed as to refusal of the court to assess any punishment.

BROWN, J., not participating.

BYRD and HOLT, JJ., dissent.

CONLEY BYRD, Justice. I disagree with that portion of the majority opinion which holds that the circuit court erred in refusing to assess any punishment against the appellee upon a judgment of guilty. All of our cases hold that before this court will review an error of the trial court there must be an objection, a ruling of the court, and an exception saved, *Downs* v. *State*, 231 Ark. 466, 330 S.W. 2d 281 (1960). In the record here I fail to find any objection to the trial court's action in failing to assess a fine against appellee. The complete record before the trial court is as follows:

"BY THE COURT:

"First, with respect to Mr. Lawrence, I find that he has been penalized enough by the economics of the situation. He has lost money by having to sell at a less price than he could have on the open market with a reasonable time for negotiation, at a considerable loss. And I take notice that he has had expense before the Alcohol Control Board, and the Chancellor, and in the Municipal Court, and in this court. I think he has been punished far beyond the severity of the crime, and he is responsible only as an owner, and that's by a statutory sort of *respondeat superior.* Would that I could remit some of that, but I cannot.

"Mr. Lurry and Mr. Campbell, I think probably they were negligent, if not intentionally. I see no reason to fine them, because I believe and I take judicial notice that Mr. Lawrence would have to pay out any fine that was assessed, which is a business-type thing. And certainly, I see no useful purpose in putting a 70-year-old sick man in the penitentiary or jail, or putting Lantz Lurry in jail. I don't see that any useful purpose would be served in either instance.

"But whether their actions be intentional or negligent, I am going to keep them both out of the liquor selling business for a year. I am putting you each on probation for a year, the condition of your probation is good conduct, and no sales in any liquor stores. Mr. Campbell can continue to work for Mr. Lacy Lawrence in the present position he occupies. Are there any questions?

"BY MR. GOODSON:

"No sir. There will be a cost factor, I assume.

"BY THE COURT:

"I think I will have to impose costs against the defendants. Although I know Mr. Lawrence has suffered terrific financial loss, there has to be something. I can't make the county stand that. Mr. Clerk, will you submit a cost bill?

"BY MR. DENMAN:

"Your Honor, do I understand that the court is holding Mr. Lawrence guilty in this case?

"BY THE COURT:

"Yes, sir, I have no alternative. There is a plea of nolo contendere; that is in one sense a confession of guilt, and I am adjudicating guilt across the board.

"BY MR. DENMAN:

"I didn't understand your statement then, sir.

"BY THE COURT:

"Yes, sir.

"BY MR. DENMAN:

"Then I would call the court's attention to 48-525, sir, and rule on the permits of Mr. Lawrence.

"BY THE COURT:

"The permits will not be affected.

"BY MR. DENMAN:

"Will not be affected?

"BY THE COURT:

"No, sir.

"BY MR. DENMAN:

"Save our exceptions, your Honor.

"BY THE COURT:

"Very well. If there is nothing further, court will be in recess subject to call."

The only objection I can find in the foregoing record has to do with Ark. Stat. Ann. § 48-525 (Repl. 1964), and the objection there was limited to the trial court's failure to revoke the permits held by appellee.

This case is a prime example of the necessity for objections to the ruling of the trial court. Had the objection been made, the trial court could have simply assessed a one dollar fine as was done in *Lindquist* v. *State*, 213 Ark. 903, 213 S.W. 2d 895 (1948), and could have, under the majority opinion, immediately suspended assessment of the one dollar fine.

Further, I do not agree with the majority opinion that the trial court was in error in refusing to assess any punishment. The statute here involved (§ 48-524) provides, "Any violation of the provisions of this section shall constitute a misdemeanor and shall be punished by a fine of not more than $500 and not more than one year in jail...." Thus as I read the criminal statute involved the only limitation placed on the court is that the sentence not exceed $500 or more than one year in jail. The case of *Graham* v. *State*, 1 Ark. 171 (1837), relied upon by the majority, involved a statute wherein the law declared that on conviction the person convicted should pay a fine not less than $100 and not more than $200. In holding that a fine of $30 was illegal, we said:

"To what good purpose has the Legislature defined punishment, and prescribed the quantum thereof, if the courts and juries are at liberty to disregard the former or, in their discretion, pass the limits prescribed for the latter? Certainly not any. In this view of the subject, (and we think it is the only correct view of it which can be taken,) it

> is unimportant whether they undertake to mitigate or increase the punishment or fine: the one is as much a departure from the legal standard as the other. The former tends to favor, the latter to oppress, the person upon whom it is to operate. In either case, the law is violated, and public justice impaired or refused."

The matter of an inadequate sentence is treated in 21 Am. Jur. 2d *Criminal Law* § 538, p. 518, as follows:

> "A sentence of less than the minimum punishment prescribed by statute is no less improper than a sentence in excess of the permissible maximum. It has been held, however, that such a sentence is not void. It is erroneous and subject to correction, but it is not a ground for reversing the judgment on appeal. Nor is it a ground for discharging the prisoner on habeas corpus, except that when an inadequate sentence has been fully served without having been corrected the prisoner is entitled to a discharge, subject to the right of the state to move for entry of a proper sentence pursuant to the verdict of conviction."

Therefore, even if we overlook the failure of the state to object to the nonassessment of any fine, I can find nothing illegal in the court's conduct because the statute involved did not fix a minimum fine as was the case in *Graham*. As I read the record the trial court found Mr. Lawrence guilty of the offense charged and assessed court costs against him. With men of pride, a mere finding of guilt is often the severest of punishment.

The majority opinion suggests that the failure of the trial court to assess "a fine of not more than $500" is error apparent on the face of the record which does not require an objection. My search of the authorities shows that the method for correcting an inadequate

sentence is by a timely motion in the trial court or by appeal from an adverse ruling on such motion, *Spanton* v. *Clapp,* 78 Idaho 234, 299 P. 2d 1103 (1956). This would appear to be the proper method or otherwise the keeper of the prisons could ignore the sentence set forth in the judgment of conviction and keep the prisoner for the minimum time set forth in the statute under which the prisoner stands convicted.

Furthermore, Ark. Stat. Ann. § 43-2736 (Repl. 1964), provides that a misdemeanor judgment "... shall only be reversed for errors of law apparent on the record to the prejudice of the appellant." Even if I should assume that the majority is correct in interpreting the statutory phrase of "not more than $500" as also including a minimum fine, it becomes obvious that such minimum could be as small as one cent—*i.e.* less than the cost of the postage stamp necessary to get the Attorney General's approval, Ark. Stat. Ann. § 43-2733, (Repl. 1964). The record here shows that the trial court would be reluctant to enter more upon a remand and might even suspend the payment of that. Under the circumstances there can be no prejudice to the State which would call for a reversal.

HOLT, J., joins in this dissent.

THE GLENS FALLS GROUP INSURANCE COMPANY v. JAMES M. SIMPSON

5-4861 439 S.W. 2d 292

Opinion Delivered April 14, 1969

Reinberger, Eilbott, Smith & Staten for appellant.

Bridges, Young, Matthews & Davis for appellee.

J. FRED JONES, Justice. This is an appeal by The Glens Falls Group Insurance Company from an adverse judgment of the Jefferson County Circuit Court award-

ing medical payments to James M. Simpson under a medical endorsement to an insurance policy issued to Rosswood Country Club.

It was stipulated that the appellee, Simpson, and three companions had played several holes of golf at the Rosswood Country Club when it commenced to rain. As they made their way to the shelter of the clubhouse, appellee stopped under the cover of a large tree where he was struck by lighting and sustained injuries resulting in medical expenses amounting to $186.65.

The appellee filed claim for medical expenses under the provisions of the policy. The appellant insurance company denied coverage under the policy and refused payment. The appellee filed suit in the Municipal Court of Pine Bluff where judgment was rendered for the insurance company. The circuit court, on appeal, reversed the judgment of the municipal court and rendered judgment for the appellee Simpson. On appeal to this court the appellant, Glens Falls, designates the following points for reversal:

> "The injuries sustained by the appellee were not caused by accident and did not arise out of the ownership, maintenance or use of the insured premises by the Rosswood Country Club and that there is no coverage under the policy issued by the appellant.
>
> That at the time of the incident described in the complaint, appellee was participating in a sport and such activities are clearly excluded from coverage under appellant's policy."

The point actually involved in this case is whether the insurance contract insured the named insured, Rosswood Country Club, against its own liability or whether it insured the members and guests of the club against medical expenses incurred because of accident arising

out of ownership, maintenance or use of the club premises.

Apparently the entire insurance contract was not made a part of the record in this case and the copy of the endorsement that is before us, is on printed form obviously designed more for individuals rather than country clubs as named insureds.

Under its first point appellant argues that it properly denied coverage under the language of the insurance policy "Insuring Agreement" which states:

> "The company agrees with the named insured to pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical and dental services, including prosthetic devises, and necessary ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, *caused by accident and arising out of the ownership, maintenance or use of premises by the named insured* and the ways immediately adjoining, or operations of the named insured, subject to the following provisions." (Emphasis supplied.)

Accident has acquired the meaning of a happening or event out of the usual order of things or not reasonably to be anticipated. Webster defines it as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected"; and Bouvier defines it as "an event which, under the circumstances, is unusual and unexpected by the person to whom it happens." Bouv. Law Dict, vol 1, p. 51. See Appleman, Insurance Law and Practice, vol. 1A, § 391, footnote 12, p. 20.

The policy endorsement does not define the term "accident" as used in the policy and injury by lightning

is not excluded. We conclude, therefore, that the trial court did not err in holding that the appellant's injury was caused by accident.

As to the principal issue, it is noted that "the company agrees with the named insured to pay" (not the expenses the *named insured* is required or obligated to pay), but "all reasonable expenses *incurred* . . . to or for each person who sustains bodily injury, sickness or disease, caused by accident arising out of the ownership, maintenance or use of premises by the named insured." (Emphasis supplied.) Did the accident here arise out of the ownership, maintenance or use of the premises by the named insured? We are of the opinion that there was some substantial evidence to support the trial court's decision that it did.

The named insured owned, maintained and used the premises as a golf course where the appellee's accident occurred, and there is no evidence that appellee would have been on the premises had the named insured not been using the area for a golf course. There is substantial evidence that appellee's injury arose out of the club's use of the premises as a golf course. There are fifteen exclusions from coverage set out in the policy endorsement and being struck by lightning is not one of them. When the endorsement is examined for coverage in the light of the specific exclusions, it is difficult to determine what is covered under the endorsement if appellee's medical expenses are not.

As to appellant's second point, exclusion (b) under the endorsement provides as follows: This insurance does not apply:

> "to bodily injury, sickness, disease or death sustained by any person practicing, instructing or participating in any physical training, sport, athletic activity or contest, unless this exclusion is specifically stated to be inapplicable."

The appellee did not sustain his injury while practicing, instructing or participating in any physical training, sport, athletic activity or contest, he sustained his injury while standing under a tree. He was not struck by a golf ball he was struck by lightning. He *had been* participating in a golf game, otherwise he would not have been under the tree on the premises owned, maintained and used by the club as a golf course. We find appellant's second point without merit.

Liability insurance is distinguished from accident insurance in 44 C.J.S. 474 as follows:

> "... [L]iability insurance is a variety of accident insurance, but it is distinguishable from accident insurance in that accident policies, strictly speaking cover accidents happening to the person of insured. While liability policies cover accidents to others than insured, provided insured stands in such relation to the person accidentally injured or killed *as to be legally liable for the result of the accident.*" (Emphasis supplied.)

The law is well settled in Arkansas that ambiguities in, and uncertainties as to the meaning of, the terms used in insurance policies will be interpretated most favorably to the insured and against the insurer who drew the contract. *Hope Spoke Co.* v. *Maryland Casualty Co.*, 102 Ark. 1, 143 S.W. 85 and the numerous other cases listed in 10A West's Ark. Digest 146.6.

The judgment of the trial court is affirmed and appellee's attorney is awarded an additional fee in the amount of $300.00.

Affirmed.

HARRIS, C.J., not participating.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice. I readily agree with the majority that appellee's having been struck by lightning was caused by accident. I feel that the majority have totally ignored the fact that there is an additional requirement to bring an accident within the coverage of the policy. The injury must have been "caused by accident and *arising out of the ownership, maintenance or use of premises by the named insured* and the ways immediately adjoining, or operations of the named insured..." The majority does not explain how being struck by lightning arises from the ownership, maintenance or use of the premises by Rosswood Country Club or the operations of Rosswood Country Club, nor does it cite any authority, even though it says it finds substantial evidence that it did. If appellant had been struck by a golf ball or if he had been struck by a golf cart propelled by a fellow golfer, I could readily say that he had suffered injuries caused by an accident and that they had arisen out of the use of the premises or the operations conducted thereon by Rosswood Country Club. I am incapable of understanding how it can be said that the lightning bolt, or its striking Simpson while he was on the golf course, arose in a manner to bring this claim within the coverage of the policy.

An accident arising out of the ownership, maintenance or use of premises or operations certainly contemplates an accident immediately identifiable with ownership, maintenance or use of the premises or operations by the named insured. While I do not know of any case in which we have treated the particular question in Arkansas, it has been treated in other states. The logic of my position is so well stated in some of these cases that I prefer to refer to some of them, rather than to further expound upon the subject.

In *National Union Fire Insurance Company of Pittsburgh* v. *Bruecks,* 179 Neb. 642, 139 N.W. 2d 821 (1966), the driver of an automobile was injured by the accidental discharge of a loaded gun in the hands of a minor

passenger who was being transported home after a hunting trip. The insurance policies in question afforded coverage for "* * * bodily injury * * * arising out of the ownership, maintenance or use * * * of the * * * automobile." The following are excerpts from the opinion in that case:

> " * * * The gun did not discharge as a result of being in the vehicle or for any reason even remotely connected with the vehicle. It seems clearly apparent that the tort action is not premised upon any connection with the automobile in which the shooting occurred, except as describing the situs of the act.
>
> * * * It seems patent, however, that some causal relation must exist between the injury and the use of the vehicle to come within the ambit of 'arising out of the use of a vehicle.' Many courts have found a causal relation to exist if the use was connected with the accident or the creation of a condition that caused the accident. The proximate cause of the injury here was the discharge of the gun. Was the discharge of the gun during the use of the automobile a sufficient connection with its use to be within the coverage provided by the 'arising out of the use' clause of the Allstate and St. Paul policies? To put it another way, we must determine whether the fact that Scott Campbell was riding in the automobile at the time of the accident, making the automobile the situs of the accident, constitutes the accident one 'arising out of the use of' the automobile, or, if not, whether it constitutes the creation of a condition that caused the accident within the terms of the policy. In this connection, it may be pertinent to observe that the injury could never have happened if Scott Campbell had not had a loaded gun in his possession in the automobile. The accident could just as readily have happened in the Bruecks' living room if Scott Campbell had carried the gun into the Bruecks' home. * * *

> * * * The words 'arising out of the use' are very broad, general, and comprehensive terms, and are ordinarily understood to mean originating from growing out of, or flowing from. See *Schmidt* v. *Utilities Ins. Co.,* 353 Mo. 213, 182 S.W. 2d 181, 154 A.L.R. 1088."

In *London & Lancashire Indemnity Company* v. *Duryea,* 143 Conn. 53, 119 A. 2d 325 (1955), the Supreme Court of Errors of Connecticut said:

> " * * * By the plain terms of the policy, the plaintiff agrees to pay on behalf of its insured all sums which the insured may become obligated to pay by reason of the liability imposed upon her by law for damages 'because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of' the hazard covered in the policy. That hazard is defined as the 'ownership, maintenance or use' of the described premises for a restaurant which includes, though it is not expressly so stated, the sale of intoxicating liquor. The decisive words are 'caused by accident and arising out of.' It seems obvious that these words modify 'bodily injury, including death * * * resulting therefrom.' The bodily injury must be 'caused by' accidental and intentional means. 7 Appleman, op. cit., § 4312. So far as the instant case is concerned, it must arise out of the sale of intoxicating liquor. The words "arising out of" mean 'caused by.' *Larke* v. *John Hancock Mutual Life Ins. Co.,* 90 Conn. 303, 309, 97 A. 320, 322 L.R.A. 1916E, 584; *Jacquemin* v. *Turner & Seymour Mfg. Co.,* 92 Conn. 382, 384, 103 A. 115, L.R.A. 1918E, 496; *Allen* v. *Travelers Indemity Co.* 108 Vt. 317, 323 187 A. 512."

I can add nothing to the clear expressions of these two courts.

I find no ambiguity. I agree with the rule of construction of insurance policies against the insurer where there is an ambiguity. I do not believe that the courts can import an ambiguity for the purpose of construing the policy against the insurance company. I would reverse the judgment of the circuit court and dismiss the cause.

WILSON WOOD D/B/A OLA MILLING COMPANY v. YATES-AMERICAN MACHINE COMPANY, ET AL

5-4868 439 S.W. 2d 307

Opinion Delivered April 14, 1969

Parker & Parker for appellant.

Laws & Schulze for appellees.

CONLEY BYRD, Justice. Appellant Wilson Wood doing business as Ola Milling Company appeals from a circuit court order refusing to set aside a default judgment for unavoidable casualty. The record shows that the default judgment was signed by the trial court April 25, 1968, dated April 26, and filed with the clerk on May 9. On August 13, 1968, appellant filed a motion for new trial alleging that the judgment was entered without notice and at a time when his counsel was ill. The verified motion also set up that appellant had a valid defense and counterclaim. Appellees' unverified response merely denied that appellant was without notice of the trial date and denied that appellant's counsel was prevented from being present or having a representative present by unavoidable casualty.

The trial court's order of August 29, 1968, recites the matter came before the court on the motion and the response. From the motion and response, the trial court found that appellant had notice of the hearing, that his attorney had notice of the hearing and was not prevented from being present at the hearing because of unavoidable casualty. We find nothing in the record to support the findings of the trial court nor does appellee point to any portion of the record which would sustain such findings. We pointed out in *Thweatt* v. *Knights & Daughters of Tabor,* 128 Ark. 269, 193 S.W. 508 (1917), that the illness of a party's only counsel constitutes unavoidable casualty or misfortune for purposes of preventing a default under Ark. Stat. Ann. § 29-506(7) (Repl. 1962).

To avoid the effects of the Thweatt case appellees contend that the appeal is not filed within the time limited by Ark. Stat. Ann. § 27-2106 (Repl. 1962), and that because of appellant's failure to properly respond to a request for admissions, appellant now has no valid defense, counterclaim or cross-complaint.

Appellees' contention that the appeal is out of time because of Ark. Stat. Ann. §§ 27-2106.3—27-2106.6 (Supp.

1967) is without merit. See *Old American Life Ins Co.* v. *Lewis,* 246 Ark. 321, 438 S.W. 2d 22 (1969).

The record with respect to the request for admissions shows that appellees served on appellant's attorney a request for admissions dated Sept. 22, 1967. The request for admissions was not answered until appellees moved for a summary judgment on Oct. 20, 1967, at which time answers were filed over the signature of appellant's counsel. The request for admissions here, like the request for admissions in *B. & P., Inc.* v. *Norment,* 241 Ark. 1092, 411 S.W. 2d 506 (1967), failed to specify the time within which the request was to be admitted or denied

In *B. & P., Inc.* the trial court accepted the facts set forth in the request for admissions as admitted, and we held that this was a matter within his discretion, although it was pointed out that under certain circumstances a trial court did not abuse its discretion in permitting the request to be verified by the party before trial. See *Kingrey* v. *Wilson,* 227 Ark. 690, 301 S.W. 2d 23 (1957).

Here, however, as distinguished from *B. & P. Inc., supra,* the record does not show that appellant has had an opportunity to explain why the answers to the request for admissions were signed by his counsel instead of himself or an opportunity to make the request for personal verification that was permitted in *Kingrey* v. *Wilson.* All that we hold here is that on this record we cannot rule that the facts are admitted until such time as the parties have had an opportunity to be heard and the trial court has made an actual ruling on the request for admissions.

Since there are no facts in the record to sustain the trial court's finding that both appellant and his counsel had notice of the hearing and that appellant's counsel was not prevented from being present because of illness, we reverse and remand the matter to the trial court for hearing upon appellant's motion for new trial.

Reversed and remanded.

5-4875 439 S.W. 2d 276

Opinion Delivered April 14, 1969

Thomas B. Keys & Virginia Tacket for appellant.

Guy H. Jones & Phil Stratton for appellee.

CONLEY BYRD, Justice. The Arkansas State Highway Commission appeals from a Chancery Court order holding that appellee T. Q. French is the owner of a strip of land 10 feet in width, adjacent to the east side of Highway 65 in the town of Bee Branch, Arkansas. The Highway Department claims the land by virtue of a 1928 county court condemnation order fixing the right of way 40 feet in width either side of a center line. For reversal, the Highway Department relies upon the following points:

1. The trial court erred in not dismissing French's injunction action because the undisputed testi-

mony showed that he had knowledge of the Highway Department's claim for more than one year (Ark. Stat. Ann. § 76-917);

2. The trial court was in error in ruling that French had no notice of the taking by the county court order;

3. The trial court erred in ruling that French was not estopped by his acquiescence and actions indicating acquiescence in the state's claim to the strip of ground upon which the state acted to its detriment in letting a contract for construction.

The record shows that subsequent to the county court condemnation order the Highway Department graded and graveled Highway 65 through Bee Branch, pursuant to job no. 843. Sheets no. 8 and 9 of the plans for job no. 843 show a right of way 40 feet in width either side of a center line up to station 608 and 30 feet either side of a center line from station 608 to approximately station 623 plus 88.7. Quitman Road is shown as being at station 610 and the post office, at that time, as being between stations 615 and 620. French's store is between station 608 and the post office. The paving of Highway 65 in Bee Branch was done in 1934, job no. 8178. Sheet no. 23 of job no. 8178 shows right of way 40 feet in width either side of a center line up to station 608. The right of way from station 608, to the post office, the latter being at station 619+26.8, is shown as being 30 feet either side of a center line except for the portion immediately in front of the post office which is shown as being 26 feet west of the center line. The latter sheet also shows that the pumps on the G. W. French filling station are located on the highway right of way as drawn by the plan.

Thomas Q. French testified that he was 64 years of age and that he was working for his father when High-

way 65 was put through in 1928—that his father had been in business there ever since 1900 and that the gasoline pumps were put in before the highway was graveled. According to Mr. French there was an existing road through the town of Bee Branch at the time the highway was graveled in '28. Following the paving of the road in 1933 or '34, he built a concrete apron in 1938 out to the roadway. About a year before the filing of the suit the highway department notified him that his pumps were on the right of way and requested him to move the same. In answer to questions by the court he testified as follows:

"Q. Now you have stated that Mr. Elledge's letter to you dated June 19, 1967 represented substantially what you and he had discussed, you did then at one time agree with him that you would move these two independent pumps farther east?

"A. I told him I would, but I never did say when, I didn't tell him exactly when.

"Q. Did that have anything to do with one of the inducements for the Highway Department to make a decision to keep the highway going through town rather than having it bypass town?

"A. You mean—

"Q. Was that an inducement to the Highway Department to help them decide to go through town?

"A. Not at that time, they had already decided.

"Q. Well, what did you imply by your agreement with the Highway Department that you would move these two pumps east? What were your intentions about it?

"A. Well, I was trying to hold them there and see what I could do. I didn't know whether they owned the right of way they were talking about and I finally checked that they didn't."

Mr. French said he did not know about the county court condemnation order until two months before the trial nor was he aware of any entry ever having been made on his property.

Witnesses on behalf of the Highway Department testified that Mr. French had promised to move the pumps and that in reliance thereon they let a contract to McGeorge Construction Company in which they obligated federal funds, after certifying that the right of way had been cleared of all obstructions. The State's witnesses did not contend that notices had been served in connection with the entry of the county court condemnation order or that claims for compensation had been filed by Mr. French or his father, a predecessor in title. These witnesses also testified that the highway was originally programed to bypass Bee Branch but, at the request of the citizenry through appellee's present counsel, then an employee of the Highway Department, a meeting was held at Bee Branch. At that time the Highway Director explained that the only way the highway could be changed to come through Bee Branch was for the people to pay for the removal of all utilities, buildings and all right of way. Following that meeting, however, the Highway Department worked out an arrangement whereby the highway would go through Bee Branch and all the additional right of way required for the construction would be taken from the west side of the highway. Pursuant to this plan, an additional 20 feet was acquired on the west side of the highway and the Highway Department admittedly paid for acquisition of this property and removal of the obstructions therefrom.

Subsequently another meeting was held between Mr. French and Mr. Gray, an employee of the Highway

Department, at the home of Hulen McKim. Mr. McKim says that the discussions centered around a service station on the west side of the road belonging to a Mr. Ethridge. With reference to the meeting at Mr. McKim's home, Mr. Gray testified as follows:

> "Well, like I say this meeting was at his house and then in relation to this other service station as Mr. McKim related, but we had worked out a method that was acceptable to the Bureau of Public Roads and our planning division, wherein if we could bring the alignment a little bit further to the west and take the right of way from the west and maintain the right of way that we had on the east that we would construct it through the town with the curb and gutter section, so that is what I went up to discuss with them, and the people involved on the west side we contacted as many of them as we could that day and told them what our proposition would be and I talked to Mr. French and told him how the situation would affect him and I advised Mr. French that his pumps were encroaching and that they would have to be set off of the right of way. Mr. French advised me that he understood that and that wasn't any concern if we were going to get the Highway through Town because he was planning at that time to acquire additional property and he was concerned about the 92 that came in there because he had plans for some sort of business there."

Mr. French acknowledges the meeting with Mr. Gray at the McKim home and in answer to a question as to what they talked about said:

> "Well, he was trying to get a right of way through Bee Branch, and he wanted to take ten feet on each side, he said, of the highway. Well, he couldn't do any good on the east side getting people to go along with him, so he came up there and said 'I have de-

cided to take twenty feet on the west side of me and pay all of the property owners for their properties.' ''

POINT 1. Appellant argues that French knew more than a year prior to the filing of the injunction suit that the Highway Department was claiming the right of way involved and that because of this knowledge French is barred by the one year statute of limitations set out in Ark. Stat. Ann. § 76-917 (Repl. 1957). We find this contention to be without merit. See *Greene County* v. *Hayden,* 175 Ark. 1067, 1 S.W. 2d 803 (1928), and *Hot Spring County* v. *Fowler,* 229 Ark. 1050, 320 S.W. 2d 269 (1959). As we read these decisions the one year statute of limitations does not begin to run against a property owner until he is served with notice by legal process or until an entry is made by the condemning agent.

POINT 2. In *Arkansas State Highway Commission* v. *Anderson,* 234 Ark. 774, 354 S.W. 2d 554 (1962), we pointed out that property could not be condemned without first giving the land owner notice so that he could have his day in court on the issue of compensation. We there held that the burden of proving that proper notice was given was upon the condemning agency.

Under the record here there was no evidence of any notice by legal process served upon Mr. French or his father. Under these circumstances the Highway Department had the burden of showing an entry upon the French property which would amount to notice. Under the proof here we believe that the Highway Department failed to sustain its burden of proof. The record shows that Bee Branch in 1928 was a town with stores on both sides of the street and with the street running from porch to porch. The further proof is that the pumps in issue here were in existence at the time the highway was constructed and that use of the pumps was not interfered with by the highway construction.

Furthermore the county court condemnation order is typical of the orders entered at that time. The right of way was described as extending from station to station and for a certain distance on either side of the center line, and is unintelligible to any one, except perhaps an engineer, without the aid of the plans and specifications on file in the Highway Department. Had Mr. French seen plans prepared in connection with the jobs 843 or 8178, he would have found that the right of way in front of his business was only 30 feet in width on either side of the center line instead of the 40 feet now claimed by the State. Upon the whole record the evidence preponderates in favor of the Chancellor's findings that Mr. French had no notice either by legal process or through entry.

POINT 3. Under this point, the State argues that appellee along with the other citizens of the town of Bee Branch made overtures to representatives of the Highway Department to secure the routing of the highway through the town instead of around the town as planned by the Highway Department. They contend that at these meetings Mr. French was present, was aware of the State's claim of right to the 10 foot strip, acquiesced in the State's claim and permitted the State to rely upon such acquiescence until the State acted to its detriment by issuing a contract for the highway construction through Bee Branch. In *Watson* v. *Murray,* 54 Ark. 499, 16 S.W. 293 (1891), he held that the burden is upon one who relies upon an estoppel to establish the facts relied upon as creating it.

Without deciding whether the facts upon which the State relies would create an estoppel, we point out that French denied that he knew the Highway Department was claiming the disputed strip. Under this state of the record we are unwilling to hold that the Chancellor's finding contrary to the State's position is against the preponderance of the evidence.

Affirmed.

CHARLES PARROTT v. STATE OF ARKANSAS

5-5393 439 S.W. 2d 924

Opinion Delivered April 14, 1969
[Rehearing denied May 12, 1969.]

Drew & Holloway for appellant.

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

FRANK HOLT, Justice . The appellant was charged by information with the crime of robbery. A jury found him guilty and assessed his punishment at 12 years imprisonment in the State Penitentiary. From the judgment on that verdict comes this appeal. On appeal appellant first questions the validity of all proceedings preliminary to his trial of the alleged offense.

At about 10 a.m. on February 15, 1968, the bank in Hartford, Arkansas was robbed of approximately $5,000 by two masked gunmen. While in the bank their general appearance was observed by two women employees and a male official of the bank. When the two robbers left the bank, one was observed to walk with a noticeable peculiarity or a "dragging" of his right foot. Their "get-away" car was parked on the street near the bank. Their departure was observed through the bank window. An accurate description of the automobile

and its license number were noted. The appellant was observed as the driver of the car. The witnesses in the bank were able to see his profile and features since the masks were removed after entering the car. The "get-away" car was found a short time later, abandoned and burning a few miles from the scene of the robbery. The robbery was reported immediately to the law enforcement officials, together with a description of the robbers and other incidental circumstances. The prosecuting attorney secured from the local justice of the peace a warrant of arrest for the appellant. Late in the afternoon of the same day of the robbery the appellant was arrested, based upon this warrant of arrest, in Oklahoma, a distance of approximately 90 miles from the scene of the robbery. At the time of his arrest for this alleged offense, the appellant was in the Adair County Jail on a traffic violation for which he had just been arrested. He was then held in that county jail with the charge of bank robbery placed against him. The next day he was arraigned before a magistrate of Adair County and released upon $5,000 bail. Appellant refused to waive extradition. He was extradited, after a hearing, to the State of Arkansas and placed in the Sebastian County Jail at Fort Smith on March 19, or about a month after his arrest. At the time he was incarcerated in the Sebastian County Jail, his bail was set at $25,000. On March 22, the prosecuting Attorney filed an information direct in the circuit court charging the appellant with the alleged offense. On March 25, the appellant was arraigned in circuit court and bail was set at $50,000. The court later reduced the bail to $35,000 upon appellant's motion. The trial court then refused to approve the tendered bail on the basis that the bondsman had not complied with the court's rule which it had promulgated pursuant to Ark. Stat. Ann. § 43-732 (Repl. 1964). After two hearings before this court, appellant was permitted to make the proffered bail in the sum of $35,000. It appears that he was released on bail pending trial of the case in July.

Appellant has not demonstrated to us any prejudicial error. We find no merit in his contentions relating to the invalidity of any preliminary proceedings. Certainly there was sufficient evidence, and we have only detailed a part of it, as a basis for probable cause in the issuance of the warrant of arrest. Appellant was properly arraigned before a local magistrate in Oklahoma and bail granted and made the day following his arrest. The proper procedure was followed in the extradition proceeding. On the date he was extradited and placed in the Sebastian County Jail a bail was set. The prosecuting attorney then filed a direct charge of robbery against the defendant. This procedure is so well established that it requires no citation of authority to support its validity. In the circumstances, appellant was arraigned within a reasonable time before the circuit court and bail was set. When the trial court refused to recognize his surety, the appellant was admitted to bail after application to this court.

The appellant next argues that the court erred in overruling his motion to suppress and quash a "lineup identification." Appellant urges that his constitutional rights were violated by this procedure and cites several federal cases, including *United States* v. *Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967); *Stovall* v. *Denno,* 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); *Gilbert* v. *California,* 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967). In the case at bar, appellant's then counsel was notified of the proposed lineup and was present during the "lineup identification" procedure. It appears that certain objections to the arrangement of the lineup were made by appellant's counsel and the state made corrections accordingly. We find no violation of appellant's constitutional rights in the instant case. Further, it appears that this out-of-court identification was not offered by the state. See *Steel* v. *State,* 246 Ark. 75, 436 S.W. 2d 800 (1969).

The appellant argues that the testimony of certain witnesses was erroneously permitted and that their tes-

timony was immaterial and "designed to reflect guilt by inference" and prevented the appellant from obtaining a fair trial. We cannot agree with the appellant. A review of the testimony of these witnesses reflects that it is relevant to the issues in the case. The testimony of these witnesses was clearly permissible to establish the identity of the appellant and to show circumstances and events that tended to connect him with the commission of the alleged crime. Such evidence has been approved by us many times. *Keese & Pilgreen* v. *State*, 223 Ark. 261, 265 S.W. 2d 542 (1954); *Williams, et al* v. *State*, 237 Ark. 569, 375 S.W. 2d 375 (1964); *Harris* v. *State*, 239 Ark. 771, 394 S.W. 2d 135 (1965); *Kurck* v. *State*, 242 Ark. 742, 415 S.W. 2d 61 (1967).

The appellant asserts that the court erred in permitting the introduction and exhibiting of the contents of appellant's billfold which was taken by search and seizure in violation of his constitutional rights. The appellant complains that it was prejudicial to admit in evidence a receipt found in his billfold which reflected the alias of "Joe Longshore" and indicated that he had paid a traffic fine in that name. This billfold was first taken from the appellant when he was placed in the Adair County Jail for a traffic violation. It was shortly thereafter, and while he was still in jail, that the appellant was arrested on the Arkansas warrant for robbery. We find no error in the introduction into evidence of this receipt since it was incidental to and a product of a lawful arrest *Ward* v. *State*, 243 Ark. 472, 420 S.W. 2d 540 (1967). There was competent evidence by witnesses that the appellant had on occasions used the name "Joe Longshore" and the use of this name tended to connect and identify him with the commission of the alleged crime of robbery.

The appellant contends that the court erred in permitting the prosecuting attorney to interrogate the witness, Pat Leatherwood, about her knowledge of appellant robbing two other banks before the alleged robbery of

the Hartford bank. The witness stated that she did not know the answer to the question. The trial court sustained appellant's objections and denied appellant's motion for a mistrial. We have often held that it is within the sound discretion of the trial court to deny a motion for a mistrial and that such discretion will not be disturbed on appeal unless there is a showing of abuse. *Briley* v. *White,* 209 Ark. 941, 193 S.W. 2d 326 (1946); *Jackson* v. *State,* 245 Ark. 331, 432 S.W. 2d 876 (1968). In the case at bar, the trial court thoroughly admonished the jury to disregard the questions propounded by the prosecuting attorney. We find no abuse by the trial court in the exercise of its discretion. There is yet another reason for a lack of merit to this contention. We have consistently held that an objection must be made, exceptions saved, and the point presented in a motion for a new trial. *Keese & Pilgreen* v. *State, supra; Randall* v. *State,* 239 Ark. 312, 389 S.W. 2d 229 (1965). There is no showing of full compliance with these requirements.

It is appellant's further contention that the trial court erred in refusing to grant a mistrial because of improper statements made by the prosecuting attorney in his opening and closing remarks. We do not agree. We have reviewed these statements and in our view the state's attorney fairly outlined in his opening remarks the evidence that would be offered and he then produced it. The closing argument of the prosecutor appears to us to be within the bounds of permissible argument and fairness. The trial court has a wide discretion in supervising the arguments of counsel before juries. *Stanley* v. *State,* 174 Ark. 743, 297 S.W. 826 (1927); *Bethel & Wallace* v. *State,* 180 Ark. 290, 21 S.W. 2d 176 (1929). In the case at bar the trial court supervised the argument of counsel in a manner of fairness and permitted no manifest prejudice to appellant.

The appellant also asserts that he was prevented from having a fair trial because of "courtesies extended to the jury by the prosecuting attorney, which amounted

to undue influence'' upon the jury. This argument is directed to the fact that the prosecuting attorney arranged a place for the jurors to eat during the trial. We find no merit in this argument. The town of Greenwood had recently been almost destroyed by a tornado. There was no public eating place available. Nearby was the Greenwood Recreation Hall. These facilities were made available upon inquiry by the prosecuting attorney and the jurors were transported there for lunch on two separate days in the company of the bailiffs. This was done only after the trial court carefully inquired if there were any objections to this procedure and none were voiced. There is no showing whatsoever that the jurors, under these circumstances, were in any manner influenced by this procedure.

The appellant contends that he was prevented from having a fair trial because of the mingling of the witnesses and numerous law enforcement officials among the jurors during recesses of the trial proceedings. The courthouse had been totally destroyed by the tornado and the trial was held in an improvised courtroom in the cafeteria of a school building. The ''band room'' was used as a witness room since witnesses were placed under ''the rule.'' The trial court carefully considered the contention of jury misconduct contained in appellant's motion for a new trial. The testimony of the jurors was taken on this issue and we agree with the trial court that there was no evidence of any misconduct on the part of the jurors or any of the witnesses or other parties.

Having carefully reviewed all of appellant's assignments of error and finding no merit in them, the judgment is affirmed.

George Rose Smith, J., concurs.

George Rose Smith, J., concurring. The judgment is rightly subject to affirmance on the merits, but at

the same time the case presents an appropriate occasion for us to call attention to an aspect of Rule 9 that is not infrequently overlooked by counsel. Rule 9 (d) requires that the appellant's abstract consist of a *condensation* of such material parts of the record as are necessary to an understanding of the case. An abstract that is a mere reprint of the record, or of a substantial part of it, may be such a violation of the Rule as to preclude the court from reversing the judgment on its merits. *Gray* v. *Ouachita Creek Watershed Dist.*, 239 Ark. 141, 387 S.W. 2d 605 (1965).

This case falls in that category. The appellant's "abstract" includes about 200 printed pages of testimony reproduced verbatim, in question and answer form. Even though the appellant in a felony case is not required to abstract the record, Rule 11 (f), if he undertakes to do so he is expected to comply with our rules. It would be impossible for us to keep our docket current if we were compelled to read mere reprints of the records in the cases submitted for decision. I think that in the long run it would be a disservice to the bar for us not to call attention occasionally, especially in affirming a judgment on the merits, to such a clear-cut violation of Rule 9 as that which occurred in this instance.

5-4877 439 S.W. 2d 797

Opinion Delivered April 21, 1969

Bethell, Stocks, Callaway & King for appellant.

Putman, Davis & Bassett for appellees.

CARLETON HARRIS, Chief Justice. This appeal questions the corrections of the ruling of the Washington County Circuit Court in sustaining a demurrer to the complaint of appellant, Sentry Insurance Company, which had filed a suit against Betty Dean Stuart, appellee herein, and Anita D. Peterson, the company's insured, under a subrogation agreement. Mrs. Peterson held a policy of automobile insurance with appellant company which provided, *inter alia,* payment to her for any medical expenses incurred as a result of a motor vehicle collision up to the sum of $1,000.00. Both Mrs. Peterson and Betty Dean Stuart were residents of Fayetteville in Washington County at the time of the events hereinafter set out.

On May 17, 1966, in the state of Oklahoma, appellee was driving an automobile in which Mrs. Peterson was riding as a passenger. According to the allegations of the present complaint filed by appellant, Mrs. Stuart, driving into a service station, struck two men, and ran her automobile into a building, resulting in injuries to Mrs. Peterson, who was hospitalized as a result of such injuries, and underwent surgery. The complaint further sets out that Oklahoma has no guest statute, and it is asserted that, under the laws of that state, Mrs. Peterson had a cause of action against Mrs. Stuart for ordinary negligence. Acts on the part of Mrs. Stuart constituting negligence which were the proximate cause of the injuries and medical expenses to Mrs. Peterson, are then set forth with the allegation that appellant's insured sustained medical and hospital expenses in the sum of approximately $2,713.13.

Pursuant to the provisions of the policy heretofore mentioned, Sentry Insurance Company paid to its insured, Mrs. Peterson, the sum of $1,000.00. Under the policy, Sentry is subrogated to the rights of Mrs. Peterson as to her cause of action for recovery against any person who might be liable for the medical expenses; further, the policy provides that the insured should do nothing after loss to prejudice subrogation rights.

It is further asserted in the complaint that Mrs. Stuart and her insurance carrier, Safeco Insurance Company, were notified by Sentry of its subrogation rights by letter, dated April 6, 1967; thereafter, on August 8, 1967, Mrs. Peterson entered into a settlement with Safeco, and, as a part of such settlement, Mrs. Peterson executed a general release to Mrs. Stuart. The settlement was effectuated without the entry of a court judgment or the filing of a suit. Sentry prayed that it have judgment against Mrs. Stuart in the sum of $1,000.00, together with costs; in the alternative, the company sought judgment against Mrs. Peterson in the event that it should be determined that any action on her part

destroyed appellant's right of subrogation against Mrs. Stuart. After filing a separate motion to quash the summons, which was denied by the court, appellee filed her separate demurrer, asserting:

> "(1) That the complaint of the plaintiff does not state facts sufficient to state a cause of action against this separate defendant.
>
> (2) That there is a defect in the parties plaintiff and parties defendant.
>
> (3) That this Court has no jurisdiction over this separate defendant."

Subsequently, the court entered its order, sustaining the demurrer, finding:

> "* * * that the Oklahoma law applies in this case as reflected in the case of *Lowder versus Oklahoma Farm Bureau Insurance Company,* decided December 12th, 1967."

Appellant was given 15 days to plead further, but elected to stand upon the complaint, and the court entered its judgment dismissing appellant's complaint. From the judgment so entered, Sentry Insurance Company brings this appeal.

Appellant asserts that the court erred in its determination of Oklahoma law, and also contends that the present litigation is governed by Arkansas law, rather than Oklahoma law. As to the law in our sister state. appellee concedes that the Oklahoma courts have not yet squarely decided the question of whether, under Oklahoma law, an insurance company can bring a subrogation action against a third party tortfeasor to recover medical payments it has made to its insured. We think the Washington Circuit Court was in error in relying upon *Lowder* v. *Oklahoma Farm Bureau Mutual Insur-*

ance Company, 436 P. 2d 654, as authority for its holding, because the holding in *Lowder* was predicated on the rule in Oklahoma against splitting a single cause of action.

It is not necessary to determine Oklahoma law to decide this litigation, for it appears that the question of what constitutes splitting a cause of action and its permissibility is a question of procedure, rather than substantive law, and is thus governed by the law of the forum.

Dr. Robert A. Leflar, Distinguished Professor of Law, and a former member of this court, comments on this question in "The Law of Conflict of Laws," § 61, p. 110:

> "There are a number of rules of law which are without much doubt treated as procedural. The question of what is the proper court in which to bring an action, for example, as between courts of law and equity, is always governed by the law of the forum. The same is true of the form of action to be brought, the sufficiency of pleadings, the effect of splitting a cause of action, and who are proper or necessary parties to the action."

In other words, the Oklahoma decision in *Lowder* was not based on substantive law.

Though we have not passed squarely on the issue of whether the insurance carrier may bring a subrogation action to recover medical payments paid to its insured, the case of *Shipley* v. *Northwestern Mutual Insurance Company,* 244 Ark. 1159, 428 S.W. 2d 268, as acknowledged by appellee, clearly indicates that such an action would be permissible. There, this court said:

> "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. [Citing cases.]"

The question has been passed upon by numerous other jurisdictions. An annotation on the subject, "Insurer—Rights Against Third Person," is found in 92 A.L.R. 2d 97. It is pointed out that subrogation is a normal incident of indemnity insurance, and that no act of the insured releasing the wrongdoer from liability can defeat the insurer's rights when a release is given without the knowledge or consent of the insurer, and when the wrongdoer has full knowledge of the insurer's right of subrogation under the contract.[1] Twenty-one

[1]The annotation, at Page 147, states:

"Although voicing some disagreement as to the application and effect of the rule where an element of damage is the subject of insurance, the courts in cases factually within the scope of this annotation topic have generally held that whatever the rule may be in other situations, and even if the rule against splitting a cause of action is applicable to a settlement by the insured short of judgment for a portion of the loss, nevertheless, where a tortfeasor chargeable with notice of an insurer's rights makes a compromise settlement with the insured to which the insurer is not a party, the tortfeasor either waives his right to invoke or is estopped to rely upon the rule as a defense to an action by the nonconsenting insurer as subrogee. Under such circumstances the settlement is regarded as having been made subject to and with a reservation of the rights of the insurer, and the tortfeasor is deemed to have consented to a separation of the rights of the insured and the insurer, although such rights may originally have been part of a single indivisible cause of action."

Seven jurisdictions are listed as supporting this principle. Footnote 17, in part, at Page 148, sets forth:

"The scope of the present annotation is limited to cases in

states are listed as holding that the insurer's right of subrogation is not destroyed by the insured's giving a release upon settlement of the claim. In *DeCespedes* v. *Prudence Mutual Casualty Company of Chicago, Illinois* (Florida), 193 So. 2d 224, the court said:

> "The plaintiffs argue that the subrogation clause amounts to an attempt to assign a claim for personal injuries, such an assignment being invalid under the common law and not expressly sanctioned by statute. * * *
>
> "The concept of subrogation is distinct from that of a mere assignment. Subrogation is a 'creature of equity having for its purpose the working out of an equitable adjustment between the parties by securing the ultimate discharge of a debt by the person who in equity and good conscience ought to pay it * * * a wrongdoer who is legally responsible for the harm should not receive the windfall of being absolved from liability because the insured had had the foresight to obtain, and had paid the expense of procuring, insurance for his protection; since the insured has already been paid for his harm, the liability of the third person should now inure for the benefit of the insurer.' 16 Couch, Cyclopedia of Insurance Law, § 61:18 (2nd Ed. 1964).
>
> * * *
>
> "Subrogation serves to limit the chance of double recovery or windfall to the insured, and, when exercised, tends to place the primary liability upon the tortfeasor, where it belongs. See 3 Appleman, supra, § 1675. So long as subrogation, as

which an insurer sought to assert subrogation rights against a tortfeasor who had entered into a settlement with the assured. Cases where the insured prosecuted a suit against the tortfeasor to final judgment are excluded, but cases where after settlement a judgment was entered by agreement by way of compromise are included."

applied to this medical pay provision, serves to bar double recovery, it should be upheld."

In *Cleaveland* v. *Chesapeake & Potomac Telephone Company,* 169 A. 2d 446, though the question of an independent action on a subrogation claim was not involved, the Maryland Court of Appeals recognized the general rule as follows:

> "The cases and text writers generally take the position that where third parties, who may be liable to an insured for a loss, effect a settlement with the latter and obtain a release from all liability with knowledge of the fact that an insurer has already paid the amount of its liability to an insured, the settlement and release will not bar the assertion of the insurer's right of subrogation. The reasoning seems to be that such release is a fraud on the insurer and constitutes no defense against it in an action to enforce its right of subrogation."

We thoroughly agree with the reasoning of the cases cited, and hold that appellant's cause of action, arising from the subrogation agreement, was not terminated by the release given by Mrs. Peterson.

Appellee apparently recognized that this court might well take the view herein expressed, for her principal argument is directed to the fact that a correct decision of a trial court will not be reversed on appeal even though erroneous reasons may have been given for such a ruling. This is an accurate statement of the law, and we have so held on numerous occasions. *Reeves* v. *Ark-La Gas Company,* 239 Ark. 646, 391 S.W. 2d 13. Appellee then points out that, in her demurrer, she raised the objection that there was a defect in the parties plaintiff and defendant, and that, since the issue of whether all necessary parties are before the court is one of procedure, rather than substance, the law of Arkansas determines whether there was a defect in the parties. From her brief:

"Appellee submits that under Ark. Stat. 27-802,[2] the insured, as assignor of a cause of action not permitted by statute, was a necessary party to this suit and since she was not made a party, appellee was entitled to have the complaint dismissed."

As mentioned by appellee, in *Motors Insurance Corporation* v. *Coker,* 218 Ark. 653, 238 S.W. 2d 491, we held that the insured had not been made a party plaintiff as required by Ark. Stat. Ann. § 27-802 (Repl. 1962), and that it was necessary that this be done before appellant's suit could be properly maintained.

Appellee overlooks the fact that this defect cannot be reached by a demurrer. Ark. Stat. Ann. § 27-1115 (Repl. 1962) sets out that "the defendant may demur to the complaint *where it appears on its face*[3] either: * * * [Here the five grounds for filing a demurrer are set out]." The defect relied upon by appellee does not appear upon the face of the complaint. In fact, Mrs. Peterson was named a defendant, and she is mentioned several times throughout appellant's pleading. The record does reflect, however, that Mrs. Peterson was not served with summons, the docket sheet simply showing "n. serv." on this defendant. Consequently, appellee's contention is without merit.

In accordance with the views herein expressed, we hold that the trial court erred in sustaining the demurrer to appellant's complaint; the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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[2]"27-802. Action by assignee—When assignor must be party. —When the assignment [of a thing in action] is not authorized by statute, the assignor must be a party as plaintiff or defendant."

[3]Emphasis supplied.

ARKANSAS STATE HIGHWAY COMMISSION v.
W. D. FREYALDENHOVEN ET UX

5-4889 439 S.W. 2d 791

Opinion Delivered April 21, 1969
[Rehearing denied May 19, 1969.]

Thomas B. Keys and *Kenneth R. Brock* for appellant.

Gordon, Gordon & Eddy for appellees.

GEORGE ROSE SMITH, Justice. In this eminent domain proceeding the appellant is condemning a right-of-way for Interstate 40 across the appellees' 300-acre farm, effectively cutting it in two. The jury fixed the landowners' compensation at $20,000. The only argument for reversal is the Commission's contention that there is no substantial evidence to sustain the landowners' claim for severance damages, which necessarily made up the greater part of the jury's verdict.

The controversy narrows down to the adequacy of an underpass which the condemnor constructed for the landowners' cattle to use in traveling from one side of the divided highway to the other. There are pastures

on both sides. It is an undisputed fact that in the landowners' cattle-raising operation the animals must be transferred from one pasture to the other several times a year. If the cattle can be induced to use the underpass, then the severance damages will fall far short of the amount of the verdict. But if the landowners must load their livestock in trucks and transport them to an overpass half a mile away, then the verdict is not excessive.

We must uphold the verdict. The landowners requested an underpass ten feet high and ten feet wide, but the highway department engineers merely enlarged a proposed concrete drainage culvert to dimensions of five feet by five feet. This tunnel is 165 feet long and according to the proof is decidedly dark throughout much of its length. Witnesses for the landowners observed snakes and mud in the tunnel. Freyaldenhoven himself, an experienced cattle raiser, testified that his livestock refused to enter the underpass, which had been completed before the trial. He roped a gentle cow and attempted to pull her through the tunnel, but the animal balked. The jury was shown a photograph depicting that unsuccessful effort. Another cattleman, the witness Grisswood, testified that in his opinion it would not be possible to force cattle to use the underpass. Two real estate appraisers also expressed that opinion.

The highway department countered that testimony with the opinions of two other real estate appraisers who thought that the underpass would serve its intended purpose. The department also offered the testimony of a cattle raiser who had a similar tunnel on his property in Clark county. He testified that his cattle had readily learned to use the underpass, though the jury may have doubted his further statement that he had a 1,200-pound work horse that customarily went through the tunnel "even though he had to squat just a little." From what we have said it is evident that the decisive issue was that of weighing the conflicting testimony of

experienced witnesses, all of whom were worthy of belief. Upon such an issue the verdict is conclusive.

Affirmed.

ROSALIE TARVIN HARRIS v. GERALD WAYNE TARVIN

5-4884 439 S.W. 2d 653

Opinion Delivered April 21, 1969

Robert D. Ridgeway for appellant.

Gladys Milham Wied for appellee.

LYLE BROWN, Justice. To the union of Rosalie Tarvin and Gerald Wayne Tarvin, appellant and appel-

lee respectively, was born a son, age seven years at the time of the hearing from which this appeal stems. The parents were divorced in 1964 and the mother was awarded custody of the child, subject to certain visitation rights of the father. On petition of Gerald Wayne Tarvin in 1968, the court enlarged his visitation rights and the mother, now Rosalie Tarvin Harris, appeals. She contends (1) that visitation rights cannot be changed without a showing of change in circumstances which would justify a change of custody; (2) that a change in the visitation period was not pleaded; and (3) that the court abused its discretion in refusing to hear the mother's testimony.

The father's 1968 petition asked for a change in custody, alleging changed circumstances and seeking full custody for himself. Alternatively, he asked that he be given custody during the school term with the child going to the mother during the three months vacation.

When the father rested his case the mother's attorney moved that the father's petition be dismissed for failure to show changed circumstances. Before ruling on the motion the court declared a twenty minute recess. When court reconvened the chancellor announced that the custody order would not be modified but that the child would be permitted to visit the father for two months during the summer and one week during the Christmas holidays. That ruling constituted a substantial enlargement of the father's visiting privileges. At that point the mother had not rested her case and she immediately requested that she be permitted to present her evidence. That request was denied.

We can perceive that during the recess period the chancellor may have been advised of the nature of the evidence the mother would introduce; and since he believed that her evidence would not alter the chancellor's conclusion, he elected not to hear it. Yet if our perception of the occurrence is correct, still we cannot give

weight to it because it is not in the record. Absent a valid and recorded reason for refusing to permit the mother to put on her proof we have no alternative but to hold that the court erred. In her pleadings the mother controverted all the allegations made by the father; she announced ready for trial; and she was entitled to the opportunity to produce her evidence. According to the record that right was denied and without an opportunity to make proffer of proof.

Another of appellant's points is that the modification of *visitation* rights is not permitted unless there is sufficient change in circumstances to warrant change of *custody*. With that argument we cannot agree. Visitation rights may be modified upon a proper showing that it is a change to which the petitioning parent is reasonably entitled because of changed circumstances pertinent to visitation; and also, that the welfare and best interest of the child dictate a change. A number of cases approving that rule are found in the 1968 cumulative supplement to Nelson on Divorce, § 15.27 (Rev. 1961).

Finally it is argued that the modification of visitation rights was improper in that the father did not make a specific plea therefore. He pleaded alternatively that custody be changed to the father and that the mother have the child during summer vacation. That plea placed the visitation privilege in issue. Secondly, the primary consideration of the court is the welfare of the child and its best interest cannot be thwarted by a minor technical error in a pleading, if in fact it did exist.

Appellant requests this court to award attorney's fee and costs incident to this appeal. The amount is fixed at $150.00. To enforce his visitation rights in 1968 the father was compelled to sue out a writ of habeas corpus in Gilmer, Texas. Certainly that expense could have been avoided had the mother cooperated. For that reason we have not fixed the amount at a sum which

would have been otherwise justified.

For the error indicated the decree is reversed and the cause remanded.

JACK BOWLIN v. OVA LEA KEIFER

5-4847 440 S.W. 2d 232

Opinion Delivered April 21, 1969

N. D. Edwards for appellant.

Jack Yates and *Theron Agee* for appellee.

JOHN A. FOGLEMAN, Justice. The primary question on this appeal involves the validity of a written instrument as a conveyance of real property.

Appellant filed a partition suit claiming to be the owner of an undivided one-seventh interest in certain tracts of land in Franklin County. He alleged that appellee was also the owner of an undivided one-seventh interest. Appellant asserted, and it is agreed, that the common source of title was George T. Wade, who owned all of the property at the time of his death on August 15, 1945. Appellant claimed title by reason of a conveyance from one Victor Grady Wade, the sole heir of Guy G. Wade, who was one of the seven children of George T. Wade. Guy G. Wade died on September 10, 1948.

On April 26, 1947, Guy G. Wade executed and delivered to appellee the following written instrument:

"Glendora, California
April 26, 1947

AGREEMENT OF SALE

NOTICE: For the sum of $300.00 cash in hand, paid, the receipt of which is hereby acknowledged, I, Guy G. Wade, sell to Ova Lea Keifer, all

my rights, title and interest in the estate of my father George T. Wade—deceased. I also agree to render proper and legal conveyance at any time upon request of said Ova Lea Keifer.

Guy G. Wade

Signed:

Guy G. Wade"

The defendants in the partition suit, of which appellee was one, filed an answer in which it was asserted that appellee was the owner of an undivided two-sevenths interest in the lands. They also denied that appellant had any interest in them. The instrument above set out was made an exhibit to their answer and later introduced in evidence in support of appellee's claim. It was also alleged in the answer that appellant knew at the time of his conveyance that his grantor had no interest in the lands and knew that Guy G. Wade had conveyed his interest to the appellee by the instrument above set out. They also alleged that the recording of this instrument on June 20, 1955, gave constructive notice to appellant.

Appellant contends that the instrument in question is void and that it was not notice either to him or to his predecessor in title. One of his arguments in support of this contention is that the deed does not describe any real property. In this respect we agree with the appellant.

In *Turrentine* v. *Thompson,* 193 Ark. 253, 99 S.W. 2d 585, we held that a deed which did not identify the land sought to be conveyed as being in any county or even in the state was void as failing to furnish a key by which the land might be certainly identified. As we said in that case, the land intended to be conveyed might be in another state.

The chancellor based his holding, in part, upon ad-

verse possession for the period of limitations by appellee, laches of appellant and estoppel. Appellee argues those defenses here even though she failed to plead either of them and testified that her claim depended entirely upon the written instrument. Generally, in order to be available to a party the defenses of limitations and estoppel must be pleaded, and relied on in the trial court. *Blakeley* v. *Ballard,* 188 Ark. 75, 65 S.W. 2d 7; *Bell* v. *Lackie,* 210 Ark. 1003, 198 S.W. 2d 725; *Moore* v. *Rommel,* 233 Ark. 989, 350 S.W. 2d 190.

The adverse possession statute may become an issue during the trial, however, either by amendment of the pleadings or by evidence showing operation of the statutory bar. *Roberts* v. *Burgett,* 209 Ark. 536, 191 S.W. 2d 579. In this case, however, appellee, on the one hand, and appellant and his grantor, on the other, were tenants in common. In order for possession of a tenant in common to be adverse to that of his cotenants, knowledge of the adverse claim must be brought home to them directly or by such notorious acts of unequivocal character that notice may be presumed. *Griffin* v. *Solomon,* 235 Ark. 909, 362 S.W. 2d 707. Stronger evidence is required when a family relationship exists than in other cases. *McGuire* v. *Wallis,* 231 Ark. 506, 330 S.W. 2d 714; *Ueltzen* v. *Roe,* 242 Ark. 17, 411 S.W. 2d 894. The burden of proof was upon appellee. *Smith* v. *Kappler,* 220 Ark. 10, 245 S.W. 2d 809.

In this case, Mrs. Keifer never talked with her nephew Victor Grady Wade about the matter. Sometime between two and six years before the trial, she executed two division orders acknowledging that Victor Grady Wade was entitled to a one-seventh interest in royalties arising from the interest of George T. Wade in the lands. The only evidence of adverse possession is the fact that rents for a two-sevenths interest were paid to appellee and none were paid to Victor G. Wade. It was shown that Victor did not inquire about his share of the rents. The sole enjoyment of rents and profits

by a tenant in common does not necessarily amount to a disseizin of a cotenant. *Hardin* v. *Tucker,* 176 Ark. 225, 3 S.W. 2d 11.

This case is remarkably similar to *Smith* v. *Kappler,* supra, where we reversed a finding of adverse possession against a cotenant seeking partition. The basis of our holding was that there was no showing that notice of the adverse claim was given and that there was a recognition of the title of the cotenant by acts done during the period of asserted adverse possession. Appellee here failed to meet her burden for the same reasons. We are not impressed with her explanation that she signed the division orders as a gratuity because they were too insignificant for her to raise any question. She admitted that she knew she was conceding a one-seventh interest to Victor Grady Wade. Her action is more consistent with a recognition of his title than with her present contention. See also *Zachery* v. *Warmack,* 213 Ark. 808, 212 S.W. 2d 706.

Generally, estoppel must be pleaded to be available as a defense. *Blakeley* v. *Ballard,* 188 Ark. 75, 65 S.W. 2d 7; *Bell* v. *Lackie,* 210 Ark. 1003, 198 S.W. 2d 725; *Moore* v. *Rommel,* 233 Ark. 989, 350 S.W. 2d 190. Estoppel may also become an issue when no objection is made to evidence in support of the defense. *Williams* v. *Davis,* 211 Ark. 725, 202 S.W. 2d 205; *Aclin* v. *Caplener,* 229 Ark. 718, 318 S.W. 2d 141. Here the defense was neither pleaded nor relied upon by appellant, who testified that her claim depended entirely upon the written instrument signed by Guy G. Wade. Although estoppel can arise by actions of a party, or his failure to speak or act as well as by representations, it does not exist unless the adverse party has in good faith relied upon the acts, representations, inaction or silence to his detriment. *Storey* v. *Brewer,* 232 Ark. 552, 339 S.W. 2d 112; *Rogers* v. *Hill,* 217 Ark. 619, 232 S.W. 2d 443; *Tarver* v. *Taliaferro,* 244 Ark. 67, 423 S.W. 2d 885. We find no evidence to show that Ora Lee Keifer relied up-

on any acts of either Victor Grady Wade or Jack Bowlin to her detriment in any respect.

In order for laches to constitute a defense, appellee must have suffered such a change in position that she could not be restored to her former state by reason of the failure of appellant or his predecessor in title to assert the present claim. *Baxter* v. *Young,* 229 Ark. 1035, 320 S.W. 2d 640. Appellant acquired title by deed from Victor Grady Wade on December 5, 1966. This action was brought February 1, 1968. Certainly there was no undue delay on appellant's part. It is not shown that appellee has suffered any change in position by reason of any delay on the part of Victor Grady Wade. Her recognition of his rights when she signed the division order negates any idea that she had changed her position in any way.

We cannot subscribe to the suggestion that the fact that appellant was married to a daughter of Guy G. Wade's widow by a subsequent marriage supplies any deficiencies in the evidence or charges appellant with any notice not otherwise shown. There might be some merit in the argument that appellant bore the burden of proof of the payment of a valuable consideration by him without notice of appellee's claim, if the instrument relied upon by appellee constituted a contract enforceable between the parties. This is not the case. A contract for the sale of land will not be enforced unless the description disclosed therein is as definite and certain as that required in a deed of conveyance. *Fordyce Lumber Company* v. *Wallace,* 85 Ark. 1, 107 S.W. 160. The instrument here does not contain such a description. *Turrentine* v. *Thompson,* supra.

The decree is reversed and the cause remanded to the trial court for entry of a decree consistent with this opinion since the title to real estate is involved.

Byrd, J., dissents.

CONLEY BYRD, Justice. The record here shows a controversy between appellee Ova Lea Keifer and appellant Jack Bowlin to a tract containing 270 acres more or less in the Ozark District of Franklin County and to one-seventh of the proceeds of a U. S. Government check for $25,500, deposited in the registery of the court. It is not disputed that George T. Wade was the father of Ova Lea Keifer and Guy G. Wade, together with other children. On April 26, 1947, Guy G. Wade executed the following instrument.

"Glendora, California
April 26, 1947

"AGREEMENT OF SALE

"NOTICE: For the sum of $300.00 cash in hand, paid, the receipt of which is hereby acknowledged, I, Guy G. Wade, sell to Ova Lea Keifer, all my rights, title and interest in the estate of my father George T. Wade, deceased. I also agree to render proper and legal conveyance at any time upon request of said Ova Lea Keifer.

Guy G. Wade

Signed:

Guy G. Wade

Subscribed and Sworn to before me this 26th day of April, 1947.

Edna Graves, Notary Public

In and for the County of Los Angeles, State of California

My Commission Expires August 27, 19 "

After execution of this instrument, Guy G. Wade died on Sept. 10, 1948, leaving as his sole and only heir

Victor Grady Wade. The testimony shows that after the Corp of Engineers begin making surveys for the Ozark Dam area, Victor Grady Wade and wife, on Dec. 5, 1966, conveyed one-seventh interest in the lands to his step-sister's husband, appellant Jack Bowlin. This deed recites a consideration "of one dollar and other valuable considerations". In offering this deed into evidence counsel for appellant stated, "Our stipulation is only to the extent that it is unnecessary to bring the clerk up to prove the deed". The record also shows that Victor Grady Wade was present in the court room but did not testify, and that the appellant Jack Bowlin neither testified nor attended the trial.

I agree with the majority opinion that the description contained in the agreement of sale is insufficient to constitute notice to a bona fide purchaser for value, HOWEVER, I do not agree that the description is void as between Ova Lea Keifer and Guy G. Wade. In *Varner* v. *Rice,* 44 Ark. 236 (1884), we permitted evidence *aliunde* to show what was meant by the description "the plantation called the Varner place". In *Thomason* v. *Abbott,* 217 Ark. 281, 229 S.W. 2d 660 (1950), we pointed out that a description "a part of the east half of south east one quarter of Section 31, 6 acres" was void for indefiniteness insofar as record title was concerned but that as between the grantor and grantee evidence *aliunde* might be introduced to establish what lands were intended to be conveyed.

Based upon the foregoing authorities it is perfectly obvious that as between appellee Ova Lea Keifer and Guy G. Wade evidence could have properly been introduced to show what the estate of George T. Wade consisted of.

Does Victor Grady Wade stand in any better position than his father? We held in *Turner* v. *Rust,* 228 Ark. 528, 309 S.W. 2d 731 (1958), that a grantor, or an heir claiming through him, is estopped to claim or assert

anything in derogation of his deed or assignment. Certainly the heir could convey no better interest to one with notice than he himself had and since he himself paid no consideration for the inheritance from his father, the title in him was no better than the title in his father.

Did the deed from Victor Grady Wade to the husband of his step-sister, reciting only a consideration "of one dollar and other valuable consideration," make Jack Bowlin a bona fide purchaser for value without notice? Since the only evidence in the record is the deed and since the record shows that Jack Bowlin was not present at the trial and did not testify, the issue turns upon who had the burden of proof. In *Osceola Land Company* v. *Chicago Mill & Lumber Company,* 84 Ark. 1, 103 S.W. 609 (1907), we said:

> "The plaintiff contends that the railroad company and Chatfield were both bona fide purchasers for value without notice of the Rozell title, and the question is presented whether the burden to show notice was on the defendant or not. In the recent case of *Steele* v. *Robertson,* 75 Ark. 228, where parties came in as interveners and in order to obtain protection alleged affirmatively that they were bona fide purchasers for value without notice, we said that the burden was on them to make out their case, and to show, not only that they had paid for the land, but that they did so without notice of plaintiffs' right. When in such a case there are circumstances that tend to show notice, or tend to raise an inference of notice, and the party who claims to be a bona fide purchaser fails in his testimony to deny notice, this may be, as we held in that case, a controlling circumstance against him, without regard to who has the burden of proof. This was probably as far as we should have gone in that case, although the law as there stated is supported by a number of cases. *Bell* v. *Pleasants,* 145 Cal. 410; *Beattie* v. *Crewdson,* 124 Cal. 577; *Wilhoit* v. *Lyons,* 98 Cal. 409, *Farley* v. *Bateman,* 40 W. Va.

542; *Connecticut Mut. Life Ins. Co.* v. *Smith,* 117 Mo. 261. But a further consideration of the case has convinced us that the statement that the burden is on the party claiming to be a bona fide purchaser to show want of notice is not correct as a general rule; for, when the party relies on the defense of being a bona fide purchaser, and shows that he has paid a valuable consideration, the burden of showing that he purchased with notice is on the party alleging it or who relies on the notice to defeat the claim of bona fide purchaser."

In 92 CJS page 228, *Vendor & Purchaser,* § 323(c), it is pointed out that a person who purchases property for a nominal or grossly inadequate consideration is not a bona fide purchaser, and in 92 CJS page 308, *Vendor & Purchaser,* § 373, it is pointed out that the recital of a consideration in the conveyance is not sufficient evidence that the grantee therein was a purchaser for value, without other evidence, to establish the defense of bona fide purchaser. To the same effect, see *Hood* v. *Webster,* 271 N.Y. Supp. 57, 2 N.E. 2d 43, 107 ALR 497, and the subsequent annotation at page 513, wherein it is said, "In accordance with the general rule . . . the numerical weight of authority is to the effect that one claiming to be a bona fide purchaser as against the holder of a prior unrecorded conveyance or encumbrance has the burden of showing that he paid a valuable consideration for the conveyance to him, and this by other evidence than the recitals in his deed."

Thus, as I view the instrument, here involved, it was sufficient to pass title as between the parties and the description contained therein was sufficient to permit evidence of what the estate of George T. Wade consisted. In this situation Victor Grady Wade as an heir of his father, Guy G. Wade, stood in the same position as his father Guy G. Wade, under the authority of *Turner* v. *Rust, supra.* Furthermore, since the appellant Jack Bowlin failed to sustain his burden of proof by

showing that he paid a valuable consideration for the deed from Victor Grady Wade, appellant Jack Bowlin stands in no better position than his grantor. Consequently I would affirm the decree of the Chancellor holding the title good in appellee.

The majority opinion places much emphasis on *Turrentine* v. *Thompson,* 193 Ark. 253, 99 S.W. 2d 585 (1936). There Will Turrentine had conveyed to Zazelle Turrentine on the 4th day of May 1927. The description in Will's deed to Zazelle is as follows, "All the right, title, interest, equity, and/or claim of every kind of character, which I may now or hereafter have, as heir of Richard Turrentine, deceased, in and to all moneys, credits, chattels, effects, insurance funds, choses in action, and/or real, personal or mixed property of every kind or nature and wherever situated." Subsequently on the 4th day of June 1927, Will Turrentine conveyed by particular description the 40 acre tract to W. C. Thompson. In turn W. C. Thompson conveyed the 40 acres by particular description to Earl Thompson on Nov. 15, 1927. All conveyances were recorded.

Since all the instruments in the Turrentine case were recorded the sole issue on appeal was by stipulation of the parties—*i.e.,* whether the description in the deed from Will to Zazelle on the 4th day of May, was sufficiently definite to convey a fee simple title in an undivided ½ interest in the "SW ¼ of NE¼ of sec. 8, twp. 12 S. R. 25 W." Thus we see that by a stipulation the parties had excluded the issue of whether other evidence could be introduced as between the parties to show what lands were included in the description in the deed from Will to Zazelle. Consequently I do not consider the Turrentine case as authority for the proposition for which the majority opinion cites the case.

Therefore, I respectfully dissent.

MILFORD FULLER AND LEO WALTON v.
STATE OF ARKANSAS

5-5410 439 S.W. 2d 801

Opinion Delivered April 21, 1969
[Rehearing denied May 19, 1969.]

Donald J. Adams (for appellant Walton) and *Moore & Brockman* for (appellant Fuller).

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

J. Fred Jones, Justice. This appeal arises from the re-trial of *Walton and Fuller* v. *State,* 245 Ark. 84, 431 S.W. 2d 462, which was reversed by this court on September 9, 1968, and remanded to the Boone County Circuit Court for a new trial.

The facts set out in that case are the same as those in the case at bar and are reiterated briefly as follows: Law enforcement officers from Missouri, accompanied by local officers, made searches of certain premises in and near Harrison in Boone County, Arkansas, and seized numerous items of personal property which had been stolen in Missouri. The principal items involved consisted of men's suits and television sets, and the items were seized under search warrants obtained in Boone County. The warrants described the premises to be searched and specifically described the property searched for. During the search of the premises, the appellant Walton directed the officers to his living quarters and pointed out to them a color television and a record player which were not designated objects of the search, but which were later determined to be stolen property and seized under voluntary relinquishment by Walton.

In the first trial all of the stolen property seized was admitted in evidence. The appellants were found guilty by the jury and sentenced by the court to four years in the penitentiary. On appeal, this court held that the warrants were defective under which the searches were conducted and that the trial court erred in admitting into evidence the objects seized thereunder. The case

was reversed and remanded for a new trial. At the second trial, from whence comes this appeal, the appellants were again found guilty and sentenced on the jury verdict to ten years in the penitentiary. On this appeal from their second conviction, the appellants rely on the following points:

"1. The court erred in denying defendants' motions to suppress all evidence, statements, and other matters obtained as the result of illegal searches and seizures and their motions to suppress evidence under the doctrine of the 'fruit of the poisonous tree.'

2. The court erred in denying defendants' motion to suppress defendants' statements and in permitting testimony and evidence concerning the statements to be introduced into evidence.

3. The court erred in accepting the verdict of the jury and sentencing the defendants to a longer term in the Arkansas Department of Corrections than is permissible under law.

4. The court erred in admitting into evidence the Zenith television set and Zenith record player, the possession of which the defendants were charged and in failing to direct a verdict of acquittal of the appellant at the close of the evidence in the case."

Appellants' first and fourth points have already been decided adversely to their contention in *Walton and Fuller* v. *State, supra,* and our decision there becomes the law of this case as to the admissibility of evidence as to the television set and the record player which defendant "voluntarily" pointed out to the officers at the time of the second search. In that case we held this evidence to be admissible regardless of the fact that the voluntary disclosure was made at a time when the search was be-

ing conducted under the authority of the defective warrant. On this point we said:

> "... Walton, in the presence of Fuller, voluntarily advised Sheriff Hickman of Boone County and Sgt. Rife that there was a quantity of other property besides the television sets for which the search was being conducted, and that he wanted to show them where it was. He told them that he had certain suits of clothing and the television set and record player upstairs in his living quarters... *Under these circumstances, the property found in the Walton living quarters and his statements about them were not come about through exploitation of an illegal search...*
>
> *For the reasons above set out, the television set and record player were admissible in evidence.*" (Emphasis supplied.)

Appellants' second point is likewise without merit for the same reason. In *Walton and Fuller* v. *State, supra,* this issue was resolved in the discussion of the evidence which was to be excluded as a result of the invalid search, wherein we said:

> "... [I]dentification of property which was inadmissible should have been excluded by the trial court as 'fruit of the poisonous tree,'... Furthermore, statements by both Walton and Fuller made in the prosecuting attorney's office, *except for those portions relating particularly to property not listed in the second search warrant about which Walton volunteered information,* were inadmissible as 'fruit of the poisonous tree.'"

Appellants argue that the statements made to the prosecuting attorney were inadmissible since appellants did not waive their constitutional rights under the holding of *Miranda* v. *Arizona,* 384 U.S. 448. This point

also was decided adversely to appellants' contention in *Walton and Fuller* v. *State, supra,* when we said:

> "Although objection was made to the statements made in the prosecuting attorney's office as being inadmissible under the rule announced in *Miranda* v. *State of Arizona,* 384 U.S. 448, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), we find adequate evidence to support the trial judge's finding that the warnings required by that rule were given, and that the statements were voluntary and made under waiver of the rights enumerated in the above case. Neither Walton nor Fuller was in custody at that time on any charge. Before interrogation, both were advised of their rights as to the giving of statements. There is nothing to indicate that either was not intelligent enough to understand the statement of his rights. Nor does it appear that either was not conscious that he was waiving them in answering questions. Walton actually signed a written waiver, on which his constitutional privilege against self-incrimination and right to counsel are clearly and fully listed. There is no indication that this was not a free and voluntary act on his part. While Fuller did not sign the waiver, there is testimony that an identical statement of his rights was read to and by him before any interrogation, after which he expressed his willingness to answer questions. It was only after the interrogation was virtually concluded that he was asked to sign a written waiver of these rights, and he then stated that he wanted a lawyer 'if it got down to where he had to sign something.' In addition to the warnings at the time of the interrogation of Walton and Fuller in the prosecuting attorney's office, the evidence that both were advised of these rights at the time of the search is convincing."

As to their third point for reversal, appellants raise the issue of double jeopardy and argue that the trial

court erred in accepting the verdict of the jury sentencing the defendants to a longer term than they had received at the first trial of the case. Arkansas Statutes Annotated § 41-3938 (Repl. 1964) is as follows:

> "Any person who shall possess stolen goods, money or chattels which exceed the aggregate value of thirty-five ($35.00), knowing them to be stolen, with intent to deprive the true owner thereof, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one (1) year nor more than twenty-one (21) years; and if the aggregate value thereof be not more than thirty-five ($35.00) dollars, such person shall be guilty of a misdemeanor and shall be punished by imprisonment in the county prison or municipal or city jail not more than one [1] year and shall be fined not less than ten dollars ($10.00) nor more than three hundred dollars ($300.00)."

This issue of former jeopardy was discussed rather thoroughly in the very recent decision of this court rendered on April 1, 1969, in the case of *Stout* v. *State,* 246 Ark. 479, 438 S.W. 2d 698.

There was no "implied acquittal" of the appellants by the reversal of their first conviction in the case at bar and different degrees of the offense were not involved as was the situation in *Green* v. *United States,* 355 U.S. 184, cited in *Stout* v. *State, supra.* In the *Green* case the accused was first convicted of second degree murder and the court held that he could not be re-tried for first degree murder, having been impliedly acquitted of that *degree* of the crime. When an accused is tried on a specific degree of crime and is convicted of a lesser degree, which is included in the greater degree, he is thereby acquitted of the greater degree and cannot be tried again for the greater degree. This has been the law in Arkansas for nearly one hundred years. *Johnson* v. *State,* 29 Ark. 31. We now hold, as we have here-

to fore indicated, that the same rule applies where the difference in the *nature* of the punishment is the difference between life imprisonment and death. *Sneed* v. *State,* 159 Ark. 65, 255 S.W. 895. In the *Sneed* case the accused was first sentenced to life imprisonment and upon a new trial following reversal he was again sentenced to life imprisonment. Sneed was tried both times for the same degree of homicide, first degree murder, and this court approved an instruction at the second trial advising the jury that if Sneed was again found guilty of first degree murder, he could only be sentenced to life imprisonment and could not be sentenced to death. We perceive that this rule was based, not on the degree of the crime or the degree of punishment, but upon the difference in the *nature of the* punishment provided by statute for first degree murder, life imprisonment or death by electrocution.

In the case at bar the appellants were tried and convicted twice for the possession of stolen goods which exceeded the aggregate value of $35.00. Some of the items of stolen goods offered in evidence at the first trial were inadmissible and appellants were granted a new trial at their own request. At the second trial, before a new and different jury, only the admissible portion of the stolen goods was offered in evidence and this jury was not as lenient in fixing punishment as the trial court was in the first trial. The punishment fixed by the jury at the second trial was of the same nature as that fixed by the judge in the first trial and was well within the maximum fixed by statute. Had the appellants served time under the first sentence, they would have been entitled to credit on the second sentence for time served on the first, *Stout* v. *State, supra.*

The appellants rely on the case of *Patton* v. *State of North Carolina,* 381 F. 2d 636. The defendant in that case had served five years of a twenty-year sentence imposed by the trial judge on a plea of nolo contendere. The conviction was overturned on constitutional grounds

under state post-conviction procedure, and at the second trial the defendant was sentenced by the trial judge to twenty-five years with credit allowed for the five years served and leaving twenty years yet to be served. The Fourth Circuit Court of Appeals held that the defendant had not waived the benefits of his initial sentence, "because of the restrictive effect this has on access to post-conviction remedies." The case at bar reaches us by direct appeal and not through post-conviction relief procedure, so we fail to see where the 14th Amendment to the constitution is involved in this case at all.

Juries in this state are closely examined on voir dire before they are accepted for service in a given case. While no one would deny that the jury system does not insure perfect justice in every case, no better system for doing so has yet been devised.

We think, the better rule to be, that where a defendant appeals from a conviction and is successful in obtaining a new trial, he must accept the hazards as well as the benefits of a new trial and assume the risk of a more severe sentence of the same nature at the hands of a new and different jury, when the second verdict is within the same degree and the punishment is within the statutory maximum fixed for the degree.

The appellants were not "put in jeopardy of life or limb" at all in this case under any reasonable interpretation of Amendment 5 of the constitution, nor have the appellants been deprived of "life, liberty, or property, without due process of law" under any reasonable interpretation of Amendment 14. We prefer to weigh appellants' rights by the plain and simple language of the constitution rather than attempting to measure the constitution by what we perceive appellants' rights should be. We are unwilling to say to the appellants "you are entitled to a new trial because some of the evidence at your first trial was inadmissible. If your second trial results in less punishment or acquittal, that is well and

good, and your constitutional rights to a speedy and public trial by an impartial jury under Amendment 6 to the constitution have been met and fully complied with. But if your second trial results in a greater penalty than the first even though the punishment is of the same nature and well within the statutory limitation for the offense charged, that part of your new trial violates your constitutional rights and will not be permitted to stand."

We are unable to derive such procedure from the constitution and we are unwilling to read such procedure into the constitution. We hold that under the law of Arkansas a new trial granted in a criminal case for error committed in the first trial constitutes a new trial as to penalty imposed by the verdict, as well as to guilt or innocence where the verdict in the second trial is for the same degree of crime as the first verdict, and the penalty assessed by the second verdict is of the same nature and within the statutory limitations for the degree of the crime involved.

The judgment of the trial court is affirmed.

WINTHROP ROCKEFELLER, ET AL v. ERNEST HOGUE, ET AL

5-4869 439 S.W. 2d 805

Opinion Delivered April 21, 1969

Wright, Lindsey & Jennings for appellants.

Sam Robinson (for appellee Hogue) and *Howell, Price & Worsham* (for appellee Hailey).

CONLEY BYRD, Justice. Appellant Winthrop Rockefeller is the Governor of the State of Arkansas. Acting as such Governor and for the purpose of removing appellees Ernest Hogue and Newt L. Hailey, members of the Arkansas Game and Fish Commission, he appointed appellants Courtney Crouch and Heartsill Ragon as members of a "hearing panel" to prepare, in accordance with judicial standards, a proper record of the charges against each Commissioner. The hearing panel is directed to hear the evidence presented both for and against removal of the Commissioners and, after the evidence had been properly prepared, to present it to the Governor for his decision. Pursuant to the Governor's plan for the preparation of the record, H. W. McMillan was appointed "evidence officer" to investigate the charges against the Commissioners and to present such evidence as he considers pertinent to the hearing panel.

The Chancery Court enjoined appellants Crouch and Ragon from holding a hearing on the Governor's charges against the Commissioners upon the basis that the referral to the panel was an unlawful delegation of authority, and also enjoined the Governor from considering as admitted matters contained in a request for admissions (the request being submitted in accordance with

the discovery procedure provided for circuit, chancery and probate courts by Act 335 of 1953). For reversal appellants contend, among other things, that the chancery court erred in taking jurisdiction because the Commissioners have an adequate remedy at law. Appellants' argument is as follows:

> "In the case at bar, two basic questions arise: (1) Is there a remedy available at law? (2) Is such remedy adequate to give appellees complete and prompt redress for any grievances they conceive they have because of the actions of appellants?
>
> "The answer to the first of these questions is unquestionably in the affirmative. Section 5 of Amendment 35 grants to the Governor the power of removing appellees after a hearing and also provides that such hearing '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.' Thus the people of Arkansas have given to appellees a clear remedy as a matter of right to redress any alleged wrongs which they might receive at the hands of the Governor because of removal proceedings. There are no provisos or special qualifications into which appellees must fit their alleged grievances in order to obtain this right of appeal. Therefore, if appellees feel that they have been wronged or that their rights have been denied or infringed, they have a right to appeal to the Pulaski Chancery Court and to this Court.
>
> "The answer to the question whether the remedy available to appellees is complete is also in the affirmative. In order to preclude the maintenance of a suit in equity the remedy at law must be plain, adequate, complete, and as efficient as the remedy

in equity. *First State Bank* v. *Chicago R. I. & P. R. R. Co.,* 63 F. 2d 585, *McGehee* v. *Midsouth Gas Company,* 235 Ark. 50, 357 S.W. 2d 282. Certainly the remedy provided for appellees by the people of Arkansas in this case meets all of these standards. By appealing the decision of the Governor to the courts in question, appellees can raise not only the alleged wrongdoings which they have raised in this suit but also any which might occur in the future as the removal proceedings continue. Also, by using the method provided for in the Constitution the appellees can have the matter decided once and for all without resorting to piecemeal litigation.

"In this case there would be no irreparable injury if appellees lose this appeal. Just for the sake of discussion, let us assume that the injunction is dissolved by this Court and that the Governor wrongfully removes appellees from office. The only thing which they stand to lose is privilege to serve as Commissioners on the Game & Fish Commission. No question of salary or other renumeration is here involved. Under the law it would not be necessary for the appellees to even miss a single day in office if they had been wrongfully removed. In *Rockefeller* v. *Hogue,* 244 Ark. 1029, 429 S.W. 2d 85, (1968), this Court held that the removal would not be complete and the office would not be vacant until the appellate proceedings had been completed.

"The people of Arkansas have provided appellees with a complete, adequate and efficient remedy to redress not only the alleged wrongs set forth in their complaints but also any grievances which they may conceive in the future. Since there are no special circumstances requiring the extraordinary remedy of injunction, the lower Court erred in allowing the appellees to substitute their request for an injunction for the appeal provided for in the Constitution."

Since our decisions, *Cummins* v. *Bentley*, 5 Ark. 9 (1842), *Bassett* v. *Mutual Benefit Health & Accident Ass'n.*, 178 Ark. 906, 12 S.W. 2d 893 (1929), recognize that equity has no jurisdiction where there is a complete and adequate remedy at law, we must then determine whether the Commissioners have a complete and adequate remedy at law.

The Commissioners sought to be removed were appointed under Amendment 35 to the Constitution of Arkansas. The amendment was initiated by the people and enacted at the general election. In adopting Amendment 35, the people of Arkansas made provision for an independent commission to regulate hunting and fishing in the State and to advance conservation of all forms of wildlife. This was something new in our constitutional fabric. By their action the people created the commission, set its membership, prescribed the qualifications for appointment, and generally outlined the powers of the commission. Section 2 of Amendment 35 conferred upon the Governor the power to appoint the commissioners. Because of the State's history of two term Governors, a "built in" safeguard was established, staggering the commissioners' terms of office, in the effort to prevent any Governor from gaining control of the commission. Thus, with seven year staggered terms, it was doubtlessly assumed that no Governor would be able to appoint a majority of the commissioners. Although recent history has shown that this assumption was erroneous in that one Governor served twelve consecutive years, there can be no doubt of the intentions. Section 5 of the Amendment provides:

> "A Commissioner may be removed by the Governor only for the same causes as apply 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.*" [Emphasis ours].

In *Rockefeller* v. *Hogue,* 244 Ark. 1029, 429 S.W. 2d 85 (1968), we held that the removal phrase "for the same causes as apply to other constitutional officers," referred to the "high crimes and misdemeanors and gross misconduct in office," set out in Art. 15, § 1 of the Constitution as grounds for impeachment of officers in general.

The United States Supreme Court, In The Matter of John Ruffalo, Jr., 390 U.S. 544, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968), pointed out that proceedings such as this are adversary proceedings of a quasi-criminal nature and that one so charged is accordingly entitled to "procedural due process". We understand this "procedural due process" to mean that one so charged is entitled to a hearing before a tribunal established by law and governed by rules of law previously established, 16 Am. Jur. 2d, *Constitutional Law* § 580, where he will be entitled to the compulsory attendance of witnesses or a substitute therefor such as the taking of depositions. Anything less would discourage men of character from accepting such positions, for otherwise their leadership and character could be destroyed by an adjudication that they were guilty of "high crimes and misdemeanors and gross misconduct in office" because of a mere failure of proof.

That a person charged in an impeachment proceeding is entitled to procedural due process is not a new requirement nor one of recent origin. It received much thought at the time of the impeachment of Sir Francis Bacon. When we analyze Section 5 above, to determine the point or place where the procedural due process is guaranteed a commissioner in a removal proceeding, we also find the answer to the question here involved—*i.e.* does the commissioner have a complete and adequate remedy at law to correct any alleged errors committed by the Governor in discharging his duties?

Under the scheme of government set out in our constitution of 1874, the government of the State was divided into three branches, the executive, the legislative and the judicial. Under Article 7, § 1, the judicial power was vested:

> "... in one Supreme Court, in circuit courts, in county and probate courts and in justices of the peace. The General Assembly may also vest such jurisdiction as may be deemed necessary in municipal corporation courts, courts of common pleas, where established, and, when deemed expedient, may establish separate courts of chancery."

Article 7, § 4 gave the Supreme Court appellate jurisdiction only, unless otherwise specifically provided. Circuit courts were generally given jurisdiction in all civil and criminal cases and superintending control and appellate jurisdiction over inferior courts, Art. 7, § 11 and Art. 7, § 14. The chancery court, as distinguished from the circuit court, has at all times been a trial court or a court of first instance. Even the superintending control and appellate jurisdiction of the circuit courts over inferior courts from 1873 to date has been by way of trial anew on the merits without any regard to any error, defect or other imperfection in the proceedings of the inferior courts (Ark. Stat. Ann. § 26-1308 [Repl. 1962]).

Also, when Amendment 35 was adopted, there was no established procedure for a hearing before the Governor or for the compulsory production of evidence to be submitted to him. Nor did Amendment 35 give the right of subpoena to the Governor for the compulsory production of evidence.

We note further that while Section 5, *supra,* provides for a review "by the Chancery Court for the First District" it also refers to the same tribunal as "trial court" when providing that the review and appeal to

this court is to be "without presumption in favor of any *finding by* the Governor or *the trial court.*" (Emphasis ours).

Thus we find that at the time of adoption of Amendment 35 there were no procedural rules established for holding hearings before the Governor or for compulsory attendance of witnesses. Nor was any such procedure established by Amendment 35. However, at that time, there existed a procedure established by law for a hearing before the chancery court, for compulsory attendance of witnesses and preservation of the record. The only conclusion that we can draw, from the language of the amendment equating the finding of the Governor with that of the "trial court" when viewed in the light of the history of the State at the time of the enactment and the requirements of procedural due process, is that a commissioner removed by the Governor is entitled to a trial anew on the merits in the Chancery Court of the First District without regard to any error, defect or other imperfection in the proceedings before the Governor. Because of this we agree with appellants that the commissioners have a complete and adequate remedy by appeal and that the chancery court was without jurisdiction to interfere with the hearing before the Governor.

Reversed and dismissed.

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

CARLETON HARRIS, Chief Justice. I agree that the Chancellor's decree should be reversed, but I see no necessity to go further than to say that the Pulaski Chancery Court had no jurisdiction to enjoin appellants from conducting the hearing. In 43 C.J.S., Injunctions, § 116, p. 647, it is stated:

> "While injunctions have been granted to prevent the improper removal of an officer where

there was no doubt as to the illegality of the action and where the removal had not already taken place but was threatened, the general rule, in the absence of statute providing otherwise, is that equity has no jurisdiction to enjoin the appointment or removal of public officers, whether the power of appointment or removal is vested in executive or administrative boards * * *."

This is also pointed out in our own case of *Davis* v. *Wilson,* 183 Ark. 271, 35 S.W. 2d 1020.

In the Vermont case of *Emerson* v. *Hughes,* 90 A. 2nd 910, the factual situation was somewhat similar to the case at bar. The governor sought to remove a member of the Liquor Control Board. The Chancery Court granted a temporary injunction restraining the Governor from holding a removal hearing, but on appeal to the Supreme Court, that court held that the Court of Chancery had no jurisdiction to grant the injunction, stating that equity does not, as a general rule, have jurisdiction to enjoin the removal of a public officer.

Of course, under Amendment 35 to the Constitution of Arkansas (setting up the Game and Fish Commission), the Governor's findings may be appealed to the Chancery Court, and thus, at that time (if such an appeal should be perfected), the Chancery Court, by virtue of the constitutional provision, would have jurisdiction—but that jurisdiction is only granted in event of an appeal.

The majority are also of the view that the Chancery Court had no jurisdiction to issue the injunction, but my disagreement with the majority is based on the fact that they proceed to set out the procedure to be followed on appeal, if and when the Governor holds that a commissioner should be removed. The question of whether a commissioner who has been removed by the Governor is entitled to a trial anew on the merits in the Chancery

Court is not a question presented to this court in the instant litigation, and it is not argued by either side in the briefs submitted. Consequently, the majority is in the position of setting out the procedure to be followed on an appeal, without giving the parties, both appellants and appellees, the opportunity to brief this question.

In accordance with the views herein expressed, I too would reverse the Chancery Court, holding that it had no jurisdiction to enter the injunction, but I would terminate the opinion with that finding, leaving questions that have not yet arisen to be decided, if and when they do arise.

JOHN A. FOGLEMAN, Justice. I agree fully that the chancery court had no jurisdiction. I agree with the disposition because I think the case must be dismissed for want of jurisdiction. But I do not agree with the means employed to reach the result. There is a much more obvious want of jurisdiction in the trial court which has been urged by appellants but ignored by the majority. Because this want of jurisdiction of subject matter is total, any action taken in the case by either the trial court or this court, except to dismiss it, is wholly void.

Appellees sought to have the chief executive of the state and commissioners appointed by him enjoined from proceeding with a hearing under Amendment No. 35 to our constitution for the removal of appellees as members of the Arkansas Game and Fish Commission. Each complaint showed on its face that the chancery court was without jurisdiction.

This want of jurisdiction was recognized in the early case of *Rhodes* v. *Driver*, 69 Ark. 606, 65 S.W. 106, where this court quoted from *High* on *Injunctions*:

> "No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is

more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature, and cognizable only by courts of law. A court of equity will not permit itself to be made the forum of determining the disputed questions of title to public offices, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy, by proceedings in the nature of a *quo warranto.*" High, Injunctions (3rd Ed.) No. 1312.

See also *Walls* v. *Brundidge,* 109 Ark. 250, 160 S.W. 230, Ann. Cas. 1915C 980; *Miller* v. *Tatum,* 170 Ark. 152, 279 S.W. 1002; *Sheffield* v. *Heslep,* 206 Ark. 605, 177 S.W. 2d 412.

Courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political and where no civil or property right is involved. They have no jurisdiction in matters of a political nature or to interfere with the duties of any other department of government. *Walls* v. *Brundidge,* supra. To assume such jurisdiction would be to invade the domain of other departments of government or of tribunals having jurisdiction. 42 Am. Jur. 2d 834, Injunctions § 86.

Political rights have been clearly defined and distinguished in *Walls* v. *Brundidge,* supra, as follows:

"* * * Political rights consist in the power to participate directly and indirectly in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers and of being elected. These are political rights which

> the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying property and exercising the paternal and marital powers and the like."

Proceedings pertaining to removal from public office are matters of a political nature and the right of the incumbent to remain in office is a political right. In this state the chancery court has no jurisdiction in cases pertaining to ouster of an incumbent from public office and none can be conferred by statute. *Gladish* v. *Lovewell,* 95 Ark. 618, 130 S.W. 579. This court said in that opinion: "The reason for the rule is that such cases involve political rights with which equity has nothing to do."

This rule has general acceptance and is stated in 42 Am. Jur. 2d, Injunctions, § 86, page 835:

> "A court of equity, unless its jurisdiction has been enlarged by statute, has no general jurisdiction over the removal of public officers, and therefore it cannot enjoin an officer or board from removing an officer or from appointing a successor to him after removal."

See also 43 Am. Jur. 55, Public Officers, § 219.

It has been applied by the Supreme Court of the United States many times. *Walton* v. *House of Representatives,* 265 U.S. 487, 44 S. Ct. 628, 68 L. Ed. 1115 (1924) (and cases cited therein). In the *Walton* case, the court said that the rule was not altered even though the removal proceeding be in the nature of a criminal prosecution.

It has also been applied in a petition to enjoin a governor from conducting a removal hearing under a sta-

tute strikingly similar to the constitutional provision involved here. See *Emerson* v. *Hughes,* 117 Vt. 270, 90 A. 2d 910 34 A.L.R. 2d 539 (1952). The authorities were carefully reviewed in that case and overwhelming support for the rule was found. The statute 47 V.S. § 6131 read:

> "* * * 'Removal. After notice and hearing the governor may remove a member of the liquor control board for incompetency, failure to discharge his duties, malfeasance, immorality or other cause inimical to the general good of the state. In case of such removal, he shall appoint a person to fill the unexpired term.' "

The lack of jurisdiction is just as great even though an injunction is sought. *Walls* v. *Brundidge,* supra; *Miller* v. *Tatum,* 170 Ark. 152, 279 S.W. 1002; *Davis* v. *Wilson,* 183 Ark. 271, 35 S.W. 2d 1020; *Priest* v. *Mack,* 194 Ark. 788, 109 S.W. 2d 665; *Curry* v. *Dawson,* 238 Ark. 310, 379 S.W. 2d 287. Thus the chancery court was devoid of judicial power in this matter to the extent that any decree rendered by it would be void. *Raney* v. *Hinkle,* 80 Ark. 617, 95 S.W. 993; *Miller* v. *Tatum,* supra; *Robinson* v. *Morgan,* 228 Ark. 1091, 312 S.W. 2d 329. See also 4 C.J.S. 163, Appeal and Error, § 42.

I regret that the majority have seen fit to bypass this fundamental want of jurisdiction and have laid its action upon a jurisdictional limitation which is not so fundamental that the chancery court would be deprived of power to act. The existence of an adequate remedy at law is not ground for dismissing a complaint, even when objection to jurisdiction on that ground is raised by demurrer. *Higginbotham* v. *Harper,* 206 Ark. 210, 174 S.W. 2d 668. My regret is based not only upon my feeling that this court should be zealous in preventing and avoiding interference with other independent and coequal branches of government but upon the feeling that the court is using this vehicle to gratuitously render an advisory opinion upon procedures in this case. In so

doing, the court is not only rendering an opinion on questions not raised or briefed by the parties but is doing so by way of dictum as support for a judgment which itself is void for want of jurisdiction.

Since there was a want of jurisdiction of the subject matter or a want of power in the trial court, the jurisdiction of this court, being derivative, is no greater. Jurisdiction of an appellate court is derived from and depends upon that of the court of origin. *Rucker* v. *Cox*, 200 Ark. 247, 138 S.W. 2d 778; *Markham* v. *Evans*, 239 Ark. 1154, 397 S.W. 2d 365; *Whitesides* v. *Kershaw*, 44 Ark. 377; *Wright* v. *Wooldridge*, 94 Ark. 276, 126 S.W. 841. Where the court from which an appeal is taken has no jurisdiction, the appeal confers none. *Gregory* v. *Williams*, 24 Ark. 177; *Dunnington* v. *Bailey*, 27 Ark. 508; *Smyrna Baptist Church* v. *Burbridge*, 205 Ark. 108, 167 S.W. 2d 501; *Carter Special School District* v. *Hollis Special School District*, 173 Ark. 781, 293 S.W. 722; *Harris* v. *Hare*, 183 Ark. 259, 35 S.W. 2d 340; See 4 Am. Jur. 2d 539, Appeal and Error, § 9. This court has no jurisdiction where the trial court had none. *Trapnall* v. *Jordan*, 7 Ark. 430. Since an appellate court acquires only such jurisdiction as the court wherein the case originated had, it may render only such judgment as the trial court could or should have rendered. *Pride* v. *State*, 52 Ark. 502, 13 S.W. 135; *Price* v. *Madison County Bank*, 90 Ark. 195, 118 S.W. 706; *Markham* v. *Evans*, supra; *Carter Special School District* v. *Hollis Special School District*, supra; *Baughman* v. *Overton*, 183 Ark. 561, 37 S.W. 2d 81; *Wright* v. *Wooldridge*, 94 Ark. 276, 126 S.W. 841; *Woolverton* v. *Freeman*, 77 Ark. 234, 91 SW. 190. See also 4 C.J.S. 159, Appeal and Error, § 41. This court has no jurisdiction to do anything except dismiss this case for want of jurisdiction.

While I academically agree with the majority that appellees have a complete and adequate remedy by appeal as provided by Amendment 35, I do not agree, even academically, that the review is of the nature suggested

in the majority opinion. The very language of the constitutional amendment contradicts the construction of the majority opinion. It says that a commissioner may be removed "after a hearing which may be reviewed by the chancery court * * * 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." It is not the removal which is to be reviewed, it is the hearing. This cannot mean that a trial de novo such as is specifically provided by statute on appeals to circuit courts is indicated. See, e.g., Ark. Stat. Ann. § 26-1308 (Repl. 1962). On those appeals, there is no review, and the hearing in the inferior tribunal is not even considered. The statute provides that the circuit court shall *hear, try* and *determine* the cause on its merits. No such provision appears in Amendment 35. A review of a hearing, on the other hand, certainly should not involve any more than the type of review given here on appeals from chancery courts. I have been unable to find any instance where the "review" of any matter heard by any tribunal in Arkansas has been taken to encompass a complete new trial where evidence is heard anew and additional evidence accepted, unless a specific statute authorizes or requires this to be done.

In matters pertaining to legal proceedings, the word "review" means a judicial reexamination, as of the proceedings of a lower tribunal of any kind by a higher (Webster's New International Dictionary, Second and Third Editions). This matter was treated by the Supreme Judicial Court of Massachusetts in *Swan v. Justices of Superior Court*, 222 Mass. 542, 111 N.E. 386, 389 (1916), wherein it was held that a review of removals of license commissioners of a city indicated simply a reexamination of proceedings already mad. The court said:

> "* * * 'A review of the charges' signifies in its broad sense an examination of the specifications of

misconduct which constitute the cause or causes on which the hearing was had, to see if they are stated fairly, in a common sense way, though not necessarily with technical accuracy. A review of 'the evidence submitted thereunder' manifests a purpose that there shall be no new witnesses heard but simply that the evidence on which the mayor based his findings shall be re-examined. A review 'of the findings' imports an examination of the conclusions reached by the mayor both as to facts, law, and the resultant decision."

The majority has grasped the words "trial court" as the basis of the opinion that a complete new trial should be had in the chancery court. The effect of this holding is to relegate the hearing before the chief of the executive branch relating to the removal of a member of that branch to the status of a preliminary hearing such as is conducted before magistrates in felony cases. It would vest the real power of removal in the judicial branch of the government rather than the executive branch. I humbly submit that this was not the intention of the people of Arkansas in the adoption of this amendment.

It is obvious to me that the people intended that the power of removal in the governor be limited to the same causes as applied to other constitutional officers and that it be subject to review in order to prevent arbitrary or capricious action. It is also obvious to me that the people intended to avoid the cumbersome, expensive and generally unsatisfactory impeachment processes by the legislative branch. But it is also clear to me that it was never intended by anyone that the real power of removal be vested in the chancery court of the first district subject only to a trial de novo on appeal, as in other chancery cases.

While I do not think the question was ever properly reached here, I felt compelled to express my present feel-

ings with regard to the proper construction of the constitutional amendment with reference to the subject of review. Viewed in a concrete factual situation, rather than in the abstract, with the question presented through advocacy, I might come to a different conclusion. I dare say that the same might be said as appropriately of my brethren of the majority.

I would reverse and dismiss.

DON H. MCCLELLAN v. JAMES H. FRENCH

5-4776 439 S.W. 2d 813

Opinion Delivered April 21, 1969

Howell, Price & Worsham for appellant.

Smith, Williams, Friday & Bowen by *W. A. Eldredge, Jr.*, for appellee.

CONLEY BYRD, Justice. Appellant Don H. McClellan appeals from a jury verdict finding that appellee Dr. James H. French was not guilty of malpractice in his treatment of McClellan's perirectal wound. For re-

versal of the judgment, McClellan relies upon the following points:

1. *The Court erred in permitting Dr. Buchman to give his opinion as to whether Dr. French was guilty of malpractice.*

2. *The Court erred in permitting defendant to propound hypothetical questions based on assumed facts which were not in evidence.*

The record shows that McClellan suffered his perirectal wound at Lake Ouachita while skiing. He was taken by friends to a hospital in Hot Springs where he was referred to Dr. French. Dr. French observed the wound, cleansed it but did not suture it at that time. McClellan waited in Dr. French's waiting room for his friends who had returned to Lake Ouachita to pick up a boat and trailer. While waiting, McClellan began bleeding, the blood flowing down his leg and off the chair onto the floor. He was returned to Dr. French's operating table where his wound was again examined. This time Dr. French sutured the wound and placed McClellan in a Hot Springs hospital for observation. McClellan was released from the hospital the next day. He states that he was released in the afternoon. Dr. French contends that he was released during the morning. Subsequent to McClellan's release from the Hot Springs hospital, he was seen by Dr. Laurens sometime between 4:00 and 5:00 and placed in a Little Rock hospital. The allegations in the complaint were as follows:

> "That said defendant did negligently and carelessly fail to apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of his profession in good standing, engaged in the practice of medicine in the locality in which he practices or in a similar locality in diagnosing and treating him; that as a result of such negligence and carelessness on the part of the de-

fendant a piece of rotten, contaminated and jagged wood remained in plaintiff's peritoneal cavity causing peritonitis, infection and putrification, requiring an exploratory laparotomy as well as a colostomy, causing great conscious pain and suffering and permanent partial disability."

POINT 1. One of the pivotal issues concerning the alleged malpractice of Dr. French was whether he should have packed the would open to permit drainage as testified to by Dr. Laurens or whether it should have been sutured as testified to by Dr. French. To support his position that that was the standard medical procedure, Dr. French called Dr. Joseph Buchman who testified as follows:

Q. Is bleeding dangerous to the patient?

A. Certainly is.

Q. Should be controlled?

A. It has to be controlled.

Q. Then I take it, doctor, in your opinion Dr. French was not guilty of malpractice in suturing?

MR. PRICE:

Your Honor, this is a question . . .

THE COURT: . . .

THE WITNESS:

A. That is standard medical procedure in this community to suture a bleeding wound.

Q. In your opinion Dr. French was not guilty of malpractice in suturing this wound?

A. He was not.

McClellan argues that Dr. Buchman should not have been permitted to testify as to whether it was "malpractice" since this was the ultimate question for the jury. He cites as authority *Johnston* v. *Order of United Commercial Travelers,* 182 Ark. 964, 33 S.W. 2d 375 (1930). During oral argument counsel cited other authorities such as *Hoener* v. *Koch,* 84 Ill. 408 (1877).

In the *Johnston* case the issue was whether Sam C. Johnston had committed suicide. In holding that it was prejudicial error for a doctor to express an opinion that Johnston died as a result of suicide, we said:

> "Opposing counsel have briefed the question of the admissibility of an expert opinion that the death in question resulted from wounds self-inflicted with suicidal intent, and there appears to be several authorities holding such testimony competent. *Miller* v. *State,* 9 Okla. Cr. 255, 131 Pac. 717, L.R.A. 1915A, 1088. We think, however, that the better rule excludes this expert testimony. This is the point in issue, the decisive fact in the case, the question which the jury was impaneled to decide, and is an inference which one person might draw as well as another. Of course, the trained physician and surgeon might know the depth and character and consequences of cuts and wounds and the manner in which they might have been inflicted, which the lay witness might not have, and testimony of this character may be given by the expert, but, when it has been given, the jury, and not the witness, should say with what intent the wounds were inflicted."

In the *Hoener* case, the Supreme Court of Illinois held that it was proper for an expert to give his opinion as to whether or not the treatment the plaintiff received was proper, but that it was error for him to give his opinion as to whether, from all the evidence in the case, the doctor was guilty of malpractice.

However, in the case of *Dorr, Gray & Johnston* v. *Headstream,* 173 Ark. 1104, 295 S.W. 16 (1927), we said:

> "Appellant's next contention for a reversal of the judgment is that the trial court erred in allowing appellee's witnesses, Doctors Ruff and Hill, to state that certain alleged facts constituted negligence on the part of appellants. They were permitted to testify that it would be negligence for an X-ray technician or practitioner to turn an X-ray of 4 milliamperes voltage on a patient for twenty or thirty minutes while absent from the room. The purpose for introducing expert testimony is to get the judgment or conclusion of the witness based upon facts assumed to be true. Expert witnesses could not answer a hypothetical question otherwise than by expressing an opinion or announcing a conclusion. We can see no difference in saying that certain acts or omissions constitute negligence in the treatment of a disease and saying that the acts hypothetically detailed show improper treatment. The court did not err in letting the two expert witnesses testify that, in their opinion, it constituted negligence for appellant to turn an X-ray on appellee of the voltage described for twenty or thirty minutes during the absence of the operator of the machine from the room. This court stated in the case of *Durfee* v. *Dorr,* 131 Ark. 376, 190 S.W. 376:
>
> " 'Objection is made by appellant also to the action of the court in permitting practicing physicians, who qualified as experts, to testify as to the character of attention a patient should receive in a hospital. 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.' "

We find nothing in the *Johnston* case contrary to our holding in the *Headstream* case. The difference between the two cases is this—in determining whether one committed suicide there is involved an element of intent, usually a matter of inference from the testimony which one person is as qualified to draw as another. On the other hand, in a malpractice case the testimony ordinarily relates to a subject upon which the average juror would have no information or experience and upon which he would not be in a position to formulate an intelligent conclusion unless he does it upon the testimony of one qualified to speak on the subject.

Since Dr. Buchman's answer to the question of whether Dr. French was guilty of malpractice shows that Dr. Buchman used and understood the word malpractice in its connotation of "standard medical procedure in the community",[1] we find no error in the use of the term malpractice.

POINT 2. ASSUMED FACTS. One of the controversal issues in the trial of this case was the time when McClellan was discharged from the Hot Springs hospital—*i.e.,* whether in the morning or in the afternoon. In contending that the trial court erred in permitting Dr. French to propound hypothetical questions based on assumed facts which were not in evidence, appellant relies upon the following proceedings:

Q. How do you tell when a foreign object sets up an infection, doctor?

A. You simply have to watch the patient and see what happens.

Q. And this takes time?

A. Times time; yes, sir.

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[1]The propriety of limiting medical standards to a particular community is not an issue in this case.

Q. This doesn't happen in a matter overnight or a few hours?

A. No, sir.

Q. All right, Dr. Buchman, assuming these same facts to be true as already asked you, let's add the further, the further facts. I want you to assume in addition, doctor, that Mr. McClellan was not toxic nor did his wound reveal any evidence of infection at the time of his discharge from the hospital in Hot Springs. Assuming that he was discharged sometime during the morning of the day after his admission to the hospital at Hot Springs, I want you to further assume that a surgeon in Little Rock examined Mr. McClellan at around 4:00 to 5:00 o'clock that afternoon and that in this surgeon's opinion Mr. McClellan was toxic, and that his wound did reveal clinical evidence of infection at the time of the examination here in Little Rock. Now, doctor, assuming all of these facts to be true, do you have an opinion as to how quickly a patient may become toxic, his symptoms may reveal he is toxic?

MR. HOWELL: Now . . .

MR. ELDREDGE:

Q. I am not through, and how quickly a wound may reveal clinical evidence of infection from that point where it did not reveal clinical evidence of infection, just answer my question yes or no to give Mr. Howell a chance to make an objection, if you have an opinion.

A. Yes, I do.

MR. HOWELL:

Your Honor . . .

THE COURT: . . .

MR. ELDREDGE:

Thank you, your Honor.

Q. Now, let's see, doctor where were we. I asked you whether or not based on those assumed facts which have already been shown, or will be shown in evidence, whether or not . . .

THE COURT:

. . . May I interrupt you just once more, Mr. Eldredge, and I am not clear and I am certainly not trying to suggest to the jury what the facts are, it seems to me that you gentlemen by referring to some record that you have in—before you, could determine whether or not your question as to the patient's discharge at Hot Springs was in the morning or afternoon. That could be clarified.

MR. ELDREDGE:

Your Honor, please, the test would be when Dr. French last examined the patient and assume, *the assumed fact was he examined him in the morning* before his discharge.

If it wasn't I meant for it to be. *I will amend my question.* [Emphasis ours].

THE COURT:

All right.

MR. ELDREDGE:

Q. All right, doctor, here we go. Do you have an opinion as to how quickly a patient can be examined and be non-toxic to being examined and being toxic; can be examined as far as his wound is concerned and have no clinical evidence of infection and being examined and have clinical evidence of infection?

A. Well, that can all take place in a matter of hours, three, four, five, something like that; depends entirely on the bacteria and upon the post of the patient and some bacteria grows much faster. You will have to remember that bacteria for the body multiplies 2, 4, 6, 8, 10. I mean 2, 4, 8, 16 and 32. That's the way they divide and they multiply very rapidly, if they are in any real good environment."

Appellant contends that Dr. Buchman was erroneously permitted to assume that plaintiff was discharged in the morning and that the discharge of appellant from the hospital in the morning was not sustained by the record. We need not decide whether there is any evidence in the record to support the assumed fact that appellant was discharged from the hospital in the morning because as we read the record that assumed fact was changed to have the doctor assume that the man was examined by Dr. French in the morning. After the correction there was no further objection by appellant. In *Wheeler, Adm'x.* v. *Delco Ben,* 237 Ark. 55, 371 S.W. 2d 130 (1963), we said:

"While appellee's counsel was propounding the hypothetical question appellant's counsel objected, stating: 'Mr. Lindsey says there is no evidence of contusion to the chest area and I beg to differ there is evidence.' Thereupon appellee's counsel stated: 'Let me rephrase that and eliminate that . . .' Since

no objection was made to the hypothetical question when rephrased, we find no merit in this contention. We cannot consider an objection to a hypothetical question when raised for the first time on appeal . ."

For the reasons indicated we find the judgment must be affirmed.

JONES, J., dissents.

J. FRED JONES, Justice. I do not agree with the majority in this case. In the days when strychnine poisoning was diagnosed as "locked bowels" and treated by administration of additional strychnine in some localities, (*Sneed* v. *State*, 159 Ark. 65, 255 S.W. 895), perhaps medical doctors in a malpractice case were properly held only to that degree of skill and learning ordinarily possessed and used by members of the profession in good standing engaged in the practice of medicine in that locality. In those days of patent medicines and home remedies; when bleeding was stopped by witchcraft or the application of soot and cobweb, perhaps a medical expert was the only one competent to say what was, and what was not, medical malpractice.

It is my opinion in this day of nationwide Blue Cross-Blue Shield, Medicare and sterile hospitals, and in this day of medical specialization and long internships, and closed circuit television, the same degree of skill and learning should apply in *all localities* and negligence in medical malpractice cases should in nowise be measured by the medical practice in the particular community where the doctor practices. In this enlightened age, when the importance of sanitation is a matter of common knowledge and the results of contamination in a closed or open wound are well known, it should not require the conclusion of a medical expert for a jury to determine whether a particular procedure in probing, cleansing, disinfecting, suturing and treating a wound, constitutes malpractice.

Dr. Buchman was permitted to testify that Dr. French was not guilty of malpractice in suturing *this* wound. (Emphasis supplied.) Under the majority opinion, a jury was not necessary in this case at all. Dr. Buchman was permitted to give the answer the jury was empaneled to find. If Dr. Buchman had found malpractice, a jury would have only been necessary in fixing damage, if any.

The evidence is undisputed that the appellant sustained a deep and severe puncture wound by falling or sinking down onto a sharp underwater object. The evidence is undisputed that the wound was more than a finger length in depth and actually extended into the peritoneal cavity. The evidence is undisputed that upon a second examination of the wound by Dr. French, the wound was closed with sutures sufficient to stop bleeding, and although the appellant was hospitalized by Dr. French, the full depth of the wound was never probed or ascertained and a half inch piece of wood was left deep within the wound. If we can logically assume that Dr. French obtained a history of how and where the injury occurred, then common sense would dictate the probability that the offending instrument was a highly contaminated wooden object, and that a residue from that object would be left in the wound.

It is my opinion that it was for the jury to say, under proper instructions, whether the suturing of *this* wound constituted malpractice under all of the evidence in this case. I would reverse and remand for a new trial.

5-4902 439 S.W. 2d 923

Opinion Delivered April 21, 1969
[Rehearing denied May 26, 1969.]

James O. Burnett for appellant.

Wade McAllister (for appellee Phipps d/b/a Lawrence's Garage) and *Crouch, Blair, Cypert & Waters* (for appellee Skelton Motors).

CONLEY BYRD, Justice. Appellant Turkey Express, Inc. sued appellees Skelton Motor Co., Inc. and Lawrence K. Phipps d/b/a Lawrence's Garage in tort for damages to appellant's truck and trailer and the turkeys thereon as a result of appellees' alleged negligence in connection with removal of appellant's truck and trailer from a ditch near Jane, Missouri. The jury, which has been instructed on the contributory negligence law of Missouri, found the issues in favor of appellees. For reversal, appellant relies on the following points:

1. The trial court erred in applying to this litigation the conflict of laws rule of *Lex Loci Delicti*, or the law of the place of harm.

2. The trial court erred in not sustaining the appellant's objection that only the law of Arkansas should be applied in this case.

The appellees contend that appellant is not entitled to prevail here because it obtained no ruling of the trial

court on the issues now raised nor made any objections to the instructions submitted to the jury.

The record shows that pursuant to the Uniform Interstate and International Procedure Act, Ark. Stat. Ann. § 27-2504 (Supp. 1967), Skelton Motor Co., Inc. gave notice of its intent to apply the contributory negligence law of Missouri. Thereafter, appellant filed an instrument called a "reply" as follows:

> "Comes now the plaintiff, Turkey Express, Inc., and in reply to the motion of Skelton Motor Company, Inc. that the law of the State of Missouri should be applied in the above-styled cause, the plaintiff states as follows, to-wit:
>
> (1) That only the law of the State of Arkansas should be applied in this case.
>
> (2) That the law of Contributory Negligence, specifically Ark. Stat. Ann. §27-1730.1 and § 27-1730.2, is procedural and therefore the law of the forum should be applied.
>
> (3) That all of the parties to this lawsuit are residents of the State of Arkansas and all of the contacts of facts and issues are with the State of Arkansas."

When this matter came on for trial the testimony was taken and the jury was instructed with reference to the law of contributory negligence without objection by appellant and without appellant ever having sought a ruling on its "reply" set out above.

By this appeal appellant asks us to review the *lex loci delicti* rule applied for many years in transitory tort actions. It argues that the law of the place which had the most significant contacts with the matter in dispute should be applied. See Leflar, *Choice-Influencing Con-*

sideration in Conflicts law, 41 N.Y.U.L. Rev. 267 (1966). However, we do not reach appellant's arguments because under our procedure, Ark. Stat. Ann. § 27-1762 and § 27-2154 (Repl. 1962), we will not review an alleged erroneous ruling or order unless a party makes known to the trial court the action which he desires the court to take or his objections to the action of the court and his grounds therefor. Here the record fails to show that appellant requested any such ruling or made any objections to the instructions submitting the issue of contributory negligence. For this reason we affirm the action of the trial court.

Affirmed.

CHARLES SKINNER v. MELVIN E. MAYFIELD, JUDGE

5-4848 439 S.W. 2d 651

Opinion Delivered April 21, 1969

[redacted]

Brown, Compton, Prewett & Dickens for petitioner.

Shackleford & Shackleford for respondent.

FRANK HOLT, Justice. This controversy results from an annexation dispute. In this original proceeding the petitioner seeks a writ of prohibition to restrain the respondent from entertaining appeals by certain citizens and taxpayers from a county court order which granted the annexation of a contiguous territory to the City of El Dorado.

The city's petition for the annexation, based upon prior approval of the qualified voters, was filed in the Union County Court on December 19, 1967. The first order for annexation by the county court was made on January 29, 1968. On April 19, 1968, the county court rendered a nunc pro tunc amendment to that order for annexation. This corrected an erroneous description and excluded a small strip of land owned by the petitioner. The objecting taxpayers first filed an affidavit for appeal as aggrieved parties on May 15, 1968, from the April nunc pro tunc order. Then, on June 10, the taxpayers filed an affidavit for appeal as aggrieved parties from the January order for annexation. Both appeals were granted by the Union County Court to the circuit court by orders dated May 15 and June 10, 1968, respectively. The respondent, Union Circuit Court, Second Division, consolidated the appeals and denied petitioner's motion to dismiss the appeals and strike the affidavits for appeals. Also denied was a similar motion by the City of El Dorado. The petitioner asserts that unless the respondent circuit court is prohibited and restrained, it will entertain both appeals from the county court's order which annexed the contiguous territory to the City of El Dorado. The petitioner contends that

neither appeal was timely filed because the appeals failed to comply with the thirty-day requirement as provided in Ark. Stat. Ann. § 19-307 (Repl. 1968). It is also petitioner's position that the nunc pro tunc order did not extend the thirty-day period and cites *Richardson* v. *Sallee,* 207 Ark. 915, 183 S.W. 2d 508 (1944) to that effect.

It is the taxpayers' (appellants from the county court order) position that both appeals were timely filed and that the county court's annexation order should be reversed and made to include the small strip of land which was excluded. They rely upon Ark. Stat. Ann. § 27-2001 (Supp. 1967) which provides that appeals are granted as a matter of right to the circuit court from all final orders or judgments of the county court at any time within six months. See, also *Pike* v. *City of Stuttgart,* 200 Ark. 1010, 142 S.W. 2d 233 (1940); *Jones* v. *Coffin,* 96 Ark. 332, 131 S.W. 873 (1910). It is argued that this particular statute is applicable in the case at bar because their appeals are not complaints to prevent annexation. To the contrary, the purpose of their appeals is to affirm the annexation of the entire contiguous area which, therefore, would include petitioner's lands.

It is, of course, settled law in our state that when a trial court is proceeding in a matter where it is entirely without jurisdiction, then the supreme court, in the exercise of its supervisory control, has the authority to prevent the unauthorized proceeding by the issuance of a writ of prohibition. *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169, 229 S.W. 59 (1920); *Norton* v. *Hutchins, Chancellor,* 196 Ark. 856, 120 S.W. 2d 358 (1938). It is, however, a well established rule that the extraordinary writ of prohibition is never issued to prohibit a trial court from erroneously exercising its jurisdiction unless the tribunal is wholly without jurisdiction or is threatening to act in excess of its jurisdiction. *Bassett* v. *Bourland,* 175 Ark. 271, 299 S.W. 14 (1927). A writ of prohibition will not lie where the jurisdiction of the

trial court depends upon a question of fact. *Coley* v. *Amsler, Judge on Exchange,* 226 Ark. 492, 290 S.W. 2d 840 (1956).

In the case at bar we are unable to determine from the meager transcript whether the litigants who appealed to the circuit court really had a grievance that could be presented by an appeal rather than by a separate complaint filed originally within thirty days, in the circuit court. Therefore, we are unable to say that the circuit court is without jurisdiction. Writ denied.

BYRD, J., concurs.

J. R. SHEPHERD v. STATE OF ARKANSAS

5-5392 439 S.W. 2d 627

Substituted Opinion on Rehearing Delivered April 21, 1969

[Original opinion delivered February 17, 1969, p. 159.]

Harry Robinson and *Harold Hall* for appellant.

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

JOHN A. FOGLEMAN, Justice. In its petition for rehearing the state admits that the evidence in this case

was insufficient to support a conviction. The basis of this confession is the fact that under the evidence, appellant was not shown to have operated as a broker-dealer in violation of Ark. Stat. Ann. § 67-1237. There is no evidence that appellant acted or purported to act as a broker-dealer in this isolated transaction. A broker-dealer is one engaged in the business of effecting transactions in securities, according to the definition in Ark. Stat. Ann. § 67-1247.

For the same reason appellant could not be guilty of the sale of an unregistered security in violation of Ark. Stat. Ann. § 67-1241. Regardless of whether the sale of an interest in an oil and gas lease by the owner constitutes a security in the sense of that section and the definition given in § 67-1247(1), this sale is exempted from the operation of the act by § 67-1248(b)(1), as an isolated non-issuer transaction. With respect to certificates of interest or participation in oil, gas, or mining titles or leases, or in payments out of production out of such titles or leases, there is not considered to be any issuer. Section 67-1247(g).

Thus regardless of whether an oil and gas lease is a security under the Arkansas Securities Act, the conviction in this case must be reversed and the charge dismissed.

The opinion delivered February 17, 1969, in this case is withdrawn and this opinion substituted. The judgment is reversed and the cause dismissed.

LEO GARNER v. AMERICAN CAN COMPANY, ET AL

5-4878 440 S.W. 2d 210

Opinion Delivered April 28, 1969

Daily & Woods for appellant.

Shaw, Jones & Shaw for appellees.

CARLETON HARRIS, Chief Justice. On February 9, 1959, appellant, Leo Garner, sustained a crushing injury to his left hand, which required extensive surgery, and partial amputation, the injury occurring in the course of appellant's employment with the Dixie Cup Division of American Can Company. A bone graft was taken from the claimant's right lower leg for the purpose of repairing the left hand, and after the surgery, Garner developed thrombophlebitis, secondary to the removal of the bone graft. Later, he developed multiple pulmonary embloi (blood clots in the lungs). This condition required ligation of the large blood vessels. Garner has continued to suffer with thrombophlebitis, and he has deep venous thrombosis in both legs. Appellant has not worked since October, 1966.

The appellee, American Mutual Liability Insurance Company carried the Workmen's Compensation Insur-

ance for the Dixie Cup Division of American Can Company at the time of the injury in 1959, and records reflect that it has paid Garner approximately $8,300.00 temporary total benefits, and $4,200.00 permanent partial benefits for a total of $12,500.00, in addition to a large amount of medical expenses. On November 30, 1965, Garner sustained another injury in the course of his employment with the same employer; however, by that date, American Can Company was self-insured. The company paid Garner a total of $33.00 temporary total benefits, and medical expenses of $52.00. Both American Mutual and American Can Company denied further medical treatment and compensation benefits to appellant as of October, 1966. A hearing was conducted before a referee for the Compensation Commision on January 27, 1967, at which time the referee found, *inter alia,* that Garner had been paid all compensation benefits and medical expenses by American Can Company to which he was entitled as a result of the injury of November 30, 1965; that Garner's present condition and medical expenses were the result of his injury of February 9, 1959; that appellant had already been paid $12,500.00, the maximum allowed in compensation benefits, by appellee on account of the injury on February 9, 1959, and that the claim had been controverted by both respondents. American Mutual was ordered to pay the medical bills incurred by Garner, and Garner's attorney was awarded the maximum attorney's fee to be based on the amount of the medical bills. American Mutual agreed to pay the bills, but appealed from that portion of the award which directed the company to pay an attorney's fee. Garner cross-appealed against the insurance company only, asserting that he was entitled to more than $12,500.00 compensation benefits, because of the 1959 injury. The 1965 injury involving the American Can Company, self-insured, was not embraced further in the proceedings after the referee's decision. On appeal, the full commission ordered American Mutual to pay the reasonable medical expenses incurred by Garner for the treatment of an ulcer on the front of his right leg below

the knee, and the company was further ordered to pay Garner's attorney the maximum attorney's fee based upon medical expenses so incurred, and the treatment, skin graft, and care of the ulcer. The commission then added:

> "The commission wishes to make clear that the attorney's fee does not apply to the medical expenses incurred in connection with the other parts of claimant's body that require treatment because of claimant's thrombophlebitic condition."

Garner was denied compensation over and above the $12,500.00 previously paid to him. On an appeal to the Sebastian County Circuit Court, Fort Smith District, an order was entered affirming the opinion and award of the commission. From the judgment so entered, appellant brings this appeal. For reversal, it is asserted that the court and the commission erred in denying Garner further compensation benefits from American Mutual. It is also asserted that error was committed in limiting the attorney's fee to the medical expense incurred for treatment of the ulcer on Garner's right leg, rather than allowing an attorney's fee on the basis of the medical expenses incurred in connection with all parts of appellant's body that require treatment because of the thrombophlebitic condition. We proceed to a discussion of these contentions.

Appellant argues that he is entitled to receive not only the maximum of $12,500.00 mentioned in Ark. Stat. Ann. § 81-1310(a) (Repl. 1960), but is also entitled to 150 weeks' compensation under the provisions of (5) of Sub-section (c) of Section 81-1313. It is his opinion that the sections should be construed separately, as though unrelated to each other, rather than being construed together as interpreted by the commission and Circuit Court. Subsection (a) of 81-1310, before being amended in 1965, provided that:

> "Compensation to the injured employee shall

not be allowed for the first seven [7] days' disability resulting from injury, excluding the day of injury. If a disability extends beyond that period, compensation shall commence with the ninth [9th] day of disability. If the disability extends for a period of four [4] weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury.

"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][1] 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."

It is then pointed out that Sub-section (c) of § 81-1313, which deals with scheduled permanent injuries, does not use the word, "disability," and it is asserted that § 81-1310 is a section dealing entirely with compensation to be paid an injured employee for disability.

Appellant's argument is largely predicated on the 1965 amendment to § 81-1310, found in the 1967 supplement as § 81-1310.1. As amended, the section provides:

"Hereafter, the maximum amount to be paid in Workmen's Compensation benefits under Initiated Act No. 4 of 1948 [§ 81-1349] as amended, shall not exceed sixty-five (65) per cent of a workers average

[1]This section provides for medical, surgical, hospital, and nursing service, and medicine, crutches, artificial limbs, and other apparatus as may be necessary after the injury.

weekly wage at the time of the accident, but in no event shall a worker or his dependents receive in excess of thirty-eight dollars and fifty cents ($38.50) per week, and in no event shall the compensation period exceed 450 weeks nor shall the total amount paid exceed fourteen thousand five hundred dollars ($14,500.00), provided that this limitation shall not apply to medical benefits as now provided by law, nor shall this limitation preclude the payment to dependents of a deceased worker of additional benefits as now provided by law, not to exceed fourteen thousand five hundred dollars ($14,500.00). Minimum compensation to be paid shall be not less than ten dollars ($10.00) per week. Hereafter, all the actual costs for medical and hospital treatment in hernia cases determined to be compensable shall be paid by the employer or by the insurance carrier for such employer."

It will be noted that the amendment changes the maximum figure per week that could be drawn from $35.00 to $38.50, the minimum, from $7.00 per week to $10.00 per week, and the maximum amount of money that can be paid is changed from $12,500.00 to $14,500.00. However, these particular changes are not pertinent to appellant's argument, for he recognizes that his compensation is governed by the provisions of the act which were in force at the time of his injury. It is asserted that the 1965 amendment carefully uses the language, "the maximum amount * * * shall not exceed * * * in no event shall the total amount" exceed $14,000.00. Appellant says that these restrictions are not in Section 81-1310, and he attaches great significance to that fact. In other words, he feels that the language used, "maximum amount," and "total amount," was intentionally employed by the General Assembly as a matter of changing the original section. It is argued that, prior to 1965, Sections 81-1310 and 81-1313 were entirely separate, each providing separate compensation; but that

the 1965 amendment (§ 81-1310.1) simply means that all benefits received under both § 81-1310.1 and 81-1313 shall not exceed a total of $14,500.00.

Appellant attaches more importance to the words, "total amount," and "maximum amount," than we consider to be justified, and we find no legislative motive in the different words used. In the first place, while it is true that the word, "disability," does not appear in Sub-section (c), § 81-1313, *the whole section is devoted to disability.* The very opening line states:

> "The money allowance payable to an injured employee *for disability* [emphasis supplied] shall be as follows * * *."

Thereafter follow Sub-section (a), Sub-section (b), and Sub-section (c), *all* dealing with different types of disability. Section 81-1310 provides that compensation for disability shall be paid for a period not to exceed 450 weeks, "*and in no case*[2] shall *exceed*[2A] $12,500.00, in addition to the benefits and allowances under Section 81-1311." This last, as previously mentioned, deals with medical and hospital services and supplies, and it is noticeable, contrary to appellant's argument, that the section specifically points out that benefits under § 81-1311 *are in addition* to the $12,500.00. It would appear that, if this maximum did not include all other benefits, the legislature could just as easily have said, "in addition to the benefits and allowances under Sub-section (c), § 81-1313." If there was any significance in the choice of words used in the 1965 amendment, we think the reason is set out in the emergency clause, which reads, as follows:

> "It has been found and is declared by the General Assembly that the welfare of both employer and employee is of primary interest to the public; that maximum and minimum benefits presently

[2] & [2A] Our emphasis.

> payable under the Workmen's Compensation Law are inadequate due to the steadily increasing cost of living and should be increased immediately to meet said increase in the cost of living, *that certain disability benefits should be clarified* [emphasis supplied], and that the immediate passage of this Act is necessary in order to alleviate the aforementioned. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the preservation of the public peace, health and safety shall take effect and be in full force from and after its passage and approval."

It will be noticed that the italicized phrase uses the word, "clarified," rather than "changed." Since appellant admits that the amendment clearly covers both disability and scheduled permanent injuries, the only purpose in clarifying would have been to make clear that § 81-1310 also included both.

As to the second point, we are also unable to say that the commission and trial court erred. The insurance company continued, during the course of the years, to furnish medical treatment for appellant after February, 1959. At the time of the second injury, he was still being furnished this treatment, but American Mutual denied responsibility for medical bills after October, 1966. It was the view of appellee at that time that the treatment needed by Garner was a result of the 1965 injury, thus due to be taken care of by American Can Company. On November 18, 1966, Robert Law, Branch Claim Manager for appellee, wrote the Dixie Cup Division of American Can Company relative to a bill which had been received by American Mutual in connection with the November 30, 1965, injury. In the letter, Mr. Law stated:

> "They [the doctors] advise us they put Mr. Garner in the hospital, as per the attached bill, which is dated October 5th, so that this is your re-

sponsibility and not ours. We understand that he has need for continued treatment and hospitalization in a connection with the present difficulty which arose out of his November 30, 1965, accident. Since we are not responsible for this bill, we are sending it to you so you may place it in line for payment."

The denial of medical benefits by appellee is discussed in the commission's opinion, as follows:

"It is evident from the evidence that the controversy that arose over the payment of certain medical, doctor and hospital bills was due, at least in part, to an error or mistake on the part of Dr. F. M. Lockwood. In 1963, Dr. Lockwood began treating claimant for a thrombophlebitic condition that resulted from claimant's admitted compensable injury on February 9, 1959, (WCC File No. A904876) at which time American Mutual was the workmen's compensation insurance carrier for the employer. Said carrier continued to pay for the necessary medical attention occasioned by the aforesaid condition apparently until after claimant sustained another injury to his *left* leg when it was struck by a roll of paper on November 30, 1965, at which time the employer was self-insured. * * * Claimant continued working for respondent employer up until sometime in October, 1966, when an ulcer developed on the front of his right leg below the knee. A skin graft was applied in an attempt to cure said ulcer. At the hearing before the referee on February 7, 1967, Dr. Lockwood at first testified to the effect that the ulcer on the front of claimant's right leg below the knee was causally connected with the injury on November 30, 1965, as he was assuming that that was the site of the injury on November 30, 1965. However, on cross-examination, by counsel for the employer, the records and reports of Dr. Lockwood established that Dr. Lockwood was mis-

taken and that the injury on November 30, 1965, was to claimant's *left* leg. After this matter was called to Dr. Lockwood's attention, he stated that the ulcer that was found on the claimant's right leg below the knee in October, 1966, had no causal relationship to the November 30, 1965, injury. To add to the confusion and to the controversy of liability of certain medical expenses, claimant testified before the referee to the effect that the November 30, 1965, injury was to his *right* leg, at the site of the ulcer, for which a skin graft was applied after the claimant quit work in 1966. The Commission is of the opinion that the overwhelming preponderance of the evidence is that the November 30, 1965, accidental injury was to the claimant's left leg, as is shown by the reports of Dr. Lockwood and the report of Dr. T. P. Foltz * * *.

* * *

"* * * The record, as a whole, establishes that the ulcer was due to the thrombophlebitic condition that resulted from the February 9, 1959, accident injury for which American Mutual is liable. The Commission is not without some sympathy for American Mutual because they were apparently misled to some degree by Dr. Lockwood although that does not negate the fact that they actually controverted the responsibility for the needed medical attention."

The commission then pointed out that, though American Mutual actually controverted the legal obligation to provide the needed medical attention, the controversy that arose between American Mutual and American Can Company was certainly due in part to this mistake of Dr. Lockwood, as well as a mistake on the part of the claimant, and the finding was then made that the attorney's fee would not be based on any medical expense except that related to treatment of the ulcer.

Let it be remembered that appellee had faithfully

paid all medical expenses in connection with the 1959 injury, and at the hearing before the referee, Mr. Law announced that the company was still ready and willing to pay the medical treatment and hospitalization, except for the specific injury of 1965. We think the circumstances set out in the commission's opinion were due to be considered in determining the attorney's fee.

Ark. Stat. Ann. § 81-1332 (Repl. 1960) provides that whenever the commission finds that a claim has been controverted, it shall direct that legal services be paid for by the employer or carrier in addition to compensation; that such fees should be allowed only on the amount of compensation controverted and awarded. In *Sisk* v. *Philpot,* 244 Ark. 79, 423 S.W. 2d 871, we pointed out that a great deal of discretion is placed in the commission in approving attorney fees within the percentage limitations of the statute.[3] In the case before us, the commission found that American Mutual Liability Insurance Company had only controverted the claim with reference to medical, doctor and hospital bills incurred by the claimant for the treatment of the ulcer on the front of his right leg below the knee, and we think there is substantial evidence to support this finding. Certainly, we are not able to say that the commission abused its discretion. Appellant contends that the issue is not one involving abuse of discretion on the part of the commission, but rather is whether American Mutual controverted the claim for medical expense. For the reasons heretofore given, we think appellant's argument is in error, and we are of the opinion that the cases cited by him are not controlling under the circumstances herein.

Affirmed.

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[3]After all, there is no requirement that the commission give the maximum attorney's fee.

ARKANSAS STATE HIGHWAY COMMISSION v. LYMAN DIXON ET AL

5-4858 439 S.W. 2d 912

Opinion Delivered April 28, 1969

Thomas B. Keys and *James K. Biddle* for appellant.

Felver A. Rowell, Jr. for appellees.

GEORGE ROSE SMITH, Justice. The Highway Commission brought this condemnation suit to acquire 1.78 acres as a right of way for Interstate 40 across the appellees' 320-acre farm. The jury fixed the landowners' compensation at $5,500.00. The Commission, in seeking a new trial, insists that there was no substantial evidence to support the amount of the verdict.

We find it necessary to discuss only the testimony of the witness Lloyd Pearce, a real estate expert who testified for the landowners. On direct examination Pearce valued the 320 acres at $109,275 immediately before the taking and at $103,725 immediately after the taking—a difference of $5,550, which slightly exceeds the amount of the jury's award. As a qualified expert who had familiarized himself with the property, Pearce was properly permitted to state his opinion without first enumerating the facts upon which it was based. *Arkansas State Highway Commn.* v. *Johns,* 236 Ark. 585, 367 S.W. 2d 436 (1963). Counsel for the Highway Commission might then have shown by cross-examina-

tion that Pearce had no substantial basis for his opinion. In fact, however, counsel did not pursue that course, their cross-examination being confined principally to a few questions about comparable sales in the vicinity.

After the construction of the highway 25 acres in the southwest corner of the appellees' land will be on the unprotected side of a levee. The principal landowner, Lyman Dixon, testified that those acres will have no value in the future, because the levee will completely cut off his access to that part of the farm. In this court the Commission insists that the 25 acre-tract cannot properly be assigned no value whatever. On that premise it is argued that Pearce's valuation after the taking cannot be regarded as substantial evidence, because, it is said, he too assigned no "after" value to the unprotected 25 acres.

That argument misconstrues Pearce's testimony. Before the taking the 25 acres outside the levee were accessible, by means of a ramp. Of the 25 acres, 10.3 acres were in cultivation and 14.7 acres were in woods. Pearce, in arriving at his "before" value, used the following figures, later rounding off the total to $109,275.00:

295 acres at $350 an acre	$ 103,250.00
10.3 acres at $300 an acre	3,090.00
14.7 acres at $200 an acre	2,940.00
Total "before" value	$ 109,280.00

If Pearce had actually assigned no value at all to the 25 unprotected acres after the taking, as the Commission suggests, then according to Pearce the landowners' total damage would have been as follows:

1.78 acres taken, at $350 an acre	$ 623.00
10.3 acres isolated, at $300 an acre	3,090.00

14.7 acres isolated, at $200 an acre	2,940.00
Landowners' total damage	$ 6,653.00

In fact, as we have already said, Pearce fixed the landowners' total damage at only $5,550.00. Hence even upon the Commission's theory he assigned a value of $1,103.00 ($6,653.00 minus $5,550.00) to the unprotected 25-acre tract after the taking. We have no basis for saying that such an "after" valuation of the 25 acres is wholly without foundation. To the contrary, the Commission's own expert witness, Zack Mashburn, in arriving at his "before" value of the unprotected tract, said that he threw in the 15 wooded acres "as nothing, because I don't think it would be worth anything on the market." Upon the record as a whole we find Pearce's testimony to constitute substantial evidence adequate in itself to sustain the amount of the verdict.

Affirmed.

JONES, J., concurs.

J. FRED JONES, Justice. I concur with the majority in affirming the judgment of the trial court in this case, but I do so only in recognition of this court's limitations in appellate jurisdiction.

I recognize that this court is committed to the "substantial evidence" rule in jury cases and if there is any substantial evidence to support the verdict of a jury, we affirm the judgment rendered thereon. *Hot Springs Street Railway Company* v. *Hill,* 198 Ark. 319, 128 S.W. 2d 369. Except, of course, in such cases where the verdict is rendered on an erroneous instruction, or under the influence of passion or prejudice, or where the amount of the verdict and judgment shocks the sense of justice. Ark. Stat. Ann. § 27-1903 (Repl. 1962); *Ark. State Highway* v. *Carder,* 228 Ark. 8, 305 S.W. 2d 330; *Little Rock & Fort Smith Ry. Co.* v. *Baker,* 39 Ark. 491.

The only point raised by the appellant in the case at bar is that "there was no substantial evidence in the record to support the verdict and the appellant is entitled to have judgment modified and the trial court directed to enter a judgment in the sum of $500.00 in favor of the appellees." This court simply does not have the constitutional power, nor the legislative authority, to do what the appellant requests under the facts in the record before us in this case.

Arkansas Statutes Annotated § 27-1903 (1962) provides as follows:

> "The verdict of any jury rendered in any action for the recovery of damages where the measure thereof is indeterminate or uncertain, *shall not be held to be excessive, or be set aside as excessive except for some erroneous instruction, or upon evidence, aside from the amount of the damages assessed, that it was rendered under the influence of passion or prejudice.* Provided, that the circuit judge presiding at the trial may on motion for a new trial filed by the losing party, if he deems the verdict excessive, indicate the amount of such excess, and thereupon, if the losing party shall offer to file and enter of record a release of all errors that may have accrued at the trial if the prevailing party will remit the amount so deemed excessive, and the prevailing party shall refuse to remit the same, the verdict shall be set aside." (Emphasis supplied.)

In the case at bar the instructions to the jury are not questioned. There is no evidence, aside from the amount of the damages assessed, that would indicate the verdict was rendered under the influence of passion or prejudice, and since we are not legally permitted, physically able, or professionally qualified, to view the land and make our own appraisal, but must rely on the record before us, we are unable to say that the amount of the verdict shocks the sense of justice.

The sworn testimony of legally qualified expert appraisers, when based on legally acceptable and properly obtained information, has always been accepted as substantial evidence in arriving at the fair market value of the property appraised, and such testimony should be reliable in arriving at the fair market value and resulting damages in highway condemnation cases.

A matter that has become shocking, however, and leaves the substantial nature of evidence in considerable doubt, is the wide difference we find in the appraisals of the so-called experts in highway condemnation cases.

In the case at bar the highest damages estimated by the Highway Commission's expert witnesses were $500.00 and the lowest estimate by the property owners' experts was $5,500.00. The property owner himself testified that his damage was $7,307.00. Judgment was entered upon the jury's verdict for $5,500.00.

In the case of *Arkansas State Highway Comm.* v. *Wahlgreen,* 246 Ark. 472, 438 S.W. 2d 694, the highest estimate of damage by the Highway Commission's experts was $9,000.00, and the lowest estimate by the land owner's experts was $58,600.00. The owner himself testified that his damage was $83,000.00. Judgment was entered on the jury's verdict for $60,000.00.

In the case of *Arkansas State Highway Comm.* v. *Hawkins,* 246 Ark. 55, 437 S.W. 2d 218, the highest estimate by the Highway Commission's experts was $3,-250.00, and the lowest estimate by the land owner's experts was $44,500.00. The owner's own estimate of damage was $77,500.00. Judgment was entered on the jury's verdict for $55,000.00.

In the case of *Arkansas State Highway Comm.* v. *Maus,* 245 Ark. 357, 432 S.W. 2d 478, the highest estimate of damage by the Highway Commission's experts was $6,150.00, and the lowest estimate by the land own-

er's experts was $21,300. The owner's own estimate was $21,500.00. Judgment was entered on a jury verdict for $16,400.00.

In the case of *Arkansas State Highway Comm.* v. *Dean,* 244 Ark. 405, 425 S.W. 2d 306, the highest estimate of damage by the Highway Commission's experts was an *enhancement* in value of $44,600.00, and the lowest estimate by the land owner's experts was $91,650.00 damages. The owner's own estimate was $114,196.00. Judgment was entered on the verdict for $41,500.00.

In the case of *Arkansas State Highway Comm.* v. *Darr,* 246 Ark. 205, 437 S.W. 2d 463, the highest estimate of damages fixed by the Highway Commission's expert appraisers was $23,500.00 and the lowest estimate fixed by the land owner's appraisers was $38,500.00. The land owner estimated her own damage at $98,500.00. Judgment was entered on a jury verdict for $50,000.00.

All the verdicts rendered in the cases, supra, were within the bounds of the value evidence produced by the land owners and their expert witnesses and all the judgments, except in Dean and Darr, were sustained by some substantial evidence. In each of these cases all the expert appraisers used the same criteria in reaching their conclusions, both as to the value of lands taken and damage to the remaining lands because of the taking. They simply had different opinions as to values, both as to enhancement and damages, and with the few comparable sales in the area, they reached widely different conclusions. In no case has the value of adjacent lands been enhanced by the construction of an interstate highway.

It is perfectly obvious from these cases that there is something wrong with the market value appraisals in highway condemnation cases and it would appear that either the Highway Commission, or the land owners, are using appraisers whose qualifications as experts exceed their ability as appraisers of the true market values of, and damage to, the lands involved. In any event, such

differences in the opinions of experts cast considerable doubt on the substantial quality of their testimony, but having no better evidence in the records coming to this court on appeals, we have no alternative except to base our opinions on the evidence we do have. Consequently, I have no other alternative except to concur in the affirmance of the judgment in the case at bar.

[redacted]

LAWRENCE LAVENDER, SR. v. SOUTHERN FARMERS ASS'N.

5-4905 440 S.W. 2d 241

Opinion Delivered April 28, 1969
[Rehearing denied June 2, 1969.]

[redacted]

Levine & Williams and *Gregory & Claycomb* (of counsel on appeal) for appellant.

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

GEORGE ROSE SMITH, Justice. On the night of October 26, 1967, a tractor-trailer combination belonging to the appellee collided with three cows, overturned, and sustained damage stipulated to be $7,287.42. The appellee brought this action for its loss, asserting that the appellant had unlawfully allowed the animals to run at large on the highway. Ark. Stat. Ann. § 41-430 (Repl. 1964); *Rogers* v. *Stillman*, 223 Ark. 779, 268 S.W. 2d 614 (1954). In appealing from a judgment for the plaintiff the appellant contends that there was no substantial

evidence to support the jury's verdict.

We cannot sustain that contention. At the time of the accident Lavender (the appellant) and his family were in Colorado on a hunting trip. Lavendar had left his livestock in charge of his son-in-law, Leslie Curbow, who lived on Mr. Lavender's place, next to the corral where the cattle were kept. Leslie's brother, Billy Curbow, was the principal witness for the plaintiff.

Billy, who testified by deposition before entering the military service, lived in the neighborhood and reached the scene of the accident about five minutes after it happened. He testified that the three cows belonged to Mr. Lavender; he "personally" saw Lavender's brand on the animals. He went on to say that the cows had been at large for about three weeks and that he and his brother had been chasing them that same afternoon. According to Billy, the cattle escaped from a pasture that had not been used since the preceding spring. The fences were in disrepair; ". . . several places where you could walk through the fence, or step over the fence, or places there just wasn't a fence."

The defense testimony was directed toward rebutting Billy Curbow's deposition. Mr. Lavender admitted in a discovery deposition that some of his cattle had gotten out, but he disclaimed negligence by saying that "someone" had a wreck and ran over his fence and that a tree blew down across the fence while he was in Colorado. Leslie Curbow denied that he and Billy had chased the cows that very afternoon. Leslie testified that the three animals belonged to Mr. Lavender's son and had escaped a few hours before the accident by pushing aside the lower corner of a gate that was fastened by a chain about three and a half feet above the ground.

From what we have said it will be seen that the decisive issue for the jury was simply that of deciding which witnesses to believe. The appellant argues that

Billy Curbow's testimony was "inconsistent and unclear," but we certainly cannot say that it was not evidence of substantial quality. It may be compared to the testimony of the plaintiff in *St. Louis S.W. Ry.* v. *Ellenwood,* 123 Ark. 428, 185 S.W. 768 (1916), where we said, in language equally applicable to the case at hand: "In the case at bar the conditions surrounding the plaintiff, as testified to by the defendant's witnesses, furnish a very strong argument against the credibility of his testimony, but this is as far as the record authorizes us to go. It can not be said that the testimony of the plaintiff is contradicted by the physical facts or is opposed to any unquestioned law of nature. His testimony related to matters, situations and conditions which might or might not have existed, and his right to recover depended wholly upon the truth or falsity of his testimony. His testimony was, therefore, evidence of a substantial character and if believed by the jury, was sufficient to warrant a recovery in this case." There is nothing we need add to that statement.

Affirmed.

CHARLES SPANGLER, EDWARD LOTHROP AND LEWIS CHEVAILLIER v. COMER LUMBER & SUPPLY COMPANY

5-4891 439 S.W. 2d 792

Opinion Delivered April 28, 1969

Keith, Clegg & Eckert for appellants.

Bernard Whetstone for appellee.

JOHN A. FOGLEMAN, Justice. The trial court held that appellants were liable for oil well drilling supplies furnished by appellee for the drilling of a well by one A. A. Morgan. The judgment was based upon a finding of the trial court, sitting without a jury, that appellants were joint venturers with Morgan. Appellants' point for reversal is their assertion of error in the finding as to the joint venture. The question for our determination is whether there was substantial evidence to support this finding. We hold that there was.

Parties to the proceedings in the lower court who are not parties to this appeal, known as the WAG group, were the joint owners of the working interests in an oil and gas lease covering the lands on which the well was drilled. This group engaged one Beverly Johnson to

drill the well on a farmout agreement.[1] Beverly Johnson arranged a sub-farmout agreement with one A. A. Morgan, under which the obligation to actually drill the well devolved upon Morgan. The terms of this sub-farmout agreement are not clearly shown. Morgan owned the necessary drilling equipment but did not have the capital necessary to drill the well to casing point, to perform the necessary tests or to complete the well, if the tests were such as to justify completion.

Beverly Johnson remembered little of his agreement with either the WAG group or with Morgan. He had some recollection of a letter from the WAG group with reference to the terms, but stated that he had turned this letter over to people in Marshall, Texas, because he had given the deal to them. He could only remember that the WAG group had retained an overriding royalty. Johnson did not have a drilling rig and made the farmout agreement on the hope that he could get someone to drill the well for a lesser interest in the oil lease than the WAG group would assign to him under the farmout agreement. The lease was not to be assigned by the WAG group until the well was drilled and completed. Johnson was unable to contract for the drilling of the well upon terms which would permit him to retain any interest. He recalled having arranged with A. A. Morgan to drill the well for a fixed amount of money plus an interest in the lease. He testified that the money for the drilling was furnished by people to whom he sold interests at various places. Johnson said these interests were sold on the basis of the well being drilled and completed for a fixed amount of money to be paid contingent upon completion. Johnson hoped to make some profit as operator of the well for the owner of the lease. He would have been paid by the month for supervision and operation of the leases under the arrangement he antici-

[1]A farmout agreement is understood to be an arrangement under which the lessee in an oil and gas lease agrees to assign his lease, retaining an overriding royalty only, to one who successfully causes a well to be drilled to a desired depth upon the leased lands.

pated. The agreement with Morgan was an oral one, and Johnson could not recall the terms as to the amount of money involved or the extent of the interest. Johnson testified that one of the appellants, Charlie Spangler, from Marshall, Texas, was one of those involved in the "first deal." Johnson was paid for looking after the first well by Spangler after a second well was completed. This payment was for supervision and engineering. His testimony on this point is somewhat equivocal as demonstrated by the following portion thereof:

"Q. Now, when you made this second deal you still ended up getting a brokerage fee or whatever kind of fee you call it on the second well, is that right?

A. I got paid for my services looking after the first well and the second well down to casing point.

Q. Who paid you for your services for looking after the first well?

A. I was paid after the second well was completed.

Q. Who paid you?

A. Mr. Spangler, the operator.

Q. In what form was the payment?

A. Money.

Q. Why would Mr. Spangler be paying you for your services in the first well if Mr. Woodward engaged you?

A. I said the first well, I was paid for my supervision and engineering the completion of it aft-

er the second well was drilled, and so maybe I didn't get anything on the first one, just got paid on the second well for the whole deal.

Q. Paid in cash?

A. Yes sir.

Q. By Mr. Spangler?

A. Mr. Spangler and his partners."

Johnson stated that the second well was drilled under an arrangement with Spangler and his partners in Marshall, Texas, who he said had interests in the first well.

A. A. Morgan could not recall ever having a letter from Johnson and doubted that Johnson had one from the WAG group about the arrangement among the parties. The entire agreement between Johnson and Morgan was oral. He confirmed Johnson's testimony that he (Morgan) was to get a certain amount of money and a certain interest in the lease if he had completed the well. As he recalled the payment was to have been $18,500 or $19,000 in cash and a one-fourth of the working interest. He stated that his undertaking was a turn-key job, i.e., he was to drill the well to casing point and run and record an electric log after the required depth of drilling had been reached. According to him, he was to bear all of the cost of drilling and testing to that point, when he was to turn the well over to the interested parties free of cost. The only written evidence of the agreement was a letter from Morgan to appellants. The text of this letter is as follows:

"This letter will serve as evidence of our agreement that you are owners respectively to the following extent:

Edward Lothrop

Charles Spangler 12/64th interest to casing point

Lewis Chevaillier 14/64th interest to casing point

These interests being in a well known as the State Moore #1 located in Southeast (SE) Southeast (SE) Sec. 5, Township 20, Range 27 West, Lafayette County, Arkansas, containing forty acres more or less.

It is understood that completion costs will be paid on a pro-rata basis by the interest holders.

Upon completion of title opinion by attorneys you will be forwarded proper assignments."

Morgan stated his conclusion that appellants were not partners with him and also stated that they did not have any right to tell him how to drill the well or from whom to buy the materials. He stated that the appellants were joint venturers with him, but explained that he meant that they were, only if the well had been completed. As he put it, "If we had made a well and completed it, why everybody would have gotten a pro rata part of it, now, if that's what you're talking about. If it had made a producing well, everybody would have got their right part." He compared the deal with one in which a contractor builds a house for a certain amount of money on a turn-key basis, paying all the expenses and delivering the house to the owner free of expense to him. Although Morgan admitted that appellants had advanced substantial moneys to him, for which he felt an indebtedness to them because of his failure to perform his contract, he testified in response to leading questions that appellants contributed nothing to the cost and expense of drilling the well and that they were under no obligation to contribute anything.

Appellant Spangler stated that his business and residence addresses were in Marshall, Texas. He stated that he dealt in oil leases, royalties and in the buying of interests in wells. He had conducted such operations

in Arkansas during the three or four years preceding. The contract with Morgan was not his first in Arkansas. The Morgan deal was about the fourth well in which Spangler was interested in Arkansas. He testified that Morgan came to Marshall and visited in the home of appellant Lothrop around Thanksgiving in 1959. Morgan sought to interest Spangler and Lothrop in a deal for the drilling of the well. According to Spangler, Morgan wanted to sell more of an interest than they wanted, so they got some of their friends to participate in the transaction with them. Spangler stated that under the arrangement with Morgan, he, Lothrop and their associates put up approximately $21,000 before Morgan did anything, in return for which Morgan was to drill the well to casing point, and, if it were a producer, Spangler and his associates would pay their proportionate part of the completion costs and receive a certain interest in the well. Appellant Chevaillier was interested in the same manner as Lothrop and Spangler, according to Spangler, although Lothrop and Spangler were to have a 12/64ths interest jointly and Chevaillier was to have a 14/64ths interest. Spangler admitted that it was a fair statement to say that he was putting up part of the cost of drilling the well in return for which, if it became a producer, he was to share in the profits. While he never went to the well site during the course of drilling, he admitted receiving cards from Morgan, at intervals, stating the depth at which he was drilling. In response to a request by appellee's attorney that he state the agreement as to the first well, Spangler said:

> "* * * The first well was with-we worked with A. A. Morgan and we had, the three of us, Lothrop, Chevaillier and I, and our associates, had 26/64ths in the first well that we bought for a lump sum payment of a well drilled to casing point."

In answer to another question, Spangler testified:

> "I put up the amount that was required to drill

the first well and the second well to casing point and I did not obligate myself for anything other than the drilling of the first well and the same thing in drilling the second well. It was a fixed amount of money which I was putting up and under no conditions unless it was a completed well was I ever to put up any more money in the drilling of either wells."

Appellant Lothrop testified that he came in on the well at the time Morgan came down to Marshall to talk about it. According to him, he put up a certain amount of money at the same time Spangler did to buy a fractional working interest in a well. He was a good friend of Morgan and came to visit him at the well site on one occasion while the drilling was going on. He stated that, at the time of the visit, he had an interest in the well, provided Morgan ever got to casing point. Lothrop said that appellants did not have any right to control any of the drilling of the well, nor were any of them competent to do so. He stated that he paid a fixed sum for a specified fractional working interest in the well but that the working interest was never delivered because Morgan was never able to fulfill his contract.

In order to determine whether or not there is substantial evidence to sustain the court's findings, we must consider the testimony in the light most favorable to appellee and draw all inferences favorable to appellee that may be reasonably drawn. In doing so, we take note of the following testimony: that the only written evidence of the agreement between Morgan and appellants states no terms except the interests owned by appellants and the obligation of the parties for completion costs; that this letter purports to be evidence of an agreement by Morgan that appellants "*are* owners" to the extent stated "*to* casing point;" (emphasis ours) that appellants advanced substantial amounts of money for the drilling; that Morgan made fitful reports of progress to Spangler; that Morgan was both a drilling contractor

and the holder of the sub-farmout rights on the lease; that appellants immediately made arrangements for the drilling of a second and successful well without any participation by Morgan after he lost the first one; that Johnson turned over his letter of agreement from the WAG Corporation to appellants, stating that he gave the deal to them; Johnson's statement that the money paid Morgan was furnished by people to whom he, Johnson, sold interests; Johnson's answer as to payment for his supervision and engineering on the first well; the rejection of Morgan's offer of leases in Michigan to appellants in an effort by him to repay them for advances, which he said were unearned; testimony by Spangler that in three previous transactions in Arkansas over the preceding three or four years he had paid a lump sum for an interest in a well drilled to casing point and obligated himself to pay part of the completion costs thereafter. We are unable to say that this testimony does not constitute substantial evidence to support the finding of the circuit judge.

Appellants rely principally upon two cases. They are *Stone* v. *Riggs,* 163 Ark. 211, 259 S.W. 412, and *Brooks* v. *McSpadden,* 219 Ark. 718, 244 S.W. 2d 144. In the former case there was a written contract, and the court was not left to the recollections of oral agreements among parties which probably never were too clearly expressed. Butler-McMurray Drilling Co., under that contract, hired a drilling outfit to Riggs and Pautz, for which they were to receive as compensation a one-eighth interest in certain oil leases. The drillers had no interest whatever in the development of the leased property otherwise. The agreement specifically provided that Riggs and Pautz should bear all the expense of labor, material, and other costs of putting down the wells. Butler-McMurray had nothing whatever to do with the drilling operations. The circuit court and this court held that the agreement on its face and attending circumstances showed that no partnership existed. Thus, no reliance was placed upon the oral testimony of inter-

ested parties as to the effect of their agreement.

In the *Brooks* case, this court affirmed the holding of a chancery court that one Eberle was not a joint venturer with McSpadden in the drilling of a well. Brooks and Jean Lumber and Supply Co. had furnished drilling materials for operations engaged in by McSpadden. Watt was a professional contractor, who owned drilling rigs, with whom McSpadden made arrangement to drill the well in question for $21,000 plus an interest in the production. Eberle was said to have supplied $19,500 to procure the drilling operations, in return for which he was to receive a fourth of the oil and gas produced. This court there said that Eberle was not shown to have been a party to any joint undertaking and that he could not be penalized on suspicion. In the *Brooks* case there was no evidence that McSpadden had transferred his farmout agreement to Eberle in return for the advance of funds by Eberle; that Eberle was the owner of an undivided interest *to* casing point; or that Eberle put up his money without obligating himself for anything *other* than the drilling of the well. The inferences which can be drawn from Spangler's statement with reference to his obligation on the first well are a significant factor in distinguishing his case from *Brooks*.

Appellants argue that there was no evidence of their right to direct and govern the movements of Morgan in respect to the joint venture. There is no evidence that any right of control or direction was exercised by any of the appellants. There is evidence, however, that each of the appellants admittedly had advanced substantial sums of money on the project, although they contend that they had no legal responsibility to do so. The progress reports made to Spangler are also of some significance. We cannot say that there is a lack of the requisite substantial evidence of the right to control.

We do not mean to say that parties cannot enter into an agreement such as the appellants claim was made

here. We only hold that the trier of the facts could and obviously did believe those portions of the testimony of appellants and other witnesses consistent with a joint venture and disbelieve other portions. See *Kansas City Southern Ry. Co.* v. *Dickerson,* 112 Ark. 607, 165 S.W. 951.

The judgment is affirmed.

NATIONAL DISTRIBUTORS, INC. v. HOUSTON H. SIMARD, ET UX

5-4890 440 S.W. 2d 31

Opinion Delivered April 28, 1969

Warner, Warner, Ragon & Smith for appellant.

Bethell, Stocks, Callaway & King for appellees.

J. FRED JONES, Justice. This is an appeal by Na-

tional Distributors, Inc. from an adverse summary judgment in favor of Houston H. Simard rendered by the Sebastian County Circuit Court. National was the plaintiff in the trial court and the suit was on a guaranty agreement.

On December 9, 1963, Jackson's Furniture, Inc. of Fort Smith contracted to refinish and sell antique furniture and serve as an outlet for antique furniture supplied by National Distributors, Inc. a Tennessee corporation. Jackson's was to sell the furniture and remit to National 134% of the original cost price within eight hours after Jackson's had collected for the furniture sold. Jackson's became indebted to National and on April 5, 1965, it executed and delivered to National a promissory note payable on demand for $22,004.66. Jackson's failed in business and was placed in receivership by chancery court decree. National filed claim for $24,453.64 in the receivership proceedings and was paid $1,934.29 as its pro rata portion of the assets. By chancery decree dated December 26, 1967, National was given judgment for $22,004.66 balance due on the note.

On February 9, 1968, National filed the present suit in the Sebastian County Circuit Court against Houston H. Simard, president and general manager of Jackson's, to recover on an undated guaranty agreement whereby Simard guaranteed the payment of any and all indebtedness owed by Jackson's to National. By way of answer and counter-claim, Simard claimed that he was entitled to a declaratory judgment on the basis that the guaranty agreement was void and unenforcable since National was not qualified to do business in Arkansas. National filed a denial to the counter-claim and Simard responded with a motion for summary judgment. The court granted the motion for summary judgment and on appeal to this court National designated the following points for reversal:

"The trial court erred in finding that appellant

was 'doing business' in Arkansas; or, at the very least, an issue of fact exists on that point.

The trial court erred in sustaining the summary judgment because appellee failed to sustain the burden of demonstrating that there are no genuine issues of material fact."

In granting the motion for summary judgment, the trial court found that the record presented no genuine issue of material fact, and the motion for summary judgment was granted under Ark. Stat. Ann. § 64-1202 (Repl. 1966) which states:

"*Any foreign corporation which shall fail to comply with the provisions of this act and shall do any business in this State,* shall be subject to a fine ... and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles or incorporation or certificates as aforesaid, *cannot make any contract in the State which can be enforced by it either in law or in equity* ..." (Emphasis supplied.)

The guaranty agreement sued on by the appellant is as follows:

"The undersigned, for value received, hereby guarantee the payment of any and all indebtedness now or hereafter incurred by Jackson's Furniture, Inc. to National Distributors, Inc., including specifically all presently due amounts in the approximate amount of $17,500.00 and future indebtedness which may be incurred from time to time, it being the intent of this agreement by the undersigned to personally guarantee payment of all indebtedness incurred by Jackson's Furniture, Inc. to National Distributors, Inc. at any time during the life of this guaranty agreement. It is the intention of this guaranty to create the same liability on our part to

and in favor of the said National Distributors, Inc. or its order as though we had actually executed sepuarate guaranty agreements for each separate indebtedness incurred and to be incurred in the future by Jackson's Furniture, Inc, to National Distributors, Inc.

We hereby severally waive presentment for payment, notice of non-payment, protest and notice of protest, and due diligence in enforcing payment of any or all of said indebtedness; and consent that an extension of time for payment may be granted or renewal taken on all or on any of said indebtedness without notice to us.

s/ Houston H. Simard

s/ Dorothy J. Simard"

Appellant argues that there is no allegation that plaintiff came to Fort Smith for the execution of the guaranty agreement, and that it was actually mailed to the appellant in Tennessee. That appellant had no physical assets in Arkansas, no agent here, no office here, and that no services were performed here. Appellant argues that the record does not even suggest that any representative of plaintiff ever set foot in Arkansas, let alone conduct business here, and that the undisputed facts established that the transaction entered into by the parties in 1963 was a Tennessee contract which involved the interstate shipment of goods to Fort Smith. The appellant also argues: "it is elementary that Houston H. Simard's contract of guaranty was an enforceable promise on his part which was collateral to the primary obligation on the part of Jackson's Furniture, Inc. * * * Simard thus promised to answer for the debt of Jackson's Furniture, Inc., which was incurred in interstate commerce, and his guaranty cannot be severed or separated from his corporation's primary obligation."

While not so important to our decision in the case now before us, appellant was apparently doing business in Arkansas through Jackson's Furniture, Inc. under the agreements entered into in 1963. A note was executed by Jackson's for the indebtedness due under these agreements, appellant's rights thereunder were litigated in chancery court and it obtained judgment against Jackson's. The pertinent portions of the 1963 agreements, relied on by appellant, are as follows:

> "It is agreed that NDI shall furnish adequate and continuing supply of antique furniture to Jackson's Furniture, Inc. on the following basis:
>
> National Distributors, Inc. shall pay all purchase and transportation expenses to Fort Smith and shall furnish Jackson's with the original suppliers invoice on all purchases.
>
> * * *
>
> National Distributors, Inc. and Beno Friedman further agree for a period of five years after this association might be dissolved for any reason; not to contact personally and to prevent their servants or acquaintances from contacting any customer or other business associate to whom they are introduced by Mr. Simard in the performance of this agreement.
>
> A. The only exception to this shall be on antiques belonging to Jackson's Furniture, Inc. and now in stock.
>
> B. National Distributors, Inc. shall be paid on terms set forth above 134% of the cost price of every piece of antique furniture sold by Jackson's Furniture, Inc. or by Houston H. Simard from this date forward.
>
> C. This agreement shall continue for a period of 99 years unless 30 days cancellation notice is giv-

en one of the parties by the other via registered mail.

It is further agreed that Jackson's Furniture, Inc. shall furnish adequate and continuing sales outlet on the following basis for antique furniture provided by National Distributors, Inc.

Jackson's shall pay for all costs involved in selling, refinishing and delivering merchandise going to customers, and shall furnish National Distributors, Inc. with a carbon copy of every Jackson's invoice for antiques of any kind which Jackson's sells.

A. 34% shall be added to the National Distributors, Inc. cost price and the total shall be paid to National Distributors, Inc. within eight (8) working hours of the time Jackson's receives payment from its customer. On invoices, factoring and credit, the same terms and conditions apply here as in our agreement dated November 22, 1963, covering the Reneau's Wholesale antiques stock now in your possession.

* * *

Further, Jackson's Furniture, Inc. and Houston H. Simard agree for a period of five years after this association might be dissolved for any reason; not to contact personally and to prevent their servants or acquaintances from contacting any supplier or other business associate to whom they are introduced by Benno Friedman in the performance of this agreement.

A. By December 15, 1963, Jackson's Furniture, Inc. agrees to furnish National Distributors, Inc. a complete list of all antiques now in stock not belonging to National Distributors, Inc. and as these pieces are sold they will be checked off the list. National Distributors, Inc. will receive no payment for

antiques on this list.

B. As of start of business the first day of each month a complete inventory of pieces (numbers only) in stock and not sold will be furnished to National Distributors, Inc. by Jackson's Furniture, Inc. This list will be placed in the mail at the latest by close of business the 5th of each month."

An additional agreement dated December 9, 1963, is set out, in part, as follows:

"The following material belonging to NDI [National Distributors] is now in the possession of Houston Simard, President of Jackson's Furniture, Inc., Fort Smith, Arkansas.

* * *

It is agreed that all material in this stock not paid for by Mr. Simard as of March 31, 1964, will be returned in good shape and at no expense to NDI... Excepted from this statement will be the pieces which have been refinished by Simard, and these pieces shall remain on consignment in Ft. Smith until sold by Simard.

As each piece is sold, a copy of the invoice will be furnished to NDI.

Most sales are to be factored, and within 8 working hours after money is received by Mr. Simard from the factor, the amount of the 'NDI price' on the piece sold will be forwarded to NDI by Mail."

Of course, a contract for the *sale* of merchandise to be shipped from a foreign corporation's place of business in another state to an Arkansas purchaser does not alone constitute doing business in Arkansas even when the contract is executed in this state. In *Robertson* v. *Southwestern Co.*, 136 Ark. 417, 206 S.W. 755, this court said:

> "A contract for the sale of merchandise to be shipped from appellee's place of business in Tennessee to the purchaser here does not constitute business in this State so as to bring the transaction under the ban of our statute, which prohibits a foreign corporation from doing business here without first filing copies of its articles of incorporation and obtaining permission to do business."

The ownership of the property is a determining factor as to the interstate-intrastate character of a transaction. In the case of *Hogan* v. *Intertype Corporation,* 136 Ark. 52, 206 S.W. 58, the appellant agreed to purchase a typesetting machine if it were demonstrated on his premises and performed as represented. The machine was shipped from out of state to Huntington, Arkansas, set up and demonstrated, whereupon appellant signed a note secured by a mortgage for the purchase price. In reversing the trial court's finding that the appellee was not doing business in Arkansas, this court said:

> "We think it conclusively established by the facts in this case that the International Typesetting Machine Company owned the machine in question after it arrived in Huntington, Arkansas, and thereafter sold it to appellant, accepting in part payment notes executed and payable in Arkansas and secured by a mortgage on the machine, which was also executed and filed for record in this state. *One test laid down by the Arkansas cases differentiating an interstate transaction from an intrastate transaction is the ownership of the property after it arrives in the state.*" (Emphasis supplied.)

In *Eisenmayer Milling Company* v. *George E. Shelton Produce Company,* 176 Ark. 620, 3 S.W. 2d 688, appellant shipped a carload of flour to brokers in Arkansas, and had the flour stored with appellee. The brokers were authorized to sell the flour at their own price,

and pay appellant's invoice price and appellant was to be furnished dray tickets so that it could check deliveries. After three or four weeks the brokers dissolved their partnership and the appellant arranged with the appellee to sell the remainder of the flour paying appellant as it was sold less charges for storage and selling. In holding that appellant was doing business in Arkansas, this court said:

> "... [T]he arrangement made with the brokers, and subsequent thereto, with appellee, was nothing more than an agency contract with the brokers and appellee to sell appellant's flour and to remit therefor as the same was sold. There was no outright sale of said flour either to the brokers ... or to appellee. Such flour was not the property of the brokers or appellee, could not have been levied upon by creditors as their property, but on the contrary, according to the undisputed testimony of appellant's witnesses, said flour had at all times belonged to it, and was being sold for its account by the brokers and appellee.
>
> * * *
>
> ... Suffice it to say that the undisputed facts here show that the shipment of the flour into this State in the first instance was not a sale to ... [the brokers] and that the arrangement between appellant and appellee was not a sale thereof in continuation of the former arrangement between appellant and ... [the brokers]. It amounted to no more than the storage of the flour in this State as its own, and the employment of an agent to make sales thereof from time to time, as purchasers could be found thereof. Had it been a sale in the first instance, with title retained and the flour retaken and a resale thereof made to appellee, the facts would be wholly different, and the result would be a transaction in interstate commerce, as held in the case of *L. D. Powell Co.* v. *Roundtree, supra.*"

The intrastate character of the relationship between the parties in the case at bar is clearly evident from the written agreements they entered into, and it is apparent to us from the plain wording of agreement, supra, that the appellant retained title to the goods in Jackson's possession until the goods were sold by Jackson's, and that the appellant was simply engaged in the antique furniture business through Jackson's Furniture, Inc. in Fort Smith, Arkansas.

It is apparent from the record before us, that Jackson's simply sold the furniture, paid for and furnished to it by the appellant, and instead of remitting 134% of the cost price to the appellant within eight hours after it was collected from the purchasers as Jackson's agreed to do, Jackson's either failed to collect or failed to remit until over a two year period it owed the appellant the sum of the chancery judgment, plus the amount appellant received from the liquidation.

The guaranty agreement actually sued on in this case is a unilateral agreement separate and apart from the contracts entered into in 1963 between the appellant and Jackson's Furniture, Inc. and is separate and apart from the promissory note given in 1965 on which judgment was entered and partially satisfied in 1967. The guaranty agreement was the only subject before the trial court in the case at bar and the appellee's affidavit in support of his motion for summary judgment states that this agreement was entered into and executed in Fort Smith, Arkansas, at the instance and upon the request of appellant's attorney in Fort Smith. Appellant's affidavit does not controvert appellee's affidavit on this point, but only states that the original promissory note, as well as the guaranty agreement, was mailed to appellant in Tennessee from Fort Smith, Arkansas.

The appellant already has its judgment on the promissory note and the validity of that judgment is not be-

fore us. The question before us is not where the appellant corporation was when it received its copy of the guaranty agreement signed by the appellee, and sued on in this case, the question on this point is where the contract was entered into. The appellee says it was in Fort Smith, Arkansas, and the appellant leaves this fact uncontroverted.

The judgment of the trial court is affirmed.

GEORGE ROSE SMITH, BROWN and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice. I would reverse the summary judgment in this case as to Houston H. Simard.[1] I do not believe that the trial court or the majority has required appellee to meet the heavy burden resting upon him to show entitlement to this extreme remedy. Our cases with reference to this burden are outlined in my dissenting opinion in *Gordon* v. *Matson,* 246 Ark. 533, 439 S.W. 2d 627. I submit that there is a genuine fact issue in this case. As I see it, both the trial court and the majority have overlooked the most material issue raised by appellant. Although I do not agree with the treatment given the guaranty agreement in the majority opinion as "a unilateral agreement separate and apart from the contracts entered into in 1963," the material fact in issue which determines whether appellant is to be allowed to maintain suit in this state is the place of making of the contract. Our statute closes the doors of our courts to a nondomesticated foreign corporation *only* on those actions involving contracts *made in this state. U. P. I.* v. *Hernreich d/b/a Station KZNG,* 241 Ark. 36, 406 S.W. 2d 317. Under the law of this state, a contract is deemed to have been entered into at the place where the last act necessary to the completion of the contract took place. *Cooper* v. *Cherokee*

[1]Appellant does not seek reversal of the summary judgment against Dorothy J. Simard, so Houston H. Simard is referred to herein as appellee.

Village Development Co., 236 Ark. 37, 364 S.W. 2d 158; Leflar, *Conflicts of Law*, § 122, page 230; Leflar, *American Conflicts Law*, § 144, page 353. See also *Hicks Body Co.* v. *Ward Body Works*, 233 F. 2d 481 (1956). It is recognized that a written contract acquires no validity until delivery, either actual or constructive. *Dem. Ptg. & Litho. Co.* v. *Parker, Auditor*, 192 Ark. 989, 96 S.W. 2d 16. A mortgage prepared at the office of the lender in Oklahoma, mailed to its representative within Arkansas for signature of the mortgagors and returned to the lender was held to constitute an Oklahoma contract. *Smith* v. *Brokaw*, 174 Ark. 609, 297 S.W. 1031.

There is no place of execution, or date, shown on the guaranty agreement exhibited with the amended complaint in this case. Appellee did not allege in his answer and counterclaim that the guaranty agreement was entered into, or made, in the State of Arkansas. Appellee's only allegation having to do with the status of the appellant as a foreign corporation, and relating to the guaranty agreement, was that appellant has engaged in business in Arkansas without qualifying to do business in the state. Appellee's motion for summary judgment asked that the trial court adjudicate that the guaranty agreement and promissory note alleged as the basis of appellant's claim were void and unenforceable. In appellee's affidavit supporting his motion, he merely stated that the guaranty agreement was presented to him and his wife by an attorney acting for appellant in Fort Smith, Arkansas, and that it was executed at his place of residence there.

Appellant's response was supported by the affidavit of Jay Fred Friedman. Friedman stated that he was one of the attorneys for appellant and that he had personal knowledge of the facts set forth in the affidavit. He stated that the promissory note and guaranty agreement sued on were both sent to the appellant by United States mail in interstate commerce and across state lines, as substantiated by the date receiving stamp

placed on all incoming mail by appellant.

I do not see how it could be more clearly made to appear that appellant was contending that the contract was made in Tennessee and not in Arkansas. Under this state of the record, there is certainly a material fact issue as to the place where the contract was made. At least, appellee failed to show that there was not an issue of fact on this point by simply showing the isolated fact as to the place of signing.

While the trial court found that there was no genuine issue of fact relevant to issues raised by the motion for summary judgment and dismissed the complaint holding the note and guaranty agreement null, void and unenforceable, the court made specific findings of fact, none of which has any bearing at all upon the place where the contract was made. The court's specific finding in that respect was simply that the appellant engaged in business in Arkansas, and, in the course of such business, obtained from appellee the guaranty agreement sued on. This point is argued by appellant under both points relied upon in his brief.

BROWN, J., joins in this dissent.

CLIFFORD SCHOLEM, ET AL v. FLETCHER LONG, EXECUTOR

5-4886 439 S.W. 2d 929

Opinion Delivered April 28, 1969

Spitzberg, Mitchell & Hays for appellants.

Harold Sharpe for appellee.

CONLEY BYRD, Justice. The trial court held that appellants Clifford Scholem and Edwin J. Scholem took under Grace Overholt's will as individuals rather than as members of a class and that consequently a devise to their brother, Percy L. Scholem, who predeceased the testatrix, lapsed.

The record shows that Grace Overholt died without issue. Her will contains fifteen clauses but only Article III thereof is for the benefit of living kinsmen. Article III provides:

> "I hereby give, devise and bequeath to Percy L. Clifford and Edwin J. Scholem of Little Rock, Arkansas, the property located at 115-117 Cypress Street, Brinkley, Arkansas, . . . This property contains two store buildings; that these legatees be not permitted to sell or mortgage this land for a period of twenty (20) years following my death."

The will was submitted to the trial court for interpretation together with the following stipulation of facts:

> "Percy Scholem, Clifford Scholem and Edwin J. Scholem, the beneficiaries of said Article III, are natural brothers to each other, and Percy Scholem, one of the said beneficiaries, predeceased the testatrix, his death having occurred on May 21, 1960. Jake Samuel was the natural father of the testatrix; Rachael Samuel Scholem, sister of the said Jake

Samuel was the natural mother of the beneficiaries of said Article III. After the death of Jake Samuel, father of the testatrix, the testatrix's mother married I. Scholem. Following said marriage I. Scholem adopted Grace Samuel, later Grace Overholt. Joseph Scholem, brother to I. Scholem, was the father of the beneficiaries of said Article III. I. Scholem and Joseph Scholem at one time owned the realty described in Article III, and they together, as partners, operated a business thereon. At the time the will in this case was executed by the testatrix, there were no other living children of Joseph Scholem and Rachael Samuel Scholem than Percy Scholem, Clifford Scholem and Edwin J. Scholem. There are at present no other living brothers or sisters of the said beneficiaries of Article III of the will. The testatrix was survived by other living cousins, both in the Scholem line and in the Samuel line. The testatrix knew of the death of Percy Scholem.

"During the lifetime of Percy Scholem both he and Clifford Scholem maintained telephone contact with the testatrix each time they were in the city of her residence, and these contacts continued by Clifford Scholem after the death of Percy Scholem and until the death of the testatrix. The testatrix and Percy Scholem and Clifford Scholem corresponded with each other.

"No other beneficiary designated in the will of the testatrix is related to her by blood or marriage. Percy L. Scholem, Clifford Scholem and Edwin J. Scholem were the intended beneficiaries of Article III of the Will."

Under our law a legacy or devise lapses when the legatee or devisee dies before the testator except where the legacy or devise is to a child or other descendant of the testator. See Ark. Stat. Ann. § 60-410 (Supp. 1967)

and *Christy* v. *Smith,* 226 Ark. 289, 289 S.W. 2d 885 (1956). A further exception to the lapsing rule occurs where there is a gift to a class. See *Johnson* v. *Dunnings, Executor,* 227 Ark. 640, 301 S.W. 2d 457 (1957) and *Rand* v. *Thweatt, Administrator,* 222 Ark. 556, 261 S.W. 2d 778 (1953).

In the *Rand* case we found the general rule to be that where a bequest or devise is made to beneficiaries designated by name, they take as individuals rather than as a class, in the absence of a contrary intention appearing elsewhere in the will, or in the surrounding circumstances. In discussing the general rule, we there quoted from Page on Wills, § 1049, as follows:

> "Where there is a gift to a number of persons who are indicated by name, and who are also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class.
>
> "The context, however, may show, that the names of the beneficiaries were added to the description of them as members of a class for the purpose of greater certainty, and that the paramount intention of testator was to make the gift to a class. In such case the gift will be treated as one to a class even if the names of the beneficiaries are given in the will . . ."

Appellants argue that since the decedent was meticulous in declaring that only the article III beneficiaries could own the land involved for 20 years, the conclusion that she was satisfied that no lapse would occur if anyone of them should predecease her is inescapable. Their argument is as follows:

> "In writing the clause 'that these legatees be not permitted to sell or mortgage this land for a period of twenty years following my death', the de-

cedent manifested her intention that the beneficiaries were to take as a class. She meant for the Scholems to hold the realty unto themselves for not less than two decades. How could she more clearly have declared that no person, including her residuary legatee, should acquire any interest in the land? She even guarded against the possibility that any other person acquire an interest through mortgage foreclosure. The testatrix adopted all measures within her perception, as expressed in Article III to declare that the realty must belong to the Scholems, and to none other than the Scholems. By precise language, she enjoined the beneficiaries from selling or encumbering to any stranger, not excluding other beneficiaries of the will, or to any relative by blood or marriage."

We are unable to agree with appellants' argument. The devise named the individuals whom the testatrix intended to be the recipients of her bounty. As we read the *Johnson* and *Rand* cases, above, this constituted a gift to them as individuals rather than as a class unless there was a contrary or paramount intention of the testator to make the gift to a class. We are unable to find any such paramount intent expressed in the will here. Rather it appears to us, that the testatrix did not consider the possibility of a lapse.

Since the testatrix could easily have made manifest an intent to devise to appellants as a class by adding "or survivor" immediately following their names, it does not seem reasonable that she would deliberately choose a hard and doubtful means of accomplishing an end when an easier and more certain means was available. For these reasons we agree with the trial court that appellants took as individuals rather than as members of a class.

Affirmed.

JAMES H. WOODWARD v. MARY J. BLYTHE, ADM'X., ESTATE OF KERMIT A. BLYTHE, DECEASED

5-4750 439 S.W. 2d 919

Opinion Delivered April 28, 1969

[Rehearing denied May 26, 1969.]

Wright, Lindsey & Jennings for appellant.

Guy H. Jones and *Phil Stratton* for appellee.

FRANK HOLT, Justice. This case results from a multiple car collision. Upon a jury trial, the issues of negligence and damages were found against the appellant and a codefendant, Leonard Johnson, who does not appeal. The jury awarded $137,000.00 to appellee. For reversal the appellant first contends that there was no substantial evidence to support a finding that appellant was guilty of negligence which was a proximate cause of any accident or collision involving his vehicle.

It is a well settled rule that if there is any substantial evidence of negligence by a defendant, when viewed in the light most favorable to a plaintiff and given its highest probative value, the question must be submitted to the jury. *Gookin* v. *Locke,* 240 Ark. 1005, 405 S.W. 2d 256 (1966).

This accident occurred about 6:15 a.m. on February 14, 1966, on Highway 70 about five miles west of Brinkley, Arkansas. The highway was 24 feet 5 inches wide, with each shoulder being 9 feet 5 inches in width. It was dark, the road was straight and level, and weather conditions presented no hazards. Appellee's decedent, Kermit Blythe, was driving a red Corvair in an easterly direction. Following him was the appellant who was driving a light blue Dodge. The decedent suddenly veered to his left to avoid striking a stalled and unlighted Cadillac which was headed in the same direction, positioned on the right shoulder of the highway and partially on the pavement. This car was being operated by the codefendant, Johnson. When the decedent pulled to his left to pass the stalled vehicle, he crossed the center line about 18 inches whereupon the left front portion of his car collided with an oncoming Pontiac automobile. This collision caused the Blythe Corvair's direction to be reversed and its left front portion to be positioned in the path of appellant's eastbound automobile. Appellant's vehicle skidded 83½ feet before striking the left

front portion of decedent's vehicle. Following this impact the appellant's car deflected slightly to the right and after traveling about 25 to 30 feet, came to rest at the rear of the stalled Cadillac after striking it and doing slight damage. The decedent's car, after being struck by appellant's vehicle, traveled eastward, or in its original direction and traffic lane, on past the stalled Cadillac and came to rest on the right side of the road approximately 50 feet from the point of impact with appellant's car. The collision between the Corvair and the Pontiac, and then the Dodge and Corvair, occurred within an area of approximately 20 feet. The appellant said he first applied his brakes when he saw flames resulting from the Pontiac-Corvair collision when he was 125 to 150 feet distant. He testified that he was traveling about 60 miles per hour. This would be approximately 88 feet per second. He had been following the Corvair at a distance of 250 to 275 feet for about four or five miles. There was a burned mark or trail on the pavement extending eastward from the 20-foot area, or the point of impact between the Dodge and Corvair, to about 8 or 10 feet from where the Corvair came to rest. There were fresh scratch marks on the pavement about the center of the eastbound traffic lane and near the end of appellant's skid marks. According to appellant, he never saw the stalled vehicle nor the oncoming Pontiac before the first collision. He does not remember whether his vehicle was damaged by the collision with decedent's vehicle or the stalled Johnson vehicle and recalls only one impact. There was red paint from the decedent's Corvair on the left front of appellant's car which shows extensive damage.

We have held many times "that a well connected train of circumstances is as cogent of the existence of a fact as an array of direct evidence, and frequently outweighs opposing direct testimony, and that any issue of fact in controversy can be established by circumstantial evidence when the circumstances adduced are such that reasonable minds might draw different conclusions."

Myers v. *Hobbs,* 195 Ark. 1026, 15 S.W. 2d 880 (1938); *Ford Motor Co.* v. *Fish,* 233 Ark. 635, 346 S.W. 2d 469 (1961). See, also, *MFA Ins. Co.* v. *Pearrow,* 245 Ark. 795, 434 S.W. 2d 269 (1968); *St. Louis, I.M.&S. Ry. Co.* v. *Owens,* 103 Ark. 61, 145 S.W. 879 (1912). Further, in determining the legal sufficiency of evidence, the testimony of a party to an action who is interested in the result will not be regarded as undisputed. *Bridges* v. *Shapleigh Hardware Co.,* 186 Ark. 993, 57 S.W. 2d 405 (1933). When we view the evidence in this case according to these well established rules and in the light most favorable to the appellee, as we must do, we cannot say as a matter of law that the evidence is insubstantial that the appellant was following too closely or failed to keep a proper lookout, or failed to keep his vehicle under control. Thus, we find no merit in appellant's first contention.

Appellant next asserts there was no substantial evidence to support a finding that appellee's decedent was alive following the collision between his Corvair and the Pontiac and, therefore, there was no substantial evidence that any negligence on the part of appellant caused or contributed to the cause of death of appellee's decedent. We must agree with appellant on this contention. The appellee's decedent was found dead in his Corvair within a few minutes following the second collision. The first collision occurred when appellee's decedent collided with the oncoming Pontiac. From the physical evidence, the entire left side of the Pontiac was damaged with a shearing or ripping effect. The left rear door was torn from the car and one of the seven passengers in this vehicle was killed. After this impact the Pontiac continued westward in its proper lane, veering to the right, for 18 feet and then along the shoulder for another 36 feet where it stopped on the edge of the shoulder embankment. The force of this impact, however, reversed the direction of the Corvair and positioned it in the path of the oncoming vehicle driven by appellant. According to appellant, he was following the Corvair at 60 miles

per hour, or 88 feet per second, when he observed flames from the first collision. He applied his brakes and skidded 83½ feet before colliding with the left front portion of the red Corvair. After this collision, as previously stated, appellant's vehicle veered to the right and traveled approximately 25 to 30 feet before striking the rear of the stalled Johnson Cadillac, doing slight damage to it. The Corvair, following the second collision, continued in its original or eastward direction and came to rest approximately 50 feet from the Dodge-Corvair point of impact and about 30 feet in front of the stalled Cadillac. The left front portion and door of the Corvair were crushed inward. The driver's seat was pushed to the right and partially torn loose. The steering shaft and wheel were pushed upward and to the right. The body of appellee's decedent was found strapped in his seat and lying to the right. He had head injuries, a crushed chest, broken legs and other bodily injuries. The death certificate shows that death was caused by "Brain injury and Internal injuries" as a result of "Head on collision of automobiles." This is the extent of the medical evidence. There was no damage to the rear or right front or right side of decedent's vehicle. According to the physical evidence, there was red paint on the bumper and left front portion of appellant's vehicle. The damage was limited to this area of appellant's car. Appellant suffered head injuries.

Even though we find substantial evidence of negligence on the part of appellant, there was still the burden of proof upon the appellee to establish that such negligence was a proximate or contributing cause of the death of appellee's decedent. *Superior Forwarding Co.* v. *Garner*, 236 Ark. 340, 366 S.W. 2d 290 (1963); *Kapp* v. *Sullivan Chev. Co.*, 234 Ark. 415, 353 S.W. 2d 5 (1962).

In *Kapp* we said:

> "To submit to a jury a choice of possibilities is but to permit the jury to conjecture or guess, and

where the evidence presents no more than such choice it is not substantial, and where proven facts give equal support to each of two inconsistent inferences, neither of them can be said to be established by substantial evidence and judgment must go against the party upon whom rests the burden of sustaining one of the inferences as against the other."

See *Superior Forwarding Co.* v. *Garner, supra; Glidewell* v. *Arkhola Sand & Gravel Co.,* 212 Ark. 838, 208 S.W. 2d 4 (1948); 22 Am. Jur. 2d, Death §§ 222 and 243.

In the recent case of *Ellsworth Bros. Truck Lines, Inc.* v. *Canady,* 245. 1055, 437 S.W. 2d 243 (1969), we said:

"It is not sufficient to show that the injuries suffered might have been caused when appellant's vehicle hit the rear of the Heaggan automobile. This causal connection between a plaintiff's damages and the defendant's negligence must be established by direct or circumstantial evidence, and it cannot be proved by conjecture or speculation. (citing cases)"

See, also, Prosser on Torts, (3d Ed. p. 245).

In the case at bar there is no contention that appellant in any manner contributed to the first collision. From the evidence in this case, we are forced to the view that only by conjecture and speculation could it be said that appellee's decedent was or was not alive when this second impact occurred and that negligence on the part of appellant was a proximate or contributing cause of the death. Therefore, we must reverse this judgment.

However, we do not think that reversal of this judgment requires its dismissal. In *St. Louis Southwestern Railway Co.* v. *Clemons,* 242 Ark. 707, 415 S.W. 2d 332 (1967), it was aptly said:

"We come now to the question of whether this case should be dismissed or remanded. This court has long adhered to the rule so well reiterated in *Fidelity Mutual Life Insurance Co.* v. *Beck,* 84 Ark. 57, 104 S.W. 533 and 1102 (1907). The general rule is to remand common law cases for new trial. Only exceptional reasons justify a dismissal. One of the exceptions is an affirmative showing that there can be no recovery. *Pennington* v. *Underwood,* 56 Ark. 53, 19 S.W. 108 (1892). There it was said that when a trial record discloses 'a simple failure of proof, justice would demand that we remand the cause and allow plaintiff an opportunity to supply the defect.' To the same effect, see *Hinton* v. *Bryant,* 232 Ark. 688, 339 S.W. 2d 621 (1961)."

In the case at bar there is a deficiency of proof as to whether appellant's negligence was a proximate cause of decedent's death. It is not impossible that such a deficiency of proof could be supplied upon a retrial.

The appellant next contends, in the alternative, that the trial court erred in modifying, amending, and changing the verdict as returned by the jury. We agree that this also constituted reversible error. However, we do not deem it necessary to discuss this point since this error is not likely to occur again upon a retrial.

Reversed and remanded.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN. I concur in the disposition of this case. I would remand for new trial upon the basis that the lack of substantial evidence is due to the failure of the appellee to show causation where expert testimony might have supplied the deficiency in accordance with the views stated in my concurring opinion in *Continental Geophysical Co.* v. *Adair,* 243 Ark. 589, 594, 420 S.W. 2d 836. See *Reynolds Metal Co.* v. *Ball,* 217 Ark. 579, 232 S.W. 2d 441.

DAVID TURNER v. WILLIAM O. ROSEWARREN, ET AL

5-4883 440 S.W. 2d 769

Opinion Delivered May 5, 1969
[Supplemental opinion on Rehearing delivered June 9, 1969, p. 1301.]

[redacted]

Irwin & Street and *Edgar Woolsey* for appellant.

J. Marvin Holiman for appellees.

CARLETON HARRIS, Chief Justice. This is a guest liability case. On October 22, 1966, Betty Rosewarren was a passenger in a car driven by David Turner, appellant herein, the young people being out on a date. Approximately three miles north of Clarksville on State Highway 103, Turner lost control of the car, and collided with a vehicle belonging to Rosa Smith, Miss Rosewarren receiving severe injuries. Thereafter, William O. Rosewarren, as father and next friend of Betty, instituted suit against Turner in the Circuit Court of Johnson County, alleging injuries to his daughter, and asserting that Turner was guilty of willful and wanton negligence in the operation of his automobile, same being the proximate cause of the injuries to Betty. The

case was tried on October 21, 1968. At the conclusion of the testimony on behalf of Miss Rosewarren, appellant moved for a directed verdict, the motion being denied by the court. No evidence was offered on behalf of Turner, and appellant again moved for a directed verdict, the motion again being overruled. Nine of the twelve jurors returned a verdict in favor of appellee in the sum of $15,000.00, and from the judgment so entered, appellant brings this appeal. For reversal, it is simply asserted that the evidence was insufficient on the question of willful and wanton misconduct of Turner to warrant submission of the case to the jury.

The evidence relied upon by appellee to establish willful and wanton operation of the Turner automobile is as follows:

Mrs. Helen Stewart, who lives near Clarksville, testified that, on the night of October 22, 1966, she drove north on Highway 103 for the purpose of going to the Woodland Church on Harmony Road, where a Halloween party was being held. Her children were in the automobile with her. When she reached Harmony Road, a point at which she would, if continuing on, start the ascent of a hill, she signaled a left hand turn, and about the same time an automobile, traveling south, came over the crest of the hill.

> "We were almost to the turnoff when a car come over the hill pretty fast, and I taken the shoulder of the road to keep it from hitting me. It was weaving."

She was unable to estimate the speed of the approaching vehicle, but said, "It wasn't holding the line —his line. Well, it was sort of taking the yellow line every once in a while." Mrs. Stewart said she moved over partly to the shoulder of the road to avoid any possibility of being hit. The witness made her turn, went on to the church, and did not know of the occurrence of an accident until sometime later.

Her daughter, Karen, testified that the car came over the hill as they were getting ready to turn off of Highway 103, and that "it was going pretty fast." When asked what was meant by the expression, she replied, "Oh, around 85 or 80 or something."

Rosa Smith, sister-in-law of Mrs. Stewart, was also traveling the same route for the purpose of attending the Halloween party. Her three children were in a station wagon with her, and she was behind Mrs. Stewart, a car driven by Mrs. Lula Baker being between the Stewart and Smith vehicles. Mrs. Smith described events, as follows:

> "Well, I was taking my children—I have three —to church that night. They were having a Halloween party, and we was going out the Harmony highway, and just before we got to the turning off place my sister-in-law was in front of me, and there was a car following her, and I was quite a ways back, and just as she turned her flicker lights on, this other car—he come around—you know—she passed him, and it looked like the car almost run into the back of that other car—
>
> "Q. Do you know who was in the car behind your sister-in-law?
>
> "A. They said it was a Mrs. Baker. And this car come right straight at me in my lane until he got almost down to me, and when he started in my lane I throwed on my brakes and stopped so he could have time to get back over on his side of the road, and just before he got to me he got over on his side of the road, and it looked like he straightened up, and then he lost control and come right straight over in front of me and slid sideways, just like he was on ice, right into the front of my car."

Mrs. Smith said that the car was going "about as fast as it could go * * * going about 80, I imagine." She said the car was traveling "almost that fast" when her station wagon was struck.

Debbra Smith, 15 years of age, riding with her mother, testified that she was unable to estimate the speed of the Turner vehicle. This was all of the evidence relating to the wreck itself.

In addition, Mrs. Ruth Rosewarren, Betty's mother, testified that, at the Clarksville hospital that night, she asked David what happened, and he replied, "I don't know. I guess I'm not a very good driver." Betty's father, William Rosewarren, said that David told him, "I guess it's my fault, I'm not a very good driver." Mrs. Jewell Phillips, employed at the hospital as a nurse at the time, testified that, as she was pushing David on a stretcher around to the suture table, Betty raised up, looked at David, and said, "Oh—no, no. I told you you couldn't make it." She said that David made no answer, but stated she was not qualified to say whether he was physically able to do so. Mrs. Phillips also said that she was not qualified to state whether Betty was in shock, nor would she say that the young woman was conscious. "She was screaming. She was screaming each word she said, and she was screaming constantly. She was being sutured under local anesthetic."

Betty, 18 years of age, testified with unusual and commendable frankness. With the exception of one fact, hereafter mentioned, she said that she did not remember anything that happened immediately before the accident and she only remembered that immediately after the collision, she heard screams, and suddenly realized that she was the person screaming. The witness said that she and David had been dating for about a year, and that, on the night of October 22, they were on their way to Clarksville, though they had not decided what they

were going to do. She stated that David was not drinking, and all she remembered about the accident was seeing lights. "It felt like the lights were right against my face, and I shoved my hand up like this, against the windshield, to shield my face." She remembered nothing after being blinded by the lights, and was not able to say whether David was driving fast or slow, or why he lost control of the car. Subsequently, on redirect examination by her own attorney, she testified that David was a good driver, and had always been a good driver prior to this occasion; that there had been times when she had called him down for speeding, but he always slowed the car when she requested it. "I never had to call him down very often. He never drove that fast." She said that she was always frightened in an automobile that was being driven fast; that David knew of this fear, and that he always honored her on that point; further, it had never been necessary to call him down for "showing off" in a car.

We think the evidence falls short of establishing willful and wanton negligence. It has been pointed out by this court that, whether an automobile is being operated in such a manner as to amount to wanton and willful conduct in disregard of the rights of others, must be determined by the facts and circumstances of each particular case. *Splawn, Admx.* v. *Wright,* 198 Ark. 197, 128 S.W. 2d 248.

Appellee relies upon four cases, which we will discuss, but it might be here stated that we do not consider that any are authority for affirmance of the present judgment. The first is *Cooper* v. *Chapman,* 226 Ark. 331, 289 S.W. 2d 686. There, the evidence showed that Cooper was driving 100 miles per hour, and Cooper admitted that one of his passengers, Mrs. Chaplain, told him he was "flying too low without wings." Though stating that he did not know that he was traveling over 100 miles per hour at the time, Cooper did say that the car would go that fast, and that he had driven it at 115

miles per hour. There was testimony that all passengers importuned Cooper to slow down. Certainly, that case is distinguishable from the instant litigation.

In *Tiner* v. *Tiner,* 238 Ark. 222, 379 S.W. 2d 425, where four children were killed, and other persons severely injured, the evidence as to willful and wanton negligence of Berlin Tiner reflected that Tiner himself stated that shortly before the collision there began a torrential rain; that he went into the rain as a "sheet or wall of rain;" that his car skidded and "fish-tailed" on the slick asphalt road, so much so that the rear of the automobile was in front of the motor, and that visibility during this "sheet or wall of rain" was practically nil. A witness testified that the Tiner car entered the rain at a speed of 80 miles per hour, and there was no lessening of that speed up to the time of the collision. There was also evidence that Tiner had said that he could have gone to the ditch on the road on his right side, but did not want to damage his car.

In *Harkrider* v. *Cox,* 230 Ark. 155, 321 S.W. 2d 226, appellant's automobile (a young lady being a guest in the car) was traveling at a speed of 45 miles per hour on a heavily traveled highway at a time when visibility due to fog was not more than 50 to 100 feet; nonetheless, Harkrider proceeded to try and pass a cattle truck, and was hit head on by an oncoming automobile.

In *Henshaw* v. *Henderson,* 235 Ark. 130, 359 S.W. 2d 436, there was not only evidence of speed at 80 miles per hour, but evidence that the driver was drinking. In fact, one of the young ladies in the car testified that, when she left her premises to go to his car, "he kinda stumbled once."

So—in *Cooper,* passengers were begging the driver to slow down, and Cooper admittedly had driven his automobile at high speeds on other occasions; also, it was established that the reason Cooper lost control of

his car was the terrific speed. Here, Turner's prior driving record was good, nor is there any evidence that anyone asked him to slow down; nor is it established that Turner lost control of the car *because of willfully moving at a high speed.* It will be noted that the other three cases all included factors that contributed to the finding of willful and wanton driving in addition to speed. In *Tiner,* there was a "wall of rain," with practically no visibility. *Harkrider,* involving the effort to pass a vehicle in a dense fog, speaks for itself. And in *Henshaw,* there was evidence of drinking.

Let us summarize the evidence in this case. In the first place, there is *no testimony* with regard to what caused Turner to lose control of his car. The automobile was apparently out of control at the time the first witness viewed it. Was it because of negligent driving? Failure of brakes? Other mechanical defect? Could he have been blinded by the lights of the oncoming cars? This last has some support in the testimony of Miss Rosewarren. The evidence of this young lady, who had been dating appellant for about a year, and seemed entirely familiar with his driving habits, does not indicate appellant to be a driver who deliberately, intentionally, or wantonly, on October 22, performed acts that he should have known would likely result in danger to his passenger. While appellee's witnesses (Mrs. Smith and Miss Stewart) were likely completely sincere in their estimate of Turner's speed as 80 or 85 miles per hour, physical facts do not indicate this to be true. A photograph of the Smith car is in the record, and it certainly does not appear, from the amount of damage shown, that the Smith vehicle was struck with that much force. The proof also shows that the windshield of the Smith car was not broken, and, though seat belts were not being used, no one was thrown from the station wagon. We find no significance in David's remark that he guessed he wasn't a good driver. Here was a young man, depressed and distracted, because of the injuries to his friend, as well as to himself, who

might well have felt blame because he was the driver of the car. At any rate, there are numerous persons who would not be considered good drivers, but who, nonetheless, do not drive willfully or wantonly—just incompetently.

Nor do we find great significance, under the circumstances, in the remark made by Betty as she was rolled through the hospital screaming, very likely in shock. The comment would mean but little, even if it were known that she referred to some particular circumstance. David's failure to answer his friend, screaming with pain, likewise establishes nothing, even if he were fully aware of what she had said.

Basically, because there is no showing of why the Turner automobile went out of control, we think the evidence falls short of establishing the requisite degree of negligence.

Reversed and dismissed.

WOODROW COOK, SPECIAL ADM'R v. ANDY BEVILL

5-4865 440 S.W. 2d 570

Opinion Delivered May 5, 1969
[Rehearing denied June 2, 1969.]

Oscar Fendler for appellant.

Graham Partlow, Jr. for appellee.

LYLE BROWN, Justice. Appellant Woodrow Cook, administrator of the estate of Elijah J. Bryeans, deceased, and appellee Andy Bevill, each claim ownership of the proceeds of a certificate of deposit issued in the names of E. J. Bryeans or Andy Bevill. Since the certificate was dated April 18, 1967, resolving the issue requires an interpretation of Acts 78 and 444 of 1965. This is a case of first impression under those acts. The chancellor, in awarding the proceeds to Bevill, applied Act 444.

Elijah Bryeans held a deposit box at Farmers Bank of Blytheville when he died intestate in September 1967. He had placed in the lockbox two certificates of deposit. One was in the principal sum of $10,000 and in Mr. Bryeans' name only. The other certificate was in the sum of $8360 and was issued in the form "E. J. Bryeans or Andy Bevill." The depositor signed nothing. Mr. Bryeans purchased the certificates with his individual funds and he alone was given a key to the lockbox. His heirs apparently consisted of two sisters, one of whom was the mother of Andy Bevill. There was a close re-

lationship between the uncle and his nephew. Mr. Bryeans was in ill health during the last eight years of his life and Andy was very attentive to him. It was the banker's recollection that Mr. Bryeans expressed an intention that Andy Bevill have the proceeds of the deposit made in the two names in the event of Mr. Bryeans' prior death.

There are three legislative enactments to be considered. They are Act 260 of 1937, appearing in Ark. Stat. Ann. § 67-521 (1947); Act 444 of 1965, digested in Ark. Stat. Ann. § 67-521 (Repl. 1966); and Act 78 of 1965, Ark. Stat. Ann. § 67-552 (Repl. 1966). Although Act 260 was amended by Act 444 we think Act 260 is significant in shedding light on the intent of the Legislature when it enacted Act 444. After a careful analysis of the enumerated acts we conclude that Act 444 is not a survivorship statute, as was its predecessor, Act 260. In that respect we disagree with the chancellor.

Prior to 1965 we had one short statute dealing with the rights of parties in bank deposits standing in two names. That was Act 260 of 1937. Here are the pertinent parts, including the title:

> AN ACT Defining Rights of Parties in Bank Deposits in Two Names and Providing for the Payment of the Same.
>
> When a deposit shall have been made by any person in the name of such depositor and another person and in form to be paid to either, or the survivor of them, such deposit thereupon and any additions thereto made by either of such persons, upon the making thereof, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to either during the lifetime of both, or to the survivor after the death of one of them; and

> such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge to said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of such joint tenants not to pay such deposit in accordance with the terms thereof.

Act 260 had a twofold purpose. It protected the bank in making payments from deposits in the names of any two persons; and it declared "a definite and conclusive relation of the parties to such deposit on the death of either . . ." *Pye* v. *Higgason,* 210 Ark. 347, 195 S.W. 2d 632 (1946). The modification of Act 260 by Act 444 was preceded by the passage of Act 78. The provisions of Act 78 have an important bearing on our interpretation of Act 444 and for that reason Act 78 should first be discussed.

Act 78 was approved February 12, 1965. It was our first comprehensive enactment governing joint bank accounts. Two years previously a very similar act was passed affecting joint deposits in savings and loan associations. See Ark. Stat. Ann. § 67-1838 (Repl. 1966). The principal virtue of Act 78 is the requirement of *designation in writing;* that is, when an account is opened or a certificate of deposit is issued in the name of two or more persons, a written designation is made as to the investiture of title. The act enumerates joint tenancy, joint tenancy with right of survivorship, and tenancy in common. It also authorizes a depositor to designate that on his death the funds represented by the account or certificate shall be paid the person or persons listed by the depositor. An exception to the requirement of making written designation is made as to an account or certificate in the name of husband and wife; in that situation the deposit becomes by operation of the statute a tenancy by the entirety.

All paragraphs in Act 78, excepting the one designated (d), deal directly or indirectly with survivorship. Paragraph (d) reads as follows:

> If an account is opened or a certificate of deposit is purchased in the name of two (2) or more persons, whether as joint tenants, tenants by the entirety, tenants in common, *or otherwise, a banking* institution shall pay withdrawal requests, accept pledges of the same, and otherwise deal in any manner with the account or certificate of deposit upon the direction of any one (1) of the persons named therein, whether the other persons named in said account or certificate of deposit be living or not; unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required to deal with such account or certificate of deposit.

We have italicized the phrase in paragraph (d) "or otherwise." That phrase could not afford protection to the bank in every conceivable situation. It must be interpreted in light of the context of Act 78 of which it is a part. *Designated in writing* is the theme of the entire act. Paragraph (d) refers to those accounts and certificates of deposit wherein the named persons are designated as joint tenants, tenants by the entirety, tenants in common, *or other designation is made affecting survivorship.* The italicized phrase is the meaning attributable to the term "or other wise." Therefore, in a matter of weeks after the passage and approval by the Governor of Act 78, the General Assembly amended Act 260 of 1937 to delete survivorship therefrom and to afford further protection to the banks in paying out funds held in the names of two or more persons. In its effort to eliminate the treatment of survivorship by Act 260, the Legislature made these significant changes in a bill which became Act 444:

1. The phrase in the title of Act 260, "Defining Rights of Parties in Bank Deposits in Two Names," was deleted from the title of Act 444. The single purpose stated in the new title was simply to authorize a bank to pay to any one of the multiple parties named in a deposit the proceeds of the account.

2. Act 444 deleted from Act 260 the phrases "or to the survivor of them" and "or to the survivor after the death of one of them." Consequently the word "survivor" nowhere appears in Act 444.

Act 78 did not provide protection for a bank in the event it paid out funds in instances where no written designation of survivorship was made and the named parties were still alive. Act 444 established that protection when such an account is processed in the manner therein provided.

The chancellor took the position that the phrase in Act 444—"shall become the property of such persons as joint tenants"—created a survivorship. We have not lightly considered that theory; however, we think that position is outweighed when we consider the entire picture of the legislation and find what reasonably convinces us was the legislative intent. We could cite a multitude of cases which hold the primary rule in statutory construction to be the determination of the intent of the lawmakers. If that cannot be precisely ascertained from the language of the act, we look to other sources. The legislative history, the title, the object sought to be accomplished, and the expediency of the act are among the many appropriate sources which shed light on legislative intent.

It is a mild statement to say that Act 260 of 1937 created a maze of problems in the handling of joint bank deposits and certificates. Much litigation over those deposits has reached this Court. Many decisions had to be made by ascertaining the intent of the depositor

from parol evidence and "after death had sealed the lips of the person principally concerned." *Ratliff* v. *Ratliff, Adm'x.,* 237 Ark. 191, 372 S.W. 2d 216 (1963). Act 260 had minimal written requirements which fell far short of being sufficient. In that situation the Legislature and the banking interests turned to the comprehensive act under which the building and loan associations had been operating for two years. It was incorporated, in most essentials, in Act 78. That act was supplemented by Act 444.

In harmonizing the two acts of 1965 we have not thus far mentioned some other factors which are significant. The same legislative body authored both acts; the same legislative committees on banks and banking evaluated the proposed legislation; and we perceive that leaders in the banking business attended the public hearings. It is inconceivable that they would intentionally approve a comprehensive act in one breath and then forthwith pass a second act substantially out of harmony with the first. Had it been their intention to modify any part of Act 78 they would surely have so stated in Act 444 and in terms of specifics. Our Court follows a maxim of the common law, namely, that acts passed on the same subject should be construed together and, if possible, reconciled to effect the legislative intent. *McFarland* v. *The Bank of the State,* 4 Ark. 410 (1842); *Ward* v. *Harwood,* 239 Ark. 71, 387 S.W. 2d 318 (1965).

This final point as to whether Act 444 treats survivorship. At one time this Court said that Act 260—predecessor to Act 444—did not establish rights of survivorship between the named parties. *Black* v. *Black,* 199 Ark. 609, 135 S.W. 2d 837 (1940). Since in 1940 this Court thought that Act 260 did not apply to survivorship, we cannot conceive it to so apply after being amended and stripped of its original title referring to "right of the parties in bank deposits in two names"; of the phrase "to be paid to either or to the survivor of

them"; and of the statement "or to the survivor after the death of one of them."

We hold that with reference to bank deposits and certificates in multiple names made after the effective date of Act 78, there must be a substantial compliance with the "designation in writing" requirements of that act in order to effect survivorship. Mr. Bryeans, in purchasing the certificate, did not affix his signature to any instrument. As was the situation in *Ratliff* there was no minimum formal action taken by the depositor.

The decree is reversed and the cause remanded with directions that judgment be entered in favor of appellant.

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

JOHN A. FOGLEMAN, Justice. I would affirm the judgment of the chancery court. While I agree, academically, with many of the statements contained in the majority opinion and with many of the rules of construction stated therein, my fundamental basis of disagreement with the majority is that I find absolutely no necessity for resort to rules of interpretation and construction in determining the application and effect of Act 444 of 1965, or in determining the legislative intent. These rules may be resorted to only where necessary, i.e., where the language of the statute itself is ambiguous or gives rise to some doubt about the effect of the act. There was no reason in this case to seek the legislative intent outside the language of the statute itself or to rely upon rules of construction. In order that the treatment of Act 444 be put in proper perspective, it is necessary to examine the full text thereof. It appears as Ark. Stat. Ann. § 67-521 (Repl. 1966). It reads:

> "When a deposit shall have been made in the names of two [2] or more persons and in form to be paid to any of the persons so named, such de-

> posit and any additions thereto made by any of the persons named in the account, shall become the property of such persons as joint tenants, and the same, together with all interest thereon, shall be held for the exclusive use of the persons so named, and may be paid to any of said persons. Such payment and the receipt or acquittance of the one to whom such payment is made shall be a valid and sufficient release and discharge of said bank for all payments made on account of such deposit prior to the receipt by said bank of notice in writing signed by any one of said joint tenants not to pay such deposit in accordance with the terms thereof."

The language of this statute is clear and unambiguous. This being the case, there is no justification for resort to any exploration for the legislative intent or room for construction. Where the language of a statute is unambiguous the intention of the legislature must be gathered therefrom. *Arkansas Valley Trust Co.* v. *Young,* 128 Ark. 42, 195 S.W. 36. It must be sought from the plain meaning of the language used. *Hopper* v. *Fagan,* 151 Ark. 428, 236 S.W. 820; *Wheelis* v. *Franks,* 189 Ark. 373, 72 S.W. 2d 231; *McCarroll* v. *Williams,* 195 Ark. 715, 114 S.W. 2d 18. In *Call* v. *Wharton,* 204 Ark. 544, 162 S.W. 2d 916, we said:

> "In interpreting and construing the meaning of statutes, the guiding rule is very clearly announced by the late Chief Justice Hart in *Berry* v. *Sale,* 184 Ark. 655, 43 S.W. 2d 225, 226, in this language: 'This court has uniformly held that, in the construction and interpretation of statutes, the intention of the Legislature is to be ascertained and given effect from the language of the act if that can be done . . .' "

In *Refunding Board of Arkansas* v. *Bailey,* 190 Ark. 558, 80 S.W. 2d 61, we held that the primary rule of construction of statutes is to ascertain and give effect to the in-

tent of the lawmakers. The guide to doing so is clearly set out in that opinion where we said:

> "In construing a statute, it may be, and frequently is necessary to consider other acts in connection with the act under consideration, in order to ascertain the intention of the Legislature. *But where, by the act itself, the intention of the Legislature is plain from the face of the statute and the language used, there is no room for construction.*
>
> 'It is beyond question the duty of courts in construing statutes to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way. But * * * *first of all in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation.* It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and *if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.'* Lewis' Sutherland Statutory Construction, vol. 2, p. 698." [Emphasis ours.]

Construction and interpretation have no place where the terms of a statute are plain and certain. *Hopper* v. *Fagan,* supra. While it is the duty of the court, in interpreting a statute, to give effect to the intention of the lawmaking body, when the act is plain and unambiguous so that no doubt arises from its terms, it needs no interpretation, and courts must follow the act implicitly. *Broadway-Main Street Bridge District* v. *Taylor,* 186 Ark. 1158, 57 S.W. 2d 1041. Where the language of a statute is plain and unambiguous, it needs no con-

struction, and it is the duty of this court to ascribe to the statute the meaning evidenced by the language used. *St. Louis I.M. & S. Ry. Co.* v. *Waldrop,* 93 Ark. 42, 123 S.W. 778; *Agee* v. *Snodgrass,* 196 Ark. 266, 117 S.W. 2d 28. Where the language used is clear and unambiguous, we are concerned with the meaning of what the legislature said or did rather than what it might have intended. *City of Little Rock* v. *Arkansas Corporation Commission,* 209 Ark. 18, 189 S.W. 2d 382. We must give unambiguous language employed in an act its obvious meaning. *Wheelis* v. *Franks,* 189 Ark. 373, 72 S.W. 2d 231. The courts have no power to construe a statute to mean anything other than what it says, if it is plain and unambiguous. *Johnson* v. *Lowman,* 193 Ark. 8, 97 S.W. 2d 86. See also *Cross* v. *Graham,* 224 Ark. 277, 272 S.W 2d 682. Neither the exigencies of a case nor a resort to extrinsic facts will be permitted to alter the meaning of plain and unambiguous language used in a statute. *Cunningham* v. *Keeshan,* 110 Ark. 99, 161 S.W. 170. It is only where the terms used in an act are ambiguous that construction is permissible to determine the legislative intent. *Wilson* v. *Biscoe,* 11 Ark. 44. We must determine the intention of the legislature from the language of the act itself, where it is unambiguous. *Raines* v. *Bolick,* 183 Ark. 832, 39 S.W. 2d 309; *Tolleson* v. *McMillan,* 192 Ark. 111, 90 S.W. 2d 990; *Miller* v. *Yell and Pope Bridge District,* 175 Ark. 314, 299 S.W. 15; *Manley* v. *Moon,* 177 Ark. 260, 6 S.W. 2d 281.

There is nothing unclear or ambiguous about language saying that when a bank deposit is made in a certain way and under such circumstances "such deposit and any additions thereto made by any of the persons named in the account shall become the property of such persons as joint tenants." In order to reach its result, it was necessary for the majority to read this language out of the statute. This was unjustified and unauthorized. A statute must be construed, if possible, so that no clause, sentence or word shall be void, superfluous or

insignificant. *Wilson* v. *Biscoe,* supra. Where the legislative intent can be ascertained from the language of the act itself, there is no excuse for adding to or changing the meaning of the language employed. *Call* v. *Wharton,* 204 Ark. 544, 162 S.W. 2d 916; *Berry* v. *Sale,* 184 Ark. 655, 43 S.W. 2d 225. We are required to give effect to all language employed in the context if reasonable and consistent. *McClure* v. *McClure,* 205 Ark. 1032, 172 S.W. 2d 243. Every word in a statute must be given effect if possible. *Monsanto Chemical Company* v. *Thornbrough,* 229 Ark. 362, 314 S.W. 2d 493. Where the language is plain and unambiguous, courts cannot add to, take from, or change the language of the statute to give effect to any supposed intention of the legislature. *McCarroll* v. *Williams,* 195 Ark. 715, 114 S.W. 2d 18. To do so would be to encroach upon the peculiar function of the sovereign power lodged in a coordinate branch of the government. *Arkansas Valley Trust Co.* v. *Young,* 128 Ark. 42, 195 S.W. 36. We cannot refuse to give effect to the plain language of a statute merely because we think it brings about an inequitable result in a particular case. *Cupp* v. *Frazier's Heirs,* 239 Ark. 77, 387 S.W. 2d 328.

Acts 78 and 444 can be construed in harmony, without doing violence to any of the language of Act 444. New legislation must be construed with reference to existing legislation on the subject. *Newton County Republican Central Committee* v. *Clark,* 228 Ark. 965, 311 S.W. 2d 774. I agree with the majority that Act 78 appearing as Ark. Stat. Ann. § 67-552 (Repl. 1966) has to do only with accounts in two or more names where the parties are either designated as husband and wife or where the relationship of the parties is designated in writing. Thus, in order for Act 78 to be effective there must either be a designation in writing that the account is to be held in "joint tenancy" or in "joint tenancy with right of survivorship" or as "tenants in common" or there must be a designation of the parties to a banking institution as husband and wife. Nothing whatever is said in that

act about the title to a deposit in two or more names in form to be paid to any of the persons named where there is no such designation. It is obvious to me that the General Assembly, its committees, the leaders in the banking business and anyone else who had anything to do with the passage of Act 444 realized that the specific repeal of Act 260 of 1937 by Act 78 of 1965 left the law in a quagmire as to the ownership of deposits where no designation was made. None of the decisions under Act 260 of 1937 could any longer be applicable. Consequently, they virtually re-enacted Act 260 of 1937 eliminating therefrom only the requirement that the deposit must be payable to either or the survivor. Thus the act as amended can only cover situations where a designation has not been made. The differences in Act 260 of 1937 and Act 444 of 1965 are insignificant, except as above mentioned. Whatever differences there are, the similarities are such that the holding in *Pye* v. *Higgason,* 210 Ark. 347, 195 S.W. 2d 632, with reference to the 1937 act as to purposes should be controlling. In that case it was held that the act, because of the language it contained, was passed, not only for the protection of the bank in which the account was deposited, but for the purpose of declaring a definite and conclusive relation of the parties to such deposit on the death of either and prior to receipt by the bank of written notice signed by any one of the joint tenants not to pay the deposit in accordance with its terms. When the legislature uses one act as the model for a new one, there is a presumption that it knew of the construction given the earlier act and the courts will not give the new act a different construction. *Adams* v. *Hale,* 213 Ark. 589, 212 S.W. 2d 330. I humbly submit that that is just what the majority has done in this case. It has not suggested what the words "shall become the property of such persons as joint tenants" should be taken to mean in Act 444. It has been held that survivorship is one of the results of joint tenancy. *Ferrel* v. *Holland,* 205 Ark. 523, 169 S.W. 2d 643; *Pye* v. *Higgason,* supra. I submit that joint tenancy means just that in Act 444, especially since

the legislature did not give the words any definition eliminating survivorship.

Undue emphasis is placed by the majority upon the title of Act 444. The title of an act is no part of the act itself. *Laprairie* v. *City of Hot Springs,* 124 Ark. 346, 187 S.W. 442; *Special School District No.* 33 v. *Howard,* 124 Ark. 475, 187 S.W. 444; *McLeod* v. *Purnell,* 164 Ark. 596, 262 S.W 682; *Glover* v. *Henry,* 231 Ark. 111, 328 S.W. 2d 382. There is no constitutional requirement that an act have a title. The legislature and courts of Arkansas have not been hamstrung by limitation on subject matter by titles of acts since the adoption of the constitution of 1874. *Laprairie* v. *City of Hot Springs,* supra. It is only where the meaning of the lawmakers is in doubt from an examination of the act itself that the title of a statute has any force in interpretation of its meaning. Anderson, "Drafting a Legislative Act in Arkansas," 2 Ark. L. Rev. 382, 385, 386; *State* v. *White,* 170 Ark. 880, 281 S.W. 678; *City of Conway* v. *Summers,* 176 Ark. 796, 4 S.W. 2d 19; *Graves* v. *Burns,* 194 Ark. 177, 106 S.W. 2d 602. See also *Huff* v. *Eudy,* 173 Ark. 464, 292 S.W. 693; *Matthews* v. *Byrd,* 187 Ark. 458, 60 S.W. 2d 909, 2 A.L.R. 385; *Special School District No.* 33 v. *Howard,* supra; *Drainage District No.* 18 v. *McMeen,* 183 Ark. 984, 39 S.W. 2d 713; *Matthews* v. *Byrd,* supra; *Berry* v. *Gordon,* 237 Ark. 547, 376 S.W. 2d 279.

I find reinforcement for my construction of the act in two other factors, which are characteristic of joint tenancies. Under Act 444 either of the persons in whose name the account is carried may give written notice to the bank in which the funds are deposited not to pay such deposit in accordance with the terms thereof. This is certainly inconsistent with a result that makes the estate of a party to a joint account who dies the owner of the account rather than the survivor. The other factor is that the bank's payment of the account to either party is not limited to their joint lives. Thus every word in Act 444 is consistent with a joint tenancy but

not with a tenancy in common or individual ownership by one party to the exclusion of the other.

In view of the fact that the construction I give the act would harmonize the two acts passed at the same session, would not result in rendering any of the words of the latest act passed meaningless, and would not resolve any conflict in favor of the earlier act passed, I submit that this is the proper construction.

Even if rules of interpretation or construction were properly resorted to, the majority opinion permits the last act passed to be amended by a prior act. This violates a primary rule of statutory construction. Where the legislature enacts two acts at the same session which are conflicting, the latest expression of the legislative will should prevail. *Williams* v. *State,* 215 Ark. 757, 223 S.W. 2d 190.

HARRIS, C.J., and HOLT, J., join in this dissent.

WINTHROP ROCKEFELLER, GOVERNOR, ET AL v.
ED FAVER SMITH, ET AL

5-4866 440 S.W. 2d 580

Opinion Delivered May 5, 1969
[Rehearing denied June 2, 1969.]

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

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

Kirsch, Cathey & Brown (for appellee Greene Co. and Reed, County Judge).

JOHN A. FOGLEMAN, Justice. Appellants in this case constitute The Board of Apportionment of the State of Arkansas created by Amendment No. 45 to the Constitution of Arkansas. Appellees consist of citizens and residents of Pulaski, Jackson, Hempstead, Lonoke and Searcy Counties, a member of the Republican Party of Arkansas, Greene County and negro electors and small wage earners of Pulaski County. Some of them became parties by intervention. The same relief was sought by all of the appellees. They prayed that the reapportionment plan filed by appellants with the Secretary of the State of Arkansas and the United States District Court on July 15, 1965, be declared unconstitutional and void. They also asked that the appellants be granted a reasonable time within which to adopt a reapportionment plan in conformity with constitutional requirements by subdividing multi-membered districts

and that the Pulaski Circuit Court subdivide these districts if The Board of Apportionment failed to act within a reasonable time. By demurrer appellants raised a question as to the jurisdiction of the court over the subject matter of the action. The demurrer was overruled and, after hearing evidence, the circuit court found in favor of the appellees and entered a judgment directing appellants to make a study of the present apportionment system and to redistrict where they found areas not appropriately subdistricted to insure distribution of legislators in a fair and representative manner.

The trial court specifically ordered: that the senatorial district composed of Pulaski and Lonoke Counties be redistricted so as to assure that the voting strength of any political, racial, economic or geographically cohesive group is not minimized or canceled; and that the house district composed of Craighead and Greene Counties, that composed of Searcy, Marion and Pope Counties, that composed of Newton and Johnson Counties be redistricted in the same manner. The trial court directed that The Board of Apportionment in all cases effect a redistricting which would create single-member districts unless valid and compelling reasons exist which require the creation of multimember districts in certain areas. The court's direction to the board required reapportionment on the basis of the 1960 census figures, but it is not clear whether the court intended that this reapportionment be the basis for use in the election of 1970 with adjustments being made on the basis of preliminary federal census figures as a compliance with § 4 of Amendment No. 45 or whether there should be a reapportionment on this basis for the elections of 1970 and that an additional apportionment be made on the basis of the final census figures by February 1, 1971. The trial court's memorandum opinion, in stating the principles to be followed by The Board of Apportionment, indicated that floterial districts should be composed of a combination of relatively small counties, rather than having some of these counties attached to larger counties and that traditior-

ally Republican counties be grouped together, rather than attached to more populous counties.

Many interesting and forceful arguments for single-member districts are advanced by appellees. In view of the fact that we find that the trial court was without jurisdiction in this matter, no useful purpose would be served in dwelling upon these arguments. It is sufficient to say that some of them would be more appropriately directed to The Board of Apportionment. We note that many of them have already been rejected as a basis for holding Congressional District reapportionments unconstitutional in the recent cases of *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 89 S. Ct. 1225, 22 L. Ed. 2d 519, and *Wells* v. *Rockefeller*, 394 U.S. 542, 89 S. Ct. 1234, 22 L. Ed 2d 535, both decided on April 7, 1969.

Section 5 of Amendment 45 reads:

> "Original jurisdiction (to be exercised on application of any citizens and taxpayers) is hereby vested in the Supreme Court of this State (a) to compel (by mandamus or otherwise) the Board to perform its duties as here directed and (b) to revise any arbitrary action of or abuse of discretion by the Board in making such apportionment; provided any such application for revision shall be filed with said Court within 30 days after the filing of the report of apportionment by said Board with the Secretary of State; if revised by the Court, a certified copy of its judgment shall be by the clerk thereof forthwith transmitted to the Secretary of State, and thereupon be and become a substitute for the apportionment made by the Board."

The proceeding by appellees could be classified both as a proceeding to compel the board to perform its duties and as a proceeding to revise alleged arbitrary action of, or abuse of discretion by, the board in making the 1965 apportionment. That apportionment was ap-

proved by the three-judge court which heard the matter and its judgment affirmed by the United States Supreme Court. *Yancey* v. *Faubus,* 251 F. Supp. 998 (1965); *Crawford County Bar Association* v. *Faubus,* 383 U.S. 271, 86 S. Ct. 933, 15 L. Ed. 750 (1966). The trial court entered an order which, in substance if not in form, was a writ of mandamus to the board to perform its duties in a manner prescribed by the trial court. By that order the Circuit Court of Pulaski County assumed jurisdiction to make a reapportionment of the state itself if appellants failed to do so within a reasonable time. Under the clear and implicit language of the section of Amendment 45 hereinabove quoted there is no jurisdiction in any Arkansas court to take the action sought by appellees except the supreme court.

One of the appellees argues that this court has no original jurisdiction more than thirty days after the filing of the report of apportionment by the board. We find no substance in this argument. The thirty-day limitation applies only to actions to revise an apportionment made by the board such as was done in *Shaw, Autry and Shofner* v. *Adkins, Governor,* 202 Ark. 856, 153 S.W. 2d 415.[1] There is no time limitation on the filing of actions to compel the board to perform its duties. Appellees rely on such cases as *Bailey* v. *Abington,* 201 Ark. 1072, 148 S.W. 2d 176; *Butler* v. *Democratic State Committee,* 204 Ark. 14, 160 S.W. 2d 494; *Faubus* v. *Kinney,* 239 Ark. 443, 389 S.W. 2d 887; *Block* v. *Allen,* 241 Ark. 970, 411 S.W. 2d 21, to indicate that this court's original jurisdiction is not exclusive. There is no merit in this contention. In only one of these cases was The Board of Apportionment a party. In none of them was any effort made to compel the board to do anything. For the most part, litigation in those cases concerned the effect of reapportionments made by The Board of Apportionment. The lone exception is *Faubus* v. *Kinney,* where

[1]No action was filed in this court seeking to have a revision of the 1965 reapportionment.

the question was whether the board had any authority, or even existed, in view of the holding by the United States District Court in *Yancey* v. *Faubus,* 238 F. Supp. 290, that parts of Amendment 45 were unconstitutional. We find nothing in the language of the constitutional amendment to indicate that any Arkansas court other than this one has any jurisdiction. It would be strange indeed, if this court should be vested with both original and appellate jurisdiction in these cases. We hold that the jurisdiction of this court in these matters is exclusive.

The action of the circuit court in overruling appellants' demurrer was erroneous. Since the trial court had no jurisdiction, the action is dismissed.

MISSOURI PACIFIC RAILROAD COMPANY v. CLEO M. CLARK

5-4874 440 S.W. 2d 198

Opinion Delivered May 5, 1969

William J. Smith and *W. A. Eldredge, Jr. for* appellant.

Fred Livingston and *McMath, Leatherman, Woods & Youngdahl* for appellee.

J. Fred Jones, Justice. This is an appeal from a judgment of the Independence County Circuit Court setting aside a jury verdict and granting a new trial, in a personal injury suit brought by Cleo M. Clark against the Missouri Pacific Railroad Company. The question is whether the trial court abused its discretion in setting aside the verdict and granting a new trial.

Cleo M. Clark was employed by Rangaire Corporation at its limestone quarry in Izard County, Arkansas. The Missour Pacific Railroad Company had constructed, and continued to help maintain, a spur track from its main line track through a cattle guard and upgrade to the quarry operations. The railroad company would switch railroad hopper cars from its main line to the end of the spur beyond the loading tipple at the quarry, and the empty cars were then moved by gravity, as they were needed, back to the loading tipple where they were loaded with limestone. After the cars were loaded, they were coupled together in pairs and moved by gravity, two at a time, downhill to where they were left standing on the end of the spur near the main line until they were picked up and pulled away by Missouri Pacific. It was a part of Clark's duties to ride the loaded cars from the loading tipple down to the main track where he coupled them to the loaded cars already set out on the end of the spur.

In removing the loaded cars from the quarry to the main line, they moved by gravity, and Clark rode the front end of the car in front and controlled their speed by the hand brake on the front car. The moving cars were permitted to strike the stationary cars with sufficient force to "make up" the coupling. There was a rather sharp curve in the spur track near a cattle guard close to the main line and the outside rail on this curve was not super-elevated. On the day of Clark's injury, six loaded cars had been set out near the main line and the hand brakes had been set on three of them. As Clark brought two additional loaded cars, coupled together, down the spur track from the quarry, he was riding on the front end of the front car as usual, and as this car struck the first of the six stationary cars, the couplings failed to make proper connection but missed each other completely and as the ends of the two cars came together Clark was caught between the two cars and injured.

Following the accident it was found that the outside rail in the curve on the spur track had twisted over, drawing the spikes from the crossties on the inside of the outside rail and leaving the wheel flanges of the front truck on the outside of the curve resting on the web of the turned rail between the ball and the turned up flange of the rail. The wheels on the opposite side of the truck dropped from the rail on the inside of the curve and three of the crossties were marked by the flanges of the wheels on that side. After the accident the wheels of the truck on the collision end of the stationary car were found in the same position on the rails as were the wheels on the moving car. The drawn spikes, the marked crossties, the twisted rail and the impact between the cars occurred near the cattle guard and on the curve in the track. The physical damage to the track extended from the quarry side of the cattle guard twelve or fourteen feet through the cattle guard to where Clark was removed from between the ends of the two cars.

Clark filed suit against the railroad company for personal injuries alleging negligence in failure to properly elevate the outside rail on the curve, and in failure to properly maintain the track, resulting in the rail twisting over under the weight and normal slow speed of the car and thereby causing the couplers on the two cars to bypass each other upon impact. The railroad company answered by general denial and the allegations of assumption of risk and contributory negligence in Clark's failure to apply proper brake restraint on the moving cars and permitting them to gather more speed than the track was designed to take, and in Clark's failure to align the couplers so that they would properly meet and "make up" on impact and not bypass each other in the curve.

Prior to the trial of the case, the discovery deposition of Clark had been taken and portions of the deposition were copied on separate paper by the railroad company attorney. Clark testified at the trial and parts of his deposition were also read into evidence. Neither actual deposition nor the excerpts therefrom were offered as exhibits in evidence at the trial. During the argument to the jury the railroad company's attorney gave to the jury the excerpts he had prepared from the discovery deposition without first presenting the document to Clark's attorney for inspection or to the court for approval. The instrument presented to the jury contained the same questions and answers that had been read into evidence but not in the same order. No objection was made to this procedure by Clark's attorneys and no instruction or admonition was requested thereon.

The railroad's motion for a directed verdict was overruled by the court, and the jury returned a verdict on interrogatories finding Clark 80% negligent and the railroad company 20% negligent. The jury found that Clark had sustained damages in the amount of $32,-720.00. Clark filed a motion for a new trial alleging prejudice by the placing of the excerpts from the depo-

sition in the hands of the jury and for the further reason that the apportionment of the negligence was contrary to the preponderance of the evidence. The motion for a new trial was granted by order of the trial court in general terms, and on appeal to this court, the railroad company relies upon the following points for reversal:

"I. *The trial court erred in granting appellee Clark a new trial, because*:

A. To affirm the granting of a new trial under circumstances presented by this record would accord trial courts unlimited discretion in setting aside jury verdict.

B. Appellant's argument was proper.

C. Appellee waived any error in appellant's argument by neither objecting thereto nor requesting a mistrial prior to the jury's verdict.

D. Appellee failed to support his motion for new trial by affidavits as required by law.

II. *Appellant's motion for a directed verdict should have been granted.*"

The question here is not the amount of discretion *we would accord* trial courts by affirming this case. The question is whether the trial court abused the discretion *it already had* in granting a new trial in this case. We are of the opinion that the trial court did not abuse its discretion.

While the motion for a new trial emphasizes the alleged impropriety of argument the appellant's attorney made to the jury, the motion for a new trial also states as a ground therefor, that the verdict was contrary to the preponderance of the evidence.

The appellate states in its brief that a reading of appellee's motion clearly reflects that appellee sought and received a new trial because of alleged misconduct by appellant's attorney in preparing and presenting to the jury the Xerox copy of portions of appellee's deposition, and the appellant argues that lack of verification as required by Ark. Stat. Ann. § 27-1905 (Repl. 1962) was fatal to appellee's motion for a new trial. We find no merit in this contention. We have read appellee's motion for a new trial, as well as the court's order granting it, and we do not share appellant's conviction that the motion was granted because of alleged improper argument to the jury. The pertinent portions of the motion are as follows:

> "(1) The movant was prevented from having a fair trial by reason of irregularity in the proceedings of the court when Mr. William Eldredge, the attorney for the defendant, at the beginning of his closing argument handed to each juror copies of the attached memorandum without first having submitted same either to the court or to the opposing counsel. * * *
>
> (4) The plaintiff further moves for a new trial on the ground that, the answers to the interrogatory dealing with the negligence of Clark and the apportionment of such negligence is contrary to a preponderance of the evidence . . ."

The order granting the motion for a new trial provides:

> "On this 27th day of May, 1968, there comes on to be heard the motion of the plaintiff for a new trial under the provisions of Ark. Stats. Sec. 27-1901, and the Court having considered the motion and having heard the arguments of counsel finds that the motion should be granted.
>
> IT IS THEREFORE CONSIDERED ORDERED AND ADJUDGED that the verdicts rend-

> ered herein on interrogatories submitted to the jury by the Court should be set aside and that the plaintiff be and he is hereby granted a new trial of the above styled cause."

As to the preponderance of the evidence, it would serve no useful purpose to quote extensively from the testimony, because we do not go into the *preponderance* of the evidence on which the trial court grants or refuses a motion for a new trial. We do not examine a record to determine what we would have done had we been sitting in the place of the trial judge, we examine the record for a determination of whether the trial court abused his discretion in taking the action he did. The appellee contends in this case that faulty track, under the weight of the cars, was the sole cause of the accident, and the appellant contends that it was solely caused by the excessive speed of the cars being moved by the appellee. Both the appellant and the appellee offered some testimony, and rather substantial circumstantial evidence, tending to sustain their respective theories.

The appellee testified that he brought the cars from the loading tipple to the point of impact at the usual speed of about three miles per hour, and that at the time of the actual impact, the car he was riding on was barely moving. This is controverted to some extent by the physical evidence of damage to the cattle guard, markings on crossties, and inferences the jury could have drawn as to the force of impact. The appellee testified that he was looking down at the couplers as the cars slowly came together and that the couplers simply missed each other. From this testimony, together with the physical and circumstantial evidence following the accident, the jury could have found that the rail had already twisted throwing the couplers out of line before the cars came together. As to what caused the couplers to bypass each other, the appellant offered evidence that the couplers had previously missed each other when they were not properly lined up by hand in preparation

to making a coupling. The evidence is in considerable conflict as to the necessity, and indeed the physical possibility, of manually aligning or moving the couplers to an appreciable degree on the particular new type ball bearing cars involved in this case.

There was evidence in the record that subsequent to appellee's injury, the outside rail at this particular point in the track again twisted under the weight of a loaded car, and Mr. Brodie, a civil engineer, who testified as an expert for the appellee, concluded his testimony as follows:

> ". . . [I]n this case, I believe there has been millions and millions of tons crossing there and that additional flexure plus this additional curvature plus this lack of super-elevation coming immediately preceding that point makes that a very weak point in the rail; that has been shown not once but twice."

Witness Brodie's testimony is contradicted by Mr. McKeithen, assistant engineer of track for the appellant, who testified that railroad rails break near the ends when they break from flexion, but that he never heard of one twisting over because of weakness caused by flexion. He testified that super-elevation was not necessary on an industrial track and that the degree of curvature on the track involved was within standard for loaded cars moving as fast as fifteen miles per hour.

From all of the evidence in this case, we are of the opinion that there was sufficient evidence of appellant's negligence to go to a jury, and that the trial court did not err in refusing appellant's motion for a directed verdict. See *Hawkins* v. *Missouri Pacific Railroad Company, Thompson, Trustee,* 217 Ark. 42, 228 S.W. 2d 642.

We do not question the sufficiency of the evidence to sustain the jury verdict in this case, for that is not the question before us. Even if the sufficiency of the evi-

dence to sustain the jury verdict were before us in this case, we would examine it for its substantial nature rather than weigh its preponderance, for that is the prerogative of the trial judge who sees the witnesses and hears them testify in law cases.

In the case of *Mueller* v. *Coffman,* 132 Ark. 45, 200 S.W. 136, the trial court in *overruling* a motion for a new trial, stated that the verdict as returned by the jury was somewhat of a surprise to him, but as there were disputed questions of fact for the determination of the jury, and, though contrary to the judgment of the court as to what the verdict should have been, he did not deem it proper to disturb the verdict of the jury. In reversing the trial court and granting a new trial, this court said:

> "That [trial] court sees the witnesses, hears them testify, and is afforded opportunities we can not have to weigh the evidence, and the duty, therefore, properly rests with that court to pass upon the question of preponderance. In doing this, the court, of course, should give proper weight to the verdict of the jury and should not set it aside lightly, but if it clearly appears, and the court so finds, that the verdict is against the preponderance of the evidence, it becomes the duty of the court to set it aside. Under the statement of the court, set out above, we think the court should have granted a new trial, and it will be now so ordered. *Spadra Creek Coal Co.* v. *Hager,* 130 Ark. 374, 197 S.W. 705; *Spadra Creek Coal Co.* v. *Callahan,* 129 Ark. 448, 196 S.W. 477; *Twist* v. *Mullinix,* 126 Ark. 427, 190 S.W. 851."

In the case of *Blackwood* v. *Eads,* 98 Ark. 304, 135 S.W. 922, this court said:

> "Where there is decided conflict in the evidence, this court will leave the question of determining the preponderance with the trial court, and

will not disturb his ruling in either sustaining a motion for new trial or overruling same. 'The Supreme Court will much more reluctantly reverse the final judgment in a cause for error in granting than for error in refusing a new trial.' *House* v. *Wright,* 22 Ind. 383; *Oliver* v. *Pace,* 6 Ga. 185. The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused."

In *McDonnell* v. *St. Louis Southwestern Ry. Co.,* 98 Ark. 334, 135 S.W. 925, this court said:

". . . It is not invading the province of the jury for the trial judge to set aside its verdict where there is a conflict in the evidence. On the contrary, it is the duty of the trial court to set aside a verdict that it believes to be against the clear preponderance of the evidence. But it should not, and the presumption is that it will not, set aside a verdict unless it is against the preponderance of evidence. This court will not reverse the ruling of the lower court in setting aside a verdict where there is substantial conflict in the evidence upon which the verdict was rendered, but will leave the trial court to determine the question of preponderance."

In *Twist* v. *Mullinix,* 126 Ark. 427, 190 S.W. 851, the trial court remarked that, in his opinion, the verdict of the jury was against the preponderance of the evidence, but he failed to set the verdict aside. In reversing the decision of the trial court, this court went rather thoroughly into the subject and for that reason we quote rather extensively from that decision:

". . . [A]fter the jury has concluded its deliberations and returned its verdict, if there is a mo-

tion for a new trial setting up that the verdict is not sustained by sufficient evidence, or that it is contrary to law, or both, it is then the province of the trial court to review the verdict and to determine whether or not the jury has correctly applied the law as contained in the court's instructions, and whether or not the verdict is responsive to the preponderance of the evidence.

* * * When the trial court becomes convinced that the verdict is not sustained by a preponderance of the evidence, then it is his duty to set aside that verdict. And if the trial court finds and announces that the verdict of the jury is against the preponderance of the evidence on a material issue of fact then he must set aside such verdict. The trial court presides over the trial. He observes and hears the witnesses, and has the same opportunity as the jury in this respect, and that is the reason why it is made his peculiar and exclusive function to determine the issue on a review of the verdict as to whether it is responsive to the preponderance of the evidence in the cause. This court cannot do that for the reason that it has no such opportunity . . .

The rule setting forth the respective functions of the jury and the trial court and this court is well expressed in *Richardson* v. *State,* 47 Ark. 562, 567, where we said: 'But the weight of evidence and the credibility of witnesses are to be determined by the jury. It is the duty of the trial court to set aside a verdict which is clearly against the weight of the evidence. But when the case reaches us, the question is no longer whether the evidence preponderates on one side or the other, or whether due credit has been given to the statements of a witness who has testified fully and fairly. But the question is, whether there is a failure of proof on a material point. To order a new trial because we differ in opinion from the circuit judge as to the

weight of the testimony, or the truth or falsity of a witness, is to substitute our discretion for his discretion. And in this matter he is supposed to enjoy some advantages over us.'

* * *

In *Blackwood* v. *Eads, supra,* we said further: 'Where there is a decided conflict in the evidence this court will leave the question of determining the preponderance with the trial court and will not disturb his ruling in either sustaining a motion for a new trial or overruling same.' * * *

'The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused.' See also *McDonald* v. *St. L. S.W. Ry. Co.,* 98 Ark. 334; *McIlroy* v. *Arkansas Valley Trust Co.,* 100 Ark. 596-599.

The only tribunal, under our judicial system, vested with the power to determine whether or not a verdict is against the preponderance of the evidence is the trial court. Where there is a conflict in the evidence and the trial court finds that the verdict, upon a material issue of fact, is against the preponderance of the evidence, the logical and necessary result of such finding as matter of law is that the verdict must be set aside; otherwise, it would be impossible to correct the error.''

In *Wilhelm* v. *Collison,* 133 Ark. 166, 202 S.W. 28, this court said:

''We are not called upon to pass upon the legal sufficiency of this testimony to support a verdict based upon it, because the court below granted a

new trial pursuant to the prayer of a motion therefor, which assigned as a ground therefor that the verdict of the jury was contrary to the preponderance of the evidence. We have many times said that the trial court should grant the motion for a new trial when convinced that the verdict of the jury was clearly against the preponderance of the evidence. *Mueller* v. *Coffman,* 132 Ark. 45, 200 S.W. 136; *Twist* v. *Mullinix,* 126 Ark. 427. And when the trial court reaches that conclusion and takes that action we have announced as a rule governing us in our review of that action that 'this court will not reverse a decision of the trial court granting a new trial on the weight of the evidence unless it appears that there has been an abuse of the discretion in setting aside the verdict which is sustained by the clear preponderance of the evidence.' *McIlroy* v. *Arkansas Valley Trust Co.,* 100 Ark. 599. And in the case of *McDonnell* v. *St. L. S.W. Ry. Co.,* 98 Ark. 336, the rule was stated as follows: 'This court will not reverse the ruling of the lower court in setting aside a verdict where there is substantial conflict in the evidence upon which the verdict was rendered, but will leave the trial court to determine the question of preponderance. *Taylor* v. *Grant Lumber Co.,* 94 Ark. 566; *Blackwood* v. *Eads.* 98 Ark. 304.' See also *Clements* v. *Knight & Co.,* 125 Ark. 488, and cases there cited."

To the same effect is our decision in the very recent case of *Bowman* v. *Gabel,* 243 Ark. 728, 421 S.W. 2d 898. In that case, as in the case at bar, the jury verdict was on interrogatories and the trial court did not invade the province of the jury, nor did he abuse his discretion in granting a new trial.

We find it unnecessary to determine whether the alleged improper conduct of appellant's counsel falls under the first or second paragraph of Ark. Stat. Ann.

§ 27-1901 (Repl. 1962) because the motion clearly alleged cause for new trial falling under paragraph 6 of § 27-1901, that "the verdict . . . is not sustained by sufficient evidence . . ." and the trial court did not state which ground he granted the motion on.

In *Hall* v. *W. E. Cox & Sons,* 202 Ark. 909, 154 S.W. 2d 19, a jury verdict was rendered in favor of the plaintiff and was set aside and a new trial granted upon the defendant's motion alleging "that the verdict of the jury was contrary to the evidence, contrary to the law, and that errors were committed in giving, and in refusing, certain instructions, and that the verdict was excessive." After a hearing on the motion, the trial court granted defendant's motion for a new trial and set aside the judgment, assigning no specific ground or grounds therefor, and the plaintiff appealed from that order. In affirming the action of the trial court, this court said:

> "While the record reflects that the order of the court in granting the motion for a new trial was general in its terms and no specific ground was stated, since the motion for a new trial alleged as a ground the insufficiency of the evidence to support the verdict, we must affirm the trial court's action if it can be supported on this or any other ground set up in the motion.
>
> The rule governing is stated by the textwriter in American Jurisprudence, vol. 3, p. 371, § 829, in this language: 'Where, however, the order is expressed in general terms, without a specification of the grounds therefor, it will be affirmed if it can be supported on any ground alleged in the motion, even though it is one which is discretionary with the court, as, for instance, the insufficiency of the evidence.' "

We find it unnecessary to deal further with the alleged impropriety of the argument to the jury, so we

now return to the only question before us as to whether the trial court abused its discretion in granting a new trial on any ground. As we said in *Hall* v. *W. E. Cox & Sons, supra,* "while the record reflects that the order of the court in granting the motion for a new trial was general in its terms and no specific ground was stated, since the motion for a new trial alleged as a ground the insufficiency of the evidence to support the verdict, we must affirm the trial court's action if it can be supported on this or any other ground set up on the motion."

We conclude that the appellant has failed to show that the trial court abused his discretion in granting the motion for a new trial and we conclude that the judgment must be affirmed.

Affirmed.

ALLEN FRANK DAVIS v. STATE OF ARKANSAS

5-5378 440 S.W. 2d 344

Opinion Delivered May 5, 1969

[Rehearing denied June 2, 1969.]

[redacted]

Jack Holt Sr. and *Bailey, Trimble & Holt* for appellant.

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

CONLEY BYRD, Justice. On January 19, 1967, appellant Allen Frank Davis shot and killed his estranged wife Sharon Davis with a 30-30 caliber rifle. The jury found him guilty of murder in the first degree without recommendation and he stands before this court sentenced to death by electrocution. His defense was not guilty by reason of insanity.

The record shows that appellant and his wife Sharon separated in August of 1966. Following the separation, appellant lived with his mother. On the date involved, appellant had caused his wife to be kept under surveillance by a friend. About quitting time appellant joined his friend across the street from where his wife worked. When he joined his friend he had with him a denim jacket described by his friend as being stiff enough to stand in the corner alone. While they were watching, his mother-in-law drove by with his children to pick up his wife. Appellant told his friend that he hated his mother-in-law but liked her cooking and, in parting, told him he was going to do something that he should have done a long time ago. His mother-in-law and Sharon proceeded to the Red Bird Laundromat and Service Station on Central Avenue. Appellant followed. At the laundromat he exchanged some words with his wife before he shot her. He also shot his mother-in-law when she ran into the laundromat for help. Witnesses testified that as he drove away he brandished his shooting iron and shouted, "Sharon, how do you like that." Appellant was arrested at his mother's home a few minutes later where he was sprawled out on a bed in a

stupor after taking some pills. The 30-30 rifle was found wrapped in his denim jacket in a dog pen.

POINT 1. Appellant, in arguing that he was deprived of his rights under the fifth amendment of the United States Constitution by virtue of the fact that he was tried and convicted upon an information, readily recognized that we have rejected this argument many times. Prosecution by information is authorized by Amendment 21 of our constitution. As we have pointed out many times the Federal Courts have not held that prosecution by information is prohibited by the United States Constitution. For this reason we hold appellant's first point to be without merit.

POINT 2. Appellant contends here that the trial court erred, under the holding in *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968), in excluding jurors who had conscientious scruples against capital punishment. A subsidiary argument is that the trial court insured the prosecution's request for a conviction and death sentence by excluding all prospective jurors who said they opposed the death sentence or had religious or conscientious scruples against the death penalty. We do not believe that the record sustains appellant's argument.

As we read the record, the trial court followed the *Witherspoon* case, excluding Justice Douglas's concurrence, and our own case of *Atkins* v. *State,* 16 Ark. 568 (1855). In the latter case we pointed out:

> "Whatever may be a man's view of capital punishment as a question of policy, the jury box is not a proper place for him to consider such policy. There he is obliged, by his oath, to try the guilt or innocence of the accused, according to law and evidence, and not to set up his own private opinion against the policy of the law, which he is bound, as a good citizen, to abide by and administer, so long as it is force, and until it is repealed by the consti-

tuted authority. See the authorities collected on this subject in *Wharton's Crim. Law* 857, 858."

To follow appellant's argument to its logical conclusion would create a kind of anarchy in our system of government whereby the minority will always hold a veto over any established public policy. For instance, since the holding in *Bloom* v. *Illinois,* 391 U.S. 194 (1968), it would be almost impossible to enforce some provisions of the 1964 Civil Rights Act, if a court were forced to accept jurors whose private opinions are contrary to the policy of the law. For these reasons we find this point without merit.

POINT 3. We find no merit in appellant's argument that the trial court abused its discretion in admitting in evidence pictures taken by William Ralph Dever, Jr. The record shows that Mr. Dever is a commercial photographer and a mail man. He has a police radio receiver in his car. When he heard the call concerning the shooting he immediately went to the scene and took the pictures of which appellant complains. In permitting the pictures to be introduced, the trial court pointed out that they were taken within a reasonable time after the incident involved and that they helped explain the testimony as to what actually occurred, nothing more, nothing less.

In *Stewart* v. *State,* 233 Ark. 458, 345 S.W. 2d 472 (1961), we pointed out that it is within the sound discretion of the trial judge to permit the introduction of photographs to describe and to identify the premises which were the scene of the crime, to establish the corpus delicti of the crime charged, to disclose the environment of the crime at the time it was committed and to corroborate testimony. See also, *Reed* v. *McGibboney,* 243 Ark. 789, 422 S.W. 2d 115 (1967).

Under this point appellant also argues that the pictures introduced into evidence concerning Mrs. Knight's

shooting and the bloodstained floor from which she was removed are not relevant, material or competent. Here, too, we find this was a matter within the discretion of the trial court. The record shows that at the time Mrs. Knight picked up appellant's estranged wife, appellant expressed hatred for Mrs. Knight, his mother-in-law. Since the shootings were all one occurrence we are unwilling to say that the photographs could not be introduced for the purpose of showing malice.

POINT 4. On the issue of insanity, appellant used two expert witnesses, Dr. Shelton Fowler, a psychiatrist on the Arkansas State Hospital staff, and Dr. Robert F. Shannon, a private psychiatrist. Dr. Fowler's treatment was limited to his duties as an employee of the state hospital. Dr. Shannon was employed by appellant's mother for purposes of testifying at the trial.

To rebut appellant's expert testimony, the state called Dr. Yohe, a psychiatrist hired by Garland County to examine appellant for purposes of determining his sanity, and Dr. Robert Lewis, a psychiatrist originally employed by appellant's mother for medical treatment and psychiatric evaluation immediately following appellant's arrest. Appellant argues that the testimony of the latter two doctors is privileged within the meaning of Ark. Stat. Ann. § 28-607 (Repl. 1962). That statute provides:

> "Hereafter no person authorized to practice physic or surgery and no trained nurses shall be compelled to disclose any information which he may have acquired from his patient while attending in a professional character and which information was necessary to enable him to prescribe as a physician or do any act for him as a surgeon or trained nurse. Provided, if two [2] or more physicians or nurses are, or have been in attendance on the patient for the same ailment, the patient by waiving the privilege attaching to any of said physicians or nurses,

> by calling said physician or nurse to testify concerning said ailment, shall be deemed to have waived the privilege attaching to the other physicians or nurses."

We find that when appellant called Dr. Shannon, as distinguished from Dr. Fowler, who may have served in a different capacity, he waived any privilege which he may have had a right to claim under the statute.

POINT 5. Appellant here argues that the verdict of the jury ignores the overwhelming evidence of insanity and that their verdict is contrary to the evidence and to the law concerning insanity. Our cases, without exception, hold that when there is conflicting evidence upon an issue the matter should be presented to the jury. In this instance there was testimony from which the jury could have found either way. In addition to the lay testimony, two doctors testified that appellant was insane and two doctors for the state testified that appellant was mentally competent. Therefore we find this contention without merit.

POINT 6. In his argument on instructions, appellant admits that the insanity instruction given by the trial court is in accordance with *Bell* v. *State,* 120 Ark. 530, 180 S.W. 186 (1915), but puts forth the argument adopted by the author in 20 Ark. Law Review 123 that the rule in *Bell* v. *State* represents "the hardened attitude". Appellant's description of the insanity rule laid down in *Bell* v. *State* is that of the author of the law review article referred to above. We do not necessarily accept as accurate appellant's description of the rule there laid down. However, we do acknowledge that the rule of who has the burden of proof on the issue of insanity is not uniform in the many jurisdictions in this nation. The rule in *Bell* v. *State* has been applied many times by this court and in a number of cases in which other rules have been rejected. See *Stewart* v. *State,* 233 Ark. 458, 345 S.W. 2d 472 (1961). We again reaf-

firm *Bell* v. *State* in holding appellant's objections to the trial court's instruction No. 5 to be without merit.

Appellant also complains of error in the trial court's refusal to give his instructions numbers 1 and 3. His instruction No. 1 had to do with the burden of proof in the whole case and was covered by other instructions given by the court. Appellant's instruction No. 3 merely gave a definition of preponderance of the evidence, and this too we find was covered by the court's instructions numbers 5 and 6.

Appellant's requested instruction No. 9 provides: "You are hereby instructed that if you should find that the defendant, Frank Davis, was in fact under the influence of alcohol and/or drugs to the extent that he would be incapable of forming an intent, then you must find the defendant not guilty of the charge of murder in the first degree." We find no evidence in the record to warrant the submission of instruction No. 9 with reference to intent. The uncontradicted testimony in the record shows that he was driving his automobile at the time and that after the shooting he entered his mother's home and told her that he wanted a conference with her. It is true that he was found by the officers on the bed in a blacked-out condition, but here again the testimony shows that it was a result of some pills taken subsequent to the shooting.

POINT 7. In arguing that the trial court erred in excluding the appellant and/or permitting his absence during trial, appellant refers to conferences in chambers between the court and counsel. The first such conference was conducted on the admissibility of certain evidence from Officer Seal. This conference was requested by the court and before any proceedings were had, the deputy prosecuting attorney, Mr. Harrison, asked appellant's counsel if he wanted appellant present. Appellant's counsel replied, "We don't know, we don't

know what is going to happen." All other such conferences between court and counsel were had at the request of appellant's counsel.

Therefore, as we read the record there was no exclusion of appellant from the in-chamber hearings. Furthermore the record shows that all rulings made as result of the in-chamber hearings were again made in open court before the jury, except in those instances when counsel for appellant specifically requested such rulings be made in chambers and not before the jury. Under these circumstances we find that if any error was committed, it was waived by appellant and his counsel. See *Davidson* v. *State,* 108 Ark. 191, 158 S.W. 1103 (1913), and *Nelson* v. *State,* 190 Ark. 1027, 82 S.W. 2d 519 (1935). In holding that there was a waiver, we specifically point out that appellant was not excluded from such hearings and that the conduct complained of involved matters ordinarily conducted by attorneys upon objections made in open court prior to the entry in chambers.

POINT 8. Appellant's last argument is that the imposition of the death sentence constitutes cruel and unusual punishment. In making this argument, appellant acknowledges that this court has held that punishment authorized by statute is not cruel and unusual unless it is barbarous or unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the community. In making this statement, however, appellant poses this question, "Does the moral sense of this community, taking a cross-section of its people, adhere to and approve the taking of human life as fit punishment?" Our answer to appellant's question is that it should be addressed to the legislature instead of the courts, except in those instances wherein the court may exercise its discretion under Ark. Stat. Ann. § 43-2310 (Repl. 1964). From our reading of the record we are not in a position to say that the punishment assessed is greater than ought to be inflicted under

the circumstances here shown. We make this observation without determining whether the statute vests the discretion in the trial court or in this court or both.

In his motion for new trial appellant raised other issues. We find all such issues to be without merit.

Affirmed.

HOLT, J., not participating.

HARRIS, C.J., dissents.

CARLETON HARRIS, Chief Justice. I think the trial court committed error by allowing state exhibits No. 7, 8, 9 and 10 to be introduced into evidence. These exhibits all relate to the shooting of Mrs. Pauline Knight, mother of the deceased, Sharon Davis. Mrs. Davis was shot while sitting in her automobile, and Mrs. Knight was shot just outside the Laundromat. Exhibit 7 shows Mrs. Knight lying in front of the Laundromat door; exhibit No. 8 depicts the same scene from a different angle; both No. 9 and No. 10 show a large pool of blood left in the doorway after Mrs. Knight had been removed.

I do not consider this evidence to be relevant, nor proper, to the crime with which Davis was charged (the murder of his wife). The shooting of Mrs. Knight was an entirely separate offense, for which he could also have been tried, and this evidence had nothing to do with appellant's motive in killing Mrs. Davis. The majority say:

> "Under this point appellant also argues that the pictures introduced into evidence concerning Mrs. Knight's shooting and the bloodstained floor from which she was removed are not relevant, material or competent. Here, too, we find this was a matter within the discretion of the trial court. The

> record shows that at the time Mrs. Knight picked up appellant's estranged wife, appellant expressed hatred for Mrs. Knight, his mother-in-law. Since the shootings were all one occurrence we are unwilling to say that the photographs could not be introduced for the purpose of showing malice."

Malice for whom? The majority answer that question by saying that Davis had expressed hatred for his mother-in-law. Since hatred for his mother-in-law was not the reason for his shooting his wife, I can see no reason for the court to have permitted the introduction of these photographs. In *State* v. *Palmer* (La.), 80 So. 2d 374, the Louisiana Supreme Court said:

> "In determining their admissibility, proper inquiry should be made to ascertain whether such evidence would clarify some material issue and would afford the court and the jury a clearer comprehension of existing physical facts and throw greater light and more accurate appreciation of the weight, if any, to be given the oral testimony. Manifestly, where photographs are irrelevant or immaterial, would confuse, or mislead, rather than be helpful, distract the tribunal's attention to other than main issues, or where the natural effect of their introduction in evidence would arouse the sympathies or prejudices, rather than throw helpful light, such evidence should be promptly excluded."

In Volume 1, Wharton's Criminal Evidence (12th Edition), § 154, page 299, we find:

> "The requirement that evidence be relevant applies to documents and photographs with the same force and effect as to other forms of evidence. They must be relevant to establish or disprove *the fact concerning which they are offered.*[1]"

[1]My emphasis.

In Volume 2 of the same edition, Section 686, Page 652, it is said:

> "As in the case of all evidence, photographs must be relevant, and are inadmissible if they introduce a substantial irrelevant element. Thus a photograph of the victim of the crime and of a weapon is inadmissible when the weapon is not related to the crime."

In line with these authorities, I maintain that the photographs of the shooting of Mrs. Knight were not relevant to establish the fact sought to be proved, *i.e.*, the murder of Mrs. Davis. Mrs. Davis had already been mortally wounded before Mrs. Knight was shot, and the photographs therefore were not related to the crime with which Davis was charged and convicted. It is my view that this evidence could only distract the jury's attention from the main issue, and could only tend to arouse prejudice against appellant.

Because, in my opinion, the court erred in allowing the photographs relating to Mrs. Knight to be introduced, I would reverse the judgment.

SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY
v. RICHARD A. DANIEL

5-4903 440 S.W. 2d 582

Opinion Delivered May 5, 1969
[Rehearing denied June 9, 1969.]

Skillman & Furrow for appellant.

Spears & Sloan for appellee.

CONLEY BYRD, Justice. The issues here are (1) whether punitive damages arising out of an accident are recoverable within the terms of appellant Southern Farm Bureau Casualty Insurance Company's automobile liability policy, and (2) whether such recovery is contrary to the public policy of the state of Arkansas. It is stipulated that as a result of an automobile accident between Larry White and appellee Richard A. Daniel, the jury returned a verdict for Daniel in the amount of $7,000 compensatory damages and $5,000 punitive damages. The policy in question, a comprehensive automobile policy, provides as follows:

> "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages:
>
> "*Coverage A.* Because of bodily injuries sustained by any person, and
>
> "*Coverage B.* Because of injury to or destruction of property, caused by accident and arising out

of the ownership, maintenance, or use of any automobile, including loading and unloading thereof."

So far as our research reveals, this is the first time this issue has come before this court. Cases from other jurisdictions can be found holding both ways, see *American Surety Co. of N. Y.* v. *Gold,* (10th Cir. 1966), 375 F. 2d 523, 20 A.L.R. 3rd 335. Those courts which accentuate heavily the punishment aspect of punitive damages hold that it is against public policy to permit them to be recovered, *Northwestern National Casualty Company* v. *McNulty,* (5th Cir. 1962), 307 F. 2d 432. Other courts point out that the line of demarcation between a jury's allowance of punitive damages and compensatory damages is too thin and exacting to apply coverage in the one case and deny coverage in the other. Such courts, *Lazenby* v. *Universal Underwriters Ins. Co.,* 214 Tenn. 639, 383 S.W. 2d 1 (1964), place much less emphasis on the punishment aspect of punitive damages and permit a recovery under language similar to that involved here. They point out that there is nothing to prevent the insurer from excluding the payment of punitive damages by appropriate policy provisions.

Our cases, *Kroger Grocery & Baking Co.* v. *Reeves,* 210 Ark. 178, 194 S.W. 2d 876 (1946), hold that there can be no recovery for punitive damages unless actual damages are suffered and assessed. Such damages have been defined as damages imposed by way of punishment and as those given or awarded in view of the supposed aggravation of the injury to the feelings of the plaintiff by the wanton or reckless conduct of the defendant, *Erwin* v. *Milligan,* 188 Ark. 658, 67 S.W. 2d 592 (1934). Punitive damages are awarded upon a showing of gross and wanton negligence, *Holmes* v. *Hollingsworth,* 234 Ark. 347, 352 S.W. 2d 96 (1961), and recovery thereof has been permitted against an employer for acts or admissions of an employee even though such acts were done without the employer's knowledge or authori-

zation and were not subsequently ratified by him, *Miller* v. *Blanton,* 213 Ark. 246, 210 S.W. 2d 293 (1948).

As we read the policy herein it agrees to pay on behalf of the insurer all sums which the insured shall become LEGALLY OBLIGATED TO PAY AS DAMAGES, because of bodily injuries sustained. When we consider that under our law, one cannot become legally obligated to pay punitive damages unless actual damages have been sustained and assessed, we find that punitive damages constitute a sum which the insured becomes legally obligated to pay as damages because of bodily injuries sustained, see *Carroway* v. *Johnson,* 245 S.C. 200, 139 S.E. 2d 908 (1965).

Neither can we find anything in the state's public policy that prevents an insurer from indemnifying its insured against punitive damages arising out of an accident, as distinguished from intentional torts. Since we have permitted punitive damages to be assessed against an employer under the doctrine of *respondeat superior* even in the absence of the employer's knowledge or authorization of the employee's acts, we can perceive of no good reason why an employer should be prohibited from insuring himself against such losses, since the losses are in effect a business loss—*i.e.,* a calculated risk of doing business.

It has been suggested that our decision herein should be controlled by *Arnold* v. *State,* 220 Ark. 25, 245 S.W. 2d 818 (1952), wherein we held that a surety on a sheriff's bond was not liable for punitive damages. We find that this case is not controlling because such bonds are executed pursuant to statute and cover only the damages set forth in the statute. See *Maryland Casualty Co.* v. *Baker,* 304 Ky. 296, 200 S.W. 2d 757 (1947).

Affirmed.

FOGLEMAN and JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice. While the precise question has not been specifically decided in this state, I must dissent from the majority opinion because the result is wholly inconsistent with the theory of punitive damages in Arkansas, and with other decisions by this court. This action places the burden of punishment on parties not guilty. While it may be true that the insurance company which pays punitive damages on an automobile liability policy is not really punished, this is so only when these losses can be passed on by the insurance company to its policyholders in the form of increased premiums.

Under the Arkansas theory allowing punitive damages, I do not see how they can be said to be sums which an insured becomes legally obligated to pay as damages because of bodily injuries sustained by another person or because of injury to or destruction of property. A review of some of the statements made by this court as to the nature and purposes of punitive damages will clearly show that the decision by the majority completely destroys the basic purpose for allowance of these damages.

The nature of both compensatory and punitive damages is treated in *Vogler* v. *O'Neal,* 226 Ark. 1007, 295 S.W. 2d 629. In that opinion we defined the sums which constituted damages because of bodily injuries. We quoted from *Coca-Cola Bottling Co. of Arkansas* v. *Adcox*, 189 Ark. 610, 74 S.W. 2d 771, as follows:

> "The *measure of damages for a physical injury* to the person may be broadly stated to be *such sum,* so far as it is susceptible of estimate in money, *as will compensate plaintiff for all losses,* subject to the limitations imposed by the doctrines of natural and proximate consequences, and of certainty, *which he has sustained by reason of the injury,* including

compensation for his pain and suffering, for his loss of time, for medical attendance and support during the period of his disablement, and for such permanent injury and continuing disability as he had sustained." (Emphasis mine.)

In treating punitive damages in the *Volger* case we recalled the announcement of a principle of law in *Miller* v. *Blanton,* 213 Ark. 246, 210 S.W. 2d 293, 3 A.L.R. 2d 203, when we adopted the language of the opinion in *Ross* v. *Clark,* 35 Ariz. 60, 274 P. 639, as follows:

> "'*Punitive damages' are not intended to remunerate the injured party for the damages he may have sustained. They are not to compensate;* they are the penalty the law inflicts for gross, wanton, and culpable negligence, and are allowed as a warning or as an example to defendants and others. Because they are an example as to what the law will do for such conduct when it results in injury to the person or property of others, they are sometimes called exemplary damages." (Emphasis mine.)

In *Holmes* v. *Hollingsworth,* 234 Ark. 347, 352 S.W. 2d 96, we said:

> "* * * *Punitive damages are not intended to remunerate the injured parties for the damages sustained.* Punitive damages are the penalty which the law inflicts on the guilty party, and are allowed as a warning or an example to others. What would be sufficient punitive damages against one person might be grossly excessive against another." (Emphasis mine.)

In *Erwin* v. *Milligan,* 188 Ark. 658, 67 S.W. 2d 592, it was said that punitive damages are given by way of punishment "in addition to compensation for the loss sustained." We have classified a judgment based upon

punitive damages as somewhat of a windfall for a plaintiff. *Dunaway* v. *Troutt,* 232 Ark. 613, 339 S.W. 2d 613.

It seems crystal clear to me from these cases that punitive damages are no part of damages "because of bodily injuries" or "because of injury to property."

The majority rely heavily upon the case of *Carroway* v. *Johnson,* 245 S.C. 200, 139 S.E. 2d 908 (1965). The result in that case is based substantially upon a statute which should be taken to be a statement of the public policy of South Carolina. Section 46-750.13, Code of Laws of South Carolina, (1962), requires that every policy of automobile liability insurance contain a provision "insuring the person * * * against loss from the liability imposed by law for damages * * *." The South Carolina court had held in *Laird* v. *Nationwide Ins. Co.,* 243 S.C. 388, 134 S.E. 2d 206 (1964) that one could not collect punitive damages under the uninsured motorist clause of his automobile insurance policy. The insurer in that case agreed to pay all sums which the insured should be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury. In its opinion the court made a clear distinction between the language of the statute hereinabove cited and the language of the uninsured motorist policy when it said:

> "It is required by Section 46-750.13 of the Code that a liability insurance policy must insure 'against loss from the liability imposed by law,' while under the uninsured motorist coverage, which appears on said policy by endorsement, is for the benefit of the insured, and those qualifying as such, and does not insure 'against liability imposed by law,' but does obligate the insurer to pay the insured 'all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.' Clearly, the legislature, by using this differing language, recognized the dis-

tinction between liability coverage and the uninsured motorist endorsement."

That court rejected the idea that the uninsured motorist insurance covered punitive damages because there was no provision in the statutes which, either expressly or by implication, required that the uninsured motorist endorsement must insure against any and all liability, as was required in liability clauses. That court held in the *Laird* case, as I think we should, that the sums which one is legally entitled to recover as damages for bodily injury are compensatory damages only. It seems clear to me that the language of the policy in the *Carroway* case was construed as being in conformity with the South Carolina statute which required that liability insurance policies issued in that state insure against loss from any liability imposed by law for damages arising out of the ownership, maintenance, or use of a motor vehicle.

The majority also places reliance upon *Maryland Casualty Co.* v. *Baker,* 304 Ky. 296, 200 S.W. 2d 757 (1947). I cannot see how that case has any application whatever. It involved the requirements of a Kentucky statute with reference to the operation of taxicabs which the Kentucky court said must be read into the policy. Recovery was sought there for the assault of a passenger by a taxi driver. The decision hinged upon the statute. In treating the question, the Kentucky court said:

> "This brings us to the question of whether there is any liability under the two policies. The determination of this question requires a construction of KRS 281.460 which is, in part, as follows: '(1) Before any authorization for the operation of a taxicab or city bus is granted by the division under KRS 281.450, the applicant shall file with the director a good and sufficient bond with adequate corporate surety, payable to the Commonwealth, binding the obligor *to pay any final judgment rend-*

> *ered against him arising out of the death of or injury to any passenger, or loss of or damage to property while in transit, or death of or injury to other persons or damage to their property, or any act or omission connected with the operation of motor vehicles by the applicant.'* " [Emphasis mine.]

While the court did affirm a judgment which included punitive damages, these damages are not awarded there on the same basis as punitive damages are awarded in Arkansas. In Kentucky, punitive damages are considered compensatory. *Tennessee Central R. Co.* v. *Brasher's Guardian,* 29 Ky. Law 1277, 97 S.W. 349 (1906). Punitive damages may be awarded in that state for gross negligence. *Southern Railway Co.* v. *Barr's Administratrix,* 12 Ky. Law 1615, 55 S.W. 900 (1900). The court held in the case last cited that it would be error to instruct a jury that punitive damages might be given by way of punishment and to furnish an example to deter others from like practices. It has been said that the purpose of the law which authorizes the recovery of punitive or exemplary damages in Kentucky is to remunerate for the loss sustained, not to inflict a penalty. The jury is permitted in that state to give these damages on account of the nature of the injury, when the commission of the act complained of is accompanied with circumstances of aggravation. *Chiles* v. *Drake,* 2 Metcalfe 146, 74 American Decisions 406 (1859).

Perhaps the first court to meet the problem here presented was the Supreme Court of Colorado in *Universal Indemnity Ins. Co.* v. *Tenery,* 96 Colo. 10, 39 P. 2d 776 (1934). In treating the propriety of the recovery of exemplary damages from an automobile liability insurance carrier, that court said:

> "* * * This award was primarily for the punishment of Callahan for his wrongful acts and as a warning to others. It was in no wise compensation

to the injured party for bodily injuries or actual loss occasioned by the negligence of Callahan. The insurance company did not participate in this wrong, and was under no contract to indemnify against such. In this particular matter the policy indemnifies against damages for bodily injuries, and nothing in addition is contracted for, and there is no further liability. The injured will not be allowed to collect from a nonparticipating party for a wrong against the public."

The reasoning and logic of that case which is directly parallel to this one seems to me to be irrefutable. It was followed in *Crull* v. *Gleb,* 382 S.W. 2d 17 (Mo. App. 1964). In that case the Missouri court said that since the chief purpose of punitive damages is to punish the offender and to serve as a deterrent to similar conduct by others, it seems only just that the burden of paying punitive damages should rest ultimately, as well as nominally, on the party who actually committed the wrong. That court also said:

"* * * Plaintiff would have already been made whole through his compensatory damages, and the insurance company, which had done no wrong, would be punished. There is no language in the policy that provides for the payment of judgments for punitive damages. The policy covers only damages for bodily injury and property damage sustained by any person. Punitive damages do not fall in this category. The $2,000 award of punitive damages to plaintiff was to punish defendant for his wrongful acts and as a warning to others. It was not to compensate plaintiff for bodily injury or property damage. The garnishee did not participate in the wrong, and was under no contract to indemnify as such.

* * * In order for the theory of punitive damages (i.e. punishment and deterrent) to work, the

delinquent driver must not be able to transfer his responsibility for punitive damages to others. * * *

Public policy against such coverage is based on the thesis that wrong-doing is discouraged by the imposition of personal punishment. If a person is able to insure himself against punishment, he gains a freedom inconsistent with the establishing of sanctions against such misconduct. It is undisputed that insurance against criminal fines would be void as violative of public policy. The same public policy should invalidate any insurance contract against civil punishment that punitive damages represent."

Other recent decisions following this line of reasoning are *Nicholson* v. *American Fire & Casualty Ins. Co.* 177 So. 2d 52 (Fla. App. 1965) and *Esmond* v. *Liscio,* (Allocatur refused) 209 Pa. Super. 200, 224 A. 2d 793 (1966).

Two of our United States Courts of Appeals have dealt with this matter in recent years and held punitive damages not recoverable on these policies. In treating virtually identical policy provisions in *Northwestern National Casualty Co.* v. *McNulty,* 307 F. 2d 432 (5th Cir. 1962) the court was dealing with Florida and Virginia law. It held that regardless of the construction to be placed on the contract, public policy would prevent the recovery of punitive damages from an automobile liability insurance carrier, even if the policy should provide specifically therefor. This finding was based on the fact that the function of punitive damages in the two states involved was for punishment and for deterrent. In a very thorough and comprehensive opinion, Judge Wisdom demonstrated that the purpose of punitive damages in both Florida and Virginia was for the protection of the public, punishment of the offender and warning and deterrent to others. These purposes are identical to the stated purposes in Arkansas. Judge Wisdom also

pointed out that the later cases in both states demonstrate that both states conform to the widely accepted basis for punitive damages for the purposes stated but not for compensation for the loss sustained by an injured party by reason of a tortfeasor's wrongdoing. Judge Wisdom carefully distinguished the legal background in states in which an insurer was held liable for punitive damages. In speaking of the public policy permitting the recovery of punitive damages, Judge Wisdom said:

> "* * * To make that policy useful and effective the delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace. We are sympathetic with the innocent victim here; perhaps there is no such thing as money damages making him whole. But his interest in receiving non-compensatory damages is small compared with the public interest in lessening the toll of injury and death on the highways; and there is such a thing as a state policy to punish and deter by making the wrongdoer pay."

In *American Surety Co. of New York* v. *Gold,* 375 F. 2d 523 (10th Cir. 1966) in an opinion by Chief Judge Murrah, the court was dealing with Kansas law. Basing its opinion upon the premise that Kansas law embraced a general concept of punitive damages (as does Arkansas law) and upon the law treated in the *McNulty* case, that court forecast that the Kansas courts would hold that such a policy did not cover punitive damages and held in favor of the automobile liability insurance carrier.

The cases hereinabove cited and referred to involve clauses in automobile liability insurance policies identical, or virtually identical, with the clauses involved here and apply the laws of states which treat punitive damages in the same way as they are treated in Arkansas

courts and do not involve statutes which affect the result. With the exception of the Tennessee case cited in the majority opinion, cases reaching the result reached by the majority can be distinguished, as some of them are, in the cited cases.

I am particularly surprised at the result reached by the majority in view of the fact that this court has recognized the general policy as to punitive damages and denied recovery from a surety in *Arnold, Sheriff* v. *State,* 220 Ark. 25, 245 S.W. 2d 818. I humbly submit that the casual treatment given this case by the majority does not distinguish it and that its doctrine should be controlling here. I quote the language of the court in that opinion, and, in doing so, submit that its rationale cannot be harmonized with the result reached by the majority in this case. We said:

> "By cross-appeal Burton contends that the court erred in correcting its judgment to relieve the surety of liability for punitive damages. This modification was correct. Punitive damages are imposed to punish the wrongdoer, not to compensate the plaintiff for the officer's breach of duty. It is therefore generally held that the surety is not liable for punitive damages unless the statute so provides. *Yesel* v. *Watson,* 58 N.D. 524, 226 N.W. 624, 64 A.L.R. 929; cf. Rest., Security, § 181. Our statute does not so provide. Ark. Stat. Ann. 1947, § 12-1101."

This clearly shows that the reason for holding that the surety was not liable unless the statute so provided is that punitive damages for the officer's breach of duty in a case in which he is liable for compensatory damages for false imprisonment are not compensatory. The statute required of Sheriff Arnold a bond conditioned that he would well, truly and faithfully discharge and perform the duties of his office. The false imprisonment was clearly a breach of that bond, so there was just as much justification for recovery of the punitive dam-

ages from the surety as there is for recovery from appellant here.

The majority seems to find some support in the fact that the recovery of punitive damages was allowed in *Miller* v. *Blanton,* 213 Ark. 246, 210 S.W. 2d 293, against an employer for acts of an employee even though done without the employer's knowledge or authorization and not ratified by the employer. The majority seems to think that case involved an individual employer. That is not the case. The employer was a corporate defendant, Columbia Pictures Corporation. The authorities treated in the opinion in that case supporting the allowance of punitive damages all involved corporate employers. The support for the result reached by the majority in that case is the rule that a corporation, as distinguished from an individual, is liable in punitive damages for the malicious acts of its agent done within the scope of his employment. The rationale for this result is that corporations are artificial beings who can only act through agents and servants and unless corporations were held vicariously liable there would be no means by which corporations could ever suffer the penalty of punitive damages. This rule is sound and I see no reason why it should not be followed, but this case does not involve a corporation, and we do not have before us the question of whether or not a corporation which might be vicariously liable for malicious acts of its agents and servants can carry liability insurance for its own protection. The Pennsylvania court which considered the matter found that allowing one who is only vicariously liable for punitive damages to shift the burden to his insurer not to be in conflict with the holding that such damages were not recoverable on an automobile liability insurance policy containing language similar to that here. *Esmond* v. *Liscio,* 209 P. Super. 200, 224 A. 2d 793.

The fifth circuit pointed up serious problems which are posed by the result reached by the majority here. That court specifically mentioned three, which are:

> "* * * (1) It would produce a serious conflict of interest between the insurer and the insured in settlement negotiations and in trial tactics. There was a conflict of interest in this case when the insurer refused an offer of settlement for $35,000, again when the insurer said nothing to the insured before trial about punitive damages, and still again when the insurer elected to concede liability for compensatory damages. (2) There would be a conflict between the rule that in assessing punitive damages evidence of the financial standing of the defendant may be considered by the jury and the rule against referring to the defendant's insurance in the presence of the jury. (3) Fantastic results would be possible having no relation to making the injured party whole."

The problem that will give the most trouble in Arkansas is that with reference to evidence of the financial standing of the defendant. In cases in which punitive damages are sought (and I predict they will be sought in most automobile cases after this holding), what basis is to be used for the showing of the financial condition of the defendant? We have dealt with the problem in other backgrounds in such cases as *Dunaway* v. *Troutt,* 232 Ark. 615, 339 S.W. 2d 613, and *Life and Casualty Ins. Co. of Tennessee* v. *Padgett,* 241 Ark. 353, 407 S.W. 2d 728. Will there be a waiver of punitive damages when a defendant has automobile liability insurance similar to that found in the *Dunaway* case? Or is the alternative introduction of evidence that a defendant carries liability insurance and the policy limits thereon? Or will proof of financial worth by either party be found to be barred as was the case in the *Padgett* case?

While it may be of no particular concern to us, I cannot help but wonder whether automobile liability insurance carriers will have to have financial statements from their policyholders as a basis for fixing premium rates or whether the burden of insurance premiums will be

spread equally among the policyholders, from the virtually insolvent wage earner to the wealthy capitalist.

The *Padgett* case itself should keep us from adopting the rule of the majority opinion. There we said:

> "Padgett's attorney argues that regardless of the rule in the case of independent tortfeasors proof of financial worth should be allowed when the defendants are employer and employee. That argument is not sound. The reason for the rule—that one defendant should not be punished on the basis of another defendant's wealth—applies just as well to employers and employees as to others not standing in that relation. Hence the rule, as one might expect, is applied in master-servant cases."

The holding of this court in this case results in the punishment of others, perhaps many others, not only because of another's actions, but on the basis of another's wealth. This is inconsistent with what we said in the *Padgett* case.

I would reverse the judgment of the trial court.

JONES, J., joins in this dissent.

SOUTHWESTERN BELL TELEPHONE CO. & JAMES R. WHEELER v. RUSSELL C. ROBERTS, JUDGE, FAULKNER CIRCUIT COURT

5-4876 440 S.W. 2d 208

Opinion Delivered May 5, 1969

Donald K. King and *George F. Hartje, Jr.* for petitioners.

Guy H. Jones and *Phil Stratton* for respondent.

FRANK HOLT, Justice. This is an action by Faulkner County, brought in the name of the state, to recover damages from the petitioners. The plaintiff alleged that petitioners negligently installed an underground cable across a county road and as a result of such negligence a county owned motorgrader overturned when it struck the concealed obstruction, causing damage to the vehicle and injuring the county employee driver. The plaintiff sought to recover $2,000.00 for damage to the motorgrader and reimbursement of $2,054.30 for medical and hospital expenses paid on behalf of its injured employee. The petitioners responded to the complaint by filing a motion to quash the summons and dismiss the action for lack of venue. Petitioners alleged that proper venue was in Pulaski and not in Faulkner County since petitioner Southwestern Bell Telephone Company is a foreign corporation legally doing business in Arkansas and petitioner Wheeler is a Pulaski County resident. The trial court, the respondent, denied their motion. A temporary writ of prohibition was granted by this court

and now the issue is whether the writ should be made permanent. This action was instituted in the name of the state pursuant to Ark. Stat. Ann. § 17-302 (Repl. 1968). This statute reads that when a "county has any demand against any persons or corporations, suit thereon may be brought in the name of the State for the use of the county."

Since this action is in the name of the state, the petitioners contend that venue lies in the Circuit Court of Pulaski County and not Faulkner County by reason of Ark. Stat. Ann. §§ 27-603 and 34-201 (Repl. 1962). The petitioners are correct.

There are certain actions which must be brought in Pulaski County according to the terms of §§ 27-603 and 34-201. In pertinent part, § 27-603 provides:

> "The following actions must be brought in the county in which the seat of government is situated:
>
> First. All civil actions in behalf of the State, or which may be brought in the name of the State, or in which the State has, or claims an interest, except as provided in sec. 484 as amended [§ 34-201]."

Section 34-201 provides, in pertinent part, that:

> "* * * all actions which are authorized by the provisions of this Code, or by law, to be brought in the name of the State, * * * shall be brought and prosecuted in the county where the defendant resides."

The respondent argues, however, that these quoted statutes are not applicable and relies upon Ark. Stat. Ann. § 27-611 which provides that:

> "Any action for damages to personal property by wrongful or negligent act may be brought either in the county where the accident occurred which caused the damage or in the county of the residence

of the person who was the owner of the property at the time the cause of action arose."

Respondent contends that the effect of this statute is to localize a formerly transitory cause of action and, since it is the more recent statute, it should control the venue in the case at bar.

This contention, however, has been decided adversely to respondent. We have held that § 27-611 is a general venue statute governing civil suits brought by persons for the recovery of damages to their property and, therefore, it is inapplicable to an action brought on behalf of or in the name of the state. In other words, it applies to persons and not the state. *Cook, Commissioner* v. *Gore,* 214 Ark. 777, 218 S.W. 2d 82 (1949). There we said that § 27-611 did not amend or affect § 34-201. In *Downey* v. *Toler, Judge,* 214 Ark. 334, 216 S.W. 2d 60 (1948), respondent contended that personal injury actions were localized by Ark. Stat Ann. § 27-610. This section provides that actions to recover for personal injury shall be brought in the county where the injury occurred or in the county where the injured person resided at the time of the injury. We held that since the defendant state policemen were state officers the controlling venue statute was § 34-201 which was unaffected by § 27-610, the later statute. Thus, venue was limited to Pulaski County which is the official residence of state officers.

Respondent argues that to be required "to pursue their remedies in the distant courts of Pulaski County" would cast an unconscionable burden upon other counties. There is much merit and appeal in respondent's argument when the practical aspect of venue is considered. However, the rule is well established that the wisdom and expediency of a statute should be addressed to the legislature. In *Newton County Republican Central Committee* v. *Clark,* 228 Ark. 965, 311 S.W. 2d 774 (1958) we said:

> "We have repeatedly said that the question of the wisdom or expediency of a statute is for the Legislature alone. The mere fact that a statute may seem to be more or less unreasonable or unwise does not justify a court in annulling it, as courts do not sit to supervise legislation. Courts do not make the law; they merely construe, apply, and interpret it."

See, also, *Leonard* v. *Henry,* 187 Ark. 75, 58 S.W. 2d 430 (1933).

In the case at bar, petitioner Wheeler is a resident of Pulaski County. Therefore, § 34-201 requires that venue in this case is in Pulaski County. Petitioner Southwestern Bell Telephone Company is a foreign corporation authorized to do business in Arkansas. A foreign corporation is not recognized, however, as having a local or county residence. *Pekin Cooperage Company* v. *Duty,* 140 Ark. 135, 215 S.W. 715 (1919); *Central Coal & Coke Company* v. *Orwig,* 150 Ark. 635, 235 S.W. 390 (1921). Therefore, Ark. Stat. Ann. § 27-603 places the venue at "the seat of government" which is in Pulaski County.

The temporary writ is made permanent.

ARKANSAS LOUISIANA GAS CO. v. PAUL D. PUGH, ET AL

5-4880 440 S.W. 2d 242

Opinion Delivered May 5, 1969

Williams & Gardner for appellant.

Mobley, Bullock & Harris for appellees.

FRANK HOLT, Justice. This is an eminent domain proceeding in which the appellant took a pipeline right-of-way easement across adjoining lands belonging to the appellees, Paul D. and Mary Pugh and Reba Ryan. The two separate actions were consolidated for trial and appeal purposes. The pipeline easement resulted in the total taking of 0.88 of an acre of the Pughs' land and 1.39 acres of Mrs. Ryan's land. This easement is 30 feet in width and is parallel to a 50-foot right-of-way easement acquired in 1959 by the appellant. Thus, the present width of the pipeline easement is 80 feet, within which there are now two parallel pipelines. The Pughs and Mrs. Ryan each asked $3,500 compensation. A jury

awarded the Pughs $938 and Mrs. Ryan $1,084 damages. From the judgments upon those verdicts comes this appeal. The appellant generally contends for reversal there is no substantial evidence to support the verdicts in excess of the value of the acreage actually acquired within the right-of-way.

We first discuss appellant's assertion that there is no substantial evidence to support that part of the jury's verdicts which allowed damages for injury to property outside of the right-of-way. The appellant pressed this point following the verdicts by filing a Motion For Judgment Notwithstanding The Verdict, asking that a Mr. Pledger's evidence of $350 and $450 timber damage outside the right-of-way on the Pughs' and Ryan's property respectively be disallowed. It was asked that the judgments, after this disallowance, reflect $688 for the Pughs and $734 for Mrs. Ryan. The motion was denied. We think the motion had merit.

The appellees presented two expert value witnesses whose testimony was very similar. One of these was Jim Pledger who is a licensed real estate broker and has been engaged in the real estate business for many years. After the case was submitted, the jury through its foreman asked: "I would like to have the figures from Mr. Pledger's appraisal of the Rryan land and the Pugh land." He was then reminded that Pledger's testimony was that the difference in the before and after value of the Ryan land was $1,184 and the Pugh property $1,038. Within a few minutes, the jury returned its verdict for damages in the sum of $1,084 and $938 respectively, or exactly $100 less in each instance. According to Mr. Pledger, he allocated the damages to the Pugh property as being $188 for the acquisition of the 0.88 of an acre; $350 damages to the timber adjacent to the 30-foot strip; and $500 for residual damage to the balance of the property. His appraisal of damages to the Ryan property was based upon $234 for the

1.39 acres acquired; $450 damages to the timber adjacent to the 30-foot strip; and $500 residual damage.

According to appellant's evidence, the greatest difference between the before and after value of the Pugh's property was $150 and that of the Ryan property was $270.

In *Arkansas State Highway Commission* v. *Ptak,* 236 Ark. 105, 364 S.W. 2d 794 (1963) we reiterated that:

> " * * * Where a witness gives his opinion as to damages, such testimony must be considered in connection with related facts upon which the opinion is based. * * * Whether there is substantial evidence to support a verdict is not a question of fact, but one of law. Because a witness testifies as to a conclusion on his part does not necessarily mean that the evidence given by him is substantial, when he has not given a satisfactory explanation of how he arrived at the conclusion."

When we apply these well settled principles, we are of the view that there is no competent or substantial evidence by any witness for the appellees to support an award to either property owner for damage to timber adjacent to or outside the right-of-way. It appears that the claim for damages to the timber adjacent to the new right-of-way is based principally upon evidence that some of this timber is now affected by a beetle disease. However, appellees' witness, Mr. Pledger, who testified about this disease, admitted that it was caused by a condition that existed before the acquisition of this 30-foot strip. We think appellant's motion to disallow this element of damages should have been granted.

Appellant now urges on appeal that there is no substantial evidence of any element of damages occasioned by the additional or expanded severance of

the lands. According to Mr. Pledger, the resulting damages were $500 to each landowner. His appraisal appears to be the highest of the competent evidence offered by value witnesses. Another expert witness reduced his figure from $500 to $250 during his testimony. According to the appellees' evidence, enlarging the right-of-way reduced the property in value by making it less attractive for sale upon the market; its accessibility was affected and logging operations were made more difficult. Although the reasons or related factors for this appraisal of damages are certainly vague and somewhat questionable, we think there is sufficient substantial evidence for the jury's consideration on this issue. The highest and best use of this property was for timber production.

As previously indicated, we agree with appellant's alternative contention that the court erred in not granting its Motion For Judgment Notwithstanding The Verdict. The competent evidence in the case at bar does not justify the Ryan judgment in excess of $734 [$1,184 less $450] and the Pugh judgment in excess of $688 [$1,038 less $350]. Accordingly, the judgments are affirmed upon condition of a remittitur of any sums in excess of these amounts. Otherwise, the judgments are reversed and remanded for a new trial.

CHARLIE BRYANT v. THE STATE OF ARKANSAS

5-5413 440 S.W. 2d 534

Opinion Delivered May 12, 1969

Bowie & *Boyce* for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

CARLETON HARRIS, Justice. Appellant, Charlie Bryant, was charged in the Municipal Court of Newport, Jackson County, Arkansas, with the offense of selling intoxicants to a minor, in violation of Ark. Stat. Ann. § 41-1117 (Repl. 1964). He was also charged with the offense of selling beer on Sunday. The cases were consolidated for trial, and appellant was found guilty of both charges, and fined $100.00 and costs on each one. Both cases were appealed to the Circuit Court of Jackson County. In May, 1968, appellant moved to dismiss the charge of violating § 41-1117, asserting that this court had, in April, 1968, in *State* v. *Jarvis,* 244 Ark. 753, 427 S.W. 2d 531, held that this section had been repealed by Act 257 of 1943. The trial court denied the motion, and the cases were tried by a jury on October 4, 1968. Bryant was found not guilty of the charge of selling beer on Sunday, but the jury deadlocked at 10 to 2 on the remaining charge. Both appellant and the state agreed to accept a majority verdict, whereupon the jury found Bryant guilty of the charge of selling intoxicants to a minor, Charles McLaughlin, in violation of § 41-1117, and fixed his fine at the sum of $50.00. From the judgment so entered, appellant brings this appeal. For reversal, it is asserted that the verdict was contrary to the evidence; that the court erred in denying appellant's motion for a continuance; and that the court was in error in submitting the case to the jury because § 41-1117 had been repealed.

Inasmuch as we agree that § 41-1117 has been repealed, and that the judgment of conviction must be re-

versed on that account, there is no need to discuss the other suggested errors.

Section 41-1117 reads 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 1941, the General Assembly passed Act 356, Subsection (a) of Section 1 reading, as follows:

> "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 $500.00 nor more than $1,000.00, or confinement for not more than one year in the Arkansas State Penitentiary or both."

Section 6 of this act repealed all laws and parts of laws in conflict, and accordingly, the penalty provision of § 41-1117 was repealed.

In 1943, two acts were passed by the Legislature dealing with this question, the first being Act 218, Section 1 appearing presently as Ark. Stat. Ann. § 48-901 (Repl. 1964). This act specifically repealed Section 1 of Act 356 of 1941, heretofore quoted, and provided the following penalty:

> "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."

Act 218 was approved on March 15, 1943.

The second act passed during this legislative session was Act 257, approved on March 18, 1943. This act, except for one change, retained the penalty in Act 218, differing from that act in that the imprisonment provision reads:

"* * * for not more than one (1) year, or both such fine and imprisonment in the discretion of the jury or court."

In other words, Act 257 simply removed the penalty of imprisonment for not less than six months. Laws in conflict are repealed.

The above is a resume of the acts relating to the sale of intoxicating liquors to a minor, where knowledge of minority is not involved. It would therefore appear that Act 218 (Section 48-901) is the governing statute of such sales (except that the penalty of imprisonment is controlled by Act 257), and controls the sale in the instant case.

State v. *Jarvis, supra,* pointed out that so much of Section 41-1117 as was in conflict with Act 257[1] pertaining to the sale of intoxicating liquors to minors had been repealed. The result is that Section 41-1117 presently only covers the sale to minors of any compound called tonics or bitters, and thus, for all practical purposes, has been nullified.

Since the provisions of Section 41-1117 no longer control the sale of intoxicants to a minor, it follows that appellant was erroneously charged, and the judgment of conviction must be reversed.

It is so ordered.

SAMMY CLARK v. STATE OF ARKANSAS

5-5399 440 S.W. 2d 205

Opinion Delivered May 12, 1969

[1]Sections 1 and 2 of Act 180 of 1961 appear in the Arkansas Statutes as Section 48-903. This statute deals with the penalty for one who **knowingly** sells or furnishes alcoholic beverages to a minor. The compiler comments that this act supersedes Section 1 of Act 257 of 1943. We think this comment is in error, as Act 180 deals entirely with sales where the seller has knowledge of the minority.

Act 277 of 1967 amended Act 180, including the changing of the penalty.

Griffin Smith and *Robert Shults* for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

George Rose Smith, Justice. This is the second appeal in this case. Clark was charged with having raped his nine-year-old stepdaughter. At the first trial he was found guilty and sentenced to life imprisonment.

We reversed that judgment for two errors, one of which was the trial court's refusal to give a requested instruction submitting to the jury the offense of carnal abuse, which under the testimony was a lesser offense included in the charge of rape. The court had submitted only the offense of rape, which was defined for the jury as the carnal knowledge of a female, forcibly and against her will. In reversing the judgment we held that if the child consented to the act the offense would be carnal abuse rather than rape. *Clark* v. *State,* 244 Ark. 772, 427 S.W. 2d 172 (1968). That holding is now the law of the case and controls subsequent proceedings. *Mode* v. *State,* 234 Ark. 46, 350 S.W. 2d 675 (1961), cert. den. 370 U.S. 909 (1962).

At the second trial the testimony was substantially the same as it had been at the first one. We summarized the proof in our first opinion and need not set it forth a second time. The jury again found the accused guilty of rape and again fixed his punishment at life imprisonment.

For reversal counsel for the appellant insist that at the second trial the court erred in including in its instructions to the jury the substance of a new statute, covering the offenses of rape and carnal abuse, that was not enacted until after the offense on trial was assertedly committed in 1966. Act 362 of 1967; Ark. Stat. Ann. §§ 41-3401 and -3403 (Supp. 1967). The new statute subdivided the offense of rape (including carnal abuse) into three degrees, which were defined and made the subject of appropriate graduated punishment. The earlier statutes (§§ 41-3401 and -3406) were expressly repealed, but they may be treated as remaining in force with respect to offenses already committed. See Ark. Stat. Ann. § 1-103 (Repl. 1956).

In the language of the new statute, as it might apply to this case, the trial court gave this instruction defining the three degrees of rape and declaring the permissible punishment for each degree:

> The defendant in this case is charged with the crime of Rape in the First Degree. A male is guilty of Rape in the First Degree when he engages in sexual intercourse with a female who is less than 11 years of age. Any male upon conviction of First Degree Rape shall be imprisoned in the State Penitentiary from 30 years to life.
>
> A male is guilty of Rape in the Second Degree when he, being 18 years old or more, engages in sexual intercourse with a female less than 14 years of age. Any male found guilty of Second Degree Rape shall be imprisoned in the State Penitentiary for not less than three nor more than 21 years.

> A male is guilty of Rape in the Third Degree when he engages in sexual intercourse with a female or carnally abuses a female who is less than 16 years old. Any male who shall be convicted of Rape in the Third Degree shall be imprisoned in the State Penitentiary for not less than one year nor more than ten years.

We agree with the appellant's insistence that the foregoing definition of first degree rape was, under the doctrine of the law of the case, more unfavorable to the accused than it should have been. On the first appeal we held that if the nine-year-old prosecutrix consented to the act of intercourse, the offense would be carnal abuse only, which was then punishable by imprisonment for from one to 21 years. But under the trial court's definition of first degree rape the question of consent was absolutely immaterial. With respect to first degree rape the only issue for the jury was whether the accused had engaged in sexual intercourse with a female less than 11 years of age, with or without her consent. According to the undisputed evidence the prosecutrix was only nine years old on the date of the offense. The action of the jury in fixing the punishment at life imprisonment shows that the error may have been prejudicial.

The error, however, does not automatically entitle the appellant to a new trial. By its verdict the jury found that the accused had in fact had intercourse with his nine-year-old stepdaughter. Under our opinion on the first appeal he was therefore guilty of carnal abuse, whether or not the prosecutrix consented to the act. It will be seen by comparing the new statute with the old one that the definition of third degree rape is precisely the same as the former definition of carnal abuse. The only difference is that the legislature has reduced the punishment to a maximum of ten years imprisonment, which of course it may do even after the commission of

the offense. *State* v. *Nichols,* 26 Ark. 74, 7 Am. Rep. 600 (1870).

Thus the trial court's error had no bearing upon the jury's determination of guilt or innocence. It affected only the extent of the punishment to be imposed. In that situation we have a choice among several corrective measures. We may, depending upon the facts, reduce the punishment to the maximum for the lesser offense, reduce it to the minimum for the lesser offense, fix it ourselves at some intermediate point, remand the case to the trial court for the assessment of the penalty, or grant a new trial either absolutely or conditionally. Several of the cases were discussed in *Bailey* v. *State,* 206 Ark. 121, 173 S.W. 2d 1010 (1943).

Here we think it best to follow the course that we adopted, upon essentially similar facts, in *Threet* v. *State,* 110 Ark. 152, 161 S.W. 139 (1913), where we said:

> For the errors indicated the judgment must be reversed; but as the jury has found by its verdict that appellant did have sexual intercourse with Gertie Hollingshead, and as it is undisputed that she was at the time under the age of sixteen years, and that the appellant is therefore guilty of the crime of carnal abuse, the State may elect, if it sees proper to do so, to have the defendant brought into the court below to be there sentenced for that crime. Unless such election shall be made in fifteen days, the cause will be remanded for a new trial.

That disposition of the case enables us to take advantage of the trial judge's superior knowledge in fixing an appropriate punishment—in this instance between one and ten years imprisonment.

Reversed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice. I concur in the result reached in the majority opinion on the basis of my understanding of the disposition being made. As I understand the majority opinion, the court is remanding the case with the state having the option of asking the trial court to sentence Clark upon a charge of carnal abuse, or of having a new trial on the charge of rape with the court giving the instruction on rape given at the first trial and the instruction on carnal abuse as requested. The only prejudice I can see in the court's instruction to the jury on the second trial is that it permitted the jury to find appellant guilty of rape if they believed that the child was over 10 and less than 11 years of age and consented to the act of intercourse. Under the law as it existed prior to the effective date of Act 362 of 1967, sexual intercourse with a female under 10 years of age would have constituted the crime of rape because she is incapable of giving consent, as a matter of law, and it would be presumed that a female under 12 but over 10 years of age was incapable of consenting, unless the proof showed that she understood the nature of the act and was capable of consenting thereto. *State* v. *Pierson,* 44 Ark. 265; *Coates* v. *State,* 50 Ark. 330, 7 S.W. 304. See also *Warner* v. *State,* 54 Ark. 660, 17 S.W. 6; *Hammons* v. *State,* 73 Ark. 495, 84 S.W. 718; *Rose* v. *State,* 122 Ark. 509, 184 S.W. 60.

I do not consider that because the victim testified that she was 9 years of age, the "law of the case" limits the crime of which appellant can be found guilty to carnal abuse. His plea of not guilty put in issue the credibility of the state's evidence, even if otherwise uncontradicted, because the presumption of innocence compels a determination of guilt by a jury. Underhill's Criminal Evidence, 5th Ed. 1384, § 553. Otherwise, the court could direct a verdict in criminal cases. See *Manning* v. *State,* 145 S.W. 938 (Tex. 1912). In a prosecution for rape of a child, the child's age is a question of fact.

Young v. *State,* 144 Ark. 71, 221 S.W. 478; *Hedrick* v. *State,* 170 Ark. 1193, 279 S.W. 785; *State* v. *Sutton,* 230 N.C. 244, 52 S.E. 2d 921 (1949) Age may be proved in many different ways such as direct testimony, records and inscriptions, hearsay, opinion and observation, inspection of the person, and his appearance to the jury. *Terry Dairy Co.* v. *Nalley,* 146 Ark. 448, 225 S.W. 887. See also *Young* v. *State, supra;* Abbott on Facts, Ch. XIV, p. 164; *Gurley* v. *State,* 179 Ark. 1149, 20 S.W. 2d 886, *State* v. *Baugh,* 323 S.W. 2d 685 (Mo. 1959). In determining the question of fact as to age and consent, the jury, in a criminal case, is not required to accept or reject any testimony. *King* v. *State,* 117 Ark. 82, 173 S.W. 852; *Smith* v. *State,* 216 Ark. 1, 223 S.W. 2d 1011; *Freeman* v. *State,* 174 Ark. 1035, 298 S.W. 333. See also *People* v. *Johns,* 173 Cal. App. 2d 38, 343 P. 2d 92 (1959).

OUACHITA MARINE & INDUSTRIAL CORPORATION ET AL v. CARMINE M. MORRISON

5-4879 440 S.W. 2d 216

Opinion Delivered May 12, 1969

Bridges, Young, Matthews & Davis by *Bill R. Holland* for appellants.

Jerry Thomason for appellee.

George Rose Smith, Justice. This is a workmen's compensation proceeding involving a work-connected injury that was ultimately diagnosed as a ruptured lumbar disc. When the case was heard by the referee the claimant's injury had healed to the greatest extent that the attending physicians thought to be possible without surgery. Morrison, the claimant, refused to submit to an operation. The commission made an award of a 60% permanent partial disability, which was affirmed by the circuit court.

On appeal the question is one of first impression in Arkansas: Under our statute does the workmen's compensation commission have discretionary authority in making an award of benefits to a claimant who refuses to undergo surgery? That question turns upon the correct interpretation of this language in our compensation law: "...where an injured person unreasonably refuses to submit to a surgical operation which has been

advised by at least two qualified physicians and where such recommended operation does not reasonably involve risk of life or additional serious physical impairment the Commission may, in fixing the amount of compensation, take into consideration such refusal to submit to the advised operation." Ark. Stat. Ann. § 81-1311 (Repl. 1960).

The claimant, a laborer, was 54 years old when his case was heard. He was using crutches at the time and testified that he was unable to return to work. Dr. Christian, an orthopedic surgeon, was similarly of the view that, *without surgery,* the claimant was totally disabled: "Since [the claimant] refuses surgical treatment and this is what I think he should have I have no alternative except to release him from care. He is, as of this time, totally disabled. I would anticipate with successful disc excision and spine fusion to have reduced his disability to partial permanent disability of an estimated 15 to 20% of the body as a whole." There was also medical testimony that the claimant's disability, without surgery, was 20% of his body as a whole.

We should stress at the outset that the medical testimony had reference only to functional physical disability and not to the economic disability that results from a workman's partial or total inability to earn a living. That distinction was explained in *Wilson & Co. v. Christian,* 244 Ark. 132, 424 S.W. 2d 863 (1968), in this language:

> 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.

In the case at bar the commission's problem was that of fixing the claimant's compensable disability in the light of his refusal to submit to corrective surgery. In a carefully prepared and excellently reasoned opinion the commission first expressed the view that Morrison's refusal to undergo an operation upon his back was not unreasonable, within the terms of the statute. We quote pertinent parts of the commission's opinion, with the preliminary observation that we find its statements of fact to be supported by substantial evidence:

> From this brief review of the evidence including the testimony of claimant himself and of the doctors who examined him, it is apparent that without surgery claimant is permanently and close to totally disabled within the meaning of the Arkansas Workmen's Compensation Law. Claimant himself testified that he is unable to work and . . . Dr. Christian, in effect, agreed with him.
>
> It is strongly insisted, however, by respondents that through successful excision of the disc material and a successful spinal fusion, claimant's disability would be greatly diminished, and that because of his refusal to submit to such surgery, he

should not be given a disability rating greater than 15 per cent to the body as a whole. This leads us to a more careful consideration of the evidence with respect to such surgery. It is true that all three of the doctors strongly advise such surgery; but it is equally true that they are not so certain or positive as to the outcome of such surgery. For example, in his deposition, Dr. Watson was asked how much, in his opinion, surgery would improve claimant's condition. He answered, "We are dealing with speculation. I might think that I had done a good job on him, a technically good job, and I might feel that his bona fide demonstrable physical residual disabilities were very minor. But what his attitude might be afterwards, I do not know."

Also, Dr. Fletcher, in his deposition, while strongly urging surgery, testified that it would have been his objective with claimant, had he performed the operation, to return him to gainful employment. But, following this same testimony, he further testified in answer to the question whether he would assume that it was probable that such would be the results, "You could probably tell at the time of surgery, as to the degree of involvement and particularly the disc next to it and *I think it might be determined by the findings at the time of surgery, probably, whether he could or couldn't return*".

In fact, respondents, on Page 7 of their brief filed with the Commission, frankly state: "That is, no one—not even the examining doctors—could say with any degree of certainty what the claimant's possibility of returning to work following an operation would be."

Our Statute, *Ark. Stats.* § 81-1311, provides that where an injured person unreasonably refuses to submit to a surgical operation which has been advised by at least two qualified physicians and

where such recommended operation does not reasonably involve risk of life or additional serious physical impairment, the Commission may, in fixing the amount of compensation, take into consideration such refusal to submit to the advised operation. Respondents have asked us to construe this provision of our workmen's compensation law to mean that in the present case claimant is not entitled to an award for any disability in excess of 15% to the body as a whole.

For at least two reasons we are unable to agree with respondents in this contention.

The first of these reasons is that we do not consider that this provision of our law should be construed as being so highly penal as to deprive in all cases an injured workman of the small compensation benefits to which the law otherwise entitles him. We must bear in mind that our statute, which is to be liberally construed in favor of the injured employee, does not itself make it mandatory that a claimant undergo a surgical operation, even upon the advice of qualified physicians, but leaves it permissive for the commission to consider such fact in fixing the amount of compensation. The statute does not require that the commission *shall* take such refusal into consideration, but uses the permissive term *may*. The only time when the commission may take such refusal into consideration is when the injured person *unreasonably* refuses to submit to such surgery. When can it be said that an injured person has unreasonably refused to submit to the operation? It would appear to us that we must weigh the obvious possible involvement of additional serious physical impairment, and the discomfort and inconvenience to claimant, as well as the additional cost to respondents, against the benefits to be gained from such operation. It is not only a question of whether the operation would rea-

> sonably involve additional physical impairment, but does it hold out probable promise of improvement? It is admitted by one of the witnesses, Dr. Watson, that there are instances of disastrous results from any kind of surgery due to many factors beyond the physical control and "it is possible that such could happen in any given case." As to the favorable results to be obtained from such operation, it was the opinion of both Dr. Watson and Dr. Fletcher that this would have to await the operation itself and that pending the operation, it was problematical or speculative in this case as to whether claimant would be benefited.
>
> It was the opinion of the doctors testifying on the question that claimant's fears were honest and genuine. It was also their opinion that this honest and genuine fear could influence the results insofar as this claimant is concerned, even though the operation might be a technical success when judged by surgical standards. In view of all these factors and considerations, we are unwilling to say that claimant's refusal to submit to surgery was unreasonable within the meaning of our law.

Thus it will be seen that the commission first reached at least a tentative conclusion that Morrison's refusal to submit to an operation was not unreasonable, within the meaning of the statute. Although we might end our review of the case at this point, we are not quite satisfied to do so, because the commission then went on to base its ultimate conclusion upon the assumption that Morrison's distaste for surgery was unreasonable. This excerpt from the opinion of the commission makes its position clear:

> But even if we should say that claimant's refusal to undergo surgery was, under all the circumstances, unreasonable, this does not mean that under the statute we should arbitrarily say that his

permanent partial disability does not exceed 15% to the body as a whole. To hold this we would have to be arbitrary for the simple reason that the statute itself does not enjoin this duty upon us. It merely provides that we may take such refusal into consideration. Without making it mandatory that we do so, it permits or authorizes us, if in our judgment the facts warrant or justify, to take this into consideration and to give to it such weight as we feel from a consideration of all the facts and circumstances should be given to it.

Furthermore, to agree with the contention of respondents that claimant should be given a permanent partial disability rating not to exceed 15% to the body as a whole based upon the testimony of respondents' medical witnesses in the case would be to confuse the terms, "permanent impairment" and "permanent disability," and would be to misconstrue the role and scope of medical responsibility in the evaluation of permanent disability. Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. While permanent impairment is always an important consideration in the evaluation of permanent disability, yet it is only a contributing factor and is not the sole thing to be considered. Permanent disability means incapacity because of injury, or permanent impairment, to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. It is based upon an injury or permanent impairment which is usually a medical condition, but it is also affected by non-medical factors such as age, education, occupational skills and training, and the economic environment. The American Medical Association in its "Guides to the Evaluation of Permanent Impairment to the Extremities and Back" points out in the preface the important distinction between

permanent impairment on the one hand and permanent disability on the other hand. It is there stated that the physicians' role in the evaluation of permanent disability is limited in its scope to the evaluation of permanent impairment or an appraisal of the nature and extent of the patient's illness or injury. It is further pointed out that the evaluation of permanent disability, which is an appraisal of the patient's present and probable future ability to engage in gainful activity, is an administrative and not a medical responsibility and function. See Special Edition of the Journal of the American Medical Association, Second Printing 1965, on "Guides to the Evaluation of Permanent Impairment to the Extremities and Back."

It is not the role or function of a doctor to state what a claimant's permanent disability is, as that term is defined in our law; but his role and the scope of his duty are to evaluate permanent impairment.

It may well be that a person has a permanent physical impairment of say 15%; yet because of age, education, training, experience and skills may have a much greater disability when measured in terms of diminished capacity to work and earn wages.

We, therefore, are of the opinion that respondents' contention, that because of claimant's refusal to undergo surgery he should be given a disability rating of not to exceed 15% to the body as a whole, is without merit. It was the opinion of at least two of the doctors testifying in this case that without surgery claimant is totally disabled. Claimant himself states that he is unable to perform any kind of gainful employment. The referee, after a consideration of claimant's age, his lack of education, his absence of vocational training or skill, and his physical impairment, came to the conclusion that

> claimant suffers a permanent partial disability of 60% to the body as a whole. We are of the opinion that this finding is supported by a preponderance of the evidence and that the award of the referee should be, and is hereby, affirmed.

In commenting upon the commission's reasoning we think it appropriate to make two observations. First, we share with other courts a genuine reluctance to disturb the findings of the commission upon a matter that lies especially within the discretion of that tribunal. Larson has summarized the cases:

> The problem of unreasonableness of refusal, and of weighing risk against probable benefit is encountered in its most acute form when the treatment takes the form of surgery. If the risk is insubstantial and the probability of cure high, refusal will result in a termination of benefits. But if there is a real risk involved, and particularly if there is a considerable chance that the operation will result in no improvement or even perhaps in a worsening of the condition, the claimant cannot be forced to run the risk at peril of losing his statutory compensation rights. In the commonest operations presenting this problem—hernia, intervertebral disc, and amputation—most courts will not at present disturb a finding that refusal to submit to the operation is reasonable, since the question is a complex fact judgment involving a multitude of variables, including claimant's age and physical condition, his previous surgical experience, the ratio of deaths from the operation, the percentage of cures, and many others. The matter cannot be determined automatically as a matter of medical statistics and expert testimony. The surgeon who sees several operations every day and who testifies that the chance of fatality is only 5 percent naturally has a different point of view than the claimant who has never had a major operation and might quite und-

> erstandably prefer to enjoy life as best he can with his injury rather than take a one-in-twenty chance of being dead. [Larson, Workmen's Compensation, § 13.22 (1968).]

Secondly, we are firmly of the view that the commission did not exceed its authority in fixing the claimant's award at a 60% permanent partial disability. It is true that the witnesses, including the claimant himself, estimated his disability as being at one or the other of two extremes: Either a 100% disability or a 20% disability. It is fair to say that there is no direct evidence fixing his disability, either functional or economic as we have heretofore explained those terms, at any percentage between the extremes of 100% and 20%. Nevertheless, we uphold the commission's award of a 60% permanent partial disability.

Our reasoning is simple. The statute declares that when the claimant unreasonably refuses to submit to surgery the Commission *may, in fixing the amount of compensation,* take into consideration such refusal to submit to the advised operation. Ark. Stat. Ann. § 81-1311. We think the legislature, in saying that the commission "may" take the refusal into consideration chose its words with care. The intangible elements entering into the decision are many as both the commission and Larson *supra* have pointed out. In view of such considerations we are of the opinion that the commission acted within its delegated authority in choosing a middle ground between the extremes of 100% disability and 20% disability.

If that is not a correct interpretation of the statute, then we are at a loss to understand what it really means. When the claimant's refusal to submit to surgery is *reasonable,* there is no problem. It is only when the refusal is *unreasonable* that the commission's discretion comes into play. If the commission is absolutely bound by the opinion of the respondents' doctors, that the

operation promises a fair degree of success and involves only a slight risk, then the discretion lies with the doctors and not with the commission. That is not what the statute says. We do not think that is what it means. No doubt cases might arise involving an abuse of the commission's wide discretion in the matter, but this is not such a case.

Affirmed.

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

CARLETON HARRIS, Chief Justice. I disagree with the result reached by the majority. Doctors Robert Watson and Thomas Fletcher both estimated Morrison's permanent partial disability at 20%. Dr. Watson, in his final report, stated that, if the estimate of disability were based upon Morrison's own statement, and upon actions strictly under Morrison's own emotional control, claimant would, presently, be considered totally disabled. He further stated, however, that an estimate of disability based on findings that can be substantiated by neurological examination would be more in the field of 20% permanent partial disability. This opinion by these doctors was a rating of disability *without surgery*. With surgery, all doctors, including Dr. Christian, were of the opinion that the permanent partial disability would be even less. The only evidence I find to the effect that there was total disability without prospects of any improvement, was that of the claimant himself, a man with no medical knowledge, and apparently prejudiced against doctors. Dr. Christian did state that, as of the time of the examination, Morrison was totally disabled; however, he added:

> "* * * I would anticipate with successful disc excision and spine fusion to have reduced his disability to partial permanent disability of an estimated 15 to 20% of the body as a whole."

Of course, no doctor can guarantee results from an operation, but it is clear that all were of the opinion that surgery would be beneficial. Doctors Watson and Fletcher both considered claimant's refusal to have surgery to be unreasonable, and while Doctor Christian did not use those particular words, it is apparent from the record that he too holds the same view. Morrison was adamant on the subject of an operation, and said that he wouldn't submit to surgery if "a million" doctors recommended it. Claimant testified that he was told by the doctors that there was a possibility that he might lose the use of his legs, if he had the operation. However, no doctor testified to that effect. It is apparent that Morrison does not have much use for the medical profession, and his refusal to submit to the operation is somewhat predicated on that fact. When asked why he felt that the doctors recommended surgery, he replied:

> "Well, they are getting paid for it. They just operate on your back and then say, Mr. Morrison, we have done all we could for you. They might do their best but they already said some do and some don't. That was plain enough for me."

Dr. Watson commented on the proposed operation, as follows:

> "It is looked upon as being a simple task that one of us might do once or twice a day, or maybe do several of them a week. Time has proved it is a perfectly safe procedure. The muscles at the back are split in a longitudinal fashion, so that they are retracted away from the backbone. There is a little ligament that runs from one lamina, which is the back of a vertebra up to the next lamina, covers an area about the size of the ball of a man's thumb. One can remove this little piece of ligament and give an opening about the size of the ball of a man's thumb, and through this we work to retract the

nerve root and to take out these pieces of fragmented disc. Sometimes the evidence of surgery is so scant that it cannot be recognized by x-ray. And as far as time of operation, it can be from thirty minutes to an hour and a half.

"As far as being bedridden, we let them out of bed to go to the bathroom the next day if they want to. We customarily send them home from the hospital from five to seven days. Rarely more than seven days after surgery. Their intervals for healing depend considerably on the type of work they do and their own personalities. Some people anxiously want to return to work too soon. Maybe in a matter of four weeks, six weeks. Some are very hesitant about ever wanting to return to work.

"I have so much faith in this I've done this surgery on personal friends, on hunting companions, on business acquaintances, and on other doctors that we are associated with."

The majority say, "If the commission is absolutely bound by the opinion of the respondents' doctors that the operation promises a fair degree of success, and involves only a slight risk, then the discretion lies with the doctors and not with the commission. That is not what the statute says." I agree that the discretion lies with the commission, but where all the medical proof is in accord, *i.e.,* all agree that the operation involves but little, if any, risk to the patient, it seems to me that the ruling was arbitrary. Had there been medical evidence also offered that the operation was dangerous, and would result in only slight benefits to the patient's condition, then a fact question would have been presented. But when the opinions of outstanding specialists are contradicted only by the statement of the claimant, I can see no justification for awarding 60% permanent partial disability to the body as a whole.

It is my view that Morrison's refusal to submit to the operation was completely unreasonable, and entirely

unsupported by substantial evidence that such an operation might aggravate or worsen his condition.

I would reverse.

J. FRED JONES, Justice. I do not agree with the majority opinion in this case. All the doctors who have examined the appellee agree that he has a rupturtd disc and is in need of surgical removal of the disc material for relief of pain, and is in need of spinal fusion for stability of the spinal column. None of the doctors say that appellee is able to do any kind of work in his present condition and the appellee says that he is not. The final medical estimates of functional disability leave little incentive for the appellee to accept the proposed surgery.

Dr. Christian reported, on May 5, 1966, as follows:

> "This patient has a herniated disc and I think quite likely a ruptured disc with nerve root compression on the right side. He has x-ray evidence of almost complete collapse of the lumbosacral disc of long duration. His current disc trouble may be at that same level but I would think more likely from the level above. In any event, he has had back and severe leg pain for a month and has not responded to conservative treatment.
>
> I have recommended to him that he be hospitalized and that a lumbar myelogram be carried out to confirm the diagnosis of the disc protrusion and to determine the level at which it has occurred and that this be followed by surgical excision of the disc. A man who does the type of work that he does, I should think, should have a fusion of the involved joint at the time of the disc excision and if the disc protrusion is at L-4, 5 the fusion should be extended to include the lumbosacral joint."

After the disc lesion was confirmed on myelogram and the appellee had refused the recommended and tendered

surgery, Dr. Christian, on May 18, 1966, reported as follows:

> "Since he refuses surgical treatment and this is what I think he should have I have no alternative except to release him from care. He is, as of this time, totally disabled. I would anticipate with successful disc excision and spine fusion to have reduced his disability to partial permanent disability of an estimated 15 to 20% of the body as a whole."

Dr. Robert Watson reported on July 8, 1966, as follows:

> "I have been furnished with a copy of Dr. Christian's letter of May 18, 1966, describing the myelographic studies as showing a likely ruptured intervertebral disc at the lumbosacral interspace on the right, and, to me, this man's present physical picture would certainly indicate such.
>
> This man, seemingly, has been seriously disabled for an interval now of four months' time, and I do not see much hope for any spontaneous recovery. In my opinion, this man should be operated upon.
>
> * * *
>
> ... I agree with Dr. Christian that should this man cooperate and have surgery, likely then his disability could be reduced to an estimated 15 to 20 per cent affecting the body as a whole."

On January 24, 1967, Dr. Watson reported as follows:

> "My last report to you regarding this man was dated July 8, 1966. In that report, I stated to you that, based on my neurological examination and the

report of Dr. Christian's myelographic studies, this man did have a ruptured lumbar disc and should be operated upon. Also, in my report to you at that time, I stated this man was very firmly opposed to the thought of surgery.

I have since seen and examined this man at your request in our office on January 23, 1967. Now this man enters the office on crutches. He tells me his condition is not appreciably changed over that when I saw and examined him last summer. Again, when I discussed surgery with him, he firmly refused it.

* * *

If one based an estimate of disability strictly upon this patient's own statement and upon the actions strictly under his own emotional control, one would then say this man was, at this time, totally disabled. However, if one bases evidences of disability on bona fide findings that can be substantiated by neurological examination, the estimate of disability is much less, and more in the field of 15 per cent affecting the body as a whole. Actually, I feel that much of this man's so-called 'disability' is under his own emotional control.

This man refuses surgery, and with his emotional makeup, one can speculate as to what sort of subjective benefit he might obtain following surgery. I feel it would be perfectly fair to the man to estimate his present permanent residual disability as being 15 per cent affecting the body as a whole, and set this present time as the interval for maximum healing. By doing so, we will give him almost a full year's interval for healing."

There is no question, according to the record in this case, that the appellee has a herniated or a ruptured

disc, and there is no question that he needs surgery. The medical reports, however, are somewhat confusing. Dr. Watson first agreed with Dr. Christian, that appellee's total disability could be reduced to 15 or 20% by surgery, and Dr. Watson did not see much hope for any spontaneous recovery. After appellee finally and unequivocally refused to have surgery, Dr. Watson found that much of the "so-called disability" was under the appellee's emotional control and he estimated appellee's true permanent partial disability to be 15% affecting the body as a whole.

The appellee had a perfect right to refuse the proposed surgery, but with the risk of statutory penalty to be assessed by the Commission if he unreasonably did so. Under Ark. Stat. Ann. § 81-1311 (Repl. 1960) pertaining to medical and hospital services and supplies, is found the following:

> "... [W]here an injured person unreasonably refuses to submit to a surgical operation which has been advised by at least two [2] qualified physicians and where such recommended operation does not reasonably involve risk of life or additional serious physical impairment the Commission may, in fixing the amount of compensation, take into consideration such refusal to submit to the advised operation."

In my opinion there is substantial evidence that the appellee was totally disabled for employment when he was last seen by Dr. Watson. He was on crutches, said he was about the same as when last seen and this would confirm Dr. Watson's previous opinion that he saw little hope for any spontaneous recovery. No witness has indicated that the appellee is not totally disabled from performing gainful employment in his present condition without surgery. It has almost become a matter of common knowledge that a truly ruptured disc does not heal spontaneously and that a person who has suffered

one is more likely to wind up in a wheel chair without surgery than he is if he has surgery. In such a situation, when does such disability become permanent?

Arkansas Statutes Annotated § 81-1313 (Repl. 1960) provides as follows:

> "The money allowance payable to an injured employee for disability shall be as follows:
>
> (a) Total Disability: In case of *total disability* there shall be paid to the injured employee during the continuance of such total disability sixty-five per centum [65%] of his average weekly wages. Loss of both hands, or both arms, or both legs, or both eyes, or of any two [2] thereof shall, in the absence of clear and convincing proof to the contrary, constitute permanent total disability. *In all other cases, permanent total disability shall be determined in accordance with the facts.*
>
> (b) Temporary partial disability: *In case of temporary partial disability resulting in the decrease of the injured employee's average weekly wage, there shall be paid to the employee sixty-five per centum* [65%] *of the difference between the employee's average weekly wage prior to the accident and his wage earning capacity after the injury.*
>
> (c) Scheduled permanent injuries: 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;
>
> * * *

(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.)

I only differ with the Commission and the majority opinion as to the extent and permanency of appellee's disability in this case. There is substantial evidence that appellee is totally disabled for gainful employment at the present time, but there is no evidence that this disability will be permanent. While appellee's refusal to have surgery may have been unreasonable at the time he first refused, it would appear to be more reasonable now if he does only have 15% permanent partial disability in his present condition without surgery and can, at best, anticipate a 15 to 20% permanent partial disability following surgery. I am convinced that much of the difficulty arising from the use of medical reports in evidence in compensation cases lies in a difference in terminology employed.

The statute distinguishes between *injury* and *disability*. Injury may result only in compensable permanent loss of use of the body or any scheduled part thereof,* or injury may result in permanent total disability or temporary partial disability *in addition to,* and *including*, permanent loss of use of the body or a scheduled member. *Glass* v. *Edens,* 233 Ark. 786, 346 S.W. 2d 685; *Wilson & Company, Inc.* v. *Christman*, 244 Ark.

*(Sometimes referred to as "functional loss," "functional disability," "clinical loss" or "clinical disability.")

132, 424 S.W. 2d 863; *Ray* v. *Shelnutt Nursing Home,* 246 Ark. 575, 439 S.W. 2d 41, (opinion delivered April 7, 1969).

I have concluded that some confusion in the cases has been brought about by the medical examiner, the Workmen's Compensation Commission and by this court deviating from the statutory terminology in distinguishing between permanent disability and permanent injury. In my opinion, so-called "*functional* disability" is not disability at all within the meaning of the statute, but is "partial loss or loss of use" within the scheduled injury section of the statute.

The statute itself is somewhat ambiguous and confusing. The statute is clear on total disability, permanent total disability and temporary partial disability. It is also clear on twenty separately numbered scheduled permanent injuries. The statute then provides in separate numbered paragraphs (21) and (22) for "total loss of use" and for "partial loss or partial loss of use" of the members of the body designated under the twenty scheduled injuries. In recognition of injuries to parts of the body not scheduled, the statute relates those injuries to the body as a whole under a separate subsection designated "other cases" and provides that "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."

It is noted that *disability* is not what is scheduled under subsection (c). Permanent injuries, including partial loss or loss of use, are what is scheduled under subsection (c). So the phrase, "permanent partial disability," as it relates to the body as a whole under the scheduled injury section of the statute, could only mean permanent injury to the body as a whole resulting, not in total or partial loss by amputation as in the case of an arm or leg, but resulting in a permanent partial *loss of use of the body* as a whole, the same as *loss of use*

of an unamputated leg or arm. The phrase "permanent partial disability" was not inadvertently used in this section. It simply means that permanent injury resulting in a *loss of use* as it relates to the body as a whole, as well as *permanent partial disability* as it relates to the body as a whole, are both compensable and are both covered by this same section. That was the effect of our holdings in the *Edens* case and the *Christman* case, supra.

Now returning to the case at bar, the highest estimate of permanent disability is 20% to the body as a whole on a functional, or loss of use basis, and there is substantial evidence that would sustain an award in that amount. There is no evidence at all as to appellee's future earning capacity, and therefore, no evidence as to the extent of his actual *permanent disability.* If the appellee's condition becomes worse, he should have the benefit of surgery if and when he should desire surgery at any time within the statutory period of limitations. If the appellee should decide to have surgery and his *disability* is greatly reduced thereby, both the appellee and the appellant should be afforded the benefit of such procedure.

Appellee's disability may or may not become partial, and it may or may not become permanent. There is substantial evidence that would support an award of 20% and certainly an award of 15% based on the loss of use of the body as a whole, but I find no evidence that would sustain an award of *permanent disability* at all or of *temporary disability* less than total.

If the Commission was convinced that the appellee was unreasonable in refusing the operation, it is my opinion that it had a perfect right, in the exercise of its discretion, to award the appellee a 60% permanent disability if, and only if, there has been any substantial evidence that the appellee had a permanent disability greater than 60%. In my opinion the Commission

would have the right, in the exercise of its discretion, to order a reduction in *weekly benefits* for an unreasonable refusal to have surgery. If the Commission did award the 60% in this case on the basis of appellee's refusal of surgery, it is my opinion that the appellee was rewarded for refusing the surgery, rather than being penalized as the statute intended, for I find no evidence in the record that appellee's disability, other than the 20% in the loss of use of body function, is permanent.

I would reverse and remand to the Commission for an award of weekly compensation for temporary total disability, subject to change if it becomes partial, and subject also to the Commission's right to the exercise of its proper discretion as to the unreasonableness of appellee's refusal to have corrective surgery.

JIMMY HARVEY ET AL v. WORTHEN BANK & TRUST CO.

5-4951 440 S.W. 2d 547

Opinion Delivered May 12, 1969
[Rehearing denied June 9, 1969.]

Howell, Price & Worsham for appellants.

Wright, Lindsey & Jennings for appellee.

George Rose Smith, Justice. More than a year after the three appellants bought a Dodge car from an automobile dealer the vehicle was heavily damaged in a collision. The purchasers then learned that the collision insurance upon the car, which had been cancelled by the insurance company several months earlier, had not been replaced. Upon being sued for the balance due on the conditional sales contract the purchasers filed a cross complaint against the appellee, Worthen Bank & Trust Company, asserting that the bank, which had financed the sale, had been at fault in failing to obtain a substitute policy of collision insurance when the first one was cancelled. This appeal is from a judgment sustaining a demurrer to the cross complaint and dismissing it.

The essential facts are simple. The appellants bought the car from Bevis Dodge on April 12, 1966, executing a conditional sales contract for a deferred balance of $3,600.36, payable in 36 monthly installments. That balance included a charge of $323.00 for insurance on the car. The contract also contained this paragraph relating to insurance:

> Any sums spent by seller for insurance or taxes on the purchased property . . . will be repayable by buyer (with interest on each expenditure from the date thereof at 6% per annum); which reimbursable items will be added to and constitute a part of the Deferred Balance. If requested by seller, buyer will carry insurance upon said property for the full insurance value thereof the policy or policies (showing loss payable to seller as its interest may appear)

> to be delivered to and held by seller; and seller may apply any insurance proceeds upon the amount then owing hereunder in inverse order of maturity.

The contract, which was on the bank's printed form, was assigned to the bank by Bevis Dodge, with recourse. On December 2, 1966, the collision insurer cancelled its policy for an undisclosed reason and sent the unearned premium of $238.60 to the bank. The bank simply held the money, making no attempt either to obtain substitute insurance or to pay the money to the purchasers. The car was damaged in a collision on May 19, 1967. On July 26, 1967, the bank applied the refunded premium to the principal debt and reassigned the contract to Bevis Dodge, who sold the car for salvage and brought this action for the unpaid balance of $1,670.44. The purchasers admitted, for the purposes of the demurrer to their cross complaint, that they knew of the cancellation of the policy and made no demand upon the bank to refund the premium or to purchase new insurance.

Counsel for the bank, citing *Providence Wash. Ins. Co.* v. *Ark. Farm Bureau Finance Co.*, 221 Ark. 327, 253 S.W. 2d 226 (1952), insist that although the bank had the right to obtain insurance on the car it was under no duty to do so. Hence it is argued that the purchasers' cross complaint did not state a cause of action.

That argument is not sound when, as here, the buyer's obligation includes the full amount of the insurance premium for the entire term of the contract. The point was decided in *Dahlhjelm Garages* v. *Mercantile Title Ins. Co.*, 149 Wash. 184, 270 P. 434 (1928), in this language:

> The second objection is that the contract does not impose a mandatory duty to keep the automobile insured against injury by collision upon the appellant or its assignors. This objection has its foundation in the language used in the quoted part

> of the contract. It will be noticed that the language is that the seller may keep the automobile insured, not that it must do so. But it will be remembered that the seller exacted and was paid, in addition to the purchase price of the automobile, a stated sum for the very purpose of keeping it insured. If its obligation would have been otherwise optional, it became absolute when it made this exaction.

To substantially the same effect see *Minor* v. *Universal C.I.T. Credit Corp.*, 27 Ill. App. 2d 330, 170 N.E. 2d 5 (1960); *Livette* v. *Menard*, La. App., 20 So. 2d 382 (1945); and *Smith* v. *Hellman Motor Corp.*, 122 Misc. Rep. 422, 204 N.Y.S. 229 (1924).

The case comes to us on demurrer, with all inferences to be resolved in favor of the cross complainants. We are unwilling to say that under the affirmative allegations of the purchasers there is no issue of fact with respect to the bank's duty to obtain new insurance coverage or to afford the purchasers the opportunity of doing so.

Reversed and remanded with instructions to overrule the demurrer.

BYRD, J., dissents.

CONLEY BYRD, Justice. In disagreeing with the majority I wish to point out that I do not disagree with the authorities upon which they rely but with the majority's application of those authorities to a situation in which there is a cancellation of an insurance policy.

In *Dahlhjelm Garages* v. *Mercantile Insurance Co.*, 149 Wash. 184 (1928), the seller insisted upon placing the insurance with the finance company's related companies. The insured then pointed out that he wished coverage for the "for hire" use of the automobile and

that such coverage was not readily available in most companies. However the seller with this knowledge exacted the premium and did obtain coverage (apparently for a one year term) as requested by the insured. When time came, the finance company to whom the contract had been assigned purchased insurance which excluded "for hire" coverage. Under those circumstances I will agree that the seller or lender who had collected the premium and undertook to place the insurance but did so negligently should be held to the same liability that exists in the case of an insurance agent or broker. This was the effect of the Washington decision and also the Illinois decision in *Minor* v. *Universal C.I.T. Credit Corp.*, 27 Ill. App. 2d 330 (1960).

The foregoing situation, however, differs greatly from the situation in which a cancellation occurs. Here it is admitted that the appellants knew of the policy cancellation and that they made no demand upon the bank to refund the premium or to purchase new insurance. The authorities generally hold that an insurance agent or broker would not be liable in the circumstances in which the bank here finds itself; see 43 Am. Jur. 2d *Insurance* § 177 and 29 A.L.R. 2d 171, 201, § 27.

The reason for not holding an insurance agent or broker liable for not procuring other insurance upon a cancellation is obvious. Cancellations come about because of an increased risk which the insurer is unwilling to carry. Such cancellations ordinarily occur as the result of the insured's own conduct. It is common knowledge that when a cancellation occurs new insurance can only be obtained at a greatly increased premium rate. In recognition of this, our legislature has provided for assigned risk plans, see Ark. Stat. Ann. § 75-1486 (Repl. 1957). Therefore the majority opinion, by holding the lender, Worthen Bank & Trust Co., liable for failure to acquire additional insurance upon the cancellation of Harvey's policy, is placing a burden upon Worthen that it did not obligate itself to undertake and holding it to a

duty greater than it would hold an insurance agent or broker under the same or similar circumstances.

As I view the record here Worthen or its assignor complied with its obligation of procuring the insurance but the policy was cancelled without any fault of Worthen. In all of the cases relied upon by the majority the lender only partially complied with its obligation by acquiring coverage for a portion of the term and liability resulted from the failure to renew or the lender's negligence in doing so. That is not the situation here.

Therefore I respectfully dissent.

BILLY GROSS v. STATE OF ARKANSAS

5-5408 440 S.W. 2d 543

Opinion Delivered May 12, 1969
[Rehearing denied June 9, 1969.]

Clark, Clark & Clark for appellant.

Joe Purcell, Atty. Gen., *Don Langston,* Asst. Atty. Gen.; *Jerry D. Pinson,* Asst. Atty. Gen. for appellee.

LYLE BROWN, Justice. This is an appeal by Billy Gross from a conviction of second degree murder and a sentence of twenty-one years, which punishment was imposed as the result of a second trial which began on October 7, 1968. The principal attack upon the verdict is based upon the admission of evidence which showed that Gross remained silent in the face of a statement accusatory in nature made in his presence by an alleged accomplice. Other points for reversal are based upon the admission into evidence of certain photographs, testimony given at the first trial by a doctor who was absent from the State at the time of the second trial, and the reception in evidence of various items showing the presence of blood.

The State produced eyewitness evidence of an orgy of drinking, fighting, and sexual acts which occurred at the home of Frank A. Birch in the Hattieville commun-

ity, Conway County, on the night of Saturday, September 28, 1963, and which culminated in Birch's death. Birch was better known as Dutch Chartan. As did the witnesses, we will refer to him as Dutch.

According to the State's evidence, two couples assembled in North Little Rock early that Saturday night. They were Billy Gross, Dollie Jean Roberts, Benjamin Winegart, and Beverly Wilkerson. After procuring some whiskey and wine the two couples motored to Hattieville, some sixty miles distant. They first visited briefly at the home of Billy's mother. From there they drove to the home of Dutch Chartan, with whom Billy and Dollie Jean were well acquainted. The party first engaged in licentious dissipation with all five participating. The festivities culminated in a fight. Billy is said to have called Dutch vile names and accused Dutch of "snitching" on him. Dollie Jean testified that Billy announced his intention to kill Dutch; that Billy struck Dutch with a stick of wood, cut on Dutch's throat with a pocket knife, and then procured a saw and "started sawing his throat." She testified that the blows from the stick felled Dutch near a stove and that he remained there. The two couples were said to have left the premises shortly before dawn Sunday morning; they went back to the home of Billy's mother and slept until midafternoon. Upon arising they returned to Dutch's house, assertedly to procure more liquor. Gross and Winegart entered the house and stayed for some time. When they returned to the car the two couples drove back to North Little Rock. On the return trip Gross allegedly told the women to get together on a story that they had not been with Gross and Winegart and that Gross stated further the men would probably be out of the State by night.

Sheriff Marlin Hawkins, in response to a call, went with other officers to the home of Dutch Chartan that Sunday night about eleven o'clock. In the disheveled house they found Dutch's body. One or two sticks of

wood and a coke bottle and a saw were observed to be stained with a red substance which appeared to be blood. There was also a towel and a pan of water, both of which contained a reddish substance.

An all-points bulletin was circulated on Gross and Winegart and they were shortly apprehended in Lubbock, Texas. Sheriff Hawkins returned them to Morrilton, the county seat. Other facts pertinent to the appeal will be related as the points for reversal are discussed. We will not burden the opinion with much of the voluminous evidence introduced because the sufficiency of the evidence to sustain a conviction is not in question.

The first two points for reversal are concerned with what is commonly called the "tacit admission rule." Sheriff Hawkins testified that on the return trip from Lubbock, Benjamin Winegart started talking about the incident. The sheriff said he thereupon advised both Winegart and Gross that they were not being asked to discuss the charges, that any statements by them could be used at the trial, and that they were entitled to consult an attorney before making any statements. Winegart is said to have stated that they did not know they had killed Dutch until the officers arrested them in Lubbock.

Another conversation allegedly occurred at the jail in Morrilton some few days after Winegart and Gross were incarcerated. At that time they were together in a cell "no larger than a jury box." Sheriff Hawkins had learned that on their flight from North Little Rock to Lubbock, the men came through Morrilton, which was not on a direct route between the first named cities. Hawkins said he told Winegart and Gross at the jail that he was curious to know why they went out of their way to come by Morrilton. He testified that Winegart answered by saying that Gross intended to proceed to Hattieville, a short distance north of Morrilton, to the home of Dutch Chartan, and burn the building—"the

building in which Chartan's body was at." Winegart said he dissuaded Gross from that plan while they were eating a sandwich at Morrilton, and they proceeded to drive to Lubbock. Sheriff Hawkins testified that Gross could not help hearing the damaging statements made by Winegart and that Gross made no response.

The fact that Gross remained silent in the face of Winegart's statements was admissible in his first trial in 1964. *Moore* v. *State,* 229 Ark. 335, 315 S.W. 2d 907 (1958); *Martin* v. *State,* 177 Ark. 379, 6 S.W. 2d 293 (1928). The 1964 conviction, which carried a life sentence, was set aside by the federal court on a finding that Gross had been denied his constitutional rights with respect to having an appeal perfected. *Gross* v. *Bishop,* 273 F. Supp. 992 (1967). It was there held that the denial of due process could not be corrected except by new trial.

Prior to the second trial came the decisions in *Miranda* v. *Arizona,* 384 U.S. 436 (1966); and *Johnson* v. *State of New Jersey,* 384 U.S. 719 (1966). This rule affecting tacit admissions was stated in *Miranda*: "In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." Then followed the pronouncement in *Johnson* which said *Miranda* should apply only to cases commenced after *Miranda* was announced; and it was also stated that the *Miranda* guidelines "are therefore available only to persons whose trials had not begun as of June 13, 1966."

This brings us to the vital question in this case, namely, whether *Miranda* applies to the 1968 retrial. The question is treated exhaustively in *State* v. *Branch,* 161 S.E. 2d 492 (N.C. 1968). There it is emphasized that the whole tenor of *Miranda* is prospective in application,

not retroactive. *Branch* cited with approval the case of *Jenkins* v. *State,* 230 A. 2d 262 (Del. 1967). *Jenkins* summarizes the view of that court in these words:

> It is our opinion that *Miranda* should not apply at retrial, notwithstanding the fact that it will be held after the June 13, 1966 effective date of *Miranda.* We think it neither logical nor reasonable that the retrial should be conducted under rules different from those prevailing when the cases were tried the first time. In *Johnson* v. *State of New Jersey,* 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966), the United States Supreme Court stated: "We hold further that *Miranda* applies only to cases in which the trial began after the date of our decision [June 13, 1966] * * *." Although *de novo,* a new trial is not a new case; it is a continuation of the original case until the judgment is final. In our opinion, *Johnson* refers to "cases" the original trial of which commenced after June 13, 1966. Neither *Miranda* nor *Johnson,* in our view, requires the courts of this State to make applicable upon retrial the *Miranda* rules which were not applicable at the original trial.

In aligning with the view expressed in *Jenkins* we are not unmindful of the provisions of our Criminal Code which provide that a subsequent trial shall be de novo. Ark. Stat. Ann. § 43-2205 (Repl. 1964). New York has the identical provision. Its appellate court recently held that upon retrial after *Miranda,* the confessions used in the first trial before *Miranda,* and which were inadmissible under *Miranda,* were nevertheless admissible on retrial. In disposing of the argument that the de novo provisions of the New York Code prohibited the use of the confessions on retrial, the court said that "the crucial factors in determining whether *Johnson* v. *State of New Jersey* applies here are considerations of policy and not labels. These sections are, therefore, totally irrelevant to the decision which we must make." *People* v. *Sayers,* 293 N.Y.S. 2d 769 (1968).

State appellate courts are not unanimous as to whether *Miranda* applies to retrial of a case originally tried on the merits before June 13, 1966. Numerically it can be approximated with reasonable certainty that a small majority of those courts passing on the question hold that *Miranda* does not so apply. Other than the three state jurisdictions heretofore cited, these cases from other state appellate courts are in agreement with the cited cases: *Chapman* v. *State,* 162 N.W. 2d 698 (Minn. 1968); *Sims* v. *State,* 156 S.E. 2d 65 (Ga. 1967); *People* v. *Worley,* 227 N.E. 2d 746 (Ill. 1967); *State* v. *Vigliano,* 232 A. 2d 129 (N.J. 1967); *Burnley* v. *Commonwealth,* 158 S.E. 2d 108 (Va. 1967); *Hall* v. *Warden,* 434 P. 2d 425 (Nev. 1967); *Boone* v. *State,* 237 A. 2d 787 (Md. 1968); and *Murphy* v. *State,* 426 S.W. 2d 509 (Tenn. 1968).

It is insisted that the court erred in admitting four photographs in evidence. The State offered ten pictures depicting the room in which Dutch Chartan met his death. The court admitted only four of the photographs. We are unable to say that the court abused its discretion. The four views of the room and the body could well have supported two theories of the State. The alleged instruments of attack were revealed by the pictures. Secondly, the State claimed that Gross and his companion returned to the scene, positioned Dutch's body and endeavored to clean his face of blood. The manner in which the body is depicted could be said to support the latter theory. The admission, relevancy, and materiality of the photographs are largely within the discretion of the trial judge. If they are accurately taken, show a correct representation of the subject matter, and can be said to be of aid to the jury, they are usually admissible. *Higdon* v. *State,* 213 Ark. 881, 213 S.W. 2d 621 (1948). The point is without merit.

Another point concerns the reading by the State of the testimony given by Dr. Roy Hoke in the 1964 trial. He was the pathologist who performed the autopsy on the deceased. In offering that testimony the State met

the requirements of Ark. Stat. Ann. § 28-713 (Repl. 1962). Appellant's only contention is that his court-appointed attorney did not have time to prepare for the examination of this medical witness at the first trial. We find no evidence in the record to sustain that contention.

The trial court permitted Sheriff Hawkins to testify that certain sticks of wood, a coke bottle, a pan of water, and a towel, contained a reddish substance similar to blood. The court also permitted the introduction of all of these items except the pan of water, which was not available. The final point on appeal questions the propriety of the fore-going evidence. We think the intention is clearly without merit. The State produced other evidence that a terrific fight had taken place. There was direct testimony that sticks of wood were used in the affray. There was no direct testimony that the bottle was utilized, nor was there direct evidence that it was not used. An analysis of the items enumerated revealed the reddish coloration to be human blood. There was direct testimony that deceased was struck with sticks of wood. There was also evidence that blood had been cleaned off the victim's face between the time of the beating and the moment the officers found him. It is true that the blood to which Sheriff Hawkins testified, or at least some of it, could have come from other participants in the affray. On the other hand, the fact that the deceased's body showed evidence of being beaten and cut, and possibly by the instruments introduced, would justify the jury in believing that some of the blood probably came from the body of the deceased. Considering the fact that the instruments introduced, together with their condition, would tend to support the State's theory that Dutch was severely beaten, we cannot say the trial court abused its discretion. See *Glover* v. *State*, 194 Ark. 66, 105 S.W. 2d 82 (1937).

Affirmed.

BYRD, J., not participating.

5-4911 440 S.W. 2d 227

Opinion Delivered May 12, 1969

Williams & Gardner for appellant.

Laws & Schulze and *Don Stumbaugh* for appellees.

LYLE BROWN, Justice. Williams-Berryman Insurance Company, Inc., appeals from a summary judgment awarded appellees, Carl Morphis and wife, and First Federal Savings & Loan Association of Russellville. The trial court found (1) that requests for admissions served on Williams-Berryman were answered out of time and should be treated as admitted; and (2) that there remained no genuine issue as to any material fact. Appellant asserts error as to both findings.

The Morphis house burned in February 1966. First Federal held a mortgage on the property. Originally the house was insured with Peoples Indemnity Insurance Company of Arkansas. That insurance was obtained through Williams-Berryman, a Russellville insurance agency. In 1965, Peoples Indemnity was declared insolvent and the policy was transferred to Homestead Fire and Casualty Insurance Company of Pine Bluff, Arkansas. A claim was filed with Homestead immediately after the fire but Homestead went into receivership some two and one-half months after the filing of the claim and before collection was effected. The home owners and their mortgagee instituted suit against Williams-Berryman. That agency was charged with negligence in failing to place the original policy with a financially sound company, in failing to see that the policy was reissued with a company capable of paying claims, and in failing to process the claim before the insolvency of Homestead Fire.

Plaintiffs served requests for admissions and asked that they be answered within ten days. Answers thereto were filed some seventeen days later. Thereafter and because of the late filing the trial court treated the

assertions as admitted; whereupon the motion for summary judgment was granted.

Williams-Berryman asserts two points as grounds for reversal. The first point actually has three prongs and for clarity we will discuss them separately.

I (a). *It was not the legislative intent that the statutory ten-day period be followed strictly.* Certainly we can agree that there is no legislative mandate to the effect that there can be absolutely no exception to the requirement. For example, when the answering party is acting in good faith and but for unavoidable casualty would have timely answered, the tardy litigant might well be excused. See Moore's Federal Practice § 36.05 [4]. But appellant's dilemma arises from the fact that the record is silent as to the reason for the delay in filing. To avoid an unintended omission due to delay the defaulting party certainly should come forward with an acceptable explanation for the delay. The appellee failed to timely answer requests for admissions in *Federal Factors* v. *Wellbanke,* 241 Ark. 44, 406 S.W. 2d 712 (1966). This court there pointed out that on retrial appellee should insert in the record his defense for late filing; otherwise, the requests would necessarily be considered admitted.

I (b). *Appellees had already received, by way of answers and objections to interrogatories, appellant's responses to a number of the requests for admissions.* The Morphises and Federal Savings filed with their complaint a set of interrogatories. The answer to one of those interrogatories covered the same subject matter as one of the subsequent requests for admissions. The last four interrogatories concerned the ratings of the two fire insurance companies by Best's Insurance Guide. Williams-Berryman refused, on grounds of immateriality, to answer those questions. The same subject matter was covered in the requests for admissions. Williams-Berryman here contends that appellees should

be required to refer to the responses to those interrogatories and thereby ascertain Williams-Berryman's answers to the corresponding requests for admissions. That requirement would relieve Williams-Berryman of admitting the truth of five of the requests for admissions.

As a general rule a party may proceed by interrogatories and by request for admissions without being required to elect. 2A Barron & Holtzoff, Federal Practice & Procedure, § 772 (1961). The same authority points out, in the same section, that although the various discovery procedures are complementary, the use of more than one procedure may become an instrument of oppression. That situation was recognized by our court in *Widmer* v. *Ft. Smith Vehicle & Machinery Corp.*, 244 Ark. 626, 427 S.W. 2d 186 (1968). We held that the trial court had the inherent power to bridle oppressive discovery methods.

The precise question before us is a narrower one. The defendant responded to a set of interrogatories, fifteen in number, filed contemporaneously with the complaint in October 1966. In January 1968 the defendant was served with requests for admissions, twenty-nine in number. Five of those requests can be said to have been covered, either by answer or objections, in the answers to the interrogatories. In those circumstances was the defendant excused from answering those five requests for admissions? There is no contention that the subject matter was repeated as a dilatory or oppressive measure, nor did the defendant seek by court order to have the requests stricken; see Barron & Holtzoff, supra. Under the circumstances we hold that the defendant was obliged to respond to all the requested admissions.

Fundamentally, interrogatories and requests for admissions are designed for different purposes. Interrogatories are designed to elicit information, some of which might be inadmissible at trial but may lead to the discov-

ery of admissible evidence. Admissible portions of interrogatories may be read as evidence but they do not necessarily eliminate from the issues the facts covered. To the contrary, answers to admissions make it unnecessary to submit proof on issues settled by the answers and confine the trial to "vital and disputed issues." *People* v. *The Jules Fribourg,* 19 F.R.D. 432 (Calif. 1955). In *Electric Furnace Co.* v. *Fire Ass'n. of Philadelphia,* 9 F.R.D. 741 (Ohio 1949), it was pointed out that answers to interrogatories do not eliminate the requirement of proof of facts while admissions do relieve the parties of the cost of proving undisputed facts. It was there held that plaintiff was entitled to an admission notwithstanding the previous interrogatories supplied the information. We confine our holding to the facts and circumstances in the case at bar; the cited cases from other jurisdictions lend credence to our conclusion.

I (c). *The attorney's certificate of service of requests for admissions should have been supplemented by proof of time of delivery.* The certificate of service attached to the requests is not too revealing. Counsel for appellees there certified that "a copy of this document has been served on the defendant or his attorney by ordinary mail." The only date thereon is the date the certificate was executed. However, the fallacy in this point is that it is raised for the first time on appeal. When the matter came on for hearing on the motion for summary judgment, which motion included the prayer that the unanswered requests be treated as admitted, it was the duty of appellant to assert any challenges it considered meritorious. Also, it is noted that appellant does not contend the requests were not served some seventeen days before they were answered.

II. *Alternatively, if the failure to respond in time to the requests results in the requests being admitted, there is still remaining to be resolved a genuine issue as to one or more material facts.* The contention is correct. It must be remembered that the suit is based on negli-

gence. Certainly a number of the admissions could be interpreted by the trier of facts as casting doubt on the diligence of Williams-Berryman in handling the insurance account of appellees; however, when all doubts and inferences are resolved against the movants, we cannot say that only one conclusion can be reached. To uphold the summary judgment it would have to be said there is no possible defense to the charge of actionable negligence. That we cannot do.

As the record now stands the requests are treated as admitted but the summary judgment should be set aside.

Reversed and remanded.

ARKANSAS STATE HIGHWAY COMMISSION v. WILLIAM H. DUFF, ET AL

5-4881 440 S.W. 2d 563

Opinion Delivered May 12, 1969

[Rehearing denied June 2, 1969.]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Thomas B. Keys and *Billy Pease* for appellant.

Gordon, Gordon & Eddy for appellees.

JOHN A. FOGLEMAN, Justice. This appeal comes from a judgment awarding appellees $8,500 as just compensation for the taking of 19.54 acres out of a 59-acre tract of land. Two grounds for reversal are asserted. The first is an allegation of error in the denial of appellant's motion for a change of venue. The second is the contention that the verdict is not based on substantial evidence and that it is excessive. These points will be discussed in the order mentioned.

Before the date the case was set for trial, appellant filed a motion for a change of venue. The allegation that appellant could not obtain a fair and impartial trial in Conway County, Arkansas was based upon a list of 15 cases in which juries in that county had awarded compensation to owners of lands taken by appellant under the power of eminent domain in amounts substantially in excess of the amounts stated to be just compensation by witnesses called by appellant. The motion was verified on behalf of appellant by its attorney. No affidavit in support of the motion for change of venue was filed. In support of its motion, appellant offered only the record of the testimony of another one of its attorneys. This was presented when the case was called for trial. He stated that he had personal knowledge of some of the awards and had knowledge of the value testimony adduced by the parties on the issue of just compensation.

His investigation covered the period from June 19, 1967, through July 20, 1968. He investigated the transcripts and files prepared by attorneys for appellant who tried cases in that county during that period. His testimony simply confirmed the allegations of the motion for a change of venue enumerating the amounts of the jury awards and the amounts indicated as just compensation by expert witnesses for both parties in each case.

Our statute requires not only that a motion or petition for change of venue be verified, but, in addition, that it be supported by the affidavit of at least two credible persons that they believe the statements of the petition are true. Ark. Stat. Ann. § 27-701 (Repl. 1962). The motion may be resisted and the judge of the trial court may make an order for the change of venue if in his judgment it be necessary, for a fair and impartial trial. Ark. Stat. Ann. § 27-703 (Repl. 1962). Venue of a civil action shall not be changed unless the court or judge finds that the same is necessary to obtain a fair and impartial trial of the cause. Ark. Stat. Ann. § 27-704 (Repl. 1962). The granting or denial of a change of venue lies largely in the discretion of the trial judge. *Louisiana & Northwest Rd. Co.* v. *Smith,* 74 Ark. 172, 85 S.W. 242; *Desha* v. *Independence County Bridge Dist. No.* 1, 176 Ark. 253, 3 S.W. 2d 969. This court will not reverse the trial court's denial of a change of venue unless there has been an abuse of its discretion. *Van Camp* v. *State,* 125 Ark. 532, 189 S.W. 173; *Adams* v. *State,* 179 Ark. 1047, 20 S.W. 2d 130; *Meyer* v. *State,* 218 Ark. 440, 236 S.W. 2d 996: *Walker* v. *State,* 241 Ark. 300, 408 S.W. 2d 905. We cannot say that there has been an abuse of discretion on the part of the trial court when there has not been compliance with the statute governing change of venue. Even if we should agree with appellant that the testimony of its attorney was proper and sufficient to constitute a supporting affidavit as required by § 27-701, this would not be compliance. No matter how credible one affiant may be, a petition for change of venue supported by the affidavit of only one person is properly overruled for non-

compliance with a statute requiring the affidavit of two credible persons. *Clayton* v. *State,* 191 Ark. 1070, 89 S.W. 2d 732; *Davis* v. *State,* 170 Ark. 602, 280 S.W. 636; *Hopson* v. *State,* 121 Ark. 87, 180 S.W. 485. There is no error in the denial of a motion for a change of venue which is not in compliance with the governing statute. *Hale* v. *State,* 146 Ark. 579, 226 S.W. 527; *Crow* v. *State,* 190 Ark. 222, 79 S.W. 2d 75.

Appellant contends that the testimony of Mr. Charles Owens, an expert value witness called by appellees, did not constitute substantial evidence because he never did give the values of comparable sales used by him in arriving at his value testimony in dollars and cents, although he admitted that some of the sales upon which he based his valuations were of more valuable property than the property of appellees. Appellant admits that this witness qualified as an expert on real estate values in the area. He also showed his familiarity with the property in question. Under these circumstances he was not required to state the facts or reasons forming the basis for his opinion in order to render his opinion as to value admissible. *Arkansas State Highway Commission* v. *Johns,* 236 Ark. 585, 367 S.W. 2d 436; *Arkansas State Highway Commission* v. *Dixon,* 246 Ark. 756, 439 S.W. 2d 912. It was incumbent upon appellant to show that Owens had no reasonable basis for his opinion before it could be said that his testimony was not substantial. *Arkansas State Highway Commission* v. *Johns, supra; Arkansas State Highway Commission* v. *Dixon, supra.* Thus, the burden fell upon appellant to show that the dollar value of the sales upon which Owens relied lent no support to his opinions. Since appellant's attorneys did not inquire as to these values, they are in no position to contend that the witness's failure to give them rendered his testimony insubstantial.

Appellant also argues that Owens based his value testimony upon an incorrect premise, *i.e.,* the market value of five- and ten-acre plots sold from the subject

land. We think that the jury might properly have otherwise construed his testimony. Upon request of appellees' attorney to state some of the comparable sales considered in arriving at his values, Owens stated that there had been several along Highway 64 which had highway frontage and would be more valuable than the property in question and consequently sold for a higher price. He then stated that the bases of his values were these sales and the amounts for which the property could be resold in five- and ten-acre plots for homesites. No objection was made to this testimony, except the objection that the sales were not comparable, which was overruled. On cross-examination, Mr. Owens stated that he was aware that appellees' land was not subdivided or platted, but he considered the development of it would be in five- to ten-acre plots rather than for sale of the property as a whole in determining the value per acre. On redirect examination, these questions were asked and answers given:

"Q. In considering your value and placing your value, you understand it is what Mr. Duff could have sold that whole tract to one buyer or combine?

A. Yes.

Q. Before and after?

A. Yes, sir.

Q. Not what he could have sold it for in five or ten acre tracts, but all in one tract at one time?

A. That's right.

Q. You are talking about what the Duffs could have done with the water available?

A. Yes, sir.

Q. Which would make it desirable?

A. Yes, sir.

Upon recross-examination, Owens answered affirmatively to the following question:

> "Q. You described this property and the drain being through it, is it your testimony—It is my understanding you think there would be a market—would have been a market for this whole 59 acres before the taking that somebody would have been willing to pay $23,600.00 for this property you described?"

In determining whether a verdict is supported by substantial evidence, we must review the testimony in the light most favorable to the appellee and indulge all reasonable inferences in favor of the judgment. *Arkansas State Highway Commission* v. *Carder,* 228 Ark. 8, 305 S.W. 2d 330; *Arkansas State Highway Commission* v. *Sargent,* 241 Ark. 783, 410 S.W. 2d 381; *Arkansas State Highway Commission* v. *Maus,* 245 Ark. 357, 432 S.W. 2d 478. We cannot say that the testimony of Owens, viewed in that light, included values based only on the total of separate sales of lots from the property in question. There was no testimony as to the number of lots that could be sold from the property and Owens clearly stated, both on redirect and recross-examination, that his total values were market values for a sale of the entire tract. Furthermore, the opinion of an expert is not rendered without reasonable basis merely because he bases value figures partially on what lots are selling for in the area. *Arkansas State Highway Commission* v. *Sargent, supra.* We also said in the *Sargent* case that in considering testimony based on comparable sales, it must be remembered that no two tracts of real estate are identical and that reasonable latitude must be allowed in evaluating sales and adjusting and compensating for differences in similar lands. Here, as there, it would not be reasonable to suppose that one making a study of values of the tract would give no consideration whatever

to the sale of lots in the immediate vicinity of the tract of land being appraised.

While appellant admits that Mr. Joe Duff, one of the appellees, was competent to testify, it makes virtually the same arguments about the substantiality of his testimony. Appellant admits that this witness based his testimony as to just compensation on his general knowledge of land values in the area as well as on comparable sales. Mr. Duff did display his familiarity with the land, its relationship to roads and highways, its location with reference to the city limits of Plumerville and the streets of that city, the existing easements across the property, the availability of utilities to the property, the uses to which the property had previously been put, drainage conditions, and the location of houses bordering the property. It has been generally recognized by this court that the opinion testimony of the owner of property is competent and admissible on the question of value, regardless of his knowledge of property values. This is based upon the intimate acquaintance with the property arising from his relationship as owner. *Arkansas State Highway Commission* v. *Fowler,* 240 Ark. 595, 401 S.W. 2d 1; *Arkansas State Highway Commission* v. *Drennen*, 241 Ark. 94, 406 S.W. 2d 327; *Arkansas State Highway Commission* v. *Russell*, 240 Ark. 21, 398 S.W. 2d 201. This does not mean that the testimony of any and every condemnee constitutes substantial evidence. His testimony must be examined to determine whether a satisfactory explanation is given for the conclusion reached. *Arkansas State Highway Commission* v. *Darr,* 246 Ark. 204, 437 S.W. 2d 463. In that case, the owner did not reside upon the land, had no knowledge of market values, and testified about the "worth" of the land, relying principally upon sentimental bases and the desires of her deceased husband. In this case, Duff had lived in Plumerville for most of his life until about two years before the trial when he moved to Morrilton, a few miles away in the same county. The city limits of Plumerville bounded the Duff property on two sides. In view

of the demonstrated familiarity of this landowner with the property, we cannot say that his testimony is not substantial. See *Arkansas State Highway Commission* v. *Maus,* supra.

The judgment is affirmed.

BYRD, J., concurs.

ROBERT TORRANS, D/B/A COMMERCIAL STORAGE & DIST. CO. v. ARKANSAS COMMERCE COMMISSION, ET AL

5-4870 440 S.W. 2d 558

Opinion Delivered May 12, 1969

Arnold & Arnold for appellant.

Louis Tarlowski for appellees.

J. FRED JONES, Justice. This appeal is from a judgment of the Pulaski County Circuit Court affirming an order of the Arkansas Commerce Commission in denying an application by Robert Torrans, doing business as Commercial Storage & Distribution Co., for authority to transport household and other goods and equipment intrastate. Torrans' main place of business is located in Texarkana, Arkansas, and he had a Texas permit authorizing intrastate operation in that state. He already had Arkansas authorization to transport household goods within Miller County and to and from the city of Texarkana, Arkansas. The intrastate authority was sought under the provisions of Ark. Stat. Ann. § 73-1762 (Repl. 1957) which provides:

> "... [A] certificate shall be issued ... if it [is] found that the applicant is fit, willing and able properly to perform the service proposed ... and that the ... service ... is or will be required by present or future public convenience and necessity; otherwise the application shall be denied; and the burden of proof shall be upon the applicant ..."

Several certificated common carriers of the type goods included in appellant's application filed protests asserting that the proposed service is not required by the present or future public convenience and necessity, and a full hearing was had before the Commerce Commission resulting in the denial of the petition.

Upon appeal from the judgment of the circuit court affirming the order of the Commission, the appellant relies on the following points for reversal:

"Circuit Court erred in not trying the case de novo, according to Sec. 73-133, Ark. Stats., *Mo. Pac. T. Co.* v. *Inter City T. Co.,* 216 Ark. 95, 224 S.W. 2d 372, and in not deciding whether the determinations of the Commission were contrary to the weight of the evidence, but found that the order of the Commission is supported by substantial evidence, p. 12 of R. Vol. 2, and solely on this basis erroneously affirmed all the findings of the commission.

The trial court erred in sustaining the Arkansas Commerce Commission's denial of the authority of Torrans for household goods applied for.

The trial court erred in sustaining the Arkansas Commerce Commission's denial of authority to transport additional commodities.

The trial court erred in sustaining the Arkansas Commerce Commission's denial of extension of authority from Miller County to include additional commodities in Southwest Arkansas.

The trial court erred in sustaining the Arkansas Commerce Commission's denial of Torrans' application in its entirety.

The trial court erred in sustaining the Commission's finding that 'the present certified carriers have equipment which stands idle a good part of the time because of lack of business.' *Fisher* v. *Branscum,* 243 Ark. 516.

The trial court erred in sustaining the Arkansas Commerce Commission's finding that 'there appears nothing in the record to show that sufficient business is generated in such adjacent counties to justify additional certified carriers.' "

Under the appellant's first point, he argues that the circuit court erred in applying the "substantial evidence" rule rather than the "weight of the evidence" rule in reaching its decision. The trial court's judgment does recite that the order of the Commission "is supported by substantial evidence, and should be, and the same hereby is affirmed." Arkansas Statutes Annotated § 73-133 (Repl. 1957) sets out the procedure to be followed by the circuit court in reviewing an order of the Commerce Commission. This statute, insofar as it is applicable here, is as follows:

> "Within thirty days after the entry on the record of the [Arkansas Commerce Commission] ... of any order made by it, any party aggrieved may file a written motion ... praying for appeal from such order to the circuit court ...
>
> The said circuit court shall thereupon review said order upon the record presented ... and enter its findings and order thereon ..."

Appeals to this court from circuit court judgments affirming or reversing orders of the Commerce Commission are governed by Ark. Stat. Ann. § 73-134 (Repl. 1957), as follows:

> "... [T]he appeal to the Supreme Court shall be governed by the procedure, and reviewed in the manner applicable to other appeals from such circuit court, except that any finding of fact by the circuit court shall not be binding on the Supreme Court, but the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable."

In the case of *Wisinger* v. *Stewart,* 215 Ark. 827, 223 S.W. 2d 604, this court said:

> "A point not to be lost sight of here is that *de novo* review by the courts, including this Court,

> must not proceed as though the Public Service Commission did not exist and had never held a hearing. A hearing has been held, and the Commission which held the hearing has had the advantage of seeing and hearing the parties and witnesses face to face, whereas the Circuit Court and this Court review the evidence from the record only. 'Where a matter is heard and decided by an administrative body such as the Public Service Commission, an order made by it should be upheld by the court on appeal unless it is against the weight of the evidence.' *Camden Transit Co.* v. *Owen,* 209 Ark. 861, 192 S.W. 2d 757, 758."

Apparently the trial court did err in applying the substantial evidence rule in the case at bar, but such error is not prejudicial to the appellant since we also review the record *de novo* on appeal from the circuit court and must affirm the order of the Commission if the order is not against the preponderance of the evidence. In *Mo. Pac. T. Co.* v. *Inter City T. Co.,* 216 Ark. 95, 224 S.W. 2d 372, we said:

> "... [T]he *de novo* review prescribed by the governing statute, Ark. Stats. (1947) §§ 73-133 and 73-134, is similar to that employed by this Court in Chancery appeals. Accordingly it was concluded that 'This Court's proper task, in the light of this state of the law, is to inquire whether the determination of the Commission was contrary to the weight of the evidence.' "

The testimony presented by appellant in support of his application is summarized briefly as follows: Appellant, Robert Torrans, testified that there is an obvious need for movers in southwest Arkansas based upon moves that he has been unable to handle.

Mr. O. L. Werst, an employee of the appellant, testified that he lived at Hatton in Polk County, Arkansas;

that he owns a tractor of his own and did use a rented trailer belonging to Mayflower Transit Co. prior to his transfer over to working for the appellant in 1960. He testified that if the appellant was awarded the intrastate permit, that he, Mr. Werst, would be in a position to service the area in and around Hatton. He testified that he received telephone calls quite frequently from residents in the community, but that he does not remember specifically who any of the individuals were or the time at which the calls were made. He did recall a Mr. C. H. Johnson, who lived at Cove, Arkansas, and that he moved him from Cove to Mena, and that since that time, within the last year, he had moved the same man interstate from Mena to Ardmore, Oklahoma. On cross-examination this witness testified that he had only handled the one move intrastate and that he was contacted by one other individual, and suggested that that individual call the appellant in regard to a move from Wicks to Ashdown.

Mr. Hollis Luck of Hope, Arkansas, testified that he was in the used furniture business and previously was in the floorsweep manufacturing business; that he used his own truck in picking up used furniture at the various places he purchased it, and that he thinks he would go out and buy more furniture if he could get it moved. He testified that it was necessary for the people in the vicinity of Hope to borrow a cattle or log truck to move their furniture, and that he is unable to get anything shipped out of Hope because the original certified mover who was at Hope had died and his wife had sold out to somebody else and that the new owners do not want to move household goods. On cross-examination this witness testified that he desires intrastate service for the appellant in order to bring merchandise into Hope; that he is purchasing used furniture locally at the present time, and that an intrastate carrier based in Texarkana would be of very little benefit to him, and that the reason common carriers do not like to handle his merchandise is that it doesn't weigh enough. This witness testi-

fied that he was under the impression that if the application should be granted, the appellant would dispatch a truck to Texarkana to pick up a load of furniture, and that he does not know if other common carriers would do the same thing or not; that he has not investigated what intrastate service is available at the present time.

Mr. Walker Strasner testified that he was in the business of farming and cattle raising, and that he does some trading in real estate at Nathan, Arkansas, north of Nashville. This witness testified that there was new industry moving into the entire area, that he sees lots of moving going on in the community, and that the moving he has observed has been in cattle trucks and open-top trucks. On cross-examination this witness testified that the moving he had observed had been in the vicinity of Murfreesboro, Nashville, Nathan and Dierks, and that he had never had an occasion to make an investigation as to what type of moving was available from Prescott, Hope or any other towns in that area.

Mr. Ed Smith testified that he lives at DeQueen, Arkansas, and is a salesman for a realty company in that area. He testified that he does not know of any common carriers situated in that area, and that he has had occasion to use the service of a household mover; that he does not remember the date but that he moved from one place to another in the city of DeQueen. He testified that he moved in an open truck and that there was no household mover in town. He testified that he knew of people moving from other parts of Arkansas to DeQueen and from DeQueen to other parts in Arkansas, but that he does not know how they moved. On cross-examination this witness testified that he moved from one place in DeQueen to another address some four years ago and that he did not have need for a household goods mover transportation service.

Mr. Luther Alford testified that he lives in Murfreesboro, Arkansas; that he has lived in that community

all of his life, is 73 years of age, and has farmed and has served eight years as deputy sheriff. He testified that he had observed people moving household goods into and out of Murfreesboro and that the most of them had moved on open cattle trucks. This witness testified that he remembers seeing one van type moving truck from Hope, and that he thinks that this move was from Murfreesboro to Hope.

Mr. Smith testified that he knew of no specific instance of anyone having difficulty in moving to and from Murfreesboro, but that he did know of one particular case where some people in Clarendon called a cattle truck to come from Murfreesboro to move them. Mr. Smith testified that the majority of the people he had observed moved in cattle trucks and that he cannot think of anyone in particular he has heard complain about lack of moving facilities. On cross-examination this witness testified that the last move he had made was in 1932, when he moved from one part of Murfreesboro to another. He testified that he does not have any need for a moving service, but that he does not know when he might.

Mr. M. A. George testified that he lives in Cove, Arkansas, and is a real estate broker; that some of the sales that he has made have resulted in people moving in and out of the community. He says that most moves are made by pickup trucks or cattle trucks, and that apparently no other local service is available to them. This witness testified that he would be glad to refer his clients to the appellant if the appellant were able to render local service and that he would like to be able to refer his clients who inquire about movers to someone close by. On cross-examination this witness testified that he had no personal need for the service of a household goods mover. He was unable to recall any specific clients who had need of a household mover from Cove, but that everyone would be more or less familiar with the fact that there was no one available. This witness testified that he

had no idea of the type service the appellant proposed to render out of Cove, Arkansas, and that he has made no investigation as to existing facilities which might be available in and around Cove. This witness testified that he could think of no reason why existing carriers could not have performed the services needed in the community. He testified that he had contacted no mover of household goods and has had no occasion to do so. He says that he has heard complaints about the lack of moving facilities but cannot remember who made them or when. He testified that he had made no effort to find moving service in Texarkana or the nearby towns.

Mr. A. J. Robinson testified that he lives at Wicks, Arkansas; that he owns a little motel and drive-in and that he is a real estate broker. This witness testified that the community was growing; that he had seen people moving in pickups and cattle trucks, but that he does not know whether the trucks belong to the people doing the moving or to someone else. This witness testified that he has no need for a furniture moving service personally.

Mr. George Turner testified that he lived in Lewisville; that the community is growing, that there is no common carrier of household goods stationed in Lewisville, and that the people moved mostly by pickup truck. On cross-examination Mr. Turner testified that it is approximately 30 miles from Lewisville to Texarkana; that until very recently he was office manager for Cherokee Carpet Mills; that he has no need for moving service himself and that his only reason for appearing as a witness was to testify that Lewisville has grown in population in the last five years, and that new industries are coming into the area.

Mr. Jim C. Reece and Mr. Odie Jackson, who live at Nashville, testified substantially the same as the other witnesses to having seen people moving locally on bobtrucks and most anything they could get. Mr. Jackson

testified that he had seen a few moving vans come into Nashville, but does not know where they were from or anything about them. He testified there was no common carrier of household goods domiciled in Nashville, and that he suspects Texarkana would be the closest place to obtain the services of a regular moving van for the moving of household goods.

Mr. W. A. Jones testified that he lived in Texarkana and is in the real estate business. He testified that the population in and around Ashdown is increasing and testified as to the new industry that is coming into southwest Arkansas. On cross-examination this witness testified that Ashdown is approximately 20 miles from Texarkana, and that he himself has no transportation problems of any kind.

The twelve protestants offered testimony to the effect that they were actively engaged in the rendition of the same services included in appellant's application. They testified that they were ready, able and willing to accept additional business and that there were many times when some of their equipment was standing idle. They testified that they solicited business by advertisements in the yellow pages of telephone directories in all parts of the state, including southwest Arkansas; that they accepted long distance collect calls from prospective customers and had never received a request for service they were unable or unwilling to perform.

The finding of the Commission, in denying the appellant's application, is set out in part as follows:

> "The Commission has given careful consideration to all of the facts and the evidence and, as stated above, finds that the Applicant has not met the burden of proof imposed upon him by Section 9 (a) of Act 397 of the Acts of Arkansas, 1955. Accordingly, it follows that no useful purpose would be served by granting Applicant authority in any adjacent county, since there appears nothing in the

record to show that sufficient business is generated in such adjacent counties to justify additional certificated carriers. From the foregoing, the Commission is of the opinion that the application must be denied in its entirety."

In the rather recent case of *Arkansas Best Freight System* v. *Missouri Pacific Truck Lines,* 240 Ark. 664, 401 S.W. 2d 571, we said:

"The rule is set out in *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Williams,* 201 Ark. 895, 148 S.W. 2d 644. There quoting from A.L.R., we said: '* * * The general rule is that a certificate may not be granted where there is existing service in operation over the route applied for, unless the service is inadequate, or additional service would benefit the general public, or unless the existing carrier has been given an opportunity to furnish such additional service as may be required.'

* * *

Of course, a few individuals or companies might receive some benefit from the granting of a certificate . . . but the benefit that might accrue in these isolated cases is not what is meant by the term '*public convenience and necessity.*' "

In the still more recent case of *Fisher* v. *Branscum,* 243 Ark. 516, 420 S.W. 2d 882, we said:

"In weighing the evidence, we do not substitute our judgment for that of the Commerce Commission. We will accord due deference to the Commission's findings because of its peculiar competence to pass upon the fact questions involved and because of its advantage in seeing and hearing the witnesses during the full hearing."

From our examination of the entire record in this case, we are unable to say that the findings of the Com-

mission and its order entered thereon, were against the weight of the evidence. The judgment of the trial court is affirmed.

Affirmed.

WILLIS T. UNTIEDT v. ST. LOUIS SOUTHWESTERN RAILWAY CO.

5-4893 440 S.W. 2d 251

Opinion Delivered May 12, 1969

Terral, Rawlings, Matthews & Purtle for appellant.

Coleman, Gantt, Ramsay & Cox for appellee.

CONLEY BYRD, Justice. Appellant Willis T. Untiedt sued St. Louis Southwestern Railway Co. for the dam-

ages that occurred to his tandem lowboy truck after it became trapped on the railroad tracks at the Highway 88 crossing in Altheimer. The trial court directed a verdict for the railroad. Untiedt for reversal claims that there was sufficient evidence to take the case to the jury on the failure to keep a lookout and the statutory duty of the railway company to maintain the approaches to its tracks at the crossing.

. . . .

The appellee's tracks in the City of Altheimer run from southwest to northeast. Its trains are controlled by a dispatcher in Pine Bluff through the use of signal blocks. A train from Pine Bluff approaching Altheimer commences to blow its horn at the Cotton Center crossing described as being 15 pole lengths from the Highway 88 crossing. A pole length is 176 feet. The signal block controlling north bound trains is 10 pole lengths or 1760 feet southwest of the highway crossing. The highway over which Untiedt was routed with his permit load in the city of Altheimer paralled the railroad track, on the north side, from west to east commencing at Olive Street past Chestnut Street, Main Street and on to Edline Street. The railway depot is located between Main and Edline Streets on the north side of the railroad tracks between the highway and the tracks.

Untiedt and two other tractor lowboy rigs were hauling experimental cotton-picking machines from Santa Rosa, Texas, to the John Deere place in Altheimer. When they reached Altheimer, the three units were parked beside the highway near the depot while the lead driver sought information about their destination. The lead vehicle and Untiedt's vehicle parked between Main Street and the Highway 88 crossing. The driver of the third vehicle parked parallel with the highway between Chestnut Street and Main Street, at the western edge of Main Street. The third truck remained at this position during the collision involved here. After the lead driver obtained his information, he pulled up and made a right turn across the Highway 88 crossing. The lead driver

had no difficulty crossing the tracks. When Untiedt pulled up to make his right turn across the tracks the lowboy he was pulling became stuck on a hump or hogsback or rise in the approach to the crossing, trapping Untiedt's truck on the tracks so that he could go neither forward or backward.

Untiedt testified that the first thing he did when he got out of his truck and saw what was wrong was to go around the truck and right over to the depot. He estimates that about 15 minutes elapsed from the time he became stuck until the collision. On direct examination he stated that he was in the depot from 5 to 10 minutes and on cross examination says that it could be anywhere from 2 to 6 minutes. He had left the depot and was standing outside when the train struck his truck. When asked, on direct, what Ralph Cratin, the driver of the number three truck was doing, Untiedt stated:

"A. Well, he went out on the track and went down the track to see if he knew what was wrong, he knew what was going on, he could see it and he went out on this track and down the track a short distance and waved his arms and tried to wave this help to get this train stopped.

"Q. In any event he was going down the track waving his arms?

"A. Right.

"Q. Now where was he with reference to this, was he on the Pine Bluff side of this building here or was he between the building and highway 88?

"A. No, he was down towards Pine Bluff just about a block, well, I don't know if it would be a block, it would be a long block from the crossing where I was to the next crossing towards Pine Bluff.

"Q. Towards which the train was coming. In any event, you say he would be on the Pine Bluff side of the depot?

"A. Right.

"Q. All right, now from the Pine Bluff side of this depot, Mr. Untiedt, and looking down towards Pine Bluff what distance down that way could you see a train coming?

"A. Well, you could see a train coming from where he was quite a distance down.

"Q. Now what would you classify as quite a distance?

"A. Well, I don't know, maybe a couple of miles, maybe two or three."

Untiedt says that the front of the train stopped within a 100 to 150 feet past the point of impact. On cross examination Untiedt testified:

"Q. Where was the second, actually the third truck driver, where was he located at that time?

"A. Approximately a block down the street by the next crossing, just say he was parked to enter the next crossing.

"Q. He hadn't started up to follow you?

"A. No. no, when I went around I headed, I went to the depot and at the same time evidently he went on the track because when I come out of the depot, (interrupted)

"Q. You didn't see him what he did?

"Mr. Rawlings: Let him finish answering the question Mr. Lile before you interrupt him.

"A. Because when I came out of the depot he was down there on the track, he was going down the track. I couldn't see him when I was in the depot.

"Q. Okay, how many minutes would you say elapsed from the time you first got hung up and when you went into the depot?

"A. Oh, it wasn't but a few, just long enough to walk down there.

"Q. I believe you stated on direct examination that the overall time, from the time that you got hung up until you were coming out of the depot was about fifteen minutes?

"A. Approximately, yes.

"Q. Is that correct?

"A. That's right.

"Q. And you said you were in the depot from five to ten minutes, I'm not sure?

"A. Well, it could have been. It could have been two, it could have been six. Whatever it took long enough for him to call down there and him go, we got out of the depot.

"Q. But overall it took about fifteen minutes?

"A. Well, approximately, I mean I didn't time it.

"Q. You really don't know exactly what the third truck driver did after you got hung up did you?

You didn't see him in his truck or his truck wasn't moving was it?

"A. No. It was parked."

Arden Vasser, a witness called out of turn by the railroad estimated that the train went a car and a half or two cars after it hit Untiedt's truck. At this point in the trial, Untiedt introduced the railroad company's answer to his interrogatories as follows:

"Q. Now during the past fifteen years, state the dates and owners thereof of all vehicles which were hung while down Highway 88 at this crossing mentioned in plaintiff's complaint.

"Answer: September 10, 1964, S. P. Conners. September 2, 1966 Willis Untiedt.

"Q. No. 10. State where the train station at Altheimer is located with reference to the crossing mentioned in plaintiff's complaint.

"Answer: North edge of Station is 215 feet South of crossing.

"Q. State the name and address of all employees of St. Louis Southwestern Railway Lines who were working in or near this station at the time of the collision mentioned in plaintiff's complaint.

"Answer: L. K. Baker, 1115 Pine Street, Pine Bluff, Arkansas.

"Q. State what was done by such employees to warn the approaching train that plaintiff's truck was hung on the crossing.

"Answer: The operator of the vehicle, Willis Untiedt, informed the Relief Agent, L. K. Baker,

that his trailer was hung up in the street with the tractor fouling the track, and Mr. Baker telephoned the Chief Dispatcher in Pine Bluff, who advised him that a North bound train was closely approaching the Altheimer station. The Chief Dispatcher informed Mr. Baker that the North bound train had already passed the last signal and the train crew could not be warned by signals of the existing condition at the crossing. Therefore, Mr. Baker started running in the direction of the approaching train, waiving a red flag in an effort to stop the train short of the crossing.

"Q. State the speed of the train at the time it struck plaintiff's truck.

"Answer: Approximately 3 to 5 miles per hour.

"Q. How far was such train from the crossing when its brakes were applied?

"Answer: Approximately 800 feet.

"Q. Was the emergency brakes applied?

"Answer: Yes.

"Q. Who applied the brakes and what is his title?

"Answer: E. P. Shanafelt, Locomotive Engineer.

"Q. For what distance could the employees of the train see the crossing and plaintiff's truck prior to the collision?

"Answer: Approximately 700 feet.

"Q. What obstruction or obstructions prevents from seeing further down the track?

"Answer: Altheimer depot."

Mr. Ernest Johnson the fireman testified that the train consisted of 112 or 115 cars and that he was sitting in the fireman's seat on the left hand side. The train commenced to blow its whistle at the Cotton Center crossing some 15 pole lengths from the highway crossing. When the train reached the section foreman's house, 9 pole lengths from the highway crossing, he saw somebody running up the track waving his arms. At this point he could not see the highway crossing because of the depot. He says the emergency brakes were applied at a point 8 pole lengths west of the crossing at a time when the train was running at a speed of 45 miles per hour (66 ft. per second). He estimated the speed of the train at the time of collision to be 5 miles per hour. He said, "I thought we was going to get stopped but we didn't quite make it". Mr. Johnson testified that the first time he saw Ralph Cratin, Cratin was at a point near Olive Street running down the railroad tracks waving his arms (approximately 500 feet west of the Main Street crossing). He says there was a gradual curve in the railroad starting about the point where he saw Cratin. On cross-examination he said you could see a person a half mile clear enough to distinguish a man from a woman or child and that a person running was much more easily seen than a person standing still.

Exhibit No. 7, a plat of the Altheimer station, indicates that the tracks are relatively straight from the Cotton Center crossing to a point some 200 feet east of the place where Johnson says he saw Cratin, and only a gradual curve from that point to the depot.

In *Lovegrove* v. *Missouri Pacific Railroad Co.,* 245 Ark. 1021, 436 S.W. 2d 798 (1969), we held:

> "When the asserted negligence is a failure to keep a constant lookout the carrier is entitled to a directed verdict if the undisputed testimony of the

> train crew shows that such a lookout was being kept. *St. Louis-San Francisco Ry.* v. *Spencer,* 231 Ark. 221, 328 S.W. 2d 858 (1959). But the jury may disregard the crew's testimony when it is inconsistent within itself or contrary to other accepted testimony in the case. *Railway Co.* v. *Chambliss,* 54 Ark. 214, 15 S.W. 469 (1891).

In this case too, Johnson testified that he was keeping a proper lookout but when his testimony is considered in connection with the plat and testimony of the other witnesses we find that a jury question was made on the lookout issue. Untiedt testified that a person from Cratin's position, that is, west of the depot, could see a train for two miles. Johnson did not testify that he saw Cratin when he first came on the track or that there was any obstruction to prevent him from seeing him a few seconds prior to the time that he actually observed him. When we consider that the train was traveling at a speed of 66 feet per second, and that it only lacked a 100 or 150 feet of being stopped in time to avoid the collision, we find that under the circumstances there was sufficient evidence to go to the jury on the issue of whether a proper lookout was being maintained. This is particularly true in a case such as this where Cratin had to be on the tracks or in the vicinity thereof for a period in excess of 10 seconds to have run to the point described by the fireman. For this reason we hold that the trial court was in error in directing a verdict for the railroad.

We find no merit in Untiedt's contention that the railroad had a duty to maintain the highway approaches to the railroad tracks. To support his contention, Untiedt relied upon Ark. Stat. Ann. § 73-614 (Repl. 1957) and *St. Louis, Iron Mt. & Southern Railway Co.* v. *Smith,* 118 Ark. 72, 175 S.W. 415 (1915) and *Payne* v. *Stockton,* 147 Ark. 598, 229 S.W. 44 (1921). However, by the Acts of 1929, No. 65 § 59, an Act to Amend and Codify the Laws Relating to State Highways (Ark. Stat. Ann. § 76-517 [Repl. 1957]), it was provided:

> "It shall be the duty of the members of the Highway Commission and of the State Highway Engineers, on all trips in the State to particularly observe crossings of railroads on State highways, and it shall be the duty of all railroad companies and the owners of tramroads whose lines intersect or cross any of the highways of the State to improve that part of the roadway between their tracks and to the end of the cross ties on each side with the same material (wherever practicable), with the same foundation and surface as that in the adjoining portions of the roadway and to maintain such crossings in a good state of repair, and said Highway Commission shall have power and authority to require any and all railway companies to build and construct roads under their tracks at such crossings as in the judgment of the Commission will be for the best and safest interest of the traveling public.* * *"

As we interpret this statute it limits the duty of all railway companies whose lines intersect or cross any of the highways of the state to improve all of that part of the roadway between their tracks and to the end of the cross ties on each side and relieves them from any duty of maintenance beyond the end of the cross ties.

Reversed and remanded.

CLARENCE BAILEY v. FORD MOTOR COMPANY

5-4932 440 S.W. 2d 238

Opinion Delivered May 12, 1969

Alonzo D. Camp for appellant.

Griffin Smith for appellee.

CONLEY BYRD, Justice. Appellant Clarence Bailey through his trustee in bankruptcy brought this action against appellee Ford Motor Company upon the theory that Ford breached an implied warranty of fitness in the sale of a 1967 Ford automobile. Ford generally denied all the allegations of the complaint and specifically set up a statutory disclaimer of liability for an implied warranty. A jury found the issues in favor of Ford Motor Company. On this appeal, appellant, pursuant to Ark. Stat. Ann. § 27-2127.2 (Repl. 1962), designates the following as the record on appeal: (1) all pleadings, (2) all instructions, (3) all exceptions to instructions, (4) the judgment on the verdict, (5) notice of appeal, and (6) designation of record. For reversal appellant relies upon the following points:

> "1. The Court erred in failing and refusing to submit the case to the jury on the implied warranty doctrine.
>
> "2. The Court erred in failing to void appellee's disclaimer. Appellee should be estopped to now contend a disclaimer defense.
>
> "3. Appellee's disclaimer was not 'conspicuous'.

"4. Disclaimers, under the Uniform Commercial Code, are unconstitutional and void. Sec. 85-1-201 (10) of the Code is unconstitutional as a denial of due process and trial by jury. Disclaimers are inimical to the public good."

The Uniform Commercial Code, Ark. Stat. Ann. § 85-2-314 and § 85-2-316 (Add. 1961), provides:

"85-2-314. (1) Unless excluded or modified (Section 2-316 [§ 85-2-316]), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind . . .

"(2) Goods to be merchantable must be at least such as . . .

"(c) are fit for the ordinary purposes for which such goods are used; . . ."

"85-2-316 . . . (2) Subject to subsection (3), 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. 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.'

"(3) Notwithstanding subsection (2)

"(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like 'as is,' 'with all faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and . . .

"(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade . . ."

In addition to damage instructions, the trial court instructed the jury as follows:

"Plaintiff claims that he purchased a car manufactured by defendant and that it was not reasonably fit for ordinary usage. Plaintiff claims that defendant impliedly warranted or guaranteed the car as being reasonably fit for usage.

"Defendant claims that its warranty or guarantee specifically excluded any implied warranty and that it has observed the warranty fully.

"The warranty has been introduced in evidence.

"If you find that the written warranty was in effect at the time the plaintiff experienced difficulty, you are instructed that it does exclude any implied warranty of fitness and you may find for the defendant.

"If you find the warranty was not in effect, you may find for the plaintiff.

"In determining whether or not the written warranty and warranty disclaimer was in effect you may consider whether or not it was a part of the transaction and/or whether it was subsequently received and ratified by the plaintiff.

"You are instructed that by operation of law, a manufacturer of automobiles impliedly warrants or guarantees to a purchaser that the new automobile is 'fit for the ordinary purposes for which such automobile is to be used'; however, the law permits a seller to exclude or disclaim an implied warranty and defendant has properly excluded any implied

warranty by language in the warranty. The question for you to decide is whether the defendant's written warranty was in effect at the time of this transaction."

Two of the instructions requested by appellant and refused by the trial court are as follows:

"You are instructed that by operation of law, a manufacturer of automobiles impliedly warrants or guarantees to a purchaser that the new automobile is 'fit for the ordinary purposes for which such automobile is to be used.'

"You are instructed that under the law, a manufacturer has a legal right to modify or exclude altogether the statutory implied warranty of fitness of his product. To do so, however, the manufacturer must put its exclusionary language in writing, and the exclusionary language must be conspicuous."

POINT 1. In *Kimery* v. *Shockley*, 226 Ark. 437, 290 S.W. 2d 442 (1956), we had before us an abbreviated record. We there said, "When error appears in a record shortened without objection we are not to presume that the judgment is supported by the omitted matter, Ark. Stat. Ann. § 27-2127.6 (1947); but it goes without saying that when the abbreviated record is free from apparent error we cannot assume that the omitted matter would require a reversal of the judgment."

The abbreviated record here consists of only the complaint alleging an implied warranty, an answer specifically setting up a statutory disclaimer of the implied warranty, the instructions and the judgment incorporating the jury verdict. Since the instructions given by the court were permissible within the pleadings and are not inherently erroneous, there is no basis for us to say that the trial court erred in giving the instructions. For the same reason the appellant has failed to demonstrate

error on the part of the trial court in refusing the instructions requested by appellant.

POINT 2. Appellant argues that the Ford Motor Company should now be estopped to contend a disclaimer defense because Ford objected to the court's instructions on the basis that they did not permit the jury to determine whether the car was reasonably fit for use. We find this contention to be without merit. The objection is not inconsistent with Ford's theory of disclaimer. Furthermore, appellant made no such contention before the trial court.

POINT 3. Appellant argues that Ark. Stat. Ann. § 85-2-316 (Add. 1961) requires a manufacturer to use conspicuous print in its disclaimer as a prerequisite to avoiding the liabilities of an implied warranty. We find no error for several reasons. In the first place the alleged warranty or disclaimer was not designated as a part of the record. Although a booklet entitled "1967 Ford" and marked "defendant's exhibit 1" is attached to the record, the alleged disclaimer has not been abstracted. Further, Ark. Stat. Ann. § 85-2-316 provides that implied warranties are excluded by language or expressions which in common understanding call the buyer's attention to the exclusion of warranties and make plain that there is no implied warranty and that an implied warranty can also be excluded or modified by course of dealings or course of performance or usage of trade. Therefore we are unable to say that appellant has demonstrated error by the trial court in instructing the jury that the defendant had excluded any implied warranty by the language in the warranty.

POINT 4. Appellant argues that Ark. Stat. Ann. § 85-1-201 (10) (Add. 1961) is unconstitutional in that it deprived him of a jury trial on the fact issue of whether or not the provisions of the disclaimer were conspicuous. Appellant did not raise the constitutional issue in the trial court. Constitutional questions cannot be raised

for the first time on appeal. See *North Hills Memorial Gardens* v. *Simpson*, 238 Ark. 184, 381 S.W. 2d 462 (1964).

Affirmed.

THOMAS E. THACKER v. VICTOR URBAN, SUPERINTENDENT

5-5402 440 S.W. 2d 553

Opinion Delivered May 12, 1969

M. C. Lewis, Jr. for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

FRANK HOLT, Justice. This is a proceeding for post-conviction relief under our Criminal Procedure Rule No. 1. The petitioner, now the appellant, asks that his sentence be vacated and that he be set free. He was sentenced in January 1966 to a term of five years in the state penitentiary upon a plea of guilty to the alleged crime of robbery.

In February 1968 the appellant filed a writ of habeas corpus which the present trial court promptly treated as a petition for post-conviction relief. The court appointed his present counsel who filed an amended petition in appellant's behalf. Subsequently, the court overruled and denied appellant's motion to set aside the denial of appellant's petition for post-conviction relief and accord appellant a new trial. This appeal followed.

The issues on appeal "involve constitutional grounds including violation of rights, violation of due process, failure to advise of charge on which arrested, failure to advise of rights, denial of rights to bond, failure to have an attorney appointed to represent him or to be represented in competent fashion, and bias and prejudice of the original Judge, P. E. Dobbs." The present trial judge (who did not preside at the original trial), conducted a fair and extensive hearing on appellant's petition and also upon his motion for a new trial following denial of the petition. The court rendered a comprehensive and thorough opinion in the form of findings of fact and conclusions of law in denying appellant the relief he sought.

Appellant first asserts that due process was denied to him because he was never told for what charge he was being arrested and was never advised of his rights. We do not agree. There was evidence for the trial court to consider that upon being arrested with his codefendant, a brother-in-law, both were identified by the victim as having committed the alleged robbery. Furthermore, on December 1, 1965, the day of his arrest, he was charged by information and accused of the alleged offense of robbery and bail was set. He had the benefit of counsel and never raised this issue at any stage until he initiated this proceeding. He was arraigned and pleaded not guilty on December 6, 1965, with counsel present, and on January 3, 1966 he pleaded guilty with the same counsel representing him, receiving a five-year sentence, along with his brother-in-law and codefendant.

Next appellant argues that he in effect was denied the right to bail or the right to make bond by Judge Dobbs, the then presiding judge. The bench warrant reflects that appellant's bond was set at $4,000 on December 1, 1965. Appellant contends that he could not make bail because Judge Dobbs threatened to raise it if he tried to make bail. This assertion was contradicted and denied by Judge Dobbs and according to the record, the bond remained the same as originally set.

Appellant contends that "he was denied due process and deprived of a fair trial in that he never retained counsel, none was appointed for him, he never accepted the services of an attorney, and he was not given effective, adequate, and competent legal representation." The evidence and record are amply sufficient to sustain the trial court's findings to the contrary. The appellant appeared with his codefendant for arraignment before the court on December 6, 1965. Senator Q. Byrum Hurst appeared with appellant and entered a plea of not guilty to the charge of robbery on behalf of appellant and his codefendant. Again, on January 3, 1966, the appellant appeared in open court with Senator Hurst

who asked permission of the court to change appellant's plea of not guilty to a plea of guilty to the charge of robbery. Upon the recommendation of the prosecuting attorney, the plea of guilty was accepted and appellant and his codefendant each received a sentence of five years in the state penitentiary on the robbery charge.

There is no evidence that appellant ever indicated during these proceedings that Senator Hurst was not representing him or that his counsel was not satisfactory or that he desired the appointment of counsel. Senator Hurst, who has approximately thirty years experience as a trial lawyer, was retained to represent these defendants by their families the day before their arraignment. He was known to both families for several years and had previously represented some of them. A few days following their arraignment, the mothers of both defendants made a substantial payment on his fee to represent the defendants. His copies of the receipts were introduced into evidence. There was evidence that he conferred with the appellant several times. Senator Hurst testified that his efforts were directed mainly toward working out an acceptable sentence on a plea of guilty. The state desired a 12-year sentence. The defendants' counsel asked for a 5-year sentence with 2 years suspended. After conferences with the prosecuting attorney, it was agreed that the state would recommend a 5-year sentence for appellant and his codefendant upon a plea of guilty. It appears that this was a reluctant agreement on the part of the state as to the appellant because he had three previous felony convictions. These consisted of burglary, forgery and uttering, and theft. His codefendant had none. As was the custom, the trial court accepted the prosecuting attorney's recommendation in assessing the recommended sentences.

The record reflects that appellant's retained counsel continued to follow his case with interest, writing letters in his behalf to appropriate officials. Further, upon appellant's commitment to the penitentiary, a doc-

ument reflecting his personal history and signed by him shows that the name and address of his attorney was "Q. Byrum Hurst, Hot Springs, Ark.". The document further reflects:

> "Brief History of Crime: (inmate's version) * * * He and accomplice robbed a WM (Robert Clairdy) on the Street in Hot Springs, Ark. taking about $250.00 from said man. Subject states that he was arrested same day by the City Police of Hot Springs, Ark., due to information from unknown party who saw said act. Subject was charged with Robbery, and went to court and entered a Plea of Guilty to said charge and received a Sentence of Five (5) Yrs. to be served.

Also, we find in the record letters from appellant to Senator Hurst acknowledging him as his attorney and asking his continued assistance.

We agree there was sufficient evidence for the court to find that:

> "[T]he following facts were substantiated by the evidence adduced at the hearing: that petitioner was sufficiently and properly warned of his constitutional rights at all critical stages in the proceedings. That the petitioner had the advice and assistance of a competent attorney. That petitioner was sufficiently advised of the charge against him. That, upon entering the not guilty plea, defense counsel indicated a need for time within which to discuss the case with the petitioner. That the time lapse between petitioner's arrest and arraignment was reasonable. That the time lapse between the date of the not guilty plea and the date on which the plea was changed to guilty was reasonable."

In *Thornton* v. *State,* 243 Ark. 829, 422 S.W. 2d 852 (1968), we said:

> "* * * Until the contrary is shown, we will assume that a person who appears in court with an attorney of his choice has ample opportunity to understand when he has entered a plea of guilty and the consequences thereof."

The crime of robbery is punishable by a sentence of three to twenty-one years. Ark. Stat. Ann. § 41-3602 (Repl. 1964). The appellant is 27 years of age and has experienced three felony convictions before this alleged crime. It appears that appellant had the benefit of effective, adequate, and competent legal representation.

Appellant next asserts that because of the bias and prejudice on the part of Judge Dobbs, the then presiding judge, appellant was denied due process and deprived of a fair trial. According to the appellant's evidence, the presiding judge refused to permit him to make bail; "promised" him 21 years if he asked for a jury trial; failed and refused to accept and file an earlier petition for writ of habeas corpus mailed to him by appellant; instructed prison authorities who transported appellant to the penitentiary to corporally punish him; and thereafter wrote a letter to the same effect to the prison officials. A photocopy of this letter was presented as a basis for appellant's motion to set aside the denial of appellant's petition and accord him a new trial. All of this was refuted by Judge Dobbs and the letter termed a forgery. There was evidence that after the appellant had been in the penitentiary a few months he was given a furlough to see his dying grandmother at the request of Judge Dobbs who also instructed that a $2,000 bond by appellant's mother would be sufficient. Appellant testified that Judge Dobbs told him he did not have to return to the penitentiary following his furlough. This was also denied by Judge Dobbs. The present trial judge's findings on these issues are based upon and supported by sufficient evidence.

Appellant argues that a combination of these factors violated his constitutional rights and, thus, the

court erroneously denied appellant's amended petition for a writ of habeas corpus and further, erred in refusing his motion for a new trial thereby setting aside the denial of appellant's petition. We do not agree. We think the trial court scrupulously observed and complied with the provisions of our Criminal Procedure Rule No. 1. This rule does not permit the holding of a second trial within itself. Rather, it exists for the purpose of providing "a method for determining, after the filing of an appropriate petition, whether any constitutional requirements or statutory enactments, either federal or state, relative to the rights of an accused, have been violated, or whether the sentence is otherwise subject to a collateral attack." *Clark* v. *State,* 242 Ark. 584, 414 S.W. 2d 601 (1967).

In *Orman* v. *Bishop,* 245 Ark. 887, 435 S.W. 2d 91 (1968), it was urged that the trial court was biased and prejudiced and that through fear appellant acquiesced in a plea of guilty. There we said:

> "If Orman feared a 105-year sentence, his fear was induced by his own knowledge of the hazards involved and not by any coercion by the trial judge."

Similarly, in the case at bar we think that in view of appellant's age and his experience with the criminal courts, any fear he had was induced by his own knowledge and experience rather than any bias, threats and prejudice of the presiding trial judge. It appears that the sentence appellant received upon a plea of guilty was based upon the efforts of competent counsel and the prosecuting attorney's recommendation which the court accepted.

After a full and complete canvass of the record in the case at bar, we are of the view that there is sufficient evidence to sustain the trial court's action in refusing to vacate appellant's sentence and to give the relief he

sought and, further, that in none of the proceedings was there any violation of appellant's constitutional rights.

Affirmed.

ROGER DEAN MOSBY & ALBERT NORRIS WILLIAMSON v. STATE OF ARKANSAS

5-5391 440 S.W. 2d 230

Opinion Delivered May 12, 1969

John W. Cole and *George Howard, Jr.* for appellants.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

FRANK HOLT, Justice. The appellants were jointly charged by information with the crime of first degree

murder while in perpetration of robbery. Upon a joint trial, a jury found each guilty and death sentences were assessed. Upon appeal numerous assignments of error are made by each appellant for reversal. Appellant Mosby's present counsel was appointed midway in the trial to assist in his defense. This occurred when there arose a conflict of interests between the appellants. Both were then being represented by the same lawyer. Appellant Williamson's appellate counsel did not participate in the trial.

The victim of the alleged crime was Ronald E. Lovelace, a taxicab driver for the Yellow Cab Company of Little Rock, Arkansas. He disappeared on the night of June 3, 1968. On June 10th his body was discovered about two miles from the location of his abandoned cab which he had been driving the night of his disappearance. The investigation of the crime resulted in the apprehension, trial and conviction of the appellants.

In a capital case we are required to consider every objection made during the trial. Ark. Stat. Ann. § 43-2723 (Repl. 1964); *Harris* v. *State,* 238 Ark. 780, 384 S.W. 2d 477 (1964); *Hays* v. *State,* 230 Ark. 731, 324 S.W. 2d 520 (1959). One of appellants' objections relates to the giving of an instruction with reference to the fact that neither of the two accused appellants took the witness stand during the joint trial. The court gave the familiar or somewhat standard instruction that:

> "A defendant may or may not testify in a case at his own discretion. The fact that a defendant did not testify is not evidence of his guilt or innocence and in fact is no evidence at all and is not to be considered by you in arriving at your verdict."

In the recent case of *Russell* v. *State,* 240 Ark. 97, 398 S.W. 2d 213 (1966), we reversed a conviction where a similar procedure occurred. There we said:

> "* * * When the accused *asks* that such a charge be given it is reversible error for the court to deny

> the request. *Cox* v. *State,* 173 Ark. 1115, 295 S.W. 29 (1927). When, however, the accused *objects* to such an instruction, a different situation is presented. Our decisions on the point have not been entirely harmonious. We held in *Watson* v. *State,* 159 Ark. 628, 252 S.W. 582 (1923), that the giving of the instruction was prejudicial error, but we took the opposite view in *Thompson* v. *State,* 205 Ark. 1040, 172 S.W. 2d 234 (1943). Upon reconsidering the question we have concluded that the instruction ought not to be given against the wishes of the defendant. If the accused is to have the unfettered right to testify or not to testify he should have a correlative right to say whether or not his silence should be singled out for the jury's attention."

Therefore, we must hold that in the circumstances the giving of this instruction, to which appellants objected, constituted prejudicial error.

The appellants further urge for reversal that it was prejudicial error to admit in evidence appellants' admissions in which each made statements and accusations against the other. According to their admissions, which were related to the jury, each appellant admitted being present and participating in the robbery of Lovelace. The jury was told, however, that each confessor denied the murder and accused the other of actually killing Lovelace following the robbery. The state argues that this variance of cross-implication is permissible because the distinction between an accessory and principal has been abolished and the accessory is equally as guilty of a crime as is his principal. Ark. Stat. Ann. § 41-118 (Repl. 1964); *Lauderdale* v. *State,* 233 Ark. 96, 343 S.W. 2d 422 (1961).

Therefore, the state contends that since both the appellants confessed their complicity in the robbery-murder and the only difference in the two confessions being that one accused the other of the actual stabbing, no

prejudicial error resulted from the introduction of their confessions implicating each other. The trial court carefully instructed the jury that the admission of one declarant could not be considered as evidence against his codefendant. The state cites and relies upon *People* v. *De Vine,* 293 N.Y.S. 2d 691, 57 Misc. 2d 862 (1968). There the harmless error doctrine was applied.

In view of a retrial, we deem it necessary to call attention to the recent cases of *Bruton* v. *United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) and *Roberts* v. *Russell,* 392 U.S. 293, 88 S. Ct. 1921, 20 L. Ed. 2d 1100 (1968). It now appears that the use of the cross-implicating confessions in the case at bar is not permissible in a joint trial because of being in violation of the confrontation clause of the federal Sixth Amendment. The answer to the problem seems to be to delete any offending portions of the admissions with reference to a codefendant, if such deletion is feasible and can be done without prejudice, or to grant separate trials. See dissenting opinion of Mr. Justice White in *Bruton, supra.* In Arkansas a separate trial, if requested, is mandatory in capital cases. Ark. Stat. Ann. § 43-1802 (Repl. 1964). Therefore, upon a retrial this problem of cross-implicating confessions would not arise if a separate trial is requested.

The appellants separately argue other points for reversal. Since we do not consider that they are likely to occur on a retrial, we deem it unnecessary to discuss them.

Reversed and remanded.

BYRD, J., not participating.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY v. BARBARA GIPSON

5-4797 439 S.W. 2d 931

Supplemental Opinion on Denial of Rehearing
Delivered May 12, 1969

[Original opinion delivered March 10, 1969, p. 296]

CARLETON HARRIS, Chief Justice. In her petition for rehearing, appellee calls attention to the following language in the opinion:

> "Appellee's case is founded upon contentions that the train crew did not keep a proper lookout; that the employees of the company negligently failed to sound the whistle or ring the bell to warn of the train's approach; that the high weeds and grass were permitted to grow along the right of way to such a height as to prevent appellees from seeing the train; and that the crossing was adnormally dangerous.
>
> "There is testimony that the train crew failed to sound a whistle or bell, and also testimony that these warnings were given; and there is testimony pro and con relative to the other contentions.
>
> "However, it is not really pertinent whether the whistle and bell were sounded in time to give warning; whether a proper lookout was maintained by the railroad employees; or whether there was

> evidentiary support for the other allegations of negligence, for it is uncontradicted that Mrs. Gipson knew the train was coming while she was still sitting in the truck on the track."

Since we did not feel that the matters mentioned were controlling in a determination of the litigation, we merely grouped them together, mentioning that there was some evidence on all allegations. Appellee contends that, under the case of *Bond* v. *Mo. Pac. R. Co.*, 233 Ark. 32, 342 S.W. 2d 473, irrespective of the negligence of the plaintiff in placing herself in a position of peril, the railroad company is liable under the lookout statute for any injury done to plaintiff, if the operators of the train, by complying with the lookout statute, could have seen the perilous position of the plaintiff in time to have avoided injuring her. She points out that we have said there was evidence, pro and con, on the question of keeping a proper lookout, and, therefore, this was a proper question for the jury to pass upon. Actually, the evidence that appellee relies upon was rather meager, and really amounts to her interpretation of part of the testimony; *i.e.*, there is no direct proof that proper lookout was not maintained.

All of the testimony on this point was given by members of the train crew. Fireman Paul was the only railroad employee who testified to having a view of the crossing. He said that, after the train crosses over the Fourche crossing, there is a fairly sharp curve to the left going west, up grade, for a quite a distance, and he testified that the view was obstructed by the cut or bend. He said that he was looking ahead, and the first view that he had was the top of the pickup truck, which he could see over the bank. The distance, according to the witness, was 350 to 400 feet, and he testified that he immediately applied the brakes. He said that his view was not obstructed by any bushes or weeds along the track, but the obstruction to seeing the crossing earlier was "the cut or the bend on the side of the hill."

Brakeman Mimms testified: "The first thing I noticed when the train threw on its brakes, and of course I looked around, by that time we had hit the pickup."

Brakeman Inman testified that his first knowledge was "when the brakes went to emergency—you know you can hear that when they go into emergency. I was on the righthand side, so I scooted over to the left side and looked just about at the time of the impact."

In the original brief, appellee argued that, from the statements of Mimms and Inman, a jury of reasonable men might have concluded that Paul did not apply the brakes immediately when he first observed the truck on the track.

The proof, however, is uncontradicted that appellee's vehicle could not be seen by the train crew from farther away than 400 feet. Paul further testified that the train was traveling 25 miles per hour, pulling 110 cars, and that it would take about 12 seconds to get the brakes on the train all the way through; that it would take not less than 700 feet or 2½ to 3 city blocks to stop the train at the aforementioned speed.

The engineer, Charles Cauthron, verified the fact that the train was traveling 25 miles an hour, and he said that the curve was a 25 mile an hour curve; he agreed that the train was carrying 110 cars, 63 of them loaded. Mr. Cauthron stated, "If I was going to make a normal stop for Bigelow, I would have started back a mile before I got to town. Because with this many cars it would have taken about a mile."

It therefore appears that, even if Fireman Paul did not tell the truth about applying the brakes immediately when he saw the truck, 350 to 400 feet away, the train could not have been stopped, even had the brakes been applied at that time, and the failure to immediately apply the brakes would not have been a proximate cause of the

accident. In *Kansas City Southern Railway Company v. Shane, Admnx.,* 225 Ark. 80, 279 S.W. 2d 284, this court said:

> "* * * These three employees were the only eye-witnesses to the collision. A witness had testified that he thought the truck could have been seen by the appellant's operatives, when the train was approximately 258 feet away, for a distance of about 225 feet from the crossing. This difference between 150[1] and 225 feet as to the distance is not of material importance here in the circumstances because the physical facts show that this train could not have been stopped in time to have avoided the collision had the truck been discovered 225 feet away. In fact 1,350 feet was required in which to stop it."

It is thus apparent that appellee cannot prevail in this litigation on the basis of the contention that appellant's employee failed to keep a proper lookout.

The petition for rehearing is denied.

BETTY JEAN PECK v. DENNIS W. PECK, JR.

5-4910 440 S.W. 2d 577

Opinion Delivered May 19, 1969

[1]The testimony reflected that the truck was first observed 150 feet away.

Gladys Milham Wied for appellant.

Hall, Tucker & Lovell for appellee.

CARLETON HARRIS, Chief Justice. Betty Jean Peck, appellant herein, and appellee, Dennis W. Peck, Jr., were married on April 30, 1946. Four children were born to this marriage, two presently being minors, Francis, age 16 years, and Thomas, age 15 years. On May 17, 1963, appellee obtained an absolute divorce from appellant in the Chancery Court of Saline County, appellant signing a waiver and not appearing at the hearing. Under the terms of the decree, appellee was awarded custody of the minor children and title to all property acquired by the parties during their marriage, except for an automobile, which had been previously delivered to appellant. In September, 1963, the parties remarried, and lived together until September, 1968, at which time, Mrs. Peck instituted suit in the Saline Chancery Court for a divorce. The complaint alleged general indignities, systematically and continuously pursued, and also set out the ownership of certain property, including the home place, appellant contending that this property should be awarded to her for the use and benefit of the children, or in the alternative, that it be sold and the proceeds equally divided. She also sought custody of the minor children. Appellee filed a cross-complaint, also seeking an absolute divorce on grounds of general indignities, and the custody of the

children, and denying all other allegations. On hearing, the court dismissed appellant's complaint, granted appellee an absolute divorce upon his cross-complaint, decreed that appellant should have the automobile; vested title in the home place in appellee, subject to a mortgage indebtedness, which appellee was ordered to pay "and relieve plaintiff of any obligation to pay it;" directed that $800.00 be paid to appellant at the rate of $50.00 per month; awarded the custody of Francis Peck to appellee, and gave custody of Tommy to Mrs. Peck, conditioned, however, that Tommy, presently at the Arkansas Children's Colony, remain there so long as the Colony officials felt that he could be helped, and providing that, when Tommy was dismissed from the Colony, he should reside with his mother, and appellee should be responsible for his support. From the decree so entered, appellant brings this appeal. For reversal, it is first asserted that the court erred in awarding the divorce and custody of the minor daughter to Dennis Peck, Jr., there being insufficient evidence to sustain the decree. It is then alleged that the court erred in not awarding appellant the divorce, in not giving her custody of both children, and in failing to award her asserted interest in the property.

Mrs. Peck's complaints were to the effect that if she were away from home, and arrived back a few minutes later than her husband thought she should, he would accuse her of being out with another man; that he would not go places with her; that he had struck her on several occasions, and would hold her in bed until she would go into hysterics. Mrs. Peck was employed at Safeway. Her sister, aunt, and a fellow employee at Safeway, all testified in her behalf, but none observed any mistreatment by appellee.[1]

[1]The sister said that an altercation between the parties took place in the bedroom, and her sister came out "just crying and tore up."

Clyde Reaves said that appellee had told him that he had gotten angry with Mrs. Peck a few times, and had slapped her.

We think the preponderance of the testimony favors Mr. Peck. The daughter, Francis, testified that she had heard her father and mother argue many times, but she had not seen her father mistreat her mother. She said that she had never seen him strike her, and had observed no bruises or marks on appellant. Further, she said that her mother, on returning from a trip to Fort Smith. told her (Francis) that she, while in Fort Smith, had gone out with other men: "She didn't act like she was sorry about it." The daughter also stated that she had observed her mother kissing a neighbor, Max Prickett. Francis testified that she desired to live with her father.

Billy Peck, a son, who had been discharged from the Air Force, testified that his mother, after he had returned from service, told him that appellee had beaten her, but he was unable to observe any bruises. He said that his father had never struck his mother. Mr. Peck testified that he had complained to his wife about the neighbor (previously mentioned), and also had made complaint about Reaves' being around the house so much during his absence. He said there were instances when she had been away from home, and appellee would not tell him where she had been. Appellee denied striking Mrs. Peck, though he said he had "held her." According to his testimony, after the court had given temporary custody of the children to him, the wife had come to the house, and endeavored to find a gun for the purpose of killing the members of the family.

Eugene Hawley and Paul Ingles both testified that they had observed Reaves at the Peck home numerous times when Mr. Peck was away at work.[2]

[2]Reaves testified: "I have been in the house many times when Mr. Peck wasn't at home having coffee with Mrs. Peck. I have

Steve Taylor, 25 years of age and a resident of Little Rock, who formerly lived next door to the Pecks, testified that on one occasion Mrs. Peck came to his mother's home with her clothes and hair "messed up," and had asked his mother to tell Mr. Peck that appellant had been at the Taylor home (as an alibi), appellant not having been there. He also said that appellant had "made passes" at him.

We are unable to say that the Chancellor's finding that appellee was entitled to a divorce was against the preponderance of the evidence, particularly when we consider the fact that he was in a position to observe all of the witnesses as they testified.

The record reflects that approximately one week prior to the first divorce between the parties, the house they were living in burned.[3] Apparently, on the same day (according to appellant's complaint) that the divorce was granted, Mrs. Peck executed a quitclaim deed, relinquishing all of her claim to the property which the parties had held as an estate by the entirety. The instrument was acknowledged before a Benton attorney. Thereafter, in August, 1963, according to the evidence, appellant and appellee received the sum of $10,500.00 from insurance which had been carried on the home, and the two entered into a building contract with Capital Savings and Loan Association, wherein the closing statement re-

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asked Mr. Peck many times if he objected. His answer would be No, that he trusted me. I recall when Mr. Peck was ill last winter, I fed his hogs for him. I didn't mind. I have done tractor work with Mr. Peck and on many occasions I have been doing a few minutes work out on the property. Yes, I have been on the Peck property many times."

[3]The first divorce decree does not appear in the record before us, and the exact date cannot be definitely determined. In an amendment to her complaint, Mrs. Peck states the divorce was granted on May 23, 1963. In her statement of the case, she says that it was granted on May 17, 1963. Appellee, in his statement of the case, says that they were divorced on May 22, 1963.

flects that Dennis Peck, Jr., and Betty Peck, as wife, paid $7,684.28 as a down payment on the home to be constructed, and executed a mortgage on the property in the sum of $8,000.00. Mrs. Peck claims an equal interest in this property, stating that she was not aware of executing a deed conveying her interest. Her evidence on this point falls far short of establishing her contention. According to her testimony, appellant never ceased to live with appellee, though they were divorced from May, 1963, to September of the same year,[4] and she asserted in her amended complaint that she signed the waiver, and agreed to a divorce in order to enable Mr. Peck to sue a union official (with whom she had an affair before the first divorce) for alienation of affection. Appellant said that the only instrument she had ever signed was the waiver, executed on April 18, 1963; however, on cross-examination, she admitted that the signature on the deed was her own, but stated: "I didn't know I was signing a deed." But, when shown a copy of the divorce decree, and specifically a provision which recited that the court held that all properties acquired by the parties during their married life, except an automobile, should be granted absolutely to Mr. Peck, Mrs. Peck admitted that this had been the arrangement. From the testimony:

> "Q. So you understood that when that divorce was rendered that all the property was going to Mr. Peck as well as custody of the children?
>
> "A. That was the agreement we made."

Of course, though Mrs. Peck signed the mortgage as the wife of Mr. Peck, the parties were not married at the time, and appellee was the sole owner of the property. It may be that she signed in contemplation of the fact

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[4]Mr. Peck denied that they had continued to live together, but Mrs. Derrick, a friend, supported appellant in this contention.

that they would later remarry, but this is not established by the record. It is pointed out that Mr. Peck never did record his deed, but this circumstance hardly supplies the necessary proof. The only facts established (from the testimony of appellant herself) are that she knew that she lost all interest in the home property when the first divorce was granted, and that she had agreed to this arrangement.

Affirmed.

BENNY A. RINKE v. MANIE SCHUMAN, ET AL

5-4935 440 S.W. 2d 765

Opinion Delivered May 19, 1969
[Rehearing denied June 9, 1969.]

U. A. Gentry and *Wright, Lindsey & Jennings* for appellant.

Frank H. Cox for appellees.

JOHN A. FOGLEMAN, Justice. Appellant seeks reversal of a decree denying his petition to redeem property from a sale to the state for nonpayment of taxes for the year 1941. The material facts are stipulated. They are:

The property was acquired by various persons through mesne conveyances from the United States Government. It was forfeited at various times for the nonpayment of taxes. It was sold to the State of Arkansas for the nonpayment of taxes for years prior to 1918. It was conveyed by the State of Arkansas on August 31, 1918, to Paul A. Birnbach by deed which is recorded in Pulaski County. On August 19, 1919, Birnbach conveyed the property to Fred A. and Bruno Rinke as tenants in common. Fred A. Rinke paid taxes on the lands for the years 1919, 1920, 1921 and 1922. The property was sold and forfeited to the State of Arkansas for the nonpayment of taxes for the year 1923. An action to confirm the sale for the 1923 taxes was instituted in the Chancery Court of Pulaski County, Arkansas, pursuant to Act 296 of the Acts of 1929. A decree of confirmation was entered in that cause on January 15, 1931, confirming the sale of the property against all informalities and irregularities. The Clerk of Pulaski County made no record of the list of lands delinquent for the nonpayment of the taxes for 1923 filed by the collector. On January 11, 1935, Fred A. Rinke was adjudged to be mentally incompetent, and he remained incompetent continuously until the date of his death on January 28, 1965. He died intestate, leaving surviving him his widow, Clara Rinke, and Benny A. Rinke, William C. Rinke and Fredene Kelone, nee Rinke, as his sole and only heirs at law. Appellant Benny A. Rinke has acquired all of the right,

title and interest of the other parties by deed dated October 14, 1966.

The lands were also sold and forfeited to the State of Arkansas for the nonpayment of the taxes for the year 1941. On June 5, 1945, the State Land Commissioner conveyed the property to Manie Schuman by deed now of record. On October 12, 1958, Manie Schuman conveyed the lands to Janis Kaye, who, in turn conveyed an undivided one-fourth interest each to Robert Allen Kaye, Marlene Kaye and Rebecca J. Kaye. Manie Schuman and his grantees have paid the taxes on all of these lots from 1945 to the date of the hearing in the trial court. On May 13, 1958, Benny Rinke was appointed guardian in succession of the estate of Fred Rinke. Neither of the guardians of Fred Rinke knew that he had any interest in the lands involved in this action. At no time between the forfeiture of 1923 and the forfeiture of 1941 was there a continuous and uninterrupted payment of taxes for a period of seven years. The lands were unoccupied and were wild, unenclosed and unimproved lands prior to the purchase by Manie Schuman in 1945. On September 29, 1953, Manie Schuman entered into a lease with J. M. Shackleford under the terms of which Shackleford was to use these lands with others as a pasture for his cattle. Since that time the pasture has been fenced.

Appellees claim title through payment of taxes under color of title since 1945, by the deed from the Commissioner of State Lands to Manie Schuman. They also alleged that Fred A. Rinke was not the owner of the lots by reason of the tax sale of 1923 for more than 10 years before he was adjudged mentally incompetent and that redemption was barred by laches and the statute of limitations by reason of the fact that a guardian was appointed for his estate in 1935.

From this evidence, the trial court dismissed the complaint of appellant and made the following findings:

"That the forfeiture and sale to the State of Arkansas of the lots here under consideration, for the non-payment of the taxes due for the year 1923, and the subsequent confirmation decree effectively vested title to said property in the State of Arkansas, and the Plaintiff failed to redeem in the time and manner prescribed by law; and that the complaint of the Plaintiff should be dismissed."

Ark. Stat. Ann. § 84-1201 (Supp. 1967) provides that lands or lots belonging to insane persons which have been sold for taxes may be redeemed within two years from and after the expiration of such disability. The right to redeem given by this statute is self-executing and may be exercised as a matter of right. It is available in all cases, not only where the tax sale from which redemption is sought is defective, but from sales which are perfectly regular and valid. *George* v. *Hefley,* 182 Ark. 678, 32 S.W. 2d 445. The right of redemption given by this statute is not an estate or interest in land but is a statutory privilege to defeat the tax title within the time limited. It is not enlarged or diminished by the fact that the state may have sold and conveyed the interest acquired by it at a tax sale. *Harris* v. *Harris,* 195 Ark. 184, 112 S.W. 2d 40. The right to redeem runs with the land, and any person who would otherwise acquire title takes with notice. *Koonce* v. *Woods,* 211 Ark. 440, 201 S.W. 2d 748; *Schuman* v. *Westbrook,* 207 Ark. 495, 181 S.W. 2d 470. The right, exercised within the statutory time, is absolute. *Schuman* v. *Westbrook,* supra.

Under these circumstances, Fred A. Rinke would have had the right to redeem within two years after his disability was removed if he was the owner of the property at the time of the tax sale. The validity of the tax sale by which Birnbach acquired the lands is not in issue, nor is any defect therein shown. Consequently the deed from Birnbach to Fred A. and Bruno Rinke conveyed title which gave Fred A. Rinke the right to redeem. Our

statute not only permits, but requires, a co-tenant to redeem the entire tract. *Harris* v. *Harris,* supra. Where the disability is removed by death, the heirs of the incompetent may redeem within the statutory period. *Tarrence* v. *Berg,* 202 Ark. 452, 150 S.W. 2d 753.

The right of appellant to redeem, then, depends upon the invalidity of the 1923 tax sale made before the incompetency of Fred A. Rinke. The decree of confirmation under Act 296 of 1929 operated as a bar only as to persons who might thereafter claim the land in consequence of any informality or illegality in the proceedings for the tax sale. *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S.W. 2d 251. A complete failure to record either the delinquent list or the publication of notice of sale is not an irregularity or informality in tax sale procedure, but renders the tax sale void. *Carle* v. *Gehl,* 193 Ark. 1061, 104 S.W. 2d 445. A number of cases holding that these failures are cured by confirmation proceedings are cases wherein the decree of confirmation was rendered under Act 119 of 1935. Under that act the decree of confirmation barred any and all persons with certain exceptions mentioned in the act but not material here. The distinction is clearly pointed out in *Fuller* v. *Wilkinson,* supra. These cases are inapplicable to a proceeding conducted under Act 296 of 1929.

The right of redemption being absolute and a statutory privilege, it is not barred by limitations or adverse possession because of the savings clauses in favor of persons under disability. *Schuman* v. *Westbrook,* 207 Ark. 495, 181 S.W. 2d 470; See also *Kendrick* v. *Bowden,* 211 Ark. 196, 199 S.W. 2d 740. The appointment of a guardian for the incompetent did not set the statute of limitations in motion where there was a savings clause in favor of a person under disability. *Zini* v. *First National Bank of Little Rock,* 228 Ark. 325, 307 S.W. 2d 874. Since appellant was only seeking to enforce a legal right not barred by the statute of limitations and was not seeking equitable relief, the doctrine

of laches could have no application, even if it could otherwise apply. *Davis* v. *Neal,* 100 Ark. 399, 140 S.W. 278; *Lesser* v. *Reeves,* 142 Ark. 320, 219 S.W. 15. The doctrine of laches is applicable only where equitable relief is sought. *Beattie* v. *McKinney,* 160 Ark. 81, 254 S.W. 338.

Appellees claim that they acquired title by payment of taxes under color of title for more than seven years under Ark. Stat. Ann. § 37-102. This statute simply provides that unimproved and unenclosed land shall be deemed to be in possession of the person who pays the taxes thereon if he has color of title. This section is in itself a statute of limitations on actions to recover land and, because of the savings clause in favor of persons under disability, would not bar the absolute statutory right to redeem, which is subject to no limitation or restriction except as to the time in which it shall be exercised, i.e., within two years after the removal of the disability. *Schuman* v. *Westbrook,* supra.

Appellees rely upon the case of *Rinke* v. *Weedman,* 232 Ark. 900, 341 S.W. 2d 44. That case has no application here. In the first place, it was agreed between the parties there that the tax sale under which Fred A. Rinke originally claimed ownership through his purchase from Birnbach was void. Thus Rinke acquired no interest whatever in the property until he obtained a deed from the Abigail Robertson Scholarship Trust in 1958. Weedman had obtained a deed from the Commissioner of State Lands in 1939 and had paid taxes on the land for more than seven consecutive years prior to acquisition of title by Rinke. In the case before us it was stipulated that at no time prior to the forfeiture of 1941 had there been any continuous and uninterrupted payment of taxes for a period of seven years. Thus there could not have been any divestiture of the title of Fred A. Rinke by payment of taxes, nor had his predecessor in title been divested of title before conveyance to him, as was the situation in the Weedman case.

The decree of the chancery court is reversed and the cause remanded for further proceedings consistent with this opinion.

JONES, J., not participating.

LARRY WAYNE TABOR v. STATE OF ARKANSAS

5-5421 440 S.W. 2d 536

Opinion Delivered May 19, 1969

Tiner & Henry for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

J. Fred Jones, Justice. Larry Wayne Tabor was tried before a jury on March 12, 1968, and was convicted of the crimes of forgery and uttering in the Poinsett County Circuit Court. The jury fixed his punishment at four years imprisonment on the forgery charge and at two years on the charge of uttering. Judgment was entered on March 14, 1968, and Tabor was sentenced to four years on the conviction for forgery and two years on the conviction for uttering. The sentences were to run consecutively with a minimum time to be served fixed at two years and a maximum time at six years. Tabor did not perfect an appeal from his original conviction, but filed a petition for habeas corpus under this court's Criminal Procedure Rule No. 1. The petition was denied by the trial court and on appeal to this court Tabor relies on the following point for reversal:

> "That the trial court erred by imposing a minimum time to be served by appellant."

Arkansas Statutes Annotated §§ 43-2306—2312 (Repl. 1964) provide as follows:

> § 43-2306—"When a jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment in their verdict, or if they assess a punishment not authorized by law, and in all cases of a judgment on confession, the court shall assess and declare the punishment, and render judgment accordingly."

> § 43-2307—"Juries and courts shall have the power to assess the punishment of one convicted of

a felony at a general sentence to the penitentiary, such sentence not being less than the minimum nor greater than the maximum time provided by law. At any time after the expiration of the minimum time, upon the recommendation of the superintendent and it appearing that a prisoner has a good record as a convict, his sentence may be terminated by the board."

§ 43-2308—"If the jury in any case, assess a greater punishment, whether of fine or imprisonment, than the highest limit declared by law for the offense for which they convict the defendant, the court shall disregard the excess, and enter judgment and pronounce sentence according to the highest limit prescribed by law in the particular case."

§ 43-2309—"If the jury, in any case, assess a punishment, whether of fine or imprisonment, below the limit prescribed by law for the offense of which the defendant is convicted, the court shall render judgment, and pronounce sentence, according to the lowest limit prescribed by law in such cases."

§ 43-2310—"The court shall have power, in all cases of conviction, to reduce the extent or duration of the punishment assessed by a jury, if, in the opinion of the court, the conviction is proper, and the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted, so that the punishment be not, in any case, reduced below the limit prescribed by law in such cases."

§ 43-2311—"If the defendant is convicted of two [2] or more offenses, the punishment of each of which is confinement, the judgment shall be so rendered that the punishment in one case shall commence after the termination of it in the others."

§ 43-2312—"Hereafter when any person shall be convicted of more than one felony, the punish-

ment for one of which begins before the expiration of the sentence imposed on the other, the court trying the cause shall have authority to direct that said sentence shall run concurrently, if it shall be deemed best for society and the person convicted."

Arkansas Statutes Annotated § 43-2823 (Repl. 1964) provides:

> "No convict confined in the Penitentiary shall be eligible for parole until he shall have been confined in the Penitentiary for one-third [1/3] of the time for which he was committed or to which same has been commuted; and provided further, that such time as said convict may be on furlough shall not be counted as confinement in the Penitentiary within the meaning of this section."

In 1968 the Arkansas Legislature passed Senate Bill No. 70 which became Act 50, First Extraordinary Session of 1968, and section 28 of that act, insofar as it applies to the case at bar, is as follows:

> "Individuals sentenced for a term of years less than life imprisonment are, after the effective date of this Act, eligible for parole at any time, unless a minimum time to be served, consisting of not more than one-third (1/3) of the total time sentenced, is imposed. In that event, the individual shall be eligible for release on parole after serving the minimum time with credit for good time allowances, and commutation by exercise of executive clemency.
>
> For parole eligibility purposes, consecutive sentences by one or more courts, or for one or more counts, shall be considered as a single commitment reflecting the cumulative minimum and maximum time to be served."

Appellant argues that since he was constitutionally entitled to the benefit of a jury trial, and since under

the jury verdict he would have been eligible for parole at any time under the provision of Act 50, supra, the trial court erroneously invaded the province of the jury in fixing the minimum time to be served by him. We do not agree. The appellant was not eligible for parole at all until he had been sentenced, and the sentence itself made him ineligible for parole until he had served two years of the four and two year terms assessed by the jury. It will be noted that prior to the enactment of Act 50, supra, no convict was eligible for parole until he had been confined for one-third of the time for which he had been committed, and under authority of § 2310, supra, the trial court has the power "to reduce the extent or duration of the punishment assessed by a jury." This provision has no application to the case at bar because the trial court neither reduced not attempted to increase the extent or duration of the punishment assessed by the jury. The trial court simply sentenced the appellant to the extent and for the duration of the punishment assessed by the jury and further provided that two years of that time must be served.

The same section and paragraph of Act 50 which removed the mandatory restriction on parole in § 2823, supra, only did so "unless a minimum time to be served, consisting of not more than one-third (1/3) of the total time sentenced, is imposed." Act 50 only makes the prisoner eligible for parole at any time *unless* he is affirmatively sentenced to serve a specific period of time consisting of not more than one-third of the total time for which he is sentenced.

The question actually comes down to whether the trial court or the jury is to fix the minimum time to be served under the 1968 statute. The penalties in the case at bar were six years penal servitude assessed by the jury, and the appellant was committed to serve that period of time. Prior to the passage of Act 50, supra, under the consecutive sentences the appellant received, he would have been obligated to actually serve one of the sentences before the other would begin before becoming

eligible for parole, § 43-2311, supra, and under the provisions of Act 50, supra, he would have become eligible for parole immediately only if the sentence had not provided otherwise.

Section 29 of Act 50, supra, provides, in part, as follows:

> "The Parole Board shall release on parole any individual eligible under the provisions of Section 28 confined in any correctional institution administered by the State Department of Correction, when in its opinion there is reasonable probability the prisoner can be released without detriment to the community or himself. All paroles shall issue upon order of the Parole Board, duly adopted."

There is good reason why the trial court rather than the jury should determine whether a prisoner is to actually serve any part of the sentence imposed before becoming eligible for parole. In many, if not most instances, the trial judge has available knowledge of facts and circumstances pertaining to the prisoner's background and prior criminal record, including parole violations, which are denied to a jury in determining the guilt or innocence of the accused on a specific charge. This additional information available to the trial judge, but excluded from the jury, becomes important in weighing what is best for the prisoner and society in determining whether the prisoner should become eligible for parole immediately following his conviction, and we conclude that the trial judge is best equipped to make that determination.

Of course, in some instances the jury may have before it all the facts bearing on whether the prisoner should be required to serve some part of the sentence imposed, before becoming eligible for parole, and in such instance the trial court might prefer to obtain the recommendation of the jury under proper instructions. In

any event we think the better rule would be to confine the jury to the specific facts and admissible evidence pertaining to the offense for which the accused is being tried and leave it to the trial court to determine, from a consideration of all the facts and circumstances available to him, whether the prisoner should serve a part of the time assessed by the jury verdict before becoming eligible for parole.

The judgment of the trial court is affirmed.

FOGLEMAN, J., not participating.

CALVIN HALE v. STATE OF ARKANSAS

5-5409 440 S.W. 2d 550

Opinion Delivered May 19, 1969

Don Gillaspie for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Asst. Atty. Gen. for appellee.

CONLEY BYRD, Justice. Appellant Calvin Hale appeals from a judgment sentencing him to 21 years for kidnaping and 10 years for robbery. For reversal of the judgment he relies upon the following points:

> " I. The confession introduced in evidence was improperly admitted.
>
> " II. The court erred in refusing to provide funds for the expenses of preparation and trial or, in the alternative, dismissing the charges herein.
>
> "III. The court erred in giving court's instructions numbers 6 and 9."

The record shows that George C. James on April 11, 1967, was accosted by one Wade Eaves and appellant

Calvin Hale in his apartment in El Dorado. Eaves and appellant escorted James from his apartment to an automobile. After driving James to a wooded area where they waited awhile, they again put him in the automobile and took him to a public telephone. While appellant held a gun on James, Eaves dialed the banks where he knew James had money. As instructed, James told the bankers that he was in a business deal with Eaves and that he was going to give him some checks. After the telephone calls, James at gun point gave Eaves a check on the First National Bank for $4,600.00 and a check on the Exchange Bank for $10,000.00. They then returned to the wooded area and instructed James to sit down by a tree and put out his hands. Thereupon they bound his hands and feet around the tree with a roll of tape and gagged him with a handkerchief. After some effort, James freed himself and went to the sheriff's office. Other witnesses described appellant as the man with Eaves on the date in question.

Wade Eaves, an inmate of Cummins State prison farm, testified that he had been convicted of the crime of kidnaping George C. James. He identified Calvin Hale as the person with him when Mr. James was kidnaped and robbed.

The record shows that when appellant's confession was obtained he was serving a five year sentence in Leavenworth Federal penitentiary. The officers interrogating appellant were W. T. Brewster, an El Dorado Police detective, Beryl Anthony, deputy prosecuting attorney and Sheriff Homer Pirtle. Mr. Brewster, Sheriff Pirtle and Mr. Anthony all testified that while Anthony was giving the *Miranda* warning to appellant, appellant interrupted Anthony and said he probably knew more about his rights and the criminal law than Anthony knew. Mr. Anthony said that when they first arrived, appellant was brought into the room by the federal guards and accompanying appellant was a penitentiary advisor who told them that it was the rule that a person from the pen-

itentiary had to be in the interrogation room, if appellant so required. Anthony said that appellant at no time indicated he wished an attorney and in fact refused to make any statement to them as long as the advisor was present. In fact he said that appellant used some pretty harsh language to the advisor in requesting him to leave the room. All of the State's witnesses stated affirmatively that no promises or rewards were offered appellant to obtain his confession. The testimony is that when appellant suggested that he would like a sentence which would run concurrently with the five year one he was serving in the federal penitentiary, he was advised that they were not in a position to make such a deal.

Appellant Hale's testimony was that he didn't agree to answer all the questions and that he told Mr. Anthony that he didn't know whether he wanted to remain silent. He testified that he told Anthony we wanted an attorney. He said Mr. Anthony told him that the State of Arkansas was not going to press charges and that if they did, he would be given a five year sentence to run concurrently with the one he was serving and that he agreed to make the statement under those conditions. He had a bad reputation having been locked up all his life, hadn't been out two years all of his life. That because of his record he agreed to sign a statement for five years to run concurrently with the one he was serving. When asked to describe what was going on at the time the confession was written out, appellant said:

> "A. I didn't even read it. The only thing that I remember is he asked me if I made any money out of it, if I was supposed to have gotten ten thousand dollars, or five thousand dollars, or some large sum of money, and I told him that I didn't get a nickel out of nothing. I also, I told him 'you just write down what you want to and I'll sign the statement regardless, because it cannot be used against me in court of

> law because I do not have an attorney present.' And I told him, 'anything that you write, in fact, if I can get a five-year sentence from it to run concurrently with the time I'm doing, I'll clear your books. Just leave me alone. Otherwise, I haven't got anything to say.' And I was assured that I would receive a five-year sentence if the State tried me."

At the conclusion of a *Denno* hearing, the trial court found that the confession was voluntarily given after appellant had been advised of his constitutional rights. In addition to the foregoing evidence the record also shows that the state, at the request of appellant and pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, (Ark. Stat. Ann. §§ 43-2005—43-2009 [Repl. 1964]), subpoenaed four witnesses from Leavenworth prison whom appellant refused to use.

We agree with the trial court that appellant had effectively waived his constitutional rights and that the confession was properly admitted into evidence. See *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

Under point 2, appellant contends that the State refused to provide him funds for the reasonable and necessary expenses of trial and preparation for trial and that it wrongfully refused to provide for the expenses for examination of defendant by a private psychiatrist. We find these contentions without merit.

The record shows that the trial court appointed a most able trial lawyer, with experience in criminal law, to represent appellant. The court had appellant moved from Leavenworth penitentiary to Union County jail on April 14, 1968. Appellant's trial did not begin until Sept. 17, 1968. We cannot tell from the record whether appellant remained in El Dorado during all that time

but obviously the State took precautions to see that appellant had an opportunity to consult with his attorney in ample time to prepare for trial. In addition the State endeavored, pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, to obtain every witness requested by appellant. In doing this we think the State discharged any burden or duty it owed appellant.

Furthermore, the record shows that the State did furnish to appellant the services of a psychiatrist. The psychiatrists furnished to appellant were selected by the State not for criminal work but for treatment of mental diseases. The State Hospital staff is only incidentally used to determine mental competency of criminal defendants. Selection of psychiatrists on the State Hospital staff is done by the Governor or through his appointees and is not in any way controlled by the persons charged in this State with prosecuting criminal defendants. Under this procedure we can find no denial of due process or equal protection of the laws to the prejudice of appellant.

Surely due process of law does not require the State to furnish expenses for appellant to shop from doctor to doctor until he finds one who considers him mentally incompetent. Appellant has cited us no law to support such proposition, nor have we found any. For this reason and the reasons stated above we find no merit in appellant's point No. 2.

On appeal appellant complains that the trial court erred in giving its instructions Nos. 6 and 9. Instruction No. 6 defined kidnaping in the statutory language of Ark. Stat. Ann. § 41-2301 (Repl. 1964). Appellant now argues that the instruction is abstract and was confusing to the jury because it included, "the taking of a person into another state or territory and transporting a person for the purpose of thwarting arrest or detection." The instruction as given is not inherently erroneous and

since appellant made no objections either general or specific to the giving of the instruction, we find his contention to be without merit.

Appellant's objection to the trial court's instruction No. 9 on the necessity for corroboration of an accomplice's testimony is that by the careless use of a simple pronoun the instruction completely fails to carry the meaning of the rule it was intended to set out. This argument is made because a portion of the instruction reads as follows:

> "A conviction cannot be had upon the testimony of an accomplice unless you find that *his* testimony is corroborated by other evidence, either by direct or circumstantial evidence tending to connect *him* with the crime."

Again there was no objection to the instruction as given. Even if there had been, we find that the supposed error is cured by the balance of the instruction which tells the jury as follows:

> "The other evidence or corroboration is not sufficient if it merely shows the facts and circumstances that the offense was committed, but it must go further and show in the affirmative that the defendant was connected with the crime and the commission of it."

Affirmed.

POULTRY GROWERS, INC. & TYSON'S FOODS, INC. v. WESTARK PRODUCTION CREDIT ASSOCIATION

5-4899 440 S.W. 2d 531

Opinion Delivered May 19, 1969

Crouch, Blair, Cypert & Waters for appellants.

Hardin, Barton, Jesson & Dawson for appellees.

FRANK HOLT, Justice. This is an appeal from the refusal of the trial court to transfer this cause to chancery court. The appellee, Westark Production Credit Corporation, is a lending agency which makes loans to its members. Loans were made to the Keeton industries which is a conglomerate operation consisting of the

parent corporation, Keeton Farms, Inc., and its wholly owned subsidiaries, Keeton Mills, Inc. and K. & W. Produce, Inc. Appellee Westark secured its loans by a first lien upon any poultry grown and produced by its debtors. Subsequently, K. & W., the marketing arm of Keeton, assigned to appellee Westark all of the money due or to become due from appellant, Poultry Growers, Inc., which had contracted to purchase poultry produced by K. & W. Appellee Westark filed this action, alleging that by virtue of this assignment the appellant, Poultry Growers, is indebted to Westark in the sum of $26,313.11 for poultry sold and delivered by K. & W. to Poultry Growers pursuant to their contract. The appellant, Poultry Growers, admitted the contract with K. & W., the amount due under the contract, and that it had received from appellee Westark a notice and copy of the assignment of the indebtedness.

Poultry Growers is one of the wholly owned subsidiaries of appellant Tyson's Foods, Inc., which is also a conglomerate enterprise and engaged in the poultry industry. Subsequent to appropriate pleadings by the appellant Poultry Growers, the appellant Tyson's Foods, Inc. filed a motion for intervention, an intervention, and a plea for equitable setoff for $19,885.36 allegedly due from K. & W. Produce and Keeton Farms to appellants, Tyson's Foods and/or Poultry Growers. On the same date the appellant Poultry Growers amended its answer, which right it had specifically reserved, and alleged substantially the same matters contained in the intervention of its parent corporation. Also on the same date, the appellants filed a joint motion to transfer this action to chancery court in order that their respective pleas for an equitable setoff could be presented. After a hearing, it appears that the trial court denied the motion to transfer. No formal order was entered and the case was set for trial. A few days before the trial date, Tyson's filed an amendment to its original intervention, alleging a breach of contract on the part of appellee, Westark, in that Westark promised that any amount owed to Tyson's

by Keeton Farms or its subsidiary would be offset against the indebtedness of Poultry Growers.

When the parties appeared on the date set for trial, the trial court refused to allow Tyson's to amend its intervention. This was refused because the amendment was not timely filed since appellee's attorney had not received any notice. The trial court ordered that this amendment to the intervention be stricken from the record. The appellants renewed their motion to transfer the cause to chancery court which was again denied. After opening statements were made to the jury and certain stipulations were agreed upon, appellants, by leave of the court, made an offer of proof. The trial court again denied appellants' motion to transfer and granted appellee Westark's motion for a directed verdict. Judgment was entered on the directed verdict and this appeal follows.

For reversal the appellants contend that the trial court erred in refusing to transfer the cause to chancery court to permit them to offer their respective pleas and invoke the doctrine of equitable setoff which is exclusively cognizable in equity. We think the appellants are correct. The appellee, Westark, argues that the trial court refused to allow Tyson's to intervene, that Tyson's did not appeal from that ruling and is, therefore, not properly a party before this court. Appellee further asserts that the lower court did not err in refusing to transfer the cause to chancery because Tyson's Foods is not a party to the contract between K. & W. and Poultry Growers and it cannot pierce the corporate veil of its subsidiary, Poultry Growers, nor can the subsidiary pierce the veil of its parent. Appellee submits that while no formal order is found in the record overruling Tyson's motion to intervene, "it is amply clear from the record that the court so ruled."

We find no merit in any of these contentions. Appellant Tyson's Foods, the parent corporation, filed its

motion to intervene on September 5, 1968. Subsequently there was admittedly a hearing upon the motion to intervene, the appellant K. &. W.'s amended answer, and appellants' joint motion to transfer the cause to chancery. We find no order disposing of these motions. Thereafter, or on September 27, appellant Tyson's filed an amendment to its intervention, alleging a breach of contract on the part of appellee Westark. On the day set for trial, October 1, it was revealed that neither opposing counsel nor the court had seen or received a copy of the amendment. The court struck Tyson's amendment to its intervention on the ground that it was not timely filed and again refused appellants' joint motion to transfer the cause to chancery court. As we construe the record, the trial court made no ruling at any stage of the proceedings that Tyson's could not intervene in the case. From the record it appears that the court struck appellant Tyson's amendment to its intervention, sustained appellee's objection to certain evidence, permitted appellants' offer of proof, and denied appellants' joint motion to transfer to chancery court.

In Tyson's motion for intervention, intervention, and its plea for an equitable setoff, and in Poultry Growers' amendment to its answer, which is substantially the same as Tyson's intervention, it was alleged that the subsidiaries of Tyson's, which included the appellant Poultry Growers, were operated as mere departments of the parent; that the subsidiaries of Keeton's were similarly operated as departments of the parent; and that both parent companies and their subsidiaries were conglomerate operations relating to the poultry industry; that in the dealings between the parties, Tyson's and its subsidiary companies were considered as one entity by all the parties, including the appellee Westark; that the Keeton companies were likewise considered as one entity; that in their dealings, the consolidated balance sheet of the Tyson's companies and the consolidated balance sheet of the Keeton enterprises were relied upon by each other; that the $19,885.36 which Tyson's seeks

to apply as an equitable setoff resulted from the sale of certain products, such as hatching eggs, feed, and propane gas, to the Keeton complex; that these supplies were in turn used to produce the poultry which is the subject matter of the contract between K. & W. and Poultry Growers; that the pending suit filed by appellee Westark is based upon the assignment of this contract; that appellee Westark was active in supervising and conducting the business of the Keeton conglomerate; that appellee Westark directed the purchases by Keeton and its subsidiary from the Tyson's complex and conspired with the general manager of the Keeton companies to refuse to pay the appellants with the intention to take the assets of the Keeton companies for its own benefit, leaving the Keeton companies hopelessly insolvent and the account owed to appellants uncollectible; that within a short time after the purchase of the supplies from Tyson's and after the sale of the poultry which is the subject matter of appellee Westark's complaint, Westark placed the Keeton companies in receivership and ultimately in bankruptcy, leaving the companies no assets with which to pay the account owed to Tyson's.

The appellants' proffered proof tended to substantiate these allegations contained in the intervention. This proof was expressly permitted by the court. Therefore, we cannot agree with appellee that the court had refused to permit the intervention. The court had the right to permit the intervention and the offer of proof in support thereof. Ark. Stat. Ann. § 27-815 (Repl. 1962). There it is provided that "Where, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party, the court may order it to be done." Certainly, appellant Tyson's is an interested party in the controversy between the original parties and in the recovery of its open account.

We think that either the appellants' pleadings or the proffered proof sufficiently raised the defense of an

equitable setoff and, therefore, entitled appellants to the requested transfer to chancery court where they could have the opportunity to present their theory of this case. Ark. Stat. Ann. § 27-212 (Repl. 1962) provides:

> "Where the action has been properly commenced by proceedings at law, either party shall have the right, by motion, to have any issue which before the adoption of this Code was exclusively cognizable in chancery tried in the manner hereinafter prescribed in cases of equitable proceedings, and if all the issues are such as before the adoption of this Code were cognizable in chancery, though none were exclusively so, the defendant shall have the right to have them all tried as in cases of proceedings in equity."

A defendant, when sued at law, must make all the defenses he has in that proceeding, both legal and equitable. and if any of them is exclusively cognizable in equity, the defendant is entitled to have such defense tried as in equitable proceedings and the case transferred to equity. *Childs* v. *Magnolia Petroleum Co.,* 191 Ark. 83, 83 S.W. 2d 547 (1935); *Wright* v. *Lake,* 178 Ark. 1184, 13 S.W. 2d 826 (1929). In *Washington Standard Life Ins. Co.* v. *Agee* 231 Ark. 594, 331 S.W. 2d 261 (1960), we said: "If the motion alleges facts which, if proved, entitle the movant to relief obtainable only in chancery, it is not the province of the circuit court to explore the equitable issue in its entirety with a view to transferring the case only if a preponderance of the evidence establishes the right to an equitable remedy."

We have long recognized the doctrine of equitable setoff. *Ewing-Merkel Electric Co.* v. *Lewisville Light & Water Co.*, 92 Ark. 594, 124 S.W. 509 (1909). There we quoted with approval:

> "It has already been suggested that courts of equity will extend the doctrine of set-off and claims in the nature of set-off beyond the law in all cases

> when peculiar equities intervene between the parties. These are so very various as to admit of no comprehensive enumeration."

It is a familiar maxim that "equity regards the substance and not the form." The relief sought by the appellants in the case at bar finds support in *Black & Decker Mfg. Co.* v. *Union Trust Co.*, 53 Ohio App. 356, 4 N.E. 2d 929 (1936); *Bromfield* v. *Trinidad Nat. Inv. Co.*, 36 F. 2d 646 (10th Cir. 1929); *In re Harr*, 319 Pa. 89, 179 A. 238 (S.C. Penn. 1935); *Knight* v. *Burns*, 22 Ohio App. 482, 154 N.E. 345 (1926); *Love* v. *Vina Banking Co.*, 168 Miss. 321, 150 So. 754 (1933).

We hold that sufficient peculiar equities are alleged in the pleadings or exist in the proffered proof, either of which entitles appellants to have this cause of action transferred to the chancery court so that their respective pleas for an equitable setoff can be presented and considered.

Accordingly, the judgment is reversed and the cause remanded.

BYRD, J., dissents.

VERNARD ROSS v. HERBERT B. VAUGHT

5-4913 440 S.W. 2d 540

Opinion Delivered May 19, 1969

J. Marvin Holman for appellant.

Terral, Rawlings, Matthews & Purtle for appellee.

FRANK HOLT, Justice. This is an action to recover damages from a parent for his child's negligent act. Appellee's automobile was damaged in a collision with a vehicle owned by appellant and being driven by appel-

lant's fourteen-year-old son. The complaint, as amended, alleged parental permission to drive the vehicle and that the negligence of appellant's son is imputed to appellant by virtue of Ark. Stat. Ann. § 75-315 (c) (Supp. 1967).

The trial court sustained appellant's demurrer to the complaint. On appeal from that order we reversed and remanded the case for trial. *Vaught* v. *Ross,* 244 Ark. 1218, 428 S.W. 2d 631 (1968). Thereupon the appellant filed an answer and counterclaim. The issues were joined by appropriate pleadings. The trial court, sitting as a jury, found that the minor was guilty of negligence which proximately caused the accident and that the child's negligence was imputed to his father, the appellant. Judgment was entered for appellee in the sum of $1,449.75, and from that judgment comes this appeal. Appellant contends as ground for reversal that there is no substantial evidence to support a judgment imputing the negligence of his son to appellant.

Ark. Stat. Ann. § 75-315(c) provides:

> "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." [Emphasis added]

Subsection (a) requires both parents, if living and having custody, to sign and verify under oath the application of their minor child for a driver's license.

Appellant's answer to the complaint admitted that a collision occurred between a vehicle owned and operated by appellee and a vehicle owned by appellant and driven by his fourteen-year-old son. It was specifically denied that the vehicle was being driven with permission of appellant.

Appellant and his wife were called as witnesses by appellee. They testified that their son, while working with his father, had been allowed to drive a truck in the woods from one pile of timber to another, but that to their knowledge he had never driven a family vehicle upon the highway. Appellant was not at home on the day of the accident. Mrs. Ross testified that she had company and was at home when her son drove the car, unnoticed and without permission. She last saw the car in the yard on the afternoon of the day the accident occurred. Mrs. Ross further testified that "sometimes his buddies drove" but that she did not give her son permission to drive the car. In her own words: "He had not been allowed to drive out."

Appellant contends that the burden of proof is upon the appellee, plaintiff in the trial court, and that "there is not one iota of evidence" in the record to show that appellant caused or permitted his son to drive the family automobile upon the highway. Appellee asserts that the testimony of appellant and his wife is unbelievable, that the trial court chose to disregard their testimony and that, therefore, there is sufficient evidence to support the judgment entered upon the court's findings of fact. Appellee further asserts that the proof of permission or the lack of it in this case is solely within the knowledge of the parents and, therefore, that the burden of proving lack of permission should be placed upon the parents of the minor.

This is a case of first impression in construing this subsection of § 75-315.

The rule announced in *Mullins* v. *Ritchie Grocer Co.*, 183 Ark. 218, 35 S.W. 2d 1010 (1931), bears on the issue in the case at bar. In *Mullins* we held:

> "The doctrine is settled in this state that, if the automobile causing the accident belongs to the defendant and is being operated at the time of the accident by one of the regular employees of the defendant, there is a reasonable inference that at such time he was acting within the scope of his employment and in the furtherance of his master's business. The inference or presumption of fact, however, may be rebutted or overcome by evidence adduced by the defendant during the trial. Where the evidence on this point is contradictory, the question is one for the jury. Where the facts are undisputed and uncontradicted, it becomes a question for the court." (citing cases)

The rule has been restated and consistently followed. See *Boehmer* v. *Short*, 184 Ark. 672, 43 S.W. 2d 541 (1931); *Ford & Son Sanitary Co.* v. *Ranson*, 213 Ark. 390, 210 S.W. 2d 508 (1948).

We think the doctrine of *Mullins* is applicable to the instant case. In the case at bar the appellant owned the automobile, and it was being driven by his unlicensed minor son. There was evidence that the boy had been permitted to drive other than upon the highway, and, according to the testimony of his mother, "Sometimes his buddies drove." When we consider this evidence and the reasonable inferences deducible therefrom, we think that, in the case at bar, appellee made a prima facie case of liability against appellant.

Next we turn to the question whether the prima facie case against appellant was overcome by testimony from appellant and his wife that they had not given their son

permission to drive the car upon the highway. In answering this question it is appropriate to review several established principles of law.

In *Skillern* v. *Baker*, 82 Ark. 86, 100 S.W. 764 (1907), we said:

> "* * * It may be said to be the general rule that where an unimpeached witness testifies distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established, and a verdict directed based as on such evidence. But this rule is subject to many exceptions, and where the witness is interested in the result of the suit, or facts are shown that might bias his testimony or from which an inference may be drawn unfavorable to his testimony or against the fact testified to by him, then the case should go to the jury."

See, also, 29 Am. Jur. 2d *Evidence*, § 162, and 31A C.J.S. *Evidence*, § 119.

In the case at bar the father is the defendant, and both parents are witnesses. It must be said that, as such, they are interested in the result of this action.

No rule is more firmly established than the rule that the credibility of witnesses and the weight to be given their testimony are solely within the province of the triers of fact. *Plunkett-Jarrell Grocer Co.* v. *Freeman*, 192 Ark. 380, 92 S.W. 2d 849 (1936).

In *Rex Oil Corporation* v. *Crank*, 183 Ark. 819, 38 S.W. 2d 1093 (1931), the appellant was found to be liable for the negligence of the driver of appellant's truck. It was admitted that the driver was in the general employ of the appellant corporation, and that the truck he was driving was the property of the corporation. The employee testified that on the morning of the day the colli-

sion occurred he had wholly abandoned the service of his master, and was pursuing his journey on a purely personal matter. The testimony of the employee was corroborated by that of his wife and a companion who were traveling with him. We followed *Mullins* v. *Richie Grocer Co., supra,* and held that despite their disclaimer there was a prima facie case made that the employee was in the conduct of his master's business. Further, we said that it was for the jury to say "whether such direct testimony overcame the inferences of fact raised by the circumstances proved." See, also, *Ball* v. *Hail,* 196 Ark. 491, 118 S.W. 2d 668 (1938); *Marshall Ice & Electric Co.* v. *Fitzhugh,* 195 Ark. 395, 112 S.W. 2d 420 (1938); *Casteel* v. *Yantis-Harper Tire Co.,* 183 Ark. 912, 39 S.W. 2d 306 (1931).

Accordingly, in the case at bar it was for the trial court, sitting as a jury, to weigh the inference of permissive use with the direct testimony to the contrary, and to say whether this "direct testimony overcame the inferences of fact raised by the circumstances proved."

Our interpretation of this subsection [§ 75-315(c)] is in accord with and reaffirms our view of parental responsibility recently expressed in *Bieker* v. *Owens,* 234 Ark. 97, 350 S.W. 2d 522 (1961). There we said that a parent is liable, under certain circumstances, for negligently permitting, actively or passively, a minor child to commit a willful and negligent act which could reasonably be expected to cause an injury to another person. There we said:

> "It is within reason and good logic to say that the parent has a responsibility to control minor children while they are in their formative years. For while they are not in the custody of the parents, absent any official action to the contrary, no other source of control may be found. Of course minors above a certain age are subject to criminal and civil sanctions but these sanctions are remedial rather

than preventative. There is a question whether the civil sanctions are of any consequence since judgments against minors are of little practical effect. The old adage 'an ounce of prevention is worth a pound of cure,' could be applied in these situations if the responsibility for the prevention is placed on the parents."

As was said in the concurring opinion, we fervently trust that this opinion "will be effective in bringing to the attention of parents their responsibility for the actions of their minor children."

Judgment affirmed.

ALLIED STEEL COMPANY v. B. BRYAN LAREY COMMISSIONER, DEPT. OF REVENUES, STATE OF ARKANSAS

5-4926 440 S.W. 2d 567

Opinion Delivered May 19, 1969

C. H. Earl and *James R. Howard* for appellant.

Lyle Williams, *John F. Gautney* and *Hugh L. Brown* for appellee.

FRANK HOLT, Justice. Appellant brought this cause of action, seeking to apply a reciprocal tax credit against the Arkansas Compensating (use) Tax which was paid under protest.

Appellant is an Oklahoma corporation authorized to do business in Arkansas and engaged in inter-state construction business. Appellant purchased at Memphis, Tennessee, a large mobile crane used in erecting steel on multi-story buildings. Appellant took delivery in Memphis and then had the crane brought directly to appellant's construction job site in Little Rock. The machine arrived in Little Rock in the first week of March, 1968, and after six weeks' use there it was shipped to Oklahoma. On March 6, 1968, appellant paid the State of Oklahoma a use tax of $2,700.00, which was measured by two per cent of the sale price of the crane. On April 12, 1968, appellee assessed an Arkansas Compensating (use) Tax in the amount of $4,050.00, representing three per cent of the purchase price, against appellant for its use of the crane in Arkansas. Appellant paid the Arkansas tax under protest and filed this suit to recover the alleged overpayment of $2,700.00. The chancellor found that appellant was not entitled to relief and dismissed appellant's complaint for want of equity. This appeal followed.

Appellant admits that there was sufficient use of the machinery in Arkansas to justify the levy of the Arkansas use tax. It is appellant's position that the lower court erred in failing to give appellant credit for the use tax paid to Oklahoma. Therefore, appellant has paid $2,700.00 in excess of its tax liability to the State of Arkansas.

Ark. Stat. Ann. § 84-3130 (1967 Supp.) provides that all tangible personal property procured from with-

out the state for use, storage or consumption by a contractor in performance of a contract in this state shall be subject to a compensating (use) tax of three per cent of the purchase price. The third paragraph of this section provides:

> "The provisions of this act [§§ 84-3129—84-3134] shall not apply in respect to the use or consumption or storage of tangible personal property as defined in this Act for use or consumption in this State upon which a like tax equal to or greater than the amount imposed by this Act has been paid in this State upon which a like tax equal to or greater than the amount imposed by this Act has been paid in another state, the proof of payment of such tax to be according to rules and regulations made by the Commissioner of Revenues. If the amount of tax paid in another state is not at least equal to or greater than the amount of tax imposed by Act 487 [§§ 84-3101—84-3128] of 1949, as amended, then the contractor shall pay to the Commissioner an amount sufficient to make the tax paid in the other state and this State equal to the total amount of tax due under Arkansas law. No credit shall be given under this section for taxes paid on such property in another state if that state does not grant credit for taxes paid on similar tangible personal property in this State."

Okla. Stat. Ann. Title 68 § 1404(c), in pertinent parts, provides:

> "If any article of tangible personal property has already been subjected to a tax, by this or any other state, in respect to its sale or use, in an amount less than the tax imposed by this Article, the provisions of this Article shall apply to it by a rate measured by the difference only between the rate herein provided and the rate by which the previous tax upon the sale or use was computed. Provided, that no credit shall be given for taxes paid in an-

other state, if that state does not grant like credit for taxes paid in Oklahoma."

Appellant asserts that under § 84-3130 any person who pays a use tax of less than three per cent to any other state is only required to pay an amount which would equal three per cent of the purchase price of the article taxed, if the state in which the tax is paid provides for a similar credit. Reciprocal credit exists in the case at bar.

Appellee contends that Oklahoma was without jurisdiction to impose the collection of a use tax from appellant, because the crane had never come within the boundaries of Oklahoma, nor had any connection with Oklahoma until it was moved there in May, 1968. Appellee submits that since there was no basis for an Oklahoma use tax, appellant's voluntary payment to the State of Oklahoma was not a "tax" for which appellant could claim a credit.

We agree with appellee. According to the plain meaning of the applicable Oklahoma statute, the Oklahoma use tax is a tax upon the storing, using or consuming of tangible personal property *within the State of Oklahoma.* Okla. Stat. Ann. Title 68 § 1402, in pertinent parts, provides:

> "There is hereby levied and there shall be paid by every person storing, using or otherwise consuming, within this State, tangible personal property purchased or brought into this State, an excise tax on the storage, use or other consumption in this State of such property at the rate of two per cent (2%) of the purchase price of such property; . . ."

The evidence is undisputed that appellant voluntarily paid the Oklahoma use tax some six weeks before the equipment entered Oklahoma. An officer of appellant corporation testified that the machine arrived in Little Rock approximately March 6, which is the day appellant

paid the Oklahoma tax as evidenced by a Oklahoma Tax Commission Excise Tax Receipt made out to appellant. He further testified that appellant made no use of the crane prior to its arrival in Little Rock and that it was moved from Little Rock to Oklahoma City and thereafter to Denver, Colorado.

In our view the $2,700.00 which appellant paid to the State of Oklahoma was not a "tax" as contemplated by the reciprocal credit provision of Ark. Stat. Ann. § 84-3130 (1967 Supp.), and appellant is not entitled to a credit in that amount against the Arkansas Compensating (use) tax assessed and collected from appellant.

Affirmed.

H. L. MANNING, ET AL v. STATE OF ARKANSAS

5-5412 442 S.W. 2d 207

Opinion Delivered May 26, 1969
[Rehearing denied July 14, 1969.]

Howell, Price & Worsham for appellants.

Joe Purcell, Atty. Gen. and *Don Langston,* Ass't. Atty. Gen. for appellee.

CARLETON HARRIS, Chief Justice. On October 17, 1967, appellants, H. L. Manning, Arthur Lee Manning and Eddie Manning, were convicted of the crime of rape, and sentenced to 40 years imprisonment. They were represented by counsel who had been retained by their mother. On November 16, 1967, appellants filed a motion for a new trial, which was denied on November 20, appeal granted, and appellants given 45 days for preparation of the Bill of Exceptions. The appeal was not perfected.[1] A petition was filed on February 14, 1968, with the trial court by the appellants, which asserted that they were without counsel and were paupers; they asked that the court appoint an attorney and order a transcript prepared, free of charge, for purposes of an appeal. The court found that appellants had been represented by an attorney, E. V. Trimble; that the time for an appeal

[1]Ark. Stat. Ann. § 43-2701 (Repl. 1964) provides as follows: "No appeals to the Supreme Court in a criminal case shall be granted, nor writs of error issued, except within sixty (60) days after rendition of the judgment of conviction in the case except that the trial judge with his discretion may by order entered prior to the expiration of said sixty (60) days extend the time for not to exceed an additional sixty (60) days."

had long since expired, and no ground had been alleged under Criminal Procedure Rule No. 1[2] which would subject the sentence rendered to collateral attack. On April 22, 1968, the appellants wrote the Circuit Judge, stating that their attorney had lost interest in their case, and they requested that an attorney be appointed to proceed under Rule 1. Two attorneys of the Pulaski County Bar were appointed to represent them, and a formal motion was filed by these attorneys on May 30, asking that appellants be allowed to appeal their conviction in *forma pauperis*. It was asserted that the action of defense counsel in "abandoning" appellants' cause, and the action of the court in denying legal counsel and a transcript, were a violation of their constitutional rights. Upon hearing, the Pulaski Circuit Court (First Division) denied the relief sought and entered judgment accordingly. From such judgment, appellants bring this appeal.

The petition filed by appellants has been given careful consideration, and we have reached the conclusion that no showing has been made which would entitle them to the relief sought. It is apparent from the record that the Manning Brothers were aware that E. V. Trimble, the attorney employed by their mother, and who had conducted their defense at the trial, was not going to appeal the case, and, though not entirely clear, it appears that appellants were cognizant of this fact while they were still incarcerated at the jail, and long before appeal time had expired. When Arthur Manning was asked if it were true that he knew before he left the Pulaski County Jail that the case was not going to be appealed by Trimble, he replied, "I didn't know for sure though." All agreed that they wanted to obtain the services of a Little Rock lawyer, Allen Dishongh, to represent them, and H. L. Manning stated that he talked with Dishongh

[2]This rule, adopted by the court on October 18, 1965 (amended on April 10, 1967) sets out the grounds for, and procedure to be followed in, petitions for post-conviction relief.

over the telephone. This contact occurred between October 17, 1967 (date of the convictions) and December 1, 1967. Though Dishongh refused employment, the brothers made no effort to communicate with the trial judge, or to advise him or any other official, that they were paupers, financially unable to employ counsel, and desired that counsel be appointed to represent them on an appeal. In fact, it appears from the record that appellants have but little use for court appointed lawyers. H. L. Manning testified, "We didn't want no state lawyer."[3]

This court, long before *Griffin* v. *Illinois,* 351 U.S. 12, 100 L. ed. 891, 76 S. ct. 585 (1955), and *Douglas* v. *California,* 372 U.S. 353, 9 L. ed. 811, 83 S. ct. 814, reh den 373 U.S. 905, 10 L. ed. 2d 200, 83 S. ct. 1288 (1963), permitted paupers to appeal their convictions, a full transcript of the proceedings at the trial being furnished without cost, with court appointed counsel directed to handle such appeals. We have also ordered, under Criminal Procedure Rule 1 appeals, that a full transcript of the original trial proceedings be prepared without charge to the defendant, and counsel appointed to belatedly appeal a conviction. See *Jackson* v. *Bishop,* 240 Ark. 1011, 403 S.W. 2d 94. However, there was a distinct difference in *Jackson* and the present case, in that Jackson made known his indigency, even before the original trial, and was represented there by court appointed counsel.

The case of *Swenson* v. *Bosler,* 386 U.S. 258, 18 L. ed. 2d 33, 87 S. ct. 996 (1967), is not applicable to the present contention. There, Missouri had no rule requiring appointment of appellate counsel for indigent defendants, and if trial counsel withdrew from the case, the Supreme Court of that state would require preparation of the transcript for appeal, but would then consider the

[3]This remark was made with reference to their trial; Manning was rather critical of the lawyer selected by his mother.

questions raised on the basis of *pro se* briefs by the defendant, or on no briefs at all. The United States Supreme Court held that this procedure violated Swenson's Fourteenth Amendment rights, and we certainly agree with that decision. The court concluded its per curiam order with these words:

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

Here, it is evident that the need for appointive counsel was not manifest to the trial court, nor does the record indicate that appellants, or any one of them, made known a need for court appointed counsel to any official representing the state. Since the attorney who represented appellants at the trial did not advise the court, within appeal time, that he was not going to go any further with the case, how was the court to know that there was need for an appointment to be made? The United States Court of Appeals for the Sixth Circuit employed pertinent language for this type of situation in *Horton* v. *Bomar,* 335 F. 2d 583 (6th Cir. 1964), where a petition for post-conviction relief was denied:

> "Finally it is claimed on behalf of the appellant that he was denied due process and equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States for the reason that he was not provided with counsel to prosecute an appeal from his conviction in the state court. The appellant's trial counsel apparently would not represent him in an appeal without the payment of an additional fee. * * * The appellant does not claim that he ever advised the trial judge that he was unable to employ a lawyer to prosecute

an appeal or that he made a request for the appointment of counsel. It was well said by the District Judge, 'The trial judge is not obliged to inquire into the continuing status of their relationship.' ''

The Federal Courts have also pointed out that, for a petitioner to be entitled to post-conviction relief, it must be shown that a responsible state official rejected the request for counsel. In *Weatherman* v. *Peyton,* 287 F. Supp. 819 (D.C. W. Va. 1968), the court said:

> ''For petitioner to be entitled to post-conviction relief, because of alleged violation of a constitutional right, it is not enough to show that he was indigent or that his privately employed counsel was negligent in not perfecting an appeal. The petitioner must show some state action. 'State action' is shown when a responsible official in the State's system of justice rejects a request for counsel for a convicted defendant when he has knowledge of the defendant's indigency and desire for appellate counsel. When an accused person retains counsel on the original trial the State may rely on the presumption that the accused's lawyer will protect his client's rights on appeal.''

See also *United States* v. *Overlade,* 149 F. Supp. 425 (D.C. Ind. 1957). This view has also received appellate approval. In *Pate* v. *Holman,* 341 F. 2d 764 (5th Cir. 1965), the court said:

> ''We take the position that when a defendant has retained counsel of his own choosing the State cannot be held to have violated the constitutional right of an indigent to counsel on appeal, unless the need for appellate counsel is brought home to the State, either by the defendant's request for appellate counsel or because a responsible State official

has actual knowledge that the defendant is indigent and desires to appeal his conviction.'"[4]

In the case before us, the record clearly shows that no action of the state has prevented appellants from being afforded full protection for their constitutional rights. Surely, in holding that a convicted indigent could assert the violation of constitutional rights in a post-conviction hearing, it was not the intention of the United States Supreme Court to entirely sweep away state statutory law setting out orderly procedures, including that of appeal, unless such statutes offend the exercise of individual rights guaranteed by the Constitution.

It might also be said that appellants, though contending that there were errors in the trial proceedings (in a letter of April 22, 1968, to the trial court), and that constitutional rights were violated, do not point out any asserted error, or specific instance of a constitutional violation. In *Jackson* v. *Bishop, supra,* cited by appellant as authority applicable to the present petition, Jackson, in his Rule 1 petition seeking relief, alleged three specific violations of his constitutional rights,[5] and, as

[4]The case was reversed with directions that an evidentiary hearing be held to determine if Pate had (as he claimed) written the County Solicitor, the Attorney General of Alabama, and twice written the trial judge, advising of his difficulties, and asking for the assistance of appellate counsel.

[5]"1. That the rights of the appellant under the Fifth and Fourteenth Amendments to the Constitution of the United States were violated by introduction of alleged oral confessions made prior to advice to the appellant of his constitutional right to remain silent and to be represented by counsel.

"2. The rights of the appellant under Section 15 of Article 2 of the Constitution of the State of Arkansas and the Fourth Amendment of the United States Constitution were violated by the illegal search of his motel room and the use of evidence so obtained against him at the trial.

"3. That the court erred in admitting a .38 caliber Smith & Wesson pistol into evidence without proper foundation, and the

previously mentioned, was represented in the trial court by counsel appointed by that court. Here, only conclusions are set out, without any mention whatever of the acts relied upon for the conclusions reached.

Summarizing, appellants sought to secure the services of another attorney to replace Trimble in taking their appeal; though unsuccessful, no effort was made to contact any other attorney, or, if they were without funds, to make this condition known to the trial court. Actually, the testimony reflects that they were apparently rather confident that funds for the employment of an attorney would be furnished by the employer of an older brother (a brother not involved in this case). It appears that it was only after this effort had failed, and appellants had been sent on to the penitentiary, that they advised the court that they were paupers, and would like to have counsel appointed to represent them. There is absolutely no evidence that any state official was aware that retained counsel did not represent appellants until long after the time for appeal had expired, nor is there any indication that the state had knowledge of appellants' indigency and need of appellate counsel until appeal time had terminated.

It follows that the judgment of the trial court should be, and hereby is, affirmed.

It is so ordered.

BYRD and HOLT, JJ., dissent.

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value of this pistol was absolutely necessary to establish the minimum of $35.00 in value of articles taken to justify a charge of grand larceny."

TRINITY UNIVERSAL INS. CO. v. STATE FARM MUTUAL AUTO INS. CO., ET AL

5-4909 441 S.W. 2d 95

Opinion Delivered May 26, 1969

Smith, Williams, Friday & Bowen by *George Pike, Jr.* for appellant.

Cockrill, Laser, McGehee, Sharp & Boswell for appellee (State Farm).

S. Hubert Mayes, Jr. for appellee (Maryland Cas.).

CARLETON HARRIS, Chief Justice. On November 22, 1964, appellant, Trinity Universal Insurance Company, had in force a family automobile liability policy issued to Marguerite G. McCoy, in which the company agreed

to pay on behalf of the insured all sums which Miss McCoy should become legally obligated to pay as damages because of bodily injury arising out of the use of any automobile by the insured. The policy limits were $10,000.00 for any person, and $20,000.00 for any occurrence. As to coverage of Miss McCoy with respect to a non-owned automobile, the policy provided that the Trinity coverage should apply only as excess insurance over any other insurance available to the insured. On November 22, 1964, there was a collision between an automobile driven by Miss McCoy, the car being owned by Ralph Overstreet, and another vehicle operated by one Gloria Jean King, the King vehicle having three passengers, Gale Montgomery, Paul Waldron, and Cheryl Brandt. It was the view of appellant that a proximate cause of the collision was the negligence of its insured in driving on the wrong side of the road, and failing to keep a proper lookout. The passengers in the King automobile received numerous injuries, and appellant company, after notifying State Farm Mutual Automobile Insurance Company (hereafter called "State Farm") and Maryland Casualty Company (hereafter called "Maryland") of the accident, and demanding that those companies admit coverage for the injuries sustained, settled the claims against Miss McCoy, when the appellee companies denied liability. The amount of settlement was $9,729.34. Thereafter, Trinity instituted suit against appellees in the Pulaski County Chancery Court, seeking judgment for that amount, together with interest, costs expended, and other proper relief. The two appellees filed separate demurrers, and also a motion to transfer the case to law, and, after amendments to appellant's complaint, and to the demurrers filed by appellees, the court found that the demurrers should be sustained; appellant's complaint, as amended, was dismissed. From the decree so entered, Trinity brings this appeal.

The sole question before us is whether the court erred in sustaining the demurrers. In its complaint, appellant alleges the facts upon which it bases the claim

against appellees. In addition to setting out its own coverage to Miss McCoy, appellant asserted that appellee, State Farm, at the time of the accident, had in force a family automobile liability policy issued to Chris Floyd, under which, *inter alia,* the company had agreed to pay all sums which its insured might become obligated to pay as damages because of bodily injuries sustained by any person arising out of the use of any non-owned automobile by any relative of the insured using said automobile with the permission of the owner, or arising out of the use of a non-owned automobile by any other person with respect to liability, because of acts or omissions of a relative of the insured.

It was further asserted that Maryland had in force a family automobile liability policy issued to Ralph Overstreet in which, *inter alia,* Maryland agreed to pay all sums which Overstreet should become legally obligated to pay as damages because of bodily injuries sustained by any person arising out of the ownership, maintenance or use of an automobile owned by Overstreet, or by any person operating the car with the permission of this insured.

The alleged facts which legally obligated the two appellee companies are as follows:

Miss McCoy was operating the vehicle owned by Overstreet (insured by Maryland), and in which Lee Floyd, son of Chris Floyd (insured by State Farm) was riding, Miss McCoy and Floyd being engaged in a joint venture for their mutual benefit, one of the objects being for Floyd to teach Miss McCoy how to drive the Overstreet vehicle. It was asserted that Floyd had the right to direct the manner of operation and course of the automobile. It is contended that this use of the Overstreet automobile by Marguerite McCoy and Lee Floyd[1] was

[1]Lee Floyd died two days later as a result of injuries received in this accident.

with the permission of Ralph Overstreet through the latter's son, Don Overstreet.

It is further asserted in the complaint that appellant notified appellee companies and made a demand that they admit coverage for the injuries sustained by the King passengers, and that appellees settle or defend the claims which those persons were making against Miss McCoy and the estate of Lee Floyd. As previously mentioned, both appellees denied coverage, and Trinity alleged that it then proceeded in good faith and "in the exercise of its best judgment" to settle these claims for the amount previously mentioned, Trinity obtaining releases for any claim which those persons might have against all three of the insurance companies, and their insureds. It is alleged that the settlements were most reasonable because of the liability of McCoy and Floyd, and the amount of damages sustained by claimants.

Both companies filed demurrers. The demurrer of State Farm (after being amended) set out four grounds, viz., (1) that appellant had not commenced its action within three years from the date of the collision, and was therefore barred by the statute of limitations, (2) that appellant was acting as a mere volunteer, being under no obligation to make any payment, (3) that, under the provisions of Ark. Stat. Ann. § 66-4001 (Repl. 1966) appellant could not properly bring a direct action against State Farm, and (4) that appellant has not exhausted its remedies against the estate of State Farm's alleged insured, Lee Floyd. Maryland also relies upon the first three to sustain its position. Motions were also filed by each appellee to transfer the case to the Circuit Court.

We find no merit in any of the grounds asserted in the demurrers. The action instituted by Trinity is based upon subrogation, but the relief sought is actually that of contribution, appellant contending at the least, that it paid more than its share of a common liability. As to the first ground, the statute of limitations had not

run for the reason that Trinity had no cause of action against anyone until it made its first settlement payment on May 11, 1965. In *Pennington* v. *Karcher,* 171 Ark. 828, 286 S.W. 969, this court said:

> "It was also expressly held in that case that the right of action for contribution accrues when one surety pays more than his share of the common liability. This is in accordance with the general rule, that a party acquires the right of contribution as soon as he pays more than his share, but not until then, and consequently the statute of limitations does not begin to run until then."

See also *Hazel* v. *Sharum,* 182 Ark. 557, 32 S.W. 2d 315.

Nor can we agree that appellant was a mere volunteer in settling the claims with the occupants of the King automobile. A volunteer is one, who, without interest to protect, or without a legal or moral obligation to pay, satisfies the debt of another. It is not necessary that we discuss whether the taking of the subrogation agreement removed appellant from this category, for it is very obvious, under the pleadings, that Trinity had an interest to protect.[2] Appellees argue that, as a prerequisite to enforcing contribution among insurers, it is essential that the same risks have been insured, and it is pointed

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[2]In **Mosher v. Conway,** 46 P. (2d) 110, the Arizona Supreme Court said:

"* * * It is true, of course, that a mere volunteer, who has no rights to protect, may not claim the right of subrogation, for one who, having no interest to protect, without any legal or moral obligation to pay, and without an agreement for subrogation or an assignment of the debt pays the debt of another, is not entitled to subrogation, the payment in his case absolutely extinguishing the debt. But when one, to protect his own interest, pays a debt which he honestly believes must be paid to accomplish that purpose, we think, by the fundamental principles of equity, he cannot be held to be a mere volunteer, even though it may afterwards appear the payment was unnecessary."

out that Trinity, in its complaint, asserted that it only had excess coverage over that of Maryland and State Farm, rather than a primary obligation to third parties. Appellees overlook the fact that appellant's averment in its complaint provided "with respect to a non-owned automobile that the coverage shall apply only as excess insurance *over any other insurance available to the insured.*"[3] The question of whether Miss McCoy was covered under policies issued by State Farm and Maryland is very much in controversy, and, should it develop that their policies do not afford coverage, appellant will have primary liability, Miss McCoy being appellant's insured. It is thus apparent that Trinity had a very real interest in settling these claims. After all, if appellant held a *bona fide* view that appellee companies held the primary coverage, but knew that those companies would contest liability, what other steps could have been taken by appellant to protect its interest? According to the allegations in the complaint, it notified State Farm and Maryland, and sought their cooperation. They refused to have any part in any negotiations with claimants. Trinity asserted that, under the circumstances of the collision, it made a "very reasonable" settlement. Bear in mind that, in testing the sufficiency of a demurrer, well pleaded allegations of the complaint are taken to be true. *Howell* v. *Ark. Power and Light Co.,* 225 Ark. 535, 283 S.W. 2d 680.

As to Points 3 and 4, we agree that, if Trinity were endeavoring to stand in the position of Marguerite McCoy for the purpose of enforcing a right of contribution against Lee Floyd (estate) the argument by appellees would be correct, for this would be a direct action against (according to the allegations of the complaint) one of State Farm's insured, and would be a violation of Ark. Stat. Ann. § 66-4001 (Repl. 1966).[4] But Trinity is not

[3]Emphasis supplied.

[4]This statute provides that a judgment must first be rendered against the insured, and remain unsatisfied for a period of 30 days before suit can be instituted against the insurer.

seeking to enforce any right of contribution which its named insured, Marguerite McCoy, might have had against Lee Floyd as a joint tortfeasor; rather, it is seeking to enforce the alleged right which Marguerite McCoy had as an insured of State Farm and Maryland. To simplify the matter, let us suppose that Miss McCoy had no insurance with Trinity, and was not carrying insurance of her own at the time of the collision. Following the accident, she advises State Farm that she believes she has coverage under the policy issued to Chris Floyd, because she and the son were engaged in a joint venture, and he was instructing her how to drive at the time of the accident; she further informs Maryland that she believes she has coverage under the policy issued to Ralph Overstreet, because she was driving Overstreet's automobile with the permission of his son, Don Overstreet. Both State Farm and Maryland deny coverage, and inform Miss McCoy that they will not defend the litigation. She has an opportunity to settle with claimants for a reasonable sum, and feels that she cannot afford to hold such an opportunity in abeyance until after testing her rights against State Farm and Maryland. Accordingly, she settles with claimants from her own funds. Would any one then dispute her right to bring suit against the two insurance companies in a direct action as a matter of establishing her contention? That is exactly the situation before us in this litigation, except that Trinity, in making settlement for Miss McCoy, was subrogated to her rights against appellee companies.

Appellees expend considerable time in their briefs with the contention that this action should have been brought in the Circuit Court. As previously mentioned, a motion to transfer the cause to that court was filed by both appellee companies. However, the question of whether the case should have been transferred to law is not before us in this litigation. The court made no ruling whatsoever on this motion; the only ruling made was that the demurrers should be sustained. If appellees thought that the case should be transferred to Circuit

Court, they should have insisted that the court pass upon the motions. In *Higginbotham* v. *Harper,* 206 Ark. 210, 174 S.W. 2d 668, this court said:

> "But assuming that appellee had a complete and adequate remedy at law and should have proceeded there, his failure to do so was not ground for dismissing the complaint as prayed in the demurrer. Section 1243, Pope's Digest.[5] There was no motion to transfer to law, and the error, if error as to forum, was waived."

See also *The Church of God in Christ* v. *The Bank of Malvern,* 212 Ark. 971, 208 S.W. 2d 770.

Here, a motion was made to transfer to law, but was never acted upon; instead, the court sustained the demurrers and dismissed the complaint, which was error.

For the reasons heretofore set out, the decree is reversed, and the cause is remanded to the Pulaski County Chancery Court (Second Division) for further proceedings not inconsistent with this opinion.

KATHLEEN BAILEY DONAHUE, ADMINISTRATRIX, ET AL. v. CAM L. COWDREY, D/B/A ROSEDALE PLUMBING CENTER

5-4849 440 S.W. 2d 773

Opinion Delivered May 26, 1969

[5]Ark. Stat. Ann. § 27-208 (Repl. 1962) is identical to this section

Martin, Dobbs, Kidd, Hendricks & Ryan and *Tom Gentry* for appellants.

Barber, Henry, Thurman, McCaskill & Amsler for appellee.

George Rose Smith, Justice. In 1965 Curtis Roy Donahue was killed and Preston Brown injured when the sides of a deep narrow trench in which they were laying sewer pipe caved in, burying both men until rescuers dug them out. These actions for wrongful death and personal injuries were brought against the appellee, Cam L. Cowdrey, whose equipment was being used to excavate the trench. The cases were consolidated for trial. This appeal is from a verdict and judgment for the defendant. The principal arguments for reversal center upon the court's instructions to the jury.

At the trial the principal issue of fact, as developed by the proof offered by the plaintiffs and by the defendant, involved the application of the borrowed-servant doctrine. Donahue and Brown were both employed by

Clint Reynolds Plumbing Company. Reynolds had agreed to install for Thibault Milling Company a sewer line running from the Thibault mill to a city sewer main 400 feet away. The line was to slope gradually from the mill to a maximum depth of nine feet at its far end.

Reynolds was not equipped to dig such a deep trench. As in earlier similar situations Reynolds arranged for Cowdrey to furnish a backhoe, with an operator, to make the excavation. The operator, Edward Vance, was a regular employee of Cowdrey. On the day of the accident the entire work crew, including Vance, Donahue, Brown, Clint Reynolds, and others, began the trench at its deepest point and worked toward the Thibault mill. The trench was only two feet wide, that being the width of the backhoe's dredging bucket. The trench collapsed after the work had progressed for almost 100 feet.

The plaintiffs charged that Cowdrey and the backhoe operator were negligent in not bracing the excavation with timbers, in driving the backhoe too close to the trench, and in other respects that need not be detailed. Cowdrey's principal defense, as far as this appeal goes, lay in the borrowed-servant doctrine, under which Cowdrey asserted that at the time of the accident Vance was working exclusively for Reynolds (whose liability to the plaintiffs was covered by the workmen's compensation law). That defense presented a question of fact for the jury.

Upon the broad issue of the employer-employee relationship the court gave AMI 701, defining 'employee,' AMI 702, defining 'scope of employment,' and AMI 703, permitting the jury to consider Cowdrey's ownership of the backhoe and his regular employment of Vance as facts bearing upon the Cowdrey-Vance relationship at the time of the accident.

AMI contains no instruction on the borrowed-servant rule. Over the plaintiffs' objections the court gave the following instructions upon that aspect of the case:

INSTRUCTION No. 15

One who is in the general employment and pay of another may be loaned or hired by his general or original employer to a third party for the performance of some particular services for such third party. If the original or general employer, and not the third party, retains the right to control and direct the conduct of the employee in the performance of such services then the original or general employer will be treated as his employer, with respect to such services. On the other hand, if the third party to whom the employee is loaned or hired has the right to direct and control the conduct of the employee in the performance of such services, then the third party will be considered his employer.

INSTRUCTION No. 16

In order for the plaintiffs, Kathleen Bailey Donahue, Administratrix of the Estate of Curtis Roy Donahue, Deceased, and Preston Brown, to recover against the defendant, Cam L. Cowdrey, d/b/a Rosedale Plumbing Center, you must find from a preponderance of the evidence that Edward Vance was, at the time of the occurrence, the employee of the defendant and acting within the scope of his employment.

If the services of Edward Vance were loaned or hired by the defendant to a third party and Vance was required to proceed in the performance of his work entirely under the control and direction of such third party, then he was the employee of such third party and your verdict should be for the defendant.

In attacking instruction number 16 the appellants rely generally upon the contention that a binding instruction is fatally defective if it omits an essential element of liability or defense and specifically upon our applica-

tion of that principle in *Phillips Coop. Gin Co.* v. *Toll,* 228 Ark. 891, 311 S.W. 2d 171 (1958).

The *Phillips* case is not so similar to this one as to be a controlling precedent on its face. There the borrowed-servant rule was not involved at all. A binding instruction was held to be bad (*a*) because it listed only two of the several elements to be considered in distinguishing an employee from an independent contractor and (*b*) because it contained a comment on the weight of the evidence. In the case at bar neither instruction 15 nor instruction 16 contained such a comment; so the applicability of the *Phillips* case turns upon whether number 16, which alone was binding, violated the requirement that such an instruction be reasonably complete within itself.

We are not willing to say that number 16 was fatally defective. In that instruction the trial court did not attempt, as in the *Phillips* case, to enumerate the various specific facts that were pertinent to the jury's determination of the question at issue. Here the problem was that of determining Vance's status: regular employee or borrowed servant. Several of the facts pertinent to that inquiry are discussed in the Restatement of Agency (2d), § 227, Comment *c* (1958). By way of illustration we take from that discussion three such facts: Vance's comparative skill as a specialist; whether the backhoe was of considerable value; and whether Cowdrey could have substituted another operator for Vance at any time.

Obviously that method of approaching the problem—the enumeration of specific facts bearing on the issue—was not adopted in instruction 16. Instead, the instruction merely referred to the ultimate fact of control, leaving counsel free to argue the specific subordinate elements to the jury. As we read the record, several of the specific pertinent facts were favorable to the plaintiffs. That is, Cowdrey owned the backhoe; the backhoe was a valuable piece of equipment; Vance was a reg-

ular employee of Cowdrey; Vance was a skilled operator; Cowdrey could have substituted another operator for Vance; and Cowdrey was apparently in the business of supplying such equipment, together with an operator, to others. Under the court's actual instructions counsel doubtless argued to the jury all those component parts of the ultimate factual question. If the plaintiffs wanted the added advantage of having the court enumerate such factors to the jury in an instruction, it was the plaintiffs' duty to draft and submit such an instruction. That duty could not be shifted to the court or to the defendant by the objection made by the plaintiffs to the instruction —that "it does not contain all the elements of master and servant relationship or principal and agent relationship under the law." That objection was really more general than specific, since it did not assist the court in supplying whatever elements the plaintiffs thought to be missing from the instruction as tendered.

We see nothing inherently wrong in instructions 15 and 16, when they are read together. (That they may be so read, see *Hearn* v. *East Texas Motor Freight Lines,* 219 Ark. 297, 241 S.W. 2d 259 [1951].) Number 15 explained that an employee may be lent to a third person or may be retained in the service of his regular employer, the test being the right of direction and control. Number 16 carried that explanation of the law to its natural conclusion by stating that if Vance's services had been lent to a third person (Reynolds) so that Vance was required to proceed with his work "entirely" under that person's control and direction, then Vance was the employee of that person, and the verdict should be for the defendant.

The suggestion is made that number 16 should have followed the language of number 15 by referring to the "right to control and direct" rather than to "the control and direction" of the third party. Unquestionably, however, instruction 16 was a substantially correct statement of the law; so the criticism now made about its

phraseology should have been put in the form of a specific objection to the language selected. *St. Louis, I.M. & S. Ry.* v. *Stacks,* 97 Ark. 405, 134 S.W. 315 (1911); *St. Louis, I.M. & S. Ry.* v. *Carter,* 93 Ark. 589, 126 S.W. 99 (1910). Had such an objection been made the court would no doubt have suitably modified the requested charge.

The appellants' other contentions for reversal do not require extended discussion. During the trial an objection was made by the defendant's attorney to the use of the word 'employee' in a question put to a witness. In ruling upon the objection the court explained to the jury that the case would turn upon whether "in your opinion, in your judgment," Vance was working on the particular occasion under the supervision and control of his own employer or of Reynolds. The plaintiffs' attorney objected to the court's remarks as a comment on the evidence and asked for a mistrial.

The request was properly overruled. The court expressed no opinion of its own, making it clear that the question would be for the jury's determination, under the guidance of instructions to be given later on. The granting of a mistrial is an extreme measure, to be resorted to only when "it must be apparent that justice cannot be served by a continuation of the trial." *Back* v. *Duncan,* 246 Ark. 438 S.W. 2d 690 (1969). Here there was no possibility of such a miscarriage of justice.

A third complaint is that the court refused to allow the plaintiffs' attorney to ask Reynolds if he had shored up the sides of the trench in completing the job after the cave-in. It is argued that a negative answer would have weakened Reynolds' credibility, because he had stated earlier that he would have braced the excavation in the first place if he had thought it to be dangerous. There was, however, no offer of proof that Reynolds' answer would have been in the negative. An affirmative answer would have been inadmissible, under the rule of

public policy that excludes proof of precautions taken to prevent the recurrence of an accident assertedly caused by negligence. See Comment, 3 Ark. L. Rev. 431 (1949). Hence the required showing of prejudice has not been made. *New Hampshire Fire Ins. Co.* v. *Blakely,* 97 Ark. 564, 134 S.W. 926 (1911).

Lastly, it is insisted that the court should not have given AMI 206, which told the jury that Cowdrey asserted negligence on the part of the plaintiffs as a defense and had the burden of proving that assertion. It is argued that the instruction had no support in the evidence, there being no proof of negligence on the part of Donahue or Brown. The jury, however, might have been justified in believing from their own common knowledge and experience that the two workmen were careless about their own safety in entering a trench that was nine feet deep and only two feet wide. The unexplained cave-in provided support for that view. Hence we are of the opinion that the court was right in giving the instruction.

No error being shown, the judgment must be affirmed.

ARKANSAS STATE HIGHWAY COMMISSION v.
H. C. CARRUTHERS ET UX

5-4864 441 S.W. 2d 84

Opinion Delivered May 26, 1969

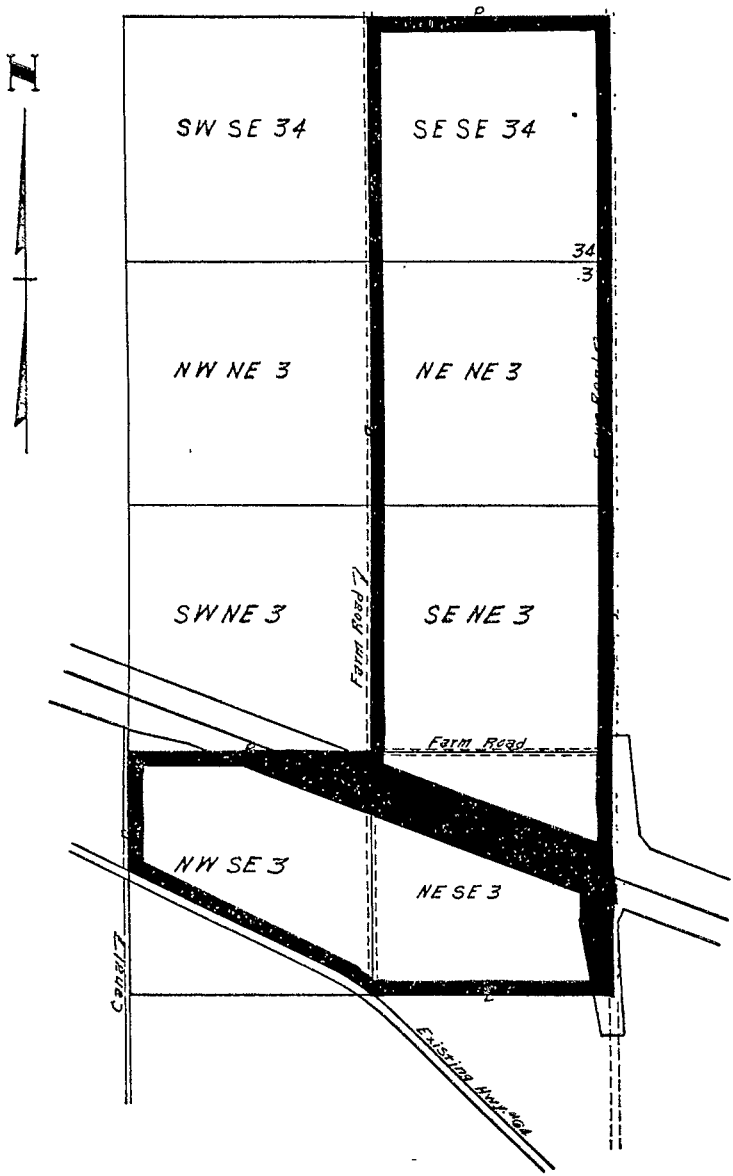
Thomas B. Keys and *Philip N. Gowen* for appellant.

George J. Cambiano for appellee.

George Rose Smith, Justice. This is a condemnation suit brought by the highway department to acquire 13.72 acres as a right of way for Interstate 40 across part of the lands of the appellees, Dr. and Mrs. Carruthers. Dr. Carruthers fixed the landowners' damages at $17,727. His only expert witness gave a figure of $12,635. The jury's verdict was for $13,500. On appeal the commission contends that the amount of the verdict is not supported by substantial evidence.

Dr. Carruthers owns other land in the vicinity, but for the purposes of this suit only a 190-acre tract was in issue. That tract comprises four forties in a north-south line and 30 acres in a fifth forty adjoining the southernmost full forty on the west. For clarification we insert a plat that is in the record. The Carruthers land is outlined in heavy black lines. The right of way being taken is shown as a wide diagonal black line.

Dr. Carruthers was the principal witness for himself and his wife. He explained that he raised cattle on other neighboring land. He used the 190-acre tract in



TRACT 502

Scale: 1" = 660'

controversy to grow alfalfa, lespedeza, and wheat as feed for his cattle. At the time of the taking, however, two of the forties were planted to soy beans—one by a tenant and the other by the doctor's employees as a bonus to them.

Dr. Carruthers, testifying from notes made in advance, valued the 190 acres before the taking at $400 an acre, or $76,000. He valued the land after the taking at $58,273. On cross examination the witness was given an opportunity to explain the $17,727 difference, but a study of his testimony shows that he actually failed to do so.

In explaining his figures the witness said that the highway department had taken 13.72 acres, which he valued at $400 an acre. He stated that the "angles" created by the new highway made it impossible to farm a total of 3.85 acres with modern equipment, reducing the value of those angular areas to $50 an acre. He reduced to the same extent the value of 1.13 acres that he thought would be needed for turnrows after the construction of the new road. Finally, he reduced the value of all the rest of the tract by $50 an acre by reason of its having been cut in two. The witness did not add up his figures on the witness stand, but they may be tabulated as follows:

13.72	acres taken, at $400 an acre	$ 5,488.00
3.85	acres damaged, at $350 an acre	1,347.50
1.13	acres damaged, at $350 an acre	395.50
171.30	acres damaged, at $50 an acre	8,565.00
190.00	acres	$15,796.00

Despite the fact that Dr. Carruthers was allowed to refer freely to his notes, it will be seen that his dollar-and-cents figures fall almost $2,000 short of the overall

damages that he claimed. It may also be noted that in his testimony he asserted damages of $1,347.50 for the four "angles" resulting from the diagonal crossing of the highway. Yet the witness, in arriving at his value of $76,000 for the land before the taking, did not reduce his figures by even a penny to compensate for two identical angles already created by Highway 64. Can two such directly contradictory estimates with respect to identical situations both be regarded as substantial evidence?

From the foregoing tabulation it will be seen that Dr. Carruthers attributed more than half of his asserted damages to an across-the-board depreciation at the rate of $50 an acre. That valuation must be tested by our settled rule that the testimony of a witness, whether a layman or an expert, cannot be regarded as substantial evidence if he is unable to give any reasonable basis for his opinion. Quotations from three of our recent decisions will make the point clear.

In *Arkansas State Highway Commn.* v. *Dupree,* 228 Ark. 1032, 311 S.W. 2d 791 (1958), we affirmed the award only on condition that it be reduced by remittitur from $100,000 to $62,400. In the course of that opinion we said:

> It is shown by the evidence that the owners now have 289 head of cattle on the property, but there is not a scintilla of evidence that they have ever made any money whatever out of cattle. Of course, it was to the interest of the owners to show the full earning capacity of the place, and yet they produced not one iota of evidence to the effect that they had ever made any money whatever out of cattle. If the place was worth from $450,000 to $600,000, as estimated by witnesses produced by the owners, then, based on the capacity to support from 800 to 900 head of cattle, there would be an investment of from $500 to over $600 in land to support one cow.

The record is completely void of any evidence to the effect that a person could pay such a huge amount for land on which to run cattle, and make a profit. Of course, the amount of profit that could be made on the land from farming or raising livestock is of primary importance here as going to show the value of the land, because there is no contention that the potential value of the property for industrial or residential purposes because of its location is lessened by reason of the new road.

Mr. William A. Payne, real estate appraiser engaged in the mortgage loan business, testified that the value of the property before the taking was $371,500 and after the taking $287,500, and he gave $87,000 as the amount of damages, including the cost of fencing. Of course, the witness could not arrive at a sound valuation without taking into consideration what the property would produce, and Mr. Payne did not know if any cotton is planted on the place, and thought the cotton allotment to be 2,-200 acres. The Government pays $46 per acre if the land is placed in the land Bank.

Mr. George Ed McCain has a place across the road from the property involved in this litigation. He places the damages at 20 per cent to 25 per cent of the total value of the place. Mr. McCain thinks the property is worth $200 per acre straight across, or $600,000 for the 3,000 acres, and that it will be depreciated $150,000 to $200,000 by the construction of the road. Mr. McCain gives no satisfactory basis for placing such a huge market value on the property or for the amount of damages he mentioned.

The owners have been operating this place since 1928 and there is no showing that they have ever made over $14,000 per year out of the property, and in arriving at this figure as to the profit made, noth-

ing is allowed for the work the owners do in connection with the operation of the place. As heretofore stated, Mr. C. S. Dupree gives his full time to looking after the place, and his two brothers give part of their time. Certainly between the three of them their services would be worth at the minimum a total of $9,000, and when this charge is correctly made it would leave a net profit on the place of not over $6,000 per year. No witness says the place is worth from $380,000 to $600,000 because it would produce a net of some $6,000 to $14,000 per year from crops, and there is no showing that the owners have ever made a dime out of cattle.

Again, in *Arkansas State Highway Commn.* v. *Byars,* 221 Ark. 845, 256 S.W. 2d 738 (1953), no fewer than ten witnesses testified to damages that exceeded the amount of the verdict, but we nevertheless reversed the judgment for want of substantial evidence to support it. From the opinion:

> There is no showing that any of the farm lands involved are suitable for any purpose except the production of livestock and hay. Yet not a single witness, including the owners themselves, gave any testimony whatever as to the number of livestock that the lands will support or the amount of feed that can be grown thereon. In determining the value of a livestock farm, one cannot ignore such material facts and arrive at an intelligent opinion.
>
> Whether there is substantial evidence to support a verdict is not a question of fact, but one of law. Because a witness testifies as to a conclusion on his part does not necessarily mean that the evidence given by him is substantial, when he has not given a satisfactory explanation of how he arrived at the conclusion.
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> * * * *
>
> "The difficulty is in differentiating between *any* evidence and substantial evidence . . . Must ap-

> pellate judges close their eyes and their minds to the obvious fact that in a particular case the evidence, from its very nature, could not have been convincing, though it produced a given result? Shall we affirm that such evidence was *necessarily* substantial because it was favorably acted upon by the jury?"

Finally, our opinion in *Arkansas State Highway Commn.* v. *Stanley,* 234 Ark. 430, 353 S.W. 2d 173, 4 A.L.R. 2d 749 (1962), is directly in point with respect to testimony which states a dollar-and-cents valuation without any supporting reasons for the witness's conclusion:

> After this introductory testimony Stanley stated that in his opinion the tract taken is worth twenty million dollars. This figure is arbitrary in that it has no relation whatever to any fact in the record. Stanley made no effort to say how he arrived at his valuation; it seems to have been plucked from the air and might equally well have been ten thousand dollars or a hundred million dollars. Even the opinion of an expert in the field of land valuation is not substantial evidence if he fails to show a fair or reasonable basis for his conclusion. *Ark. State Highway Comm.* v. *Byars,* 221 Ark. 845, 256 S.W. 2d 738. There is still less reason for finding the fanciful figure fixed by Stanley to be a sufficient foundation for the verdict in this case.

The principles announced in those cases apply to this one. Dr. Carruthers took the position that the three untouched forties north of the interstate highway had been uniformly damaged at the rate of $50 an acre by being separated from the smaller part of the property south of the new right of way, but he gave no substantial reasons for his conclusion. By contrast, in the recent case of *Arkansas State Highway Commn.* v. *Freyaldenhoven,* 246 Ark. 688, 439 S.W. 2d 791, the landowner proved the need for access from one part of his land to the other and the damage he suffered from

the loss of that access. Here there is no such factual proof.

Dr. Carruthers made several statements about the loss of access to one part of the tract from the other, but his assertions were so vague as to be of no help to the jury. He said that he and his brother, who owned other neighboring lands, had a "headquarters" at a point that cannot be located from the testimony in the record (except that it was not on the 190-acre tract in issue). But Dr. Carruthers failed to say what the headquarters consisted of or to what extent his farming operations involved movements between the headquarters and the rest of the property. How could the jury assign a pecuniary loss to the suggested possibility that the 190-acre tract had been separated from a headquarters about which the jurors knew nothing whatever?

In testifying about loss of access the doctor also referred to an overpass which the highway department had provided at the southeast corner of the 190-acre tract. Dr. Carruthers admitted that it was a good overpass, but he said that it was not wide enough for the passage of a four-row cultivator. There is, however, not one line of testimony to show how often such passages may be necessary or to show that the doctor had ever owned or used such a cultivator. Of what help was such testimony to the jury in evaluating the claimed damage of $50 an acre?

In fact, Dr. Carruthers wholly failed to say why it was necessary for him or his employees to travel from one side of the new highway to the other in order to raise fodder for cattle. Moreover, at the time of the taking 80 acres north of the highway were being devoted to the cultivation of soy beans by tenants or employees of the landowners. There is not a syllable of proof to show that those persons had any need for access to the property south of the highway. How could such utterly vague testimony assist the jury in its deliberations?

The doctor also said that he would have to construct new roads involving a total area of 2.8 acres. He did not say to what extent those roads would replace the ones that already existed, or what type of roads the new ones would be, or what they would cost, or to what extent they might affect the value of the farm. Can such fragmentary evidence assist the jury in reaching a reasoned verdict?

Dr. Carruthers' testimony was actually quite similar to that of the landowner in the *Stanley* case, *supra*. Although he voiced the conclusion that the new highway would damage his land by $50 to the acre, he gave no supporting facts for that conclusion. As in the *Stanley* case, the $50 figure was apparently plucked from the air and might just as well have been $10 or $100. Such fanciful conclusions do not attain the dignity of substantial evidence.

We need not recite in detail the testimony of the other three witnesses called by the landowners. Dr. Carruthers' brother and the latter's tenant both echoed the doctor's assertion of an across-the-board damage to the entire tract at the rate of $50 an acre. But neither gave any factual basis for his statement. Rather to the contrary, the brother insisted on cross examination that the untouched forty lying more than a half mile away from the new highway was damaged to exactly the same extent as the forty that was actually bisected by the new construction. That a sympathetic jury may have given credence to such a statement does not lessen its absurdity.

One real estate appraiser, Forrest Griswood, testified for the landowners. He valued the land at $300 an acre before the taking and paralleled Dr. Carruthers' testimony by finding a uniform damage of $45 an acre to the tract as a whole. The trouble is that he was able to adduce no facts whatever to support his expert opinion. Quite the contrary, he admitted on cross examina-

tion that most farms in the vicinity are similarly divided by public roads. Moreover, despite his insistence that the farm as a whole had been reduced in value from $300 to $255 an acre, he conceded on cross examination that *after* the construction of the new highway Dr. Carruthers had actually sold 80 or 90 acres of the very land in question for $350 an acre! No reasonable inference can be drawn from the witness's testimony as a whole except that the untouched northern forties were in fact benefited by the new highway.

The jury's verdict demonstrably exceeds the greatest amount that can be said to be supported by substantial proof. In a situation of this kind, where no particular ruling by the trial court is assigned as error, it is our practice to allow the landowner to remit down to the most liberal amount that we would approve if the jury had returned a verdict for that sum. *Arkansas State Highway Commn.* v. *Darr,* 246 Ark. 204, 437 S.W. 2d 463 (1969). Here that amount cannot exceed $10,000, because the proof would not support the allowance of a greater sum even if one should include a severance award of $50 an acre for the two southernmost forties that were crossed by the new construction. Hence the judgment will be affirmed if a remittitur of $3,500 is filed within 17 days; otherwise the judgment will be reversed and the cause remanded for a new trial.

FOGLEMAN, J., concurring in part; dissenting in part.

BYRD, J., dissents.

JOHN A. FOGLEMAN, Justice. I agree with the majority that the landowner's testimony in this case did not constitute substantial evidence to support a jury verdict for an amount greater than the damages arrived at by any expert witness. I do not agree with some of the factors upon which the majority find the testimony insubstantial.

I do not see how the conclusion is reached that Dr. Carruthers did not consider the angles created by Highway 64 in arriving at his value of the tract before the taking. Dr. Carruthers was asked to state his opinion of the value of the 190-acre agricultural tract, which was treated as an integral unit for valuation purposes by all parties. He responded in the same manner as is common with people who establish the criteria for market value, i.e., buyers and sellers of real estate. He gave the value of the tract in dollars per acre. This is the language spoken by virtually everyone who speaks of values of farmland, if not of all unsubdivided tracts. This was the way appellant's expert Mashburn expressed his appraised value before the taking. This does not mean that each acre bears the same value. It is clear to me that this landowner did not mean his testimony to be so construed. He had pointed out that there were roads and turnrows on the land, that part of the tract was wooded land, and that part of it was in drainage ditches. Although a purchaser would ascertain the acreage taken up in roads, ditches, woods, turnrows and angles, he would also arrive at a per acre figure for the whole tract in deciding what he would pay. There is no indication that Dr. Carruthers put separate values on the "disadvantaged" acres in arriving at his total "before taking" value. I trust that we will not find value testimony insubstantial simply because the language of the real estate market place is used by a witness. We are not likely to change that dialect outside the courtroom, where the market value is actually established.

Furthermore, the failure to show that the doctor used or owned four-row farm equipment should be of no significance whatever. Even if the doctor never had farmed at all but was simply a landlord who rented his lands to tenants, any impediment to the use of four-row mechanized farm equipment in 1967 had a definite bearing upon the price any purchaser having the ability and occasion to purchase his farmland would be willing to pay for it. Every element which a businessman of

ordinary prudence would consider before purchasing property should be considered in arriving at its value. *Kirk* v. *Pulaski Road Improvement District No.* 10, 172 Ark. 1031, 291 S.W. 793. A person buying farmland in the last half of the 1960's who did not consider ability or inability to use four-row equipment on agricultural land would not be one of ordinary prudence. In the present cost-price squeeze on agriculture the necessity for use of equipment this size or larger wherever possible is a matter of common knowledge which should not have to be shown by evidence.

The fact that Dr. Carruthers might not need to cross the highway to raise fodder for cattle or that he grew alfalfa and cattle feed on part of the tract and permitted tenants and employees to grow soybeans on the remainder is also overemphasized by the majority. The use being made of the land by him is of minor importance. It is the land's availability for the most valuable purpose for which it is adapted and can be used that determines market value. *Scott* v. *State,* 230 Ark. 766, 326 S.W. 2d 812; *Desha* v. *Independence County Bridge District No.* 1, 176 Ark. 253, 3 S.W. 2d 969; *Rinke* v. *Union Special School District No.* 19, 174 Ark. 59, 294 S.W. 410; *Weidemeyer* v. *Little Rock,* 157 Ark. 5, 247 S.W. 62; *Drainage District No.* 11 v. *Stacey,* 127 Ark. 549, 192 S.W. 904. When the testimony of all witnesses is reviewed the only reasonable conclusion that could be reached is that the highest and best use of this property for market value consideration before the taking was as an integral farm unit.

Neither do I agree that the testimony of Forrest Griswood has no reasonable basis or that it does not constitute substantial evidence. This 190-acre agricultural tract was connected for its entire length by a farm road connected with existing Highway 64. It was not badly broken by drainage ditches. There was a deep ditch which provided drainage for the entire tract. Both parties treated it as an integral unit. Griswood also

spoke the common language of the market place when he said that the damage to the Carruthers tract was $45 per acre. His qualifications as an expert witness were admitted by appellant. Griswood supported his statement by testimony that the tract was disintegrated as one operation and that a buyer would not pay as much for a farm that was disintegrated. He commenced to explain his answer but was interrupted by appellant's attorney who was anxious to interrogate him about a subsequent sale of part of the lands. His admission that most farms in the vicinity were divided by public roads seems to me to be without significance in determining whether his testimony was substantial. No one contended, or even suggested, that the value of these other lands, as farms, would not have been greater if they had not been so bisected. Griswood stated the truism that expense of operation is greater when the lands are divided than when they are in one block.

The sale of part of these lands by the owner is also given too much weight by the majority in measuring the substance of this expert's testimony. It is to be noted that Griswood's "before" valuation was $300 per acre, the same as appellant's expert Mashburn's, but less than the $350 per acre sale. It appears that this sale was made by Dr. Carruthers to his brother, who owned a lot of land on which he conducted farming operations in the immediate vicinity. Dr. Carruthers shared a farming headquarters with this brother. Such transactions are seldom at arm's length. Usually, a tract of farmland is more valuable to an adjoining owner or to one with a headquarters nearby than it is on the open market.

I submit that every factor mentioned about Griswood's testimony by the majority has to do with its weight but not its substance. The majority finds an inference in his testimony that part of the Carruthers land was benefitted by the highway, in some way I cannot find explained. Neither the appellant nor its witnesses suggested any such benefit.

I am also puzzled by the disposition of this case. I suppose appellee cannot be hurt by the court's offer of an option. I would reverse and remand as we did in *Arkansas State Highway Commission* v. *Darr,* 246 Ark. 204, 437 S.W. 2d 463. I can see no difference in this case and that. In both, the single ground of appeal was that there was no substantial evidence to support the verdict. In both, the testimony which would support the verdict was held not to be substantial. The *Darr* opinion stated that it fell in the category of cases where error in the trial court enhanced the award. There we were unable to find a satisfactory figure clearly not excessive because acceptance of the values fixed by an expert for the landowner, whose testimony was substantial, would ignore the testimony of the highway commission's experts. Here, the majority opinion leaves the record with only appellant's experts as to "before" and "after" values. Yet the landowner may accept an amount twice that which would be supported by appellant's appraiser who found the greatest amount as just compensation.

ARKANSAS STATE HIGHWAY COMMISSION v.
EMMA STALLINGS LEAVELL

5-4900 441 S.W. 2d 99

Opinion Delivered May 26, 1969

Thomas B. Keys and *Kenneth R. Brock* for appellant.

Gordon, Gordon & Eddy for appellee.

LYLE BROWN, Justice. This action in eminent domain was brought by the Highway Commission to acquire lands needed for the relocation of Highway 9, necessitated by the construction of a new bridge across the Arkansas River near Morrilton. The jury awarded Emma Stallings Leavell $28,000. The Commission asserts error in that the trial court denied its motion for a change of venue and alleges alternatively that there is no substantial evidence to support the verdict.

The landowner had a tract consisting of 151 acres. The land is situated near the bank of the Arkansas River, slightly under two miles south of the heart of the City of

Morrilton. Highway 9 runs south from Morrilton and between the west boundary of part of the lands and the river, then turns southwesterly across the river bridge. The northerly 36 acres are in the hills and inside the city limits. Mr. and Mrs. Leavell have their home on the hill land. The southerly 115 acres are in the bottoms. At the time of the taking the entire tract was used for the residence and for agricultural purposes. The taking involves only the 36 acres in the hills. It is not contended that the bottom land was damaged.

The new location of Highway 9 may be described as entering the 36-acre tract near the southwest corner. It then goes into a curve, touching the east boundary of the lands and there turns northwesterly and leaves the Leavell property at a point near the center of the north boundary line. The curvature of the highway leaves the tract divided into three parcels of irregular shapes and sizes.

Basing their figures on residential development, three appraisers for the landowner fixed damages at $30,160, $24,200, and $26,100. Mr. Leavell approximated the damages at between $35,000 and $40,000. The two appraisers for the Commission based compensation on agricultural use and fixed damages at $9,000 and $8,750.

In support of its motion for a change of venue the Commission introduced evidence reflecting judgments in nineteen condemnation cases tried in that county between June 18, 1967, and August 5, 1968. In all those cases the landowners received awards substantially exceeding the value testimony of expert witnesses called by the Commission. The value testimony in all of those cases was introduced in the case at bar by a lawyer witness who had inspected the records. That witness did not express any opinion as to whether the Highway Commission could obtain a fair trial in Conway County.

Just as in the case of *Arkansas State Highway Commission* -v. *Duff,* 246 Ark. 922, 440 S.W. 2d 563

the Commission tendered no affidavits in support of its motion. Our holding in *Duff,* to the effect that a minimum of two supporting affidavits is required, is of course determinative of the issue. We would add only a brief comment to what we said in *Duff.* Since 1875 it has been the mandatory requirement of our statutes that any party to a civil action desiring an order for change of venue shall support his motion with the affidavits of at least two credible persons. Ark. Stat. Ann. § 27-701 (Repl. 1962). That statute is not attacked nor is any legal reason offered for waiving it. As a practical matter it would appear that if the Commission cannot in fact obtain a fair trial, there would surely be available two credible persons who would have knowledge of such a fact and would supply the required affidavits. Appellant argues that the results of the nineteen cited trials make it obvious that it cannot receive a fair and impartial trial in the case at bar. Assuming, without deciding, that the assertion be a fact, it would not of itself justify this court in ignoring the statutory requirement for supporting affidavits. We are not permitted to so legislate.

No objection was made at the trial level that the motion was not supported by affidavits. Appellant therefore reasons that we should not consider the landowner's argument on appeal that the absence of the affidavits is fatal. We evaluate the absence of the affidavits in resolving the ultimate question, that is, whether the trial court abused its discretion in denying the motion for change of venue. In the circumstances here, which of course include the failure to comply with the governing statute, we cannot say the court abused its discretion.

In support of its contention that the record is void of substantial evidence, appellant criticizes the use of two of the many comparable sales which were analyzed and compared with the Leavell property. On cross-examination Mr. Leavell improperly referred to an offer

for a small portion of the 36-acre tract. Also, some of witness Barnes' value figures were taken out of context to support appellant's contention that Mr. Barnes was in error. If it be conceded that some or all of that testimony is subject to criticism, that fact would not necessarily destroy the substantiality of other testimony favorable to appellee.

The real attack on the evidence concerns the subject of highest and best use. The Commission contends there is no reasonable basis for fixing the highest and best use as being for residential property. It is true the Commission's witnesses considered the most advantageous use presently and in the immediate future to be agricultural. It was conceded by one of its witnesses that Morrilton is growing south toward the river and that it was not unreasonable to predict future urban development upon the Leavell property; however, he insisted that any such development would be at a time far in the future. On the other hand, three expert witnesses for the landowner testified that the highest and best use as of the date of the taking was for residential subdivision. The elements upon which that conclusion was based were supported by such factors as the 36 acres being in the city limits; all utilities are available; the town is already expanding in that direction; the development of the Arkansas River for navigation and recreation will hasten the subdividing of the Leavell tract; two additions have already been developed between the subject property and Morrilton; and it was argued that the topography of the acreage was most desirable for homesites.

It is true, as is urged by the Commission, that we are concerned only with the present market value and not those values based upon speculative anticipation of future development. *Arkansas State Highway Commission* v. *Watkins,* 229 Ark. 27, 313 S.W. 2d 86 (1958). Consideration must be given to existing uses, but it cannot be seriously argued that present usage is the guideline. In fact, it was pointed out in *Watkins* that a tract,

at the time of taking, may be utilized for farming or it may be "covered with brush or boulders." Nevertheless it is still proper in those situations to value the land for building purposes if those uses, at the time of taking, have an effect on the present market value of the land.

Such was the opinion of the three expert witnesses for the landowner. Witness Gene Hewitt testified that he had been in the real estate business in Morrilton since 1955 and recounted experience in the development of a nearby subdivision. He concluded just compensation to be $30,160, based upon the recited elements which support residential development in the area. Mr. Leavell has lived on the land for many years and of course showed substantial acquaintance with lands in the area. His estimate of just compensation was more than the jury actually awarded.

We are unable to say as a matter of law that there is no substantial evidence to support the verdict.

Affirmed.

JONES, J., dissents.

J. FRED JONES, Justice. At the risk of being accused of invading the province of the jury, I respectfully dissent from the majority opinion in this case.

As more specifically pointed out in my concurring opinion in the case of *Ark. State Highway Commission* v. *Dixon,* 246 Ark. 756, 439 S.W. 2d 912, a tremendous gap has developed between the opinions of the experts testifying for the landowners, and those testifying for the highway commission, as to the damages sustained to land in highway condemnation cases, and this case is no exception. The lowest estimate of damages by the appellee's experts in this case is $24,200 and the highest estimate by appellant's experts is $9,000, a difference of $15,200. The jury verdict was for $28,-

000. The appellant's expert appraisers say that the highest and best use of the land involved is for agricultural purposes; whereas the appellee's experts say that its highest and best use is for subdivision residential development. As I attempted to point out in my concurrence in *Dixon, supra,* these expert appraisers had the same information available to them and drew their conclusions from the same source. If such discrepancy does not reflect on the qualifications of these witnesses as expert appraisers, it certainly does, in my opinion, adulterate the quality of their testimony and opinions as substantial evidence.

I recognize that only the trial judge has the statutory authority, under Ark. Stat. Ann. §§ 27-1901—27-1903 (Repl. 1962), to re-examine the issues of fact after a verdict by a jury, and that it is the duty of the trial judge and not this court to set aside a verdict which is against the preponderance of the evidence. (*La. & Ark. Ry. Co.* v. *O'Steen and Barr,* 194 Ark. 1125, 110 S.W. 2d 488.)

I also recognize that in the case at bar enhancement in value by the construction of the highway was not pleaded by the appellant and that aside from a mere unsupported motion for a change in venue, the appellant relied on the usual, and almost trite contention, that there was no substantial evidence to support the jury verdict of $28,000. I recognize that my dissent is based on a rather radical departure from our usual procedures in determining what is substantial evidence.

Witness Hewitt testified for the appellee that the highest and best use of the land was for residential development and the damage was $30,160. Witness Hayes testified for the appellant that the highest and best use was for agricultural purposes and that the damage was $8,750. The testimony of appellee's experts ranged from Mr. Hewitt's high of $30,160 to witness Barnes' low of $24,200, and for the appellant the testimony ranged from Mr. Hayes' low of $8,750 to Mr. Mashburn's

high of $9,000—so what is substantial evidence under such discrepancy in the testimony of experts? I am simply unable to accept as substantial evidence, the opinions of the experts in this case when the testimony, in my opinion, is so thoroughly contradicted by the plat of the area involved and accepted in evidence.

The land involved in this case is inside the corporate limits of Morrilton and is on a high bank overlooking the Arkansas River above lock and dam No. 9. The highway involved is not a controlled access highway, but is a new location of the old highway. The old highway crossed the river bridge and ran parallel with the river along the west side of appellee's property, whereas the new highway crosses a new bridge a short distance down stream from the old bridge. The new highway enters appellee's land at its southwest corner, crosses a part of the land and then curves north to run through the east side of appellee's property. The old highway now constitutes a paved street on the west side of appellee's property next to the river and the new paved highway provides highway frontage and access to any portions of the east half of appellee's property.

If the appellee's experts were correct in their opinion that the highest and best use of appellee's land is for residential development purposes, then their testimony that the lands have been damaged by the construction of a paved road readily accessible to any residential plots that may be laid out on such land, simply does not make sense to me.

Since no enhancement in value was alleged in this case and no request was made for a new trial, I would reverse and remand for a determination of the market value of the land actually taken in fee and for an assessment of damages not to exceed that amount.

LOUIS RAY JONES v. THE STATE OF ARKANSAS

5-5377 441 S.W. 2d 458

Opinion Delivered May 26, 1969

Harkness, Friedman & Kusin for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Ass't. Atty. Gen. for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was convicted of burglary and grand larceny. He lists 15 points for reversal. His failure to argue some of them, except by repeating the statement of the points themselves is evidence that these are merely formal in nature. Others are overlapping and intertwined. We shall treat as many of these points in this opinion as seem to merit discussion, some of which we consider only in view of the reversal of this case for insufficiency of the evidence. Others we consider to be wholly without merit. In dealing with those of which there is some indication of merit, we will consolidate into the following:

1. The evidence is insufficient to support the verdict of the jury.

2. Appellant was never taken before an examining magistrate.

3. The conviction should be set aside because appellant's arrest was not based upon a warrant or probable cause.

4. Evidence obtained by search of a barn wherein a large quantity of paint was stored should have been suppressed.

5. A cardboard box found by an officer prior to the arrest of appellant should have been suppressed as evidence.

6. Appellant was deprived of constitutional rights by failure of the officers to advise him of his right to counsel, to permit him to use a telephone for at least 30 hours, to permit him to communicate with his parents or relatives, and by interrogation of appellant in the absence of any attorney.

7. The court erred in giving an instruction distinguishing between direct and circumstantial evidence.

8. The court erred in instructing the jury as to a rule of evidence in regard to possession of stolen property.

We treat these points in the order listed.

1.

We find reversible error in the denial of appellant's motion for new trial on this ground.

The Sherwin-Williams Paint Store on State Line Road in Texarkana, Arkansas, was burglarized during the weekend of May 27, 28 and 29, 1967. Paint, brushes and other articles worth more than $5,000 were taken from the store. Among the articles taken were various cloths, a sander, a safe containing papers and records, and various accessories. The burglary was discovered by Sid Smith, the manager of the store, at 7:00 a.m., Monday, May 29. The store had apparently been entered through a window which had been broken and unlocked. Smith immediately notified the Texarkana Police Department. Chief Max Tackett directed the investigation. He learned that a yellow panel-body truck belonging to the paint store had been found at the store on Monday morning with its motor running. He also had information that a truck belonging to the Texarkana School District had been stolen during the same weekend. Assistant Chief Thurman Quisenberry examined the school truck. It was a 1½-ton or 2-ton flat bed truck. The floor of the truck bed consisting of 1'' x 4'' wooden slats was heavily scratched and scarred. The truck was light green, but the bed was black. It had dual wheels and oak sideboards. It had been found abandoned on the side of a road near Fulton. Clay mud was found underneath the truck, and sprigs of wild oats were caught in the springs underneath the truck. On and about the bed of the truck Chief Quisenberry found limbs and thorns from bois d'arc trees, cedar limbs and foliage and leaves appearing to be from wild hedge. Freshly

sprayed black paint appeared along the edges of the floor slats. Lettering on the truck doors had been obliterated by paint of the same color, but of a different type. In the truck the officer found a claw hammer and a small can of green spray paint of the same brand carried in the stock of the paint store. Both Tackett and Quisenberry examined the truck at the paint store and found foliage, some of which was on the rearview mirror, sililar to that found on the school truck. Quisenberry noticed scratches up and down both sides of the paint store truck. Chief Tackett ascertained that plants bearing these types of foliage were indigenous to the vicinity of Brownstown, a small community in Sevier County. He proceeded to that area with Quisenberry and Officer John Butler. Butler was taken because he had previously made his home in Sevier County about six or seven miles from Brownstown. They went near a place known to Butler as the Hogue place. After going some 200 yards from the highway and through a wire gap, they noticed the tracks of a dual-wheeled truck. They drove about 300 yards down through woods to a creek. They walked across the creek and followed these tracks into a thicket of bois d'arc bushes. They then drove back to a welding shop and learned that a new house had been built north of the house that Butler remembered.

The next day Tackett, Butler, Quisenberry and Officer Weir returned to the area. As they came into the area they saw a house on the Hogue place 10 to 12 feet square with a garage to the right, a tool shed to the left rear and a combination chicken house and barn just beyond the tool shed. The barn was 60 to 70 yards from the road and the tool shed 10 to 20 yards from it. The house was 30 to 40 yards from the road. They recognized a 1960 model Chevrolet automobile parked in the road in front of the house as one used by both Louis Ray Jones and his mother, a resident of Texarkana. Jimmy Hogue, the owner of the place was Louis Ray Jones' grandfather. A man named Carl Ray was in charge of the place.

Butler went up to Snead's grocery, while the other officers proceeded along the road about a half mile, passing through the wire gap. Weir remained with the car while Tackett and Quisenberry walked farther. After they crossed a creek, Tackett found a piece of pasteboard which bore stencilled marks pertaining to Sherwin-Williams at Texarkana. Following dual wheel tracks, they saw skinned places on the brush bearing bluish green paint marks approximately the same color as the paint on the school truck. After the officers had unsuccessfully searched the area for the safe and other missing articles, they returned to the area of the small house they had seen, leaving the police car 50 or 60 steps from the place the cardboard was found and about 60 to 70 steps from the place the dual wheel tracks led into brush consisting largely of bois d'arc in a place where some wild oats also grew. They had been rejoined by Butler who reported information he had received at the store. The officers walked around behind the garage, where they found dual wheel tracks, appearing to be fresh, leading to the barn on the side most remote from the highway. Looking through a wire enclosure they saw that the barn contained stacks of hay. It appeared to Butler that the barn door had been recently opened. Weir and Butler looked through a crack and saw a two-wheeled dolly.

Quisenberry took up a station in some woods 50 or 60 yards from the road in a position where he could watch the house, barn and other buildings, while Tackett, Butler and Weir proceeded to the Snead store. From there, Chief Tackett called the sheriff's office at DeQueen for a search warrant. He left Weir at the store to await the arrival of a Sevier County officer, and he and Butler returned to the area where the cardboard had been found and searched for the safe and paint for more than an hour. During this time Quisenberry saw Louis Ray Jones, Jo Ann Womack and Wayne Jones arrive in a Volkswagen, which they parked in front of the Chevrolet. After they raised the hood on the Chevrolet, Louis Ray and Jo Ann Womack came around behind the

garage and mounted a tractor located between the garage and the house. They backed the tractor into the road and proceeded in the direction in which Tackett and Butler had gone. Butler and Tackett heard the motor of the tractor and could tell that it was approaching them. When Butler got back to the police car, he saw a set of tractor tracks indicating that a tractor had been turned around near the car. Weir had seen the party arrive and called Chief Tackett on a "walkie-talkie" radio and advised him of the party's arrival. Tackett instructed Weir not to let these people leave, but not to make any arrests before the Sevier County officer arrived, if he could avoid doing so. Shortly thereafter Deputy Sheriff Young arrived, and he and Weir went to the house. About 10 or 15 minutes after they arrived, Louis Ray Jones and Miss Womack returned, and were placed under arrest by these officers. The arrest was made about 20 or 30 feet from the shed or garage at or near the edge of the road. Chief Tackett and Butler arrived shortly thereafter and found Louis Ray Jones and Jo Ann Womack under arrest and in a car. Young had a search warrant which was declared invalid by the trial court. The officers immediately commenced a search of the barn and garage in the vicinity. In the barn they found most of the stolen articles which were later returned to the Sherwin-Williams Paint Store. They did not find the safe. They also found a large number of empty fertilizer sacks in the barn and fertilizer in clear plastic bags in the garage. The bags were colored red in part. Some of the bags in the garage were also empty. The two-wheeled dolly was recovered from the garage.

T. D. Snead ran the store about a quarter of a mile away from the place where Jones was arrested. Late in the evening on the day before the police came up he saw a large truck with sideboards pull out from the barn. It went south toward the cliff, a point beyond the Hogue house near the river and south of Brownstown. .

On the following day Tackett, Quisenberry, Weir and Butler returned to the area with Willis B. Smith, Jr., and went along the road beyond the Hogue place, searching for the safe. They found and recovered a plastic bag of the type found at the barn and garage containing Sherwin-Williams papers and records. They found dual wheel tracks indicating that a truck had backed up to Little River where they found 12 or 15 more of the same type bags. Two of these found in the river also contained records and papers belonging to Sherwin-Williams Paint Company at 800 State Line Road. The papers were identified by the manager of Sherwin-Williams Paint Company.

This evidence was entirely circumstantial. We find it insufficient to support the jury verdict. Where circumstantial evidence alone is relied upon to establish guilt of one charged with a crime, such evidence must exclude every other reasonable hypothesis than that of the guilt of the accused. *Logi* v. *State,* 153 Ark. 317, 240 S.W. 400; *Turner* v. *State,* 192 Ark. 937, 96 S.W. 2d 455; *O'Neal* v. *State,* 179 Ark. 1153, 15 S.W. 2d 976. A conviction resting upon evidence which fails to come up to the standard prescribed is contrary to law, and it is the duty of the court to set it aside. Where all the circumstantial evidence leaves the jury to conjecture only in determining the guilt of one accused, it fails to meet this standard. *Logi* v. *State,* supra.

The conviction here is based upon evidence lacking important elements shown in cases where we have found circumstantial evidence sufficient. In this case there was no evidence indicating that appellant was ever actually in possession of any part of the stolen property as there was in *Meadows* v. *State,* 128 Ark. 639, 193 S.W. 264; or that he was ever present at or near the paint store as was shown in *Nick* v. *State,* 144 Ark. 641, 215 S.W. 899; or that he had actually been present at the place or in the vicinity where the stolen property was found prior to the time when seen by the officers; or that he was ever

in the vehicle tracked to the area where the paint was found as was shown in *Nick* v. *State,* supra. Under this state of the record, the circumstances could be just as consistant with the guilt of Jimmy Hogue, Carl Ray, Wayne Jones, Jo Ann Womack (now Jones), or any one of innumerable people who might have had access to the Hogue place and the garge and barn there. There was no evidence whatever as to who might have lived on or frequented the premises. It was not shown that appellant lived on or had occasion to stay on the premises as was indicated in *Nick* v. *State,* supra, and *O'Neal* v. *State,* 179 Ark. 1153, 15 S.W. 2d 976. The evidence in this case is no stronger than was the circumstantial evidence of grand larceny in *France* v. *State,* 68 Ark. 529, 60 S.W. 236, where we said that the defendant might be guilty, that the circumstances were suspicious but the evidence was too slight to support the verdict and a new trial should have been granted.

2.

We have repeatedly said that the provisions of Ark. Stat. Ann. § 43-601 (Repl. 1964) are directory, not mandatory. There can be no reversible error solely because of a failure to take one lawfully arrested before a magistrate for preliminary examination. *Moore* v. *State,* 229 Ark. 335, 315 S.W. 2d 907; *Paschal* v. *State,* 243 Ark. 329, 420 S.W. 2d 73.

3.

We find ample evidence to justify the arrest of appellant in this case. His actions and conduct after the officers had arrived at the Hogue place were sufficient to give them reasonable grounds for believing that he had committed a felony. He stopped immediately at an apparently disabled car he had been known to drive at a place where the officers had reason to believe fruits of the crime were stored. He displayed a great familiarity with the premises and the surrounding area where in-

criminating evidence had already been found. He commenced an immediate reconnaisance of the area. His tractor ride with his girl friend commenced in an area near the garage and barn. It took them toward the area where the truck tracks, the cardboard and other incriminating evidence had been observed but was reversed abruptly when the police car came into his sight. Under Ark. Stat. Ann. § 43-403 (Repl. 1964) an officer has the right to make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony. Appellant argues that even if the other officers did have reasonable grounds for making the arrest, Deputy Sheriff Young did not. Obviously, knowledge and information gained by the officers were interchanged among them. Chief Tackett, while approaching the place of arrest, directed by radio that it be made. Butler had previously conveyed to Tackett the information given him by Snead. Young testified on the hearing on a motion to suppress evidence that Weir stated that the Texarkana officers had reason to believe that the stolen paint was in the area or buildings, that Louis Ray Jones had been seen hauling feed or hay in the area,[1] and that Jones and the girl had ridden away from the area on a tractor. He stated that the only ground for him to suspect the parties was the statement the officer, Weir, had given him. Probable cause is to be evaluated by the courts on the basis of the collective information of the police (which may consist partially of hearsay) rather than that of only the officer who performs the act of arresting. *Smith* v. *United States,* 358 F. 2d 835 (D.C. 1966), *cert. denied,* 386 U.S. 1008. See also *State* v. *Fioravanti,* 46 N.J. 109, 215 A. 2d 16 (1965); *United States* v. *Ventresca,* 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684. Information coming to officers must rise above mere suspicion of criminal activity in order to constitute probable cause for an arrest, but it need not be tantamount to that degree of proof sufficient to sustain a

[1]No evidence to support this statement was offered in the actual trial.

conviction. *Clay* v. *United States,* 394 F. 2d 281 (8th Cir. 1968), *cert. denied,* 393 U.S. 926; *Reed* v. *United States,* 401 F. 2d 756 (8th Cir. 1968). See also *Smith* v. *State,* 241 Ark. 958, 411 S.W. 2d 510.

4.

The trial judge conducted an extensive hearing on appellant's motion to suppress this evidence. The evidence heard was virtually identical with that later adduced during the trial. The trial judge found from the evidence that appellant had no standing to complain and that the search was incident to and contemporaneous with a lawful arrest. We find substantial evidence to support his findings that the search was incidental to and contemporaneous with a lawful arrest, even if appellant did have standing to complain.

In applying Fourth Amendment sanctions, it must always be remembered that only unreasonable searches are condemned. *Carroll* v. *United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1924). Reasonableness of a search must be tested under the particular circumstances of the case rather than by comparison with particular searches which have been approved by the United States Supreme Court in specific cases. That court has deliberately avoided the establishment of any formula or measure by which the validity of a search should be determined. In *United States* v. *Rabinowitz,* 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1959) that court said:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

If comparisons with specific cases are to be made, it is better to make them with cases wherein searches have

been disapproved as unreasonable. We find no decision of the United States Supreme Court wherein a search such as this has been held unreasonable.

The only limitation which has been placed upon a search incidental to an arrest is that it not be remote in time and place. See *Agnello* v. *United States,* 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145; *Preston* v. *United States,* 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964). In order to be incident to an arrest, it is only necessary that the search be substantially contemporaneous with the arrest. See *Stoner* v. *California,* 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). This does not mean that the arrest cannot precede the search. Nor does it mean that the search is necessarily restricted to the boundaries of the premises where the arrest is made. The time and space intervals must not be so unreasonable as to render the search remote. Applying that criterion to the case before us, we find that there was evidence that the officers commenced the search as soon as appellant was placed under arrest. A search incident to a lawful arrest could scarcely be less remote in time than this. The most remote point of the search was conducted within 70 yards from the point of arrest. The search took place on premises on which appellant was arrested or immediately adjacent to the point on a public road on which he was arrested. We find no declaration by the Supreme Court of the United States that a search not within the precise boundaries of the premises on which an accused was arrested is unreasonable. Where, as here, the search is in the immediate vicinity of the place of arrest and movements of the arrested person in that vicinity had been observed, we find that it was reasonable. See *Stoner* v. *California,* supra. We do not consider the fact that the arrest was made in the public road bordering the premises searched, standing alone, would make the search remote in space. Actually, the road, or a substantial part thereof, could be said to constitute a part of the property of the abutting owner on whose premises the search was made. *McLain* v. *Keel,* 135

Ark. 496, 205 S.W. 894; *McGee* v. *Swearengen,* 194 Ark. 735, 109 S.W. 2d 444; *Wilkerson* v. *Gerard,* 200 Ark. 125, 138 S.W. 2d 76.

The legitimate objects of a search incidental to an arrest include fruits of the crime [*Agnello* v. *United States,* 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925); *Preston* v. *United States,* 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964)] and evidentiary material. *Warden* v. *Hayden,* 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967). Cases such as *Cooper* v. *California,* 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967) which seem to limit some warrantless searches for evidence to situations where necessary to prevent destruction of evidence are not applicable to searches contemporaneous with an arrest. In that case, the search was conducted a week after the arrest. It was admitted that it was not incidental to the arrest. . Cases involving searches preceding and used as justification for an arrest in "stop and frisk" cases such as *Sibron* v. *New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968) are also inapplicable.

5.

The cardboard box bearing the name and address of the burglarized paint store was introduced as an exhibit over appellant's objection and his motion to suppress was denied. This was an "open field" search and not unreasonable. *Hester* v. *United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1926); *McDowell* v. *United States,* 383 F. 2d 599 (8th Cir. 1967).

6.

We do not understand appellant's arguments here. If the state had sought to introduce evidence of in-custody statements resulting from interrogation or if it were contended that he was denied counsel at a critical stage in his prosecution by state action, then we might

have some basis for inquiry as to the denial of constitutional rights. Since no such questions are involved, we find no merit in this contention.

7.

The court's instruction on this point read as follows:

> "A fact in dispute may be proved by circumstantial evidence as well as by direct evidence. A fact is established by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced. A fact is established by circumstantial evidence when its existence can reasonably be inferred from other facts proved in the case. Any fact in the case, and any element of the crimes charged may be proved by either kind or both kinds of evidence."

Appellant's objection was that the instruction should not have been given because there was no direct evidence to connect him with the crime. We found a substantially similar instruction invulnerable to that objection in *Duckett* v. *State,* 175 Ark. 1169, 299 S.W. 1004.

8.

Appellant does not object to this instruction as incorrect. He only objects to it as being inapplicable and abstract, contending that there was no evidence to show that Louis Ray Jones was ever in possession of the stolen property. We find this objection well taken in the absence of evidence that the stolen property was or had been in appellant's possession, or other direct evidence connecting him with the crime.

We think it is proper that the case be remanded for a new trial, as was done in *France* v. *State,* supra.

Byrd, J. concurs.

Harris, C.J., dissents.

CONLEY BYRD, Justice. I concur in the result reached but I am also of the opinion that the search was not incident to a lawful arrest within the reasons given by the U. S. Supreme Court for allowing the exception to the Fourth Amendment requirement of a search warrant.

The record shows that the Texarkana Police, under the direction of Chief Max Tackett, called the sheriff's office of Sevier County with a request for a search warrant. While they were waiting for the search warrant, appellant, his brother and his girl friend drove up to the grandfather's house place in a Volkswagon. The brother began to work on his mother's car. Appellant and the girl friend got on a tractor, drove across the field near Chief Tackett's car, came back, parked the tractor behind the barn, and were in the process of leaving in the Volkswagon when Deputy Sheriff Young of Sevier County arrived with the search warrant. Acting upon directions from Chief Tackett, the deputy sheriff arrested appellant and his girl friend at a point on the gravel road some twenty-five to forty feet from the garage and about sixty to seventy yards from the barn. The officers then arrested the brother and made a complete search of the garage and barn where they found the paint and other related articles.

Based upon *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and the exclusionary rule adopted thereunder, appellant moved to suppress the evidence obtained by the search on the ground that the search warrant was illegally issued. The trial court, finding that the warrant was issued by the clerk instead of a magistrate, held that the search warrant was invalid, but permitted the evidence obtained from the search to be introduced on the theory that it was a valid search incident to a lawful arrest.

The State, to support the action of the trial court, cites as authority an annotation in 19 A.L.R. 3rd at pages

805 and 807 wherein several states have permitted a search as an incident to a lawful arrest so long as the search of premises was in the "immediate presence," "immediate control," or "immediate surroundings" of the person arrested. However, because the Fourth Amendment of the U. S. Constitution has been made applicable to the States by *Mapp* v. *Ohio,* I believe we should look to the interpretation given the Fourth Amendment by the U. S. Supreme Court, rather than rely upon interprepations given by the several States to their own Constitutional provisions.

The Fourth Amendment only prohibits "unreasonable searches and seizures." In applying its exclusionary rule, the United States Supreme Court has consistently recognized a search incident to a lawful arrest as being reasonable.

In *Preston* v. *United States,* 376 U.S. 364, 367, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964), Mr. Justice Black stated:

> "... Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Weeks* v. *United States,* 232 U.S. 383, 392 (1914); *Agnello* v. *United States,* 269 U.S. 20, 30 (1925); This right to search and seize without a search warrant extends to things under the accused's immediate control, *Carroll* v. *United States,* supra, 267 U.S., at 158, and, to an extent depending on the circumstances of the case, to the place where he is arrested, *Agnello* v. *United States,* supra, 269 U.S., at 30; *Marron* v. *United States,* 275 U.S., 192, 199 (1927); *United States* v. *Rabinowitz,* 339 U.S. 56, 61-62 (1950). The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault

an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime —things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest..."

In *Agnello* v. *United States,* 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925), the facts showed that Agnello was arrested a block or two from his residence. In holding the search unlawful and not incidental to a lawful arrest, the court said: "While the question has never been directly decided by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."

A reading of the decisions of the United States Supreme Court shows that a search as an incident to a lawful arrest, without a warrant, has been approved only (1) where the arrest was made within the premises, *Ker* v. *California,* 374 U.S. 23, 34, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963); *Stoner* v. *California;* 376 U.S. 483, 486, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964); (2) where the search was necessary to seize weapons or other things which might be used to assault the officers, *Sibron* v. *New York,* 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968); or (3) where the search was necessary to prevent the destruction of evidence, *Cooper* v. *California,* 386 U.S. 58, 59, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967).

Here, (1) the arrest was not made within the barn or the garage, and (2) there is no showing that the same was necessary to prevent an injury to the officers or an escape of the person arrested, or (3) to prevent the destruction of evidence. Therefore I am of the opinion that the search was not incidental to a lawful arrest.

STANLEY BROWN v. MARYLAND CASUALTY COMPANY, ET AL

5-4723 442 S.W. 2d 187

Opinion Delivered May 26, 1969

[Rehearing denied July 14, 1969.]

Acchione & King for appellants.

S. Hubert Mayes, Jr. for appellee (Maryland Cas.).

Clark, Clark & Clark for appellee (Con-Ark.).

JOHN A. FOGLEMAN, Justice. The Housing Authority of Pike County, Arkansas, contracted with Plez Lewis & Son, Inc., for the construction of a housing project according to plans and specifications prepared by architect Stanley Brown. After Plez Lewis defaulted, the housing authority called upon Maryland Casualty Company, surety on the contractor's performance bond, to complete the contract. Maryland contracted with Con-Ark Builders, Inc., to complete the construction in accordance with the original plans. Apparently, it was contemplated that a change would be made in the plans and specifications as to foundations, because mention of this was made in the contract between Maryland and Con-Ark. After Con-Ark. took over, "Change Order G-2" was added requiring the installation of 124 piles, a minimum of ten feet in length or a total of 1,240 lineal feet. Con-Ark's proposal to Maryland had contained an item of $6,500 for this work plus $4.75 per foot in excess of 1,240 feet. Con-Ark subcontracted this work to Piling & Repairs, Inc., for $5,084 plus $3.85 for each additional lineal foot. After the piling work started, R. W. Laird, the architect's representative on the job site, instructed Piling & Repairs' workmen to drill the pilings deeper than the originally specified ten feet. Accordingly, this resulted in an additional 1,268 lineal feet of drilling over the original specification of 1,240 lineal feet.

Piling & Repairs, who had been paid by Con-Ark for a portion of the overrun, brought suit against Con-Ark for the balance due on the overrun. Con-Ark admitted the overrun and cross-complained against Mary-

land Casualty Company on the premise that should Con-Ark be liable to Piling & Repairs, Con-Ark should have judgment against Maryland. Maryland then cross-claimed against the housing authority and Stanley Brown and R. W. Laird seeking judgment against them, jointly and severally, for any amount for which it was held liable.

At the trial it was stipulated that Stanley Brown was the housing authority's agent and that Laird was Brown's agent.

The trial court entered judgment for Piling & Repairs against Con-Ark as prayed, for Con-Ark against Maryland Casualty Company as prayed, and for Maryland against the housing authority, Stanley Brown and R. W. Laird, jointly and severally, for anything Maryland might be required to pay to satisfy the judgment in favor of Con-Ark. Brown and Laird filed notice of appeal. Con-Ark gave notice of appeal from the judgment in favor of Piling & Repairs. The appeal by the housing authority was designated as a cross-appeal in the sense used in Ark. Stat. Ann. § 27-2106 (Repl. 1962), *Brown* v. *Maryland Casualty Co.,* 245 Ark. 70, 431 S.W. 2d 258. Maryland also appealed.

Maryland contends that it is not liable to Con-Ark unless and until it is paid for the extra work by the housing authority and its architect. Under the terms of the contract between Con-Ark and Maryland allowance of the amount to be paid by the owner was a condition precedent to payment from Maryland to Con-Ark. The pertinent contract portions are as follows:

> "7. Maryland agrees to pay the Contractor, as full compensation for all liability assumed hereunder, the sum of $109,500.00, *subject to additions and deductions resulting from change orders or extras issued by the Owner,* to be paid as follows:—
> a. The sum of $101,729.83, being the balance of the

Contract price remaining under the said Contract between Lewis and the Owner, out of the estimate and retained percentages to be received by Maryland from the Owner periodically, as provided for in the Contract between Lewis and the Owner, for work performed by the Contractor, and to be paid to the Contractor within five (5) days after receipt thereof by Maryland, such payment to be in like amounts as Maryland receives from the Owner.

b. The additional sum of $7,770.17 * * *

c. Within five (5) days after receipt by Maryland from the owner of any payment to it *for extra work ordered, including but not limited to contemplated change in foundations,* on or after the effective date of this AGREEMENT and performed by the Contractor, *Maryland will make payment of an amount equal to the amount received by Maryland from the Owner for the aforesaid extra work.*

d. Within five (5) days after the Owner notified Maryland in writing that the Contract has been completed and accepted and the Owner has paid the final estimate and retained percentage to Maryland, then Maryland will pay to the Contractor the balance due under this AGREEMENT, if any. *It is distinctly understood and agreed by the parties hereto that the payments provided for hereunder are to be made only after Maryland receives from the Owner* the estimate payments, *payments for extras and changes,* and retainages to be paid to Maryland by the Owner and Lewis. *It is further understood and agreed that the payments shall, in no event, exceed the sum of* $109,500.00, *subject to any additions or deductions provided for hereunder. . Any change or increase in the amount*

of this AGREEMENT hereinafter provided for shall be paid to the Contractor only in such amount as is allowed therefor by the Owner, anything in this AGREEMENT to the contrary notwithstanding.

It is understood that the payments provided for as above are to be made only after Maryland receives from the Owner the estimate payments, the payments for extras and changes, and retainages to be paid Maryland by the Owner under the terms of its Contract with Lewis, provided, however, that should the Owner withhold any estimate payment, payment for extras, or retainage for a period of twenty (20) days beyond the time it would normally be paid because of any reason not the fault of the Contractor, then Maryland shall nevertheless make payment to the Contractor for any such estimate, extra, or retainage earned by the Contractor and without awaiting payment from the Owner, as provided for in subparagraphs a, b, and c; provided further, however, that should the Owner withhold any payment herein referred to for a period of twenty (20) days beyond the time it would normally be paid, for reasons not the fault of the Contractor, then Maryland shall have the right to cancel this AGREEMENT upon notice to the Contractor. In the event of such cancellation, the Contractor shall be entitled to payment from Maryland for all amounts earned by the Contractor, including retainage under this AGREEMENT, up to the date of cancellation.'' (Emphasis ours.)

It is obvious that all parties knew that this was an undertaking to complete a job on which the original contractor had defaulted. Con-Ark was Maryland's subcontractor for the completion of the work. There is no reason why the parties could not contract for this work on any terms they agreed upon. There is no reason

why the terms of the contract which both parties agreed to should not be enforced.

In *Blair* v. *United States,* 147 F. 2d 840 (8th Cir. 1945), there was a contract between a contractor and a subcontractor which contained provisions very similar to those in this case. A fixed completion date in the contract between the government and Blair, the general contractor, had been extended. By a later supplemental contract, this date was advanced to the original one, upon agreement of the government to reimburse Blair for additional costs resulting from the reduction of time on the basis of expenditures approved by the government's contracting officer. Blair notified his subcontractors that they were committed to the original completion date, " 'with additional compensation as approved by the Government being granted you where applicable, in accordance with Article II of attached Supplemental Agreement.' " In reversing a judgment in favor of the subcontractor, the court said:

> "* * * The above quoted letter discloses not a promise by Blair to pay, but that additional compensation as approved by the government would be granted where applicable. This implied a promise that Blair would turn over funds if and when realized by allowance and payment by the government. As such payment has not been received by him and no claim is made that he has not diligently attempted to make collection, and it affirmatively appears that he has done so, defendant should not be held liable contrary to the terms of his agreement. * * * (Citations omitted.) We conclude that plaintiffs were not entitled to recover on account of the speed-up agreement though they may be entitled to such recovery dependent upon whether or not defendant Blair received additional compensation from the government on account of the adjustment in the date of the completion of the work under his contract."

The rule stated there is applicable to this situation. There is no escape from the conclusion that, as to changes adding to the contract price, the liability was not absolute but conditional. While some of the clauses of the contract might be construed as only fixing a time for payment of an absolute liability, the provision of Section 7 d that any change or increase be paid to Con-Ark "only in such amount as allowed therefor by the Owner, anything in this AGREEMENT to the contrary notwithstanding" can only create a liability conditional upon approval of the change by the owner.

Language contained in *Mascioni* v. *I. B. Miller, Inc.*, 261 N.Y. 1, 184 N.E. 473 (1933) is pertinent. In that case, the contractor agreed to pay a subcontractor 55 cents per cubic foot for erection of concrete walls. The promise to pay contained the proviso "Payments to be made as received by the Owner." The court reversed a holding by the appellate division that this provision merely fixed the time of payment and did not create a condition precedent. That court said:

> "A provision for the payment of an obligation upon the happening of an event does not become absolute until the happening of the event. Whether the defendant's express promise to pay is construed as a promise to pay 'if' payment is made by the owner or 'when' such payment is made, 'the result must be the same; since, if the event does not befall, or a time coincident with the happening of the event does not arrive, in neither case may performance be exacted.' * * *
>
> True, a debt with consequent obligation to pay may exist aside from any express promise to pay. Then a condition annexed to an express promise to pay the debt may render the promise to pay conditional without making the debt subject to the same condition. 'It must be admitted, however, that a condition annexed to a promise to pay a debt will

commonly, upon the true construction of the instrument in which it is contained, extend to the debt itself. There is a difference also between a promise to pay a debt on a certain condition, and a proviso that the debt shall be payable only upon a certain condition; for the latter necessarily renders the debt itself conditional.' Langdell, Summary of the Law of Contracts, § 36. In this case, if there were no express promise to pay a stipulated price for stipulated work, such a promise would be implied. There is, however, an express promise to pay moneys 'as received from the Owner,' and the event upon which that promise would ripen into an absolute, immediate obligation has not occurred. From the express promise to pay upon the happening of an event, an inference may be drawn that the parties did not intend or impliedly agree that payment should be made even if the event does not occur.

In many cases, nevertheless, an inference that an express promise to pay a debt on a certain condition excludes an implication that the debt shall be paid, even though performance of the condition is impossible, would defeat the intention of the parties. The tests approved by the Law Institute in its Restatement of the Law of Contracts, § 295, are whether '(a) a debt for performance rendered has already arisen and the condition relates only to the time when the debt is to be discharged, or (b) existence of the condition is no material part of the exchange for the promiser's performance, and the discharge of the promiser will operate as a forfeiture.' In either case 'impossibility that would discharge the duty to perform a promise excuses the performance of a condition.'

Here on its face the contract provides for a promise to perform in exchange for a promise to pay as payments are 'received from the Owner.' Performance by the plaintiff would inure directly

> to the benefit of the defendant, because the defendant had a contract with the owner to perform the work for a stipulated price. The defendant would not profit by the plaintiffs' performance unless the owner paid the stipulated price. That was the defendant's risk, but the defendant's promise to pay the plaintiffs for stipulated work on condition that payment was received by the defendant shifted that risk to the plaintiffs, if the condition was a material part of the exchange of plaintiffs' promise to perform for defendant's promise to pay."

The principle is succinctly stated in 17 Am. Jur. 2d, Contracts, § 339:

> "There is a difference between a promise to pay a debt on a certain condition, and a provision that the debt shall be payable only upon a certain condition, for the latter necessarily renders the debt itself conditional. Although a condition annexed to an express promise to pay a debt may render the promise to pay conditional without making the debt subject to the same condition, a condition annexed to a promise to pay will commonly be construed to extend to the debt itself."

It has been recognized and applied by this court as illustrated by the following language from *Jacks* v. *Phillips County,* 25 Ark. 64:

> "The proposal made by Jacks to the county court, and which was accepted, was, that Jacks was to receive for his services one-half of the money collected off of the lands which he might ascertain to have been omitted in the late assessment of the county taxes; and this right to compensation depended upon the performance of his contract, by ascertaining the omitted lands and bringing them upon the assessor's list, and that money had been received in payment of taxes on the lands so ascertained and assessed. Then, and not until then, would he have

> a right to claim of the county one-half of the money collected; because his contract was conditional, and his right to compensation depended upon his performance of his contract, and the collection of the money."

The above stated principle is applicable to this case. Consequently the judgment against Maryland is reversed.

Inasmuch as the judgments in favor of Maryland and against Brown, Laird and the housing authority were made dependent upon the amount which was paid by Maryland on the judgment in favor of Con-Ark, those judgments must be reversed also, in spite of the fact that we could dismiss the appeal of the housing authority or affirm the judgment against it because of its failure to file a brief on cross-appeal. See Rule 10; *Dunham* v. *Phillips,* 154 Ark. 87, 241 S.W. 361; *Day* v. *Langley,* 202 Ark. 775, 152 S.W. 2d 308. These judgments were void as conditional judgments in any event. *Bank of Commerce* v. *Goolsby,* 129 Ark. 416, 196 S.W. 803; See also *Brotherhood of Locomotive Firemen and Engineers* v. *Simmons,* 190 Ark. 480, 79 S.W. 2d 419.

It is necessary that we consider the appeal by Brown and Laird, because, on a retrial, they might be held liable to Maryland for any amounts for which Maryland could not recover from housing authority because of any actions taken by them without authority from the principal. Under the evidence hereinafter set out and the finding of the trial court thereon, Laird could not be liable to Maryland. Its cross-complaint against him is dismissed.

The trial court found that Laird was Stanley Brown's agent, that Stanley Brown was the housing authority's agent, and that the agents had either the actual or apparent authority of the housing authority to require the additional piling, in spite of evidence that Laird had exceeded his authority. The trial court found

that the actions of Laird had been ratified by Brown. There is substantial evidence to support this finding in the testimony of W. S. Little, field engineer for Brown. Little stated that before the drilling was more than one-half completed he discovered that the drilling was beyond the depth specified in the change order. He reported this fact to Brown but did not stop the work. There was testimony by Kennedy, the construction superintendent for Con-Ark, that Mr. Little also took part in telling him whether or not the holes drilled for piling were deep enough. It was Kennedy's recollection that Little came on the job about May 13[1] and remained for two or three days. He testified that Little was telling him to go to refusal during that time. Kennedy stated that Little was aware of the additional depth to which these drillings were being made. The authorities consistently hold that where an agent is duly constituted, names his principal, contracts in the principal's name, and does not exceed his authority, the principal is responsible on the contract and not the agent. *Neely* v. *State,* 60 Ark. 66, 28 S.W. 800; *Dale & Banks* v. *Donaldson Lbr. Co.,* 48 Ark. 188, 2 S.W. 703; *McCarroll Agency Inc.* v. *Protectory For Boys,* 197 Ark. 534, 124 S.W. 2d 816; *Ormsby* v. *Kendall,* 2 Ark. 338; *Ogletree* v. *Smith,* 176 Ark. 597, 600, 601, 3 S.W. 2d 683; *Meier* v. *Hart,* 143 Ark. 539, 541, 542, 220 S.W. 819; *Ferguson* v. *McMahon,* 52 Ark. 433, 12 S.W. 1070. A principal, knowing of the acts of his agent, or of facts putting him on notice thereof, who fails to object cannot be heard to deny the agency but will be held to have acquiesced in and ratified his acts. *St. Louis-San Francisco Railway Co.* v. *Lee Wilson Co.,* 212 Ark. 474, 206 S.W. 2d 175; *American Mortgage Co.* v. *Williams,* 103 Ark. 484, 145 S.W. 234.

The authority of an architect as the owner's agent is limited. He may not direct that the work be done in any manner other than set out in the plans and specifica-

[1]Testimony indicated that drilling started May 10 and was completed on May 19.

tions, except as he has been given authority to do so in the contract. *Incorporated Town of Bono* v. *Universal Tank & Iron Works,* 239 Ark. 924, 395 S.W. 2d 330. Since there is no evidence in the record to show Brown's actual or apparent authority to bind housing authority or to show that the housing authority knew of Brown's or Laird's actions, we are unable to say whether Brown or Housing Authority, or either of them, is liable to Maryland. Housing Authority liability to Maryland is dependent upon its contract with Maryland and its contract with the original contractor or upon the extent of the architect's actual or apparent authority. Since the record is deficient in these respects, we remand Maryland's cross-complaint against Brown and the housing authority for a new trial.

The appeal by Con-Ark from the judgment against it in favor of Piling & Repairs is without merit. There is nothing to indicate that the compensation of Piling & Repairs depended upon recovery by Con-Ark from Maryland. The contract provided for a fixed compensation. The only contingency was the depth of the drilling for the piling for which Piling & Repairs was to be paid $3.85 for each additional foot. There was evidence that the President of Con-Ark approved the additional drilling by Piling & Repairs and assured them of payment for the additional footing. That judgment is affirmed.

Remanded for further proceedings consistent with this opinion.

HOLT, J., not participating.

GEORGE ROSE SMITH and BYRD, JJ., dissent.

CONLEY BYRD, Justice. In dissenting I wish to point out that the majority opinion mistakenly classifies the contract between Con-Ark and Maryland Casualty Co. as a conditional liability rather than an absolute liability. In so classifying the contract as a conditional lia-

bility it erroneously describes the contract here involved as being similar to the one in *Blair* v. *United States,* 147 Fed. 2d 840 (8th Cir. 1945).

The record here shows that Con-Ark had no contract with the Housing Authority. Con-Ark's only contract was with Maryland Casualty Company. The majority opinion quotes a portion of the original contract between Con-Ark and Maryland with respect to payment, but since it omits what I consider an essential part of the contract I am setting forth the portion quoted in the original contract together with that succeeding portion omitted from paragraph no. 7 of the contract.

"c. Within five (5) days after receipt by Maryland from the owner of any payment to it for extra work ordered, including but not limited to contemplated change in foundations, on or after the effective date of this AGREEMENT and performed by the Contractor, *Maryland will make payment of an amount equal to the amount received by Maryland from the Owner for the aforesaid extra work.*

"d. Within five (5) days after the Owner notifies Maryland in writing that the Contract has been completed and accepted and the Owner has paid the final estimate and retained percentage to Maryland, then Maryland will pay to Contractor the balance due under this AGREEMENT, if any. It is distinctly understood and agreed by the parties hereto that the payments provided for hereunder are to be made only after Maryland receives from the Owner the estimate payments, payments for extras and changes, and retainages to be paid to Maryland by the Owner under the terms of the Contract between the Owner and Lewis. It is further understood and agreed that the payments shall, in no event, exceed the sum of $109,500.00, sub-

ject to any additions or deductions provided for hereunder. Any change or increase in the amount of this AGREEMENT hereinafter provided for shall be paid to the Contractor only in such amount as is allowed therefor by the Owner, anything in this AGREEMENT to the contrary notwithstanding.

"It is understood that the payments provided for as above are to be made only after Maryland receives from the Owner the estimate payments, the payments for extras and changes, and retainages to be paid Maryland by the Owner under the terms of its Contract with Lewis, *provided, however, that should the Owner withhold any estimate payment, payment for extras, or retainage for a period of twenty* (20) *days beyond the time it would normally be paid because of any reason not the fault of the Contractor, then Maryland shall nevertheless make payment to the Contractor for any such estimate, extra, or retainage earned by the Contractor and without awaiting payment from the Owner, as provided for in subparagraphs a, b, and c;* provided further, however, that should the Owner withhold any payment herein referred to for a period of twenty (20) days beyond the time it would normally be paid, for reasons not the fault of the Contractor, then Maryland shall have the right to cancel this AGREEMENT upon notice to the Contractor. In the event of such cancellation, the Contractor shall be entitled to payment from Maryland for all amounts earned by the Contractor, including retainage under this AGREEMENT, up to the date of the cancellation.

The testimony of Mr. Charles Nabholz was that the specification upon which the original contract was drawn made no provisions for any pilings to be placed as foundation for the structures to be built on. He said that after they made the original agreement to complete the project, a new order came out to put in 1240 ft. of pilings

and that they submitted to Maryland Casualty Co. the following bid:

"Maryland Casualty Company
c/o Edward Corrington
325 Waldron Building
Little Rock, Arkansas

"Re: Glenwood
Ark Project 45-3

"We propose to furnish labor and material to install concrete piles as per drawings by Stanley Brown sheets A-2, A-4, A-6, A-7 revised showing concrete piles for the sum of $6,500.00 to be added to our base bid of $109,500.00 on the above referred job.

"This price is based on 124 piles 10' deep. In event there is an overrun the price will be 4.75 per ft. In the event there is a underrun the credit will be at 4.00 per ft.

"Respectfully submitted,

"Charles Nabholz, President
Con-Ark Builders, Inc."

At page 168 of the record Mr. Nabholz testified as follows:

"Q. You had authorization from Maryland for payment on overrun in April of '65, is that correct?

"A. That's right."

That the contract in *Blair* v. *United States*, 147 Fed. 2d 840 (8th Cir. 1945), is not similar to the contract here involved can readily be demonstrated by quoting the full paragraph from which the majority opinion takes a partial quote on page 3. The full paragraph in the Blair opinion is as follows:

"There is no evidence of any verbal contract by which Blair agreed to pay plaintiffs for extra expense incurred as a result of the "Speed-up Agreement." The above quoted letter discloses not a promise by Blair to pay, but that additional compensation as approved by the government would be granted where applicable. This implied a promise that Blair would turn over funds if and when realized by allowance and payment by the government. As such payment has not been received by him and no claim is made that he has not diligently attempted to make collection, and it affirmatively appears that he has done so, defendant should not be held liable contrary to the terms of his agreement. *Thomson* v. *Leak,* 135 Cal. App. 534, 27 P. 2d 795; *Wheat* v. *Platte City Ben. Assessment Special Road Dist.,* 227 Mo. App. 869, 59 S.W. 2d 88; *Cowan* v. *Browne,* 63 Mont. 82, 206 P. 432. We conclude that plaintiffs were not entitled to recover on account of the speed-up agreement though they may be entitled to such recovery dependent upon whether or not defendant Blair received additional compensation from the government on account of the adjustment in the date of the completion of the work under his contract."

In 17 Am. Jur. 2d, *Contracts,* § 339, the promise to pay upon a specified event or condition is discussed as follows:

"§ 339. Promise to pay upon specified event, condition, or contingency; payment out of particular fund.

"Where an instrument purports to be payable upon the happening of a certain event, the question which must precede any inquiry as to the time of payment, assuming that the event has not happened, is whether the instrument imports an absolute liability. If the event is one that is CERTAIN to happen, the mere promise to pay may import such an

absolute liability. If, however, the event is one WHOLLY or PARTIALLY within the promisor's control and therefore not certain to happen, the absolute character of the liability cannot be inferred from the mere promise, but must be sought in the other terms of the instrument or in extrinic circumstances. Thus, the mere fact that the party promised to pay a certain amount when he sold a piece of land is not conclusive of the fact that there was an absolute liability.

"The real significance of the provision that the instrument is payable upon the happening of an event that is wholly or partially within the control of the promisor is apparent after it has been determined whether the debt is an absolute one. If the instrument, read in the light of the surrounding circumstances, shows that the debt is an absolute one, it is reasonable to suppose that the parties intended that a reasonable effort should be made to cause the event to happen within a reasonable time. Some courts declare broadly that where payment is to be made upon a condition under the control of the promisor, an action may be brought within a reasonable time. Moreover, where a debt is due and the happening of a future event is fixed on merely as a convenient time for payment, but the future event does not happen as contemplated, the law implies a promise to pay within a reasonable time. Thus, to an agreement to *pay as soon* as a crop can be sold or the money raised from any other source the law annexes as an incident that one or the other shall be done within a reasonable time and that the sum admitted to be due shall be paid accordingly. In such a case payment is not conditional to the extent of depending wholly and finally on the alternatives mentioned, but the stipulation merely secures to the debtor a reasonable amount of time within which to procure in one mode or another the means necessary to meet the liability. However, it appears to be the

general rule that a promise to pay out of a particular fund does not create an absolute liability, in the absence of facts or circumstances showing the contrary. Accordingly, where a contract requires payment from a particular fund, it cannot be said that the debt is payable in a reasonable time where the source fails without the fault of the promisor. Nevertheless, where the promise is to pay out of a fund to be realized in a certain way, there is an implied obligation to use reasonable diligence in performing the act upon which payment is contingent. In default of such diligence, payment becomes due without performance of the condition.

"In some instances the money is made payable within a specified time after the happening of a certain event, such as the return of a specified vessel, which it is assumed will certainly occur. The fact that the vessel is lost at sea does not prevent the money from being payable within the time stipulated after the expiration of the period usually required for the return trip of the vessel. If a party puts it out of his power to cause the event to happen, his liability accrues at once.

"There is a difference between a promise to pay a debt on a certain condition, and a provision that the debt shall be payable only upon a certain condition, for the latter necessarily renders the debt itself conditional. Although a condition annexed to an express promise to pay a debt may render the promise to pay conditional without making the debt subject to the same condition, a condition annexed to a promise to pay will commonly be construed to extend to the debt itself."

The complaint of Piling and Repairs was filed in the Circuit Court on Dec. 11, 1965, the case was tried on Dec. 4, 1967, and the judgment was filed on Jan. 2, 1968. Thus, under the terms of the contract between Con-Ark and

Maryland, it is obvious that the owner has withheld the payment of the extras in excess of twenty (20) days beyond the time it would normally be paid. For these reasons I contend that Maryland's liability to Con-Ark is an absolute liability and that having performed the work in April of '65, Con-Ark was certainly entitled to receive its pay in Jan. of '68. In Maryland Casualty Company's pleading on page 32 of the record it acknowledges that the additional work has been accepted by the Housing Authority.

FURTHERMORE, I would affirm the judgment *in toto* including the judgment against Stanley Brown and the Housing Authority. I would affirm the judgment against the Housing Authority because it has waived any errors with respect to the judgment against it by failing to file briefs here within the time allowed. The record at pages 166 and 167 shows that the bid price submitted to the Housing Authority for the additional work contained no provision for the overage and underage as was contained in Piling and Repairs contract. Based on this contract, the Housing Authority relied upon a provision in its contract that no contractual changes should be binding on the Housing Authority unless provided for in writing prior to making such changes. In its complaint, Maryland Casualty Co. in paragraph 3 pleaded as follows:

> "Maryland Casualty Company denies that it is liable to Plaintiff or Third Party Plaintiff in any amount, but states that should it be found liable to Third Party Plaintiff in any amount for the cost of additional pilings in excess of 1,240 lineal feet or an amount in excess of $6,500.00, that it should have and recover such sum from Housing Authority of Pike County, Arkansas; Stanley Brown, Architect, and R. W. Laird, jointly and severally."

Recognizing that there was a contention that Stanley Brown did have authority to authorize the additional

work, Maryland Casualty Co. pleads in paragraph 6 of the complaint as follows:

> "In the alternative, should Maryland Casualty Company be required to pay Third Party Plaintiff any sums in excess of $6,500.00 for said piling work and should it be determined that the Housing Authority of Pike County, Arkansas is not liable to Maryland Casualty Company for such sums, Maryland Casualty Company should have and recover judgment over and against and be fully reimbursed and indemnified for such sums by Stanley Brown, Architect, and his agent, servant and employee, R. W. Laird, for reason that said work was performed under their specific instructions and directions, both oral and written, at a time and place when they had actual and apparent authority to authorize same, or held themselves out to have such authority."

At the trial Stanley Brown, Architect, called the manager of his Little Rock Office, Mr. George Dowling, who testified that Laird, the man who authorized the extra piling, did not have the actual authority to authorize any excess drillings. He further stated that Laird had told him he did not take such authority. In addition to George Dowling, Stanley Brown called his structural engineer Ronnie Snowden, who testified that the extra piling work done was not called for by their plans and specifications and that from the standpoint of utility the extra piling added nothing to the buildings.

My understanding of the law is set forth in *Ormsby & Abraham Hite* v. *Kendall,* 2 Ark. 338, 344 (1839), as follows:

> "... The principle is well settled, that if a person undertakes to contract as an agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible. *White* v. *Skinner,* 13 J. R. 307; *Randall* v. *Van Vechten,* 19 J. R. 60; *Taft* v.

> *Brewster*, 9 J. R. 334; *Tippetts* v. *Walker*, 4 Mass. R. 596; and *Mott* v. *Hicks*, 1 Cowen 536. The agent, when sued upon a contract, can only exonerate himself from responsibility by showing his authority to bind those for whom he is undertaking to act. It is not for the plaintiff to show that he has not authority. The application of this principle to the case now under consideration clearly proves that Kendall is personally responsible, and not the steamboat owners. He was bound to show that he had authority to contract for the steamer Tecumseh and owners, and to prove this affirmatively, and in failing so to do, he becomes himself personally liable upon his undertaking. . ."

The architect, Stanley Brown, acting through his agent Laird, authorized the extra work resulting in this litigation. If I correctly read the *Ormsby* case, the architect became personally responsible unless he showed that he had authority to contract for the extra work and that the burden of proof was on him to do so. Not only did he not do so here but he affirmatively stated that he had no such authority.

Therefore I would affirm the judgment of Con-Ark against Maryland on the basis that it was an absolute liability which was due at the time of trial. I would also affirm Maryland Casualty Company's judgment against the Housing Authority by virtue of the Housing Authority not having filed its brief within the time allowed by law. I would also affirm the judgment against the architect because he stated that his agent had no authority from the Housing Authority to authorize the extra work. I am at a loss to see how the architect could take one position in the trial court and a different position on appeal.

For the reasons stated I respectfully dissent.

George Rose Smith, J., joins in this dissent.

HOME INSURANCE CO. v. ALLIED TELEPHONE CO., ET AL

5-4897 442 S.W. 2d 211

Opinion Delivered May 26, 1969
[Rehearing denied July 14, 1969.]

Terral, Rawlings, Matthews & Purtle for appellant.

McMillen, Teague, Bramhall & Davis for appellees.

J. FRED JONES, Justice. Olin S. Payte sued Allied Telephone Company in the Pike County Circuit Court for property damages growing out of an automobile collision. Olin S. Payte died during the pendency of the action and Home Insurance Company, who had paid the collision loss to Payte under an insurance contract it had with him, was substituted as party plaintiff under its subrogation agreement with Payte. A jury trial resulted in a judgment for Allied. Home Insurance has appealed and relies on the following points for reversal:

> "That the Court erred in allowing the defendant to testify to self-serving, hearsay statements

made by the driver of plaintiff's motor vehicle, a bailee.

That the Court erred in refusing to give the plaintiff's instruction on the Arkansas law pertaining to the imputation of negligence from bailee to bailor."

The recorded facts are as follows: Johnny Payte was the son of Olin Payte, and on March 9, 1967, between 9:30 and 10:00 a.m., Johnny Payte was driving an automobile registered in his father's name north on a county road in Pike County and Johnny's wife was riding as a passenger in the front seat with him. As he drove over a "rise" in the highway, a truck belonging to appellee and being driven by its employee, Richard Ray, was traveling south meeting the Payte automobile. According to the uncontradicted testimony of the investigating officer, the Payte vehicle skidded fifty-four feet and the appellee's vehicle skidded ten feet, and the two vehicles collided with the point of impact being about one foot and four inches east of the center line, and on Payte's side of the road. The traveled portion of the gravel road was sixteen feet and six inches wide at this point. The Payte automobile was damaged in the amount of $925.00. The police officer testified that appellee's truck was over the center line of the highway and that from his investigation at the scene of the collision, he was of the opinion that the Payte automobile was traveling too fast for the conditions of the highway.

Mrs. Payte testified that as she and her husband came over a rise in the highway, the appellee's vehicle was in the center of the road "a little on our side." She testified that her husband was driving about thirty miles per hour. Mrs. Payte was asked and answered questions as follows:

"Q. Where were you going at the time of the collision?

A. We had just gotten off from school, and we were going to my mother's—to my mother-in-law's house.

* * *

Q. Who was the registered owner of this car at the time of the collision?

A. Olin S. Payte.

Q. Who is he?

A. He's my father-in-law.

Q. Were you on an errand for him?

A. No, sir.

Q. You were on your own personal business?

A. Yes, sir."

The above questions and answers by Mrs. Payte are the only evidence in the record pertaining to the agency relationship between the owner and the driver of the automobile. If the pronoun "you" in the questions was used or understood in the singular, it shed no light at all on the agency relationship between the driver and the owner. If the question was asked and understood in the plural, the answers could have been interpreted to say that Mrs. Payte and her husband, who was driving an automobile registered in his father's name, had just gotten off from school at 9:30 in the morning and had started to Mrs. Payte's mother-in-law's house on their own personal business and not on an errand for her husband's father. Be that as it may, the whole case was tried on the theory that Johnny Payte was a permissive bailee of the automobile and there was no evidence to the contrary.

One subpoena was issued for Trooper Rex Martin, Johnny Payte and Mavis Payte. It was served on Mr. Martin and Mrs. Payte, but was not served on Johnny Payte and he did not testify at the trial. Mr. Ray, the driver of appellee's truck, was permitted to testify as to statements made to him by Johnny Payte following the collision. This testimony was offered and admitted as admissions against interest and it was objected to because Johnny Payte was not a party to the lawsuit and as being self-serving if he were. What the objection actually amounted to was that it was inadmissible as hearsay evidence. The testimony of Mr. Ray as to what Johnny Payte said to him and the objections made to it are copied from the record as follows:

"Q. I should have asked you one other question. Mr. Ray, since the accident on more than [one] occasion have you had conversation with Mr. Payte, the driver of that automobile?

MR. OSTERLOH:

I am going to object to any conversation he had with Mr. Payte, the driver. He isn't a party to this lawsuit and has never been.

MR. STEEL:

He was the driver of the car, and any admissions made against his interest, I think, are certainly admissible.

MR. OSTERLOH:

And they are self-serving, Your Honor.

THE COURT:

Overruled. You may answer.

Q. (Con'd. by Mr. Steel) You may answer the question that I am about to ask—what conver-

sation you had with him as to whose fault it was.

A. Well, right after the accident we went to the hospital, and I saw him in the hospital. He came over and asked how I was, if I was doing all right, and he said something about it looked like we were at the right place at the wrong time.

Q. Now, since that time, were you working along the road, and did he stop and talk to you?

A. Yes, sir.

Q. What did he tell you then?

A. I don't remember the exact words, but it was just like, in so many words he said it was something that couldn't be helped.

MR. OSTERLOH:

I object, Your Honor.

THE COURT:

Yes, sir. You will have to repeat the conversation as you remember it, not what you think it was.

Q. (Con'd. by Mr. Steel) Do you remember the exact words he used, Mr. Ray?

A. He said, 'It looks like it was something that couldn't be helped.' ''

We are of the opinion that the trial court should not have admitted the statement as an *admission* against interest in the absence of evidence that Johnny Payte had actual, or implied, authority to make such admission.

The record reflects, however, that Johnny Payte was a bailee of the automobile at the time of the collision and as such would have been liable to the owner for any damage to the vehicle caused by his own negligence.

In determining the admissibility of statements into evidence as exceptions to the hearsay rule, there is a distinction between *declarations* against interest and *admissions* against interest. In vol. 2, Ark. L. Rev., pages 26-52 (1947-48) appears an article by Dr. Robert A. Leflar entitled "Theory of Evidential Admissibility—Statements Made Out of Court," and under subheading "Declarations Against Interest" at page 41, Dr. Leflar states:

> "Another exception dating from the early days of the Hearsay Rule is that which admits declarations made against the interest of the declarant. It is well settled that to be admissible under this exception the statement must have been against the declarant's interest when he made it."

And under subheading "Admissions by a Party or One in Privity" Dr. Leflar says:

> "When it is shown that a party has made a statement inconsistent with the position taken by him in the present suit, the statement so made is admissible in evidence as an 'admission.' It is substantive evidence, both in civil and criminal cases, of the facts admitted in the statement."

And then on page 43 Dr. Leflar continues:

> "It is easy to confuse the admission rule with that admitting declarations against interest. Many extrajudicial statements might be admitted in evidence equally under either rule. For example, a statement made by a person to or through whom a party traces his present interest is admissible against that party as the admission of one in privity with him, and the same statement would frequently

be a declaration against the interest of the one who made it. [citing *Rotan* v. *Nichols,* 22 Ark. 244 (1860); *Peters* v. *Priest,* 134 Ark. 161, 203 S.W. 1042 (1919); *Jefferson* v. *Souter,* 150 Ark. 55, 233 S.W. 804 (1921)]. There are differences, however. A *declaration* against the interest of the one who made it is always admissible, regardless of who he is, but for a statement to be admissible as an *admission* it must have been made by a party to the litigation or his authorized agent, or by one having identity or privity of interest in the matter in respect to which the statement was made. [citing 4 Wigmore, Evidence, secs. 1076-87 (3rd ed., 1940)]. And for a statement to be admissible as a declaration against interest, the declarant must be dead or at least unavailable, but admissions by parties, their agents and privies are admissible in evidence even though the declarant be physically available, even to the extent of being personally in the courtroom, as is often the case. Likewise, the admissions of an agent, made within the scope of his authority to speak for his principal, are admissible against the principal, even though they are not declarations against the personal interest of the declarant himself. They are admissible as admissions, but not as declarations against interest." (Emphasis supplied.)

See also *Wilkins* v. *Enterprise TV, Inc.,* 231 Ark. 958, 333 S.W. 2d 718.

We conclude, therefore, in view of young Payte's potential liability, that any statements made by him absolving another party of fault for the damage inflicted, could not be said to be self-serving and such statements were admissible as declarations against interest if Johnny Payte was not available as a witness. The burden was on the appellee to show that Payte was not available, but a specific objection to the introduction of testimony because of failure to lay the proper foundation

must be made before it can be said that admission of the testimony was error. *Smith* v. *State,* 243 Ark. 12, 418 S.W. 2d 627. The reason for this rule is that otherwise the court is not apprised of the deficiency and the adverse party is not given an opportunity to supply it. We conclude, therefore, that the admission of the declarations of Johnny Payte did not constitute error.

The appellant's proposed instruction does not appear in the record as such, but in chambers the appellant's attorney made the following statement:

> "My proposed instruction reads that 'any negligence on the part of the defendant entitles the plaintiff to recover one-hundred per cent of whatever damages he suffered.' Now, the Judge has refused to give this, and I would like to object because this leaves me without an instruction as to the law of bailments insofar as negligence is concerned—the imputation of negligence from bailee to bailor, and the law of Arkansas states that the negligence is not imputable."

The trial court did not err in refusing to give this instruction. Negligence is not compensable in damages unless the damage is caused by the negligence, or the negligence is a proximate cause of the damage. The trial court did give instruction No. 4, as follows:

> "In this case, the Home Insurance Company claims damages from Allied Telephone Company, and has the burden of proving each of these essential propositions:
>
> First, that it has sustained damages.
> Second, that Richard Ray was negligent.
> And third, that such negligence was a proximate cause of the damage to the Payte vehicle.

If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for the Home Insurance Company; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for Allied Telephone Company."

The judgment is affirmed.

BYRD, J., dissents.

H. T. BRADY v. THE CITY OF SPRINGDALE, ARKANSAS, A MUNICIPAL CORPORATION

5-4906 441 S.W. 2d 81

Opinion Delivered May 26, 1969

Lewis D. Jones for appellant.

Crouch, Blair, Cypert & Waters for appellee.

J. Fred Jones, Justice. This is an appeal by the landowner from a judgment of the Washington County Circuit Court denying his motion for a new trial in a condemnation case. The City of Springdale, through eminent domain, condemned a construction easement 50 feet wide and a permanent easement 15 feet wide for a sewer line across ten acres of the appellant's tract of land containing 114 acres. By answer and counterclaim the appellant alleged damages in the amount of $25,000 for the taking of the easement, and $20,000 further damage in diminished value of the remaining land because of water and air pollution and noxious odors arising from a sewage disposal plant adjacent to appellant's property. The appellant also alleged damage in the amount of $5,000 for breach of contract in connection with fencing, paving and preservation of a spring in consideration for the grant of the easement.

A jury trial resulted in a judgment for the appellant landowner in the amount of $750 and upon appeal to this court from a judgment denying a motion for a new trial, the appellant relies on the following points for reversal:

> "The court erred in overruling defendant's motion for a new trial for the reason that the verdict was clearly against the preponderance of the evidence.
>
> The jury's verdict as to the damages was clearly inadequate and should be set aside with a new trial ordered."

Both of the appellant's points were included in his motion for a new trial based upon his contention that the verdict was against the preponderance of the evidence. In the case of *Taylor* v. *Grant Lumber Co.*, 94 Ark. 566, 127 S.W. 962, this court said:

> "Trial courts have large discretion in the matter of granting new trials, especially upon the weight of the evidence, and this court will not interfere with such discretion unless it be made to appear that it was improvidently exercised."

The reason for the rule is stated in *Blackwood* v. *Eads*, 98 Ark. 304, 135 S.W. 922, wherein this court said:

> "Where there is decided conflict in the evidence, this court will leave the question of determining the preponderance with the trial court, and will not disturb his ruling in either sustaining a motion for new trial or overruling same. * * * The witnesses give their testimony under the eye and within the hearing of the trial judge. His opportunities for passing upon the weight of the evidence are far superior to those of this court. Therefore his judgment in ordering a new trial will not be interfered with unless his discretion has been manifestly abused."

The only question before us on this appeal is whether the trial court abused his discretion in refusing to grant a new trial, and in answering that question, we do not consider preponderance of the evidence in any case. Where the motion is denied, we only consider the legal sufficiency of the evidence to support the jury verdict, and if there is any substantial evidence to support the jury verdict, we do not disturb the trial court's action in denying a motion for a new trial. *Price-Snapp-Jones Co.* v. *Brown*, 184 Ark. 1143, 45 S.W. 2d 517; *Chaney* v. *Missouri Pacific Railroad Co.*, 167 Ark. 172, 267 S.W. 564. *Mueller* v. *Coffman*, 132 Ark. 45, 200 S.W. 136.

So the question here boils down to whether there was any substantial evidence to support the jury verdict. The appellant, Brady, testified that his entire farm consists of 114 acres; that prior to the present taking there was an underground sewer over the same area. Much of Brady's testimony concerned a breach of contract he alleged in his counterclaim. The contract provided for payment of $3,500 for the easement, and for the reseeding of the damaged surface area. It also provided for the removal of rocks and other debris and for the erection of some fence. The appellee also agreed to build and surface a designated access road into appellant's property and to install some tile in a spring on the property. In proof of his damages on the alleged breach of contract, the appellant testified that it would cost $200 to reseed the easement area; that it would cost $200 to remove the rock and debris left by the operation and he estimated the before and after value of his entire farm as a result of the destruction of his spring, the taking of the easement, and the offensive odors emanating from the sewage disposal plant at $100,000 before the taking and $55,000 after the taking.

Dale Killian, a real estate broker, relying on his general knowledge and experience in the sale of real estate, and basing his opinion on the area taken and offensive odors emanating from the sewage disposal plant, estimated the value of the entire track of land at $70,000 before the construction of the sewer line and disposal plant, and at $50,000 after the facilities were installed. He testified that there was an offensive odor from the sewage disposal plant when he was on the property but that his knowledge as to odor prior to the construction of the plant in 1964, would be hearsay.

Candida Crane testified that she works for the appellant and lives about four miles west of the property involved. She testified that she had detected odors from the sewage disposal plant while she was on the appellant's property and that the odor was detected at her

home four miles away. She testified that the odor was worse at some times than it was at other times.

King Wheeler, a real estate dealer, testified that he had been familiar with the property since 1943. He testified that its highest and best use prior to 1964 would have been for a gentlemen's estate or a boy's camp, but since the construction of the sewage facility across the land, its best use would be for grazing. He placed the before and after value at $74,900 prior to 1964 and $51,-866 after the facilities were installed. He testified that the odor from the disposal plant had been apparent on appellant's property since 1964, but not before that date.

Mrs. Harry Wobb testified that she had carried mail to and by the appellant's property for a number of years and that the odor from the sewage disposal plant had been noticeable during that period of time. She testified that it is possible that the odor may be less now than it was in 1958, but she doesn't think so.

Clifford Houston testified that his farm adjoins the appellant's farm and that he started noticing the odor from the sewage disposal in September or October of 1967. He testified that the odor was worse in these fall months. He had lived on his farm since 1948.

Mr. Dave Taylor testified that he was an inspector for the sewer and water department of Springdale and helped install the plant. He testified that prior to 1964 the sewage was partially treated at another location, and that the treatment was completed at the present location in older and smaller facilities. He testified that the partially treated sewage had higher odor producing content than does the raw sewage now being treated.

L. M. Goodwin, a consulting engineer who designed the disposal plant, testified that when the new plant was first installed it produced considerable trouble from offensive odors, but that in 1966 additional equipment was

installed and that there had been no significant odor emanating from the plant since the fall of 1966. He testified that he had been in the vicinity of appellant's property many times since 1966 and was unable to detect any significant odor from the plant.

Casey Forbes, superintendent of water works and sewers for the appellee, testified that a serious odor problem did develop in 1966, and that this problem had been eliminated by the installation of new odor eliminating equipment which has worked very satisfactorily. He testified that there is no significant odor in connection with the plant at the present time and that the plant does not emit an odor since the new equipment was installed in 1966.

O. J. Snow, a real estate broker and appraiser, testified that in his opinion the before value of the property was $75,750 and the after value was $75,000. He testified that he visited the plant and also the appellant's property; that he detected some odor at the plant but none at all on the appellant's property.

The jury not only saw the witnesses and heard them testify in this case, the jury went onto the premises and viewed the alleged damage. We may reasonably assume that the jury also sampled the air over appellant's land for offensive odors. The preponderance and weight of evidence is for a jury to consider in reaching its verdict and is for the trial court to consider when the verdict is questioned as being against the preponderance of the evidence. When a circuit court judgment is questioned on direct appeal to this court, we examine the record for any substantial evidence to support the judgment, or the verdict upon which it is rendered, and we can do no more than that in determining whether the trial court abused its discretion in overruling a motion for a new trial on the ground that the verdict is against the preponderance of the evidence.

The alleged damages for breach of contract were apparently abandoned by the appellant in favor of the other damages he alleged. No jury instruction on breach of contract was given by the trial court nor requested by the appellant. The appellant relied most heavily on the difference in the market value of his land before and after the easement was taken and the present sewage disposal plant was constructed and placed in operation in 1964.

Aside from the approximate one-third acre in the easement actually taken, the appellant's only other alleged damage to which the evidence was directed, pertained to reduction in the value of his land because of destruction of a spring on the property and air pollution over the property consisting of offensive odors from the appellee's sewage disposal plant. The evidence on these two items was in substantial conflict. The conflict in the evidence as to the destruction of the spring ranged all the way from a clear year-round running spring which was covered and destroyed, as testified to by the appellant, to no spring at all, but a damp place in wet weather where a tree was pushed out of the ground and a tile pipe inserted, as testified to by Johnnie Jones. The evidence pertaining to air pollution ranged all the way from constant and unbearable odor, as testified to by the appellant, to no odor at all as testified to by Messrs. Forbes and Snow.

There was substantial evidence to support the jury verdict in this case and we are unable to say that the trial court abused his discretion in refusing to grant the appellant's motion for a new trial.

Affirmed.

J. B. COUNCIL, ET UX v. LEWIS CLARK, ET AL

5-4888 441 S.W. 2d 472

Opinion Delivered May 26, 1969

Jack Yates for appellants.

R. H. "Buddy" Hixon for appellee (Wright).

Jeta Taylor for appellees (Clark)

CONLEY BYRD, Justice. This is a boundary line dispute. The record shows that appellants J. B. and Nina Council at one time owned the W½ SW¼, Sec. 21, T. 8 N., R. 27 W. On February 11, 1947, appellants sold to Millard Wright a portion of the land by the following description: "Part of the West Half of the Southwest Quarter of Section 21, Township 8 North, Range 27 West, lying South of Hurricane Creek and containing in all 40 acres, more or less."

Within 10 to 60 days after the conveyance, a fence was constructed along the top of the south bank of Hurricane Creek. Mr. Council testified that it was constructed as a division or boundary fence. Mr. Wright denied that the fence was to be a division fence on the property line and said that Mr. Council was originally to assist in building the fence and that the plan was for Council to build half-way down the north bank and Wright half-way up the south bank with a water gate to be placed across the creek to connect the two fences. Wright denies that Council furnished any of the cost of the original fence; however, Council insists that he did participate in the cost of construction. In 1959 Millard Wright conveyed the lands under the same description to appellees Lewis Clark and Mrs. Lewis Clark reserving, however, one half of the mineral rights.

Mr. Clark testified that after he purchased the property from Wright, Mr. Council attempted to buy the property from him and that after he declined to sell to Council, Council suggested that they should straighten the deed up. On cross examination Council admitted that he had never told appellee Clark that he was claiming the land north of the fence until shortly before April 1963.

Other testimony shows that Council cleaned up and cleared the north bank of the creek when the Soil Conservation Service did some drainage work but that because of appellee Wright's objections, nothing was done to the south bank. It is stipulated that Hurricane Creek is nonnavigable.

The trial court found that the fence erected by Council and Wright in 1947 was a fence of "convenience" rather than a boundary fence. From a decree determining that the boundary line between the parties was the thread of Hurricane Creek, appellants appeal and rely upon the following points:

"1. That the deeds between the parties hereto show on their face that the grantees were only to receive that portion of real estate south of Hurricane Creek, 40 acres more or less. That the survey ordered by the Chancellor indicates that each party did receive this amount using the fence as a boundary line.

2. The portion of the Court's Decree in which he relates that the fence was not the boundary line is erroneous in that the fence was built by agreement as the boundary line between the parties.

3. That the fence had been in place since 1947 and no one at any time ever questioned the fact that the fence was the boundary line, but in fact helped repair and rebuild said fence from time to time over some 20-year period of time."

POINT 1: We agree with the trial court that under the description of the deed, title extended to the middle of the stream of Hurricane Creek. See *Gill* v. *Hedgecock,* 207 Ark. 1079, 184 S.W. 2d 262 (1944).

POINT 2: There was conflict in the testimony between Council and Wright as to whether the fence was an agreed boundary. The burden of proof was on appellants to show that the parties agreed on a boundary other than that described in the deed. Based upon the conflict in testimony between the parties we are not in a position to say the Chancellor erred in finding that the fence did not constitute an agreed boundary line.

POINT 3. Neither do we find any merit in appellants' argument that the fence had become a boundary line by long acquiescence. In all of the cases cited on boundary lines by acquiescence, *Stewart* v. *Bittle,* 236 Ark. 716, 370 S.W. 2d 132 (1963), *Gregory* v. *Jones,* 212 Ark. 443, 206 S.W. 2d 18 (1947), and *Vaughn* v. *Chandler,* 237 Ark. 214, 372 S.W. 2d 213 (1963), there has been

involved a peaceful occupation of the lands up to the fence by the person claiming the boundary to be one by acquiescence. There was testimony here that Council's cows were never seen on appellees' side of Hurricane Creek and that because of the terrain it would have been impossible to have built the fence in the middle of the creek according to the description in the deed. When we consider that the fence in question was built generally as close to the natural barriers of the creek as possible, we agree with the Chancellor that the fence had not become a boundary line by acquiescence.

In their argument, appellants suggest that since they have used the property up to the north side of the fence since 1947, they have acquired title by adverse possession. Since Mr. Council admitted on cross examination that he had never given notice of any claim of title to the property between the creek and the fence until some time in April 1963, we find no merit in his position. In *Franklin* v. *Hempstead County Hunting Club*, 216 Ark. 927, 228 S.W. 2d 65 (1950), we said:

> "The rule is well established that 'retention of the possession of vendors after the execution and delivery of a deed is presumed to be in subordination of the title conveyed and the statute of limitations will not begin to run until notice of the hostility of their claim is actually given to the grantee.' "

Affirmed.

SECURITY TIRE AND RUBBER COMPANY, INC. v. STEPHEN E. HLASS D/B/A STEPHENS TIRE CO. AND LARRY McCORD, TRUSTEE IN BANKRUPTCY

5-4936 441 S.W. 2d 91

Opnion Delivered May 26, 1969

Sam Goodkin for appellant.

Shaw & Bedwell for appellees.

CONLEY BYRD, Justice. Appellant Security Tire and Rubber Co., Inc. on April 25, 1967, took four notes from appellee Stephen E. Hlass secured by the following security agreement:

> "I Steve E. Hlass do hereby assign the customer accounts receivables and the Company owned inventory of Stephens Tire Company, 2517 Alma Highway, Van Buren, Arkansas to the Security Tire and Rubber Company, Inc. of Richmond, Virginia, as collateral for four notes Nos. 1, 2, 3 and 4 in the amount of $9,092.00."

On May 9, Stephen Hlass gave his check for $2,273.00 in payment of the first note which was dishonored because

of "insufficient funds." On June 9, 1967, appellant completed the filing of its security agreement and on June 16, 1967, filed its complaint asking for foreclosure under its security agreement of the inventory here involved. On August 28, 1967, Hlass was adjudicated a bankrupt and on September 18, 1967, appellee Larry McCord, trustee in bankruptcy, intervened claiming that appellant's security agreement was a voidable preference under § 60b of the Bankruptcy Act. When the trustee in bankruptcy filed a motion for summary judgment based upon the pleadings and certain alleged credit memos of appellant, appellant responded and attached an affidavit of its agent, Oscar Hamlett.

In his affidavit Hamlett says that appellant began doing business with Stephen Hlass in December 1965. At one time Hlass owed appellant more than $18,000 but he made substantial payments in November, December, January, February and March immediately preceding making the notes. He then states that Hlass decided that he was overstocked and wanted to reduce his inventory and on Hlass's request appellant took back some tires and gave Hlass credit. Hamlett says that at the time of taking the notes he made inquiry about Hlass's business and was told that he just bought a $25,000 home, that Hlass owed nobody except appellant and that his Dunn & Bradstreet rating showed a net worth between $20,000 and $35,000 with a good credit. Hamlett says that he did not know and had no cause to know or believe that Hlass was insolvent either in April or June of 1967.

The Court in awarding summary judgment to the trustee in bankruptcy found as follows:

> "The Court specifically finds that the attempted transfer and the suit and attachment based thereon occurred within four (4) months of the bankruptcy action, that the attempted transfer and attachments based thereon were all executed at a time when the debtor was insolvent and had been insolvent for a period of time, and the plaintiff knew

or had reasonable grounds to know and believe that the Debtor was insolvent when the transaction was arranged, that the consideration therefor was an antecedent debt, and to allow this transfer to the Plaintiff to stand would enable the Plaintiff-creditor to obtain a greater percentage of his debt than other creditors in the same class. Therefore all elements constituting a preference are found to be in existence, and this transfer is accordingly null and void as a preference under the Bankruptcy Act.

"The Court specifically finds further that the attempted assignment to the Plaintiff-creditor was not validly executed under the terms of the Uniform Commercial Code, and a lien predicated on the security instrument is found to be null and void as a secured transaction and this Plaintiff is therefore in the same category as any other unsecured creditor."

For reversal of the summary judgment appellant relies upon the following points:

"1. The Court erred in holding that appellant's lien did not qualify as a security interest under the Commercial Code;

"2. The Court erred in granting a summary judgment, inasmuch as a genuine issue of two material facts existed; the issues being (a) whether Stephens was insolvent and (b) whether appellant had reasonable cause to believe that Stephens was insolvent."

POINT 1. Appellees to support the summary judgment argue that the security agreement does not contain a sufficient description of the inventory to comply with Ark. Stat. Ann. § 85-9-110 and Ark. Stat. Ann. § 85-9-402(1) (Add. 1961). They contend that a description of the collateral must be described by type or item to be

sufficient. Ark. Stat. Ann. § 85-9-110 upon which they rely provides:

> "For purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described."

Ark. Stat. Ann. § 85-9-402(1) provides:

> "A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and CONTAINS A STATEMENT INDICATING THE TYPE, OR DESCRIBING THE ITEMS, OF COLLATERAL."

The foregoing sections are commented upon by Mr. Oscar Spivack in his pamphlet, "*Secured Transactions*" (ALI 1960), and by the honorable Harry Meek in 18 Ark. Law Review 30, (1964). Mr. Meek in his article cites *Industrial Packaging Prod. Co.* v. *Fort Pitt Pack. Int'l.*, 399 Pa. 643, 161 A. 2d 19 (1960), *In re Kowalski,* 202 F. Supp. 897 (D. Conn. 1962) and *In re Drane,* 202 F. Supp. 221 (W.D. Ky. 1962). These authorities agree that the better practice is to describe the collateral by types or items when a security is taken on inventory. However the authorities cited by Mr. Meek point out that the description need not be such as would enable a stranger to select the property and that a description is sufficient which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property. When the instrument here is considered in that light, it shows that it gave a lien on the "Company owned inventory of Stephens Tire Company, 2517 Alma Highway, Van Buren, Arkansas." When we consider that the term "inventory" is defined in Ark. Stat. Ann. § 85-9-109(4), we believe that a fact issue was made by which the goods involved here could possibly be identi-

fied under the agreement given. The information given here seems to have been adequate for the sheriff to take the property into his possession. The record does not say but it is obviously possible that the Stephens Tire Company is the only business at the address given and that its only business has to do with tires. The record here does show that the inventory consisted of tires and tubes. For these reasons we hold that the trial court erred in holding as a matter of law that the description given in the security instrument was insufficient under the statute above.

POINT 2. We are also of the opinion that the trial court erred in rendering summary judgment on the basis that the record conclusively established that the security agreement constituted a preference under § 60b of the Bankruptcy Act. Our cases consistently hold that the theory underlying a motion for summary judgment is the same as that underlying a motion for a directed verdict and that any testimony submitted with such a motion must be viewed in the light most favorable to the party resisting the motion with all doubts and inferences being resolved against the moving party. See *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S.W. 2d 89 (1963).

To sustain the summary judgment appellees readily concede that under our decision in *Fly & McFall* v. *Watts,* 209 Ark. 282, 190 S.W. 2d 533 (1945), it was necessary for them to show the following:

"1. A transfer on, or payment of, an antecedent debt,

2. by an insolvent debtor,

3. within four (4) months of bankruptcy,

4. resulting in advantage to the creditor,

5. who then had reasonable cause to believe that the debtor was insolvent."

When we consider the affidavit of Oscar Hamlett in the light most favorable to appellant we believe that a fact issue was made on the solvency of Hlass at the time of perfection of the security agreement as a lien and also whether appellant had reasonable cause to believe that Hlass was insolvent. In holding that the trial court erred in awarding the summary judgment we have looked to determine only whether or not there was any substantial evidence presented by appellant to make an issue of fact and have not in any manner attempted to evaluate the testimony for purposes of credibility.

Reversed and remanded.

RAY HOLLAND v. STATE OF ARKANSAS

5-5415 442 S.W. 2d 218

Opinion Delivered June 2, 1969
[Rehearing denied July 14, 1969.]

Murphy & Carlisle for appellant.

Joe Purcell, Atty. Gen.; *Don Langston,* Asst. Atty. Gen.; *Jerry D. Pinson,* Asst. Atty. Gen. for appellee.

CARLETON HARRIS, Chief Justice. This is an appeal by Ray Holland from his conviction of the crime of assault with intent to kill. Holland was found guilty by the Washington County Circuit Court, sitting as a jury, and his punishment fixed at five years in the State Penitentiary. The court further ordered that pronouncement of three years of this five-year sentence be deferred upon the good behavior of the appellant. Six points are urged for reversal, but we can only consider one, the sufficiency of the evidence, since none of the other alleged errors were set out in the motion for new trial. We do not consider asserted errors not preserved in the motion for new trial. *Hardin* v. *State*, 225 Ark. 602, 284 S.W. 2d 111.

The testimony reflects that appellant and his wife, Hazel, were divorced in October, 1967, the wife receiving custody of the minor son, 10 years of age. In March, 1968, Hazel married Kenneth Cecil Lawson, and the parties lived in Fayetteville. Mrs. Lawson testified that a restraining order had been issued against Holland, restraining him from coming about the Lawson home, but on the morning of October 10, 1968, around 9:30 or 10:00 A.M., she saw her ex-husband standing in the street, taking the license numbers of her automobile and her husband's pickup truck. She inquired as to the reason for his presence, and he replied, "Go ahead and call the police." Mrs. Lawson announced that that was exactly what she intended to do, and asked Holland what he was going to do, appellant replying, "A damned plenty." Holland left, and Mrs. Lawson said that soon thereafter, her husband also left to take her car to the garage, something being wrong with the transmission. The witness stated that she, after thinking over Holland's actions in taking the license numbers, left the house (in the pickup truck) for the purpose of going to police headquarters. However, she observed the Lawson automobile stopped on 15th Street, and also saw Ray Holland turning his car around, and coming back in her direction. She parked the pickup behind the Lawson

automobile, and saw Mr. Lawson lying on the ground, "just as bloody as he could be all over." She did not see the encounter.

Hershel Rogers testified that, on the morning of October 10, as he pulled out of Wal-Mart, and headed east on 15th Street, he observed two cars stopping about 200 yards ahead. Upon getting closer, he saw the occupant of the front car, a 1959 Mercury, get out of his vehicle, and go around to the back car, a red Ford, the occupant of that automobile being in the act of getting out of his car, and the two went into a "clinch." According to the witness, this occurred about at the opening of the Ford door on the driver's side. The two automobiles were about 60 feet apart. Rogers stopped his automobile, and observed the fight. One man (Lawson) seemed to be getting the worst of the fight, and broke away. Rogers then observed that this man, who ran west from the scene about 200 feet, had bloody spots over his clothes. The witness left to call the officers.

Glenn Riggins, criminal investigator on the police force of Fayetteville, testified that a call was received about the occurrence, and officers started to the scene, but before arriving there, received a radio message that Holland was already at the station. They returned, and, according to Riggins, another officer, Richard Wells, advised Holland of his constitutional rights by reading from a waiver.[1] Holland then admitted that he had cut Lawson with a knife, and a pocket knife was taken from appellant, which appeared to have blood stains on it.[2]

Kenneth Lawson testified, as follows:

> "I started out to see about my car and I seen his car in front of me. He pulled over and stopped

[1]This waiver contained all of the so-called **Miranda** warnings. **Miranda v. Arizona**, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

[2]Holland made a statement at the station, but the court did not admit it into evidence, as it was unsigned.

> and I stopped. I was going to ask him—now, I didn't know Mr. Holland personally but I did recognize the car and the car had been following me on previous occasions. When I'd take the kids to school, when I'd be going to and from work, and I wanted to know why. I stopped to ask him why. I didn't get a chance to say a word. He come out of his car and he said, 'You son-of-a-bitch, you've caused me enough trouble. I'm going to kill you.' And he come out with a knife."

The witness said that he had no weapon of any sort, but was finally able to break away from appellant. He denied that he left his house to "go out after Holland."

Dr. John W. Vinzant, of Fayetteville, testified relative to the wounds received by Lawson, as follows:

> "The man had sustained several knife wounds and had a blood pressure at that time of around eighty systolic with shock. * * * He had seven stab wounds over the shoulder, the thorax above the belt. Two of these wounds were severe, the others were minor. One penetrated the thoracic cage[3] on the left. * * * Cut a rib in two, went through the diaphragm and lacerated the liver."

The doctor testified that the wounds indicated the application of considerable force; that the wound caused by the blow that cut the rib in two was 3 or 3½ inches long, and approximately 2 inches deep. "It went clear through the thoracic wall." The witness said all seven wounds required stitches to be closed, and he stated that Lawson was in serious condition when he (Vinzant) saw him. The doctor testified that Lawson had a collapsed lung," and remained in the hospital for nine days; further, that the liver was also cut, and Vinzant described a particular wound over the heart, which he found to be serious, as follows:

[3]The doctor explained this as "the lung, into the lung cavity."

"Directly over it [the heart] and into the thoracic cage. Again, the lung could have collapsed but for some reason, it didn't, on that side."

More specifically describing this wound, the witness said:

"This wound was approximately two and a half inches in length, it went laterally or in a circle around the body between the ribs. It went completely through the chest wall which would be about the same thickness as the other one, around two inches, and you could explore it with your fingers and touch the heart and lung."

Holland testified that he was copying the license numbers because he understood that one of the vehicles was registered in the name of Holland, and he was "curious." He said:

"Well, Hazel came rushing out of the house there and commenced to throw one of her usual hissies. * * * 'What are you doing out here bothering us? Why don't you go away and let us alone?' * * * I just went on and let them alone. I had the numbers that I wanted."

Holland said that he knew someone was following him, and he was suspicious that it was Lawson; the car behind caught up with him at a stop light, and followed him "bumper to bumper" to where appellant stopped his automobile. The record reflects the following:

"Well, I got out to see what was going on and he jumped out of his car and he was messing around there behind the door of his car. I thought he was coming out with a pipe or a tire tool.

Q. Then what occurred?

A. Well, I pulled my knife out and waded in on him."

He said they "came together," and Lawson struck him, and "that's when I went to work [meaning that he used his knife]." When asked if he held any ill will toward Lawson, he said, "Not a thing only over my children. I want to see those children."[4] Appellant said that Lawson had no weapon, "but I thought he would have." He stated that, if he had wanted to kill Lawson, he could have done so, but he was only interested in "getting him away from me."

Of course, the court, sitting as a jury, was the fact-finder, and it apparently did not believe Holland acted in self-defense. In *Davis* v. *State*, 206 Ark. 726, 177 S.W. 2d 190, we said:

> "Although the state is required to prove that the defendant actually intended to kill, it need not depend upon declarations made by the defendant to establish such fact. While the intent to kill cannot be implied as a matter of law, it may be inferred from facts and circumstances of the assault, such as the use of a deadly weapon in a manner indicating an intention to kill, or an act of violence which ordinarily would be calculated to produce death, or great bodily harm. In determining whether or not the intent to kill should be inferred, the trier of the facts may properly consider the character of the weapon employed and the way it was used, the manner of the assault and the violence attendant thereon; the nature, extent and location on the body of the wound inflicted, if any; the state of feeling existing between the parties at and anterior to the difficulty; statements of the defendant, if any; and all other facts and circumstances tending to reveal defendant's state of mind."

[4]The reference "children" included the two daughters of Mrs. Lawson by an earlier marriage, these children having been adopted by appellant during his marriage to the present Mrs. Lawson.

Certainly, there was substantial evidence to support the verdict. Holland was the first to stop his automobile, and he immediately pulled his knife, though the evidence clearly shows that Lawson was unarmed. Without making any effort to ascertain whether the prosecuting witness had any sort of weapon, appellant, according to his own words, "pulled my knife out and waded in on him." The number of times appellant struck Lawson with the knife, and the severity of the wounds are clear indications that Holland had the intent to kill.[5] In fact, it seems rather remarkable that Lawson did not die, having a rib cut in two, the diaphragm completely penetrated, a lacerated liver, a collapsed lung, and the knife going so completely through the chest wall that the doctor testified that the heart and lung could be touched by the finger. The evidence is more than ample to support the judgment.

Affirmed.

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[5]From the record: "Q. Then when you got down to the jail, you asked somebody, you said, 'Is that bird dead yet?' Some of the police officers? Didn't you? The Court: Did you say that? A. I don't recall saying that in that particular way. Mr. Coxsey: Just a moment. Q. To Riggins and Hutchens, and this young man, Wells? I'll ask you if you didn't say this, or this in substance, 'Is that bird dead yet?' A. I don't recall saying it in that—. Q. How did you say it? A. I really don't recall the exact words. Q. The fact is that you expected him to die and you asked him if he wasn't dead yet, and you said 'That bird,' now didn't you, Ray? A. I am not going to admit to that, Ted, because I don't think I said it. Q. Are you going to deny it? A. I can't very well deny it but I am still not going to admit that I said it. Now, if Mr. Wells says I did, I'm not going to argue with him."

LESLIE THOMAS v. WANDA LEE THOMAS

5-4925 443 S.W. 2d 534

Opinion Delivered June 2, 1969
[Rehearing denied August 25, 1969.]

[redacted]

Jeff Duty for appellant.

Davis & Reed for appellee.

CARLETON HARRIS, Chief Justice. This is a case of first impression in this state. On January 15, 1968, appellee, Wanda Lee Thomas, instituted suit against appellant, Leslie Thomas, seeking an absolute divorce. On March 26, 1968, the parties entered into a "property and support agreement," setting out that it was "the desire of the parties hereto to settle, compromise and determine their respective rights, duties and obligations with regard to support, property and financial matters * * *." Included in the agreement was a provision requiring Mr. Thomas to pay to Mrs. Thomas, as alimony and support, the sum of $35.00 per week, beginning on April 6, 1968. Thereafter, on May 29, 1968, a decree of divorce was entered, granting appellee an absolute divorce from appellant, the decree reciting that the parties had entered into a certain property and sup-

port agreement, which had been filed and approved by the court. The actual order in the decree reads as follows:

> It is, therefore, by the Court considered, ordered, adjudged and decreed that the plaintiff be, and she is hereby, awarded an absolute divorce of and from the defendant; that the Property and Support Agreement entered into by the parties which is filed herein, be, and the same is hereby, specifically approved by the Court and is adopted and incorporated herein as a part and parcel of this Decree in settlement of the respective rights, liabilities, and obligations of the parties hereto; and that the defendant bear the costs of this action and attorney's fees incurred herein.
>
> "It is so ordered."

Thereafter, appellee filed a petition asking that Leslie Thomas be cited for contempt of court, the petition alleging that appellant had failed to comply with the provision in the agreement requiring the payment of $35.00 per week to Mrs. Thomas. On hearing, the court found appellant in contempt, and ordered that he be confined in the Washington County Jail for a period of 10 days. From the order so entered, appellant brings this appeal. The sole point for reversal is that the court had no authority to hold appellant in contempt under the wording of the decree, appellant asserting that the court made no order requiring Mr. Thomas to comply with the terms of the property settlement.

At the outset, it might be stated that there is authority on both sides of the question of whether a court can enforce, by contempt proceedings, a property agreement reached in contemplation of divorce. Cases are cited by both appellant and appellee, holding with their respective positions. It is our view that the question, in this state, is determined by statute, *viz.*, Ark. Stat. Ann.

§ 34-1212 (Repl. 1962). Prior to 1941, the controlling statute was Section 4391 of Pope's Digest, which provided:

> "The court may enforce the performance of any decree or order for alimony and maintenance by sequestration of the defendant's property, or that of his securities, or by such other lawful ways and means as are according to the rules and practice of the court."

In 1941, the Legislature amended this section, same now appearing as Section 34-1212, and reading as follows:

> "Courts of equity may enforce the performance of written agreements between husband and wife made and entered into in contemplation of either separation or divorce and decrees or orders for alimony and maintenance by sequestration of the defendant's property, or that of his sureties, or by such other lawful ways and means, including equitable garnishments or contempt proceedings as are in conformity with rules and practices of courts of equity."

This action by the Legislature clearly seems to have been taken for the purpose of enabling the Chancery Court to enforce the performance of written agreements between husband and wife entered into in contemplation of divorce, *i.e.,* to cover situations like the one presently before us. It will be noted that the amended statute also specifically includes contempt proceedings as one means of enforcement.

Nor do we agree with appellant that, under the decree, no order to make the weekly payments was entered. The pertinent part of that decree, heretofore quoted, commences, "It is, therefore, by the Court considered, *ordered,* adjudged and decreed." this language relating to three items which follow. First, it is ordered that

the plaintiff is awarded an absolute divorce "from the defendant; * * *." Following the semi-colon, the decree provides that the property and support agreement is incorporated as a part of the decree in settlement of "the rights, liabilities, and obligations of the parties hereto; * * *." Immediately after this semi-colon, there appears the language, "and that the defendant bear the costs of this action and attorney's fees incurred herein." In other words, the opening line wherein the word, "ordered," is used, applies fully as much to the second clause (relating to the settlement) and to the third clause (referring to the costs) as to the first clause (awarding the divorce).

We think that, in addition to the statute, simple logic supports this view. It is certainly logical that a court, in order to maintain the respect of those who appear before it, be able to enforce the provisions sanctioned by it in a decree of divorce. A like situation was at issue in the case of *Solomon* v. *Solomon,* 149 Fla. 174, 5 So. 2d 265. There, a husband and wife executed a property agreement in contemplation of divorce, the agreement setting out that the " 'decree shall provide that the husband shall pay to the wife $300.00 per month on the first of each * * * month.' " The final divorce decree was eventually entered, but contained no express provision for the payment of the stipulated amount of alimony, such decree simply reciting "that the property settlement and agreement * * * is hereby approved and ratified in all respects, and incorporated by reference into this decree and made a part hereof." The Chancellor directed the husband to show cause why he should not be held in contempt for disobedience of the decree by failing to meet some of the payments, but on hearing, refused to hold the husband in contempt. On appeal, Mr. Solomon took the same position relied upon by Mr. Thomas in the case before us. Mr. Justice Thomas in a succinct and learned opinion, speaking for the court, said:

> "There can be no doubt that the court in the decree sanctioned the arrangement the parties had

made between themselves anent the discharge by the husband of his legal and marital duty to support the wife even after the marriage tie was severed and until she remarried.

"It is the appellee's position that, although the appellant has her remedy to collect the amount due, she cannot resort to proceedings in contempt for that purpose because no specific order was made by the chancellor commanding the appellee to meet the promised payments and that, therefore, he could not be punished for defiance of the decree.

"It seems to be the rule that where such an agreement is merely ratified and not made a part of the final decree, the husband is not responsible in contempt proceedings for default on his part, but if the agreement is embodied in the decree and contemplates when executed that it shall become a part of the court's order, a failure of the husband is punishable by contempt.

Here, the property and support agreement was not only specifically approved by the court, but was adopted and incorporated as part of the decree in setting out the obligations of the parties.

Affirmed.

CHARLES P. OULETTA v. STATE OF ARKANSAS

5-5406 442 S.W. 2d 216

Opinion Delivered June 2, 1969
[Rehearing denied July 14, 1969.]

Q. Byrum Hurst and *Harmon & Wallace* for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Ass't. Atty. Gen. for appellee.

George Rose Smith, Justice. The appellant was charged with 138 counts of forgery and uttering, all arising from his business transactions with the Benton State Bank. In 1966 and 1967 Ouletta was a contractor, building houses that were financed by the bank. The informations were filed in 1968, after it was discovered that Ouletta had transferred to the bank, for value, a great many construction notes and mortgages that were signed with fictitious names of persons who were supposedly employing Ouletta to build houses. The circuit court, trying the case without a jury, found the defendant guilty and imposed two ten-year sentences, to run concurrently, with a minimum of one third to be actually served.

We first consider Ouletta's contention that he should have been acquitted, for insufficiency of the State's evi-

dence. It is insisted that the bank's officers knew the signatures to be fictitious and that therefore Ouletta was not shown to have had the necessary intent to defraud.

That issue involved a question of fact about which the testimony was in conflict. Ouletta usually dealt with W. A. Springer, formerly a vice-president of the bank. Springer testified that he regularly checked on the progress of Ouletta's houses when Ouletta first began business. After several years, however, Springer came to have confidence in Ouletta and discontinued any attempt to verify the notes and mortgages that he brought to the bank. Springer testified that he had no idea that the instruments were forgeries. W. R. Alsobrook, president of the bank, corroborated Springer's testimony.

Ouletta, testifying in his own defense, maintained in substance that his financial condition had deteriorated to such an extent that the bankers must have known that the instruments were not genuine. When, however, Ouletta was asked point-blank by his own attorney whether he said anything to Mr. Springer about the use of fictitious names on the notes, his reply was evasive: "Well, I might have. I probably did say that they probably were fictitious, to which he probably got the idea." Thus the issue was essentially one of credibility, upon which the trial court's finding is conclusive.

Secondly, it is argued that the court erred in allowing Fred Caudle, a Federal Deposit Insurance Corporation bank examiner, to testify that Ouletta made a statement in writing that he had signed the fictitious names without anyone else knowing about it. It is insisted that Caudle's testimony and the signed statement should have been excluded, because Ouletta was not given a *Miranda* warning by Caudle.

That argument is not sound. Counsel rely upon two cases: *United States* v. *Wainwright,* 284 F. Supp. 129 (D.C. Colo. 1968), and *United States* v. *Turzynski,* 268 F. Supp. 847 (D.C. Ill. 1967). In those cases it was

held that a taxpayer should be warned of his rights before being interrogated about his income tax returns by the Intelligence Division of the Internal Revenue Service. In both cases, however, it was pointed out that a tax matter is not referred to the Intelligence Division until there is reason to believe that the taxpayer has committed a crime. The jurisdiction of the Intelligence Division is limited to criminal matters. Thus those cases merely followed *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), in holding that the warning must be given when an investigation reaches the accusatory stage.

That was not the case here. Caudle testified that he was not a member of any law enforcement agency. In making his examination of the bank he noticed the similarity of handwriting on the notes and asked Ouletta to come in, because his name and address were on the documents. According to Caudle, Ouletta came to the bank voluntarily and signed the statement in the course of a conversation about the documents. It cannot be said that Ouletta was in custody or was deprived of his freedom of action in any way. See *Miranda* v. *Arizona,* 384 U.S. 436 86 S. Ct. 1602, 16 L. Ed. 2d. 694 (1966), and *Orozco* v. *Texas,* 394 U.S. 324, 89 S. Ct. 1095, 22 L. Ed. 2d 311 (1969). The trial court correctly admitted in evidence Caudle's testimony and the statement signed by Ouletta.

Finally, it is argued that after the trial judge had made a finding of guilty and had announced the sentence, the court erred in stating that he would suspend the sentence if the bank president, Alsobrook, recommended it—which Alsobrook refused to do. We find no error, not only because the matter of suspending the sentence lay within the discretion of the trial court, but also because there was no objection nor exception to the court's request for Alsobrook's recommendation. *McDonald* v. *State,* 160 Ark. 185, 254 S.W. 549 (1923).

Affirmed.

JONES, J., not participating.

HARLAN RAY HORN v. BYRON SHIRLEY, D/B/A SHIRLEY TRUCKING COMPANY

5-4930 441 S.W. 2d 468

Opinion Delivered June 2, 1969

Sexton & Wiggins and *Hixson & Douglas* for appellant.

Bethell, Stocks, Callaway & King for appellee.

GEORGE ROSE SMITH, Justice. This action for personal injuries was tried before a jury and ended in a verdict for the defendant. At the trial the plaintiff con-

tended that under Act 161 of 1937, which we will call our Labor Department Act, the measure of the defendant's duty to provide the plaintiff with a safe place to work exceeded the common-law standard of ordinary care and in effect was that of an insurer. Ark. Stat. Ann. §§ 81-101 through 81-121 (Repl. 1960). The trial court rejected that contention and submitted the case to the jury under AMI instructions which told the jury that at the time of the accident the defendant Shirley and his employee Utley were under a duty to exercise ordinary care for the safety of the plaintiff. It was the trial judge's belief that the Labor Department Act was not applicable to the case, for the reason that there had been no employer-employee relationship between the plaintiff and the defendant. Whether that ruling by the trial court was correct is the principal issue on appeal.

The controlling question being wholly one of law, we need state only the salient facts that emerge from an extensive record. The plaintiff Horn was regularly employed as a driller and oil-field roughneck by Miller Drilling Company. In May of 1967 Miller completed the drilling of an oil well and needed to move its equipment to another location. Miller engaged the defendant Shirley, doing business as Shirley Trucking Company, to handle the move. For the job Shirley supplied a tractor-trailer rig operated by Shirley's employee, C. H. Utley. Miller instructed two of its employees, Parker and the plaintiff Horn, to help Utley load the equipment.

Two large 10,000-pound motors had to be loaded on the trailer. The tractor had a winch-and-cable attachment that was used to pull the first motor onto the rear half of the trailer. Utley then decided to disconnect the tractor and trailer, thereby letting the front end of the trailer down to the ground, load the second motor onto the bed of the tractor, and then transfer the motor from the tractor bed to the front half of the trailer.

The motors were permanently equipped with steel skids similar to railroad tracks. As the second motor was being winched onto the bed of the tractor one of its skids got caught under the edge of the tractor's fifth wheel. At Utley's suggestion Parker and Horn picked up crowbars and tried to pry the motor away from the fifth wheel. In some way, assertedly as a result of Utley's changing the tension on the winch cable, the motor shifted its position and dropped down on the lower end of Horn's crowbar. That caused the other end of the bar to snap upward and strike Horn's chin and jaw with great force, inflicting severe and painful injuries.

Horn, as we have said, was employed by Miller, not by the defendant Shirley. Horn's attorney, in view of the proof, did not request an instruction submitting to the jury the question whether Horn had become Shirley's employee under the borrowed-servant doctrine. See *Bell Transp. Co.* v. *Morehead,* 246 Ark. 170, 437 S.W. 2d 234 (1969); *Transport Co. of Texas* v. *Ark. Fuel Oil Co.,* 210 Ark. 862, 198 S.W. 2d 175 (1946). Hence the case comes to us with no contention that Horn was acting other than as a regular employee of Miller at the time of the accident.

The pivotal issue of law is a narrow one. The appellant insists that under the Labor Department Act he was entitled to instructions imposing upon Shirley an absolute duty to provide Horn with a safe place to work rather than a common-law duty merely to exercise ordinary care to do so. To sustain that contention Horn must succeed in establishing two propositions: First, it must be found that the Labor Department Act imposed the absolute duty that Horn invokes. (For differing views upon that point see *Carter* v. *Frazer Const. Co.,* 219 F. Supp. 650 [W.D. Ark. 1963], and *Crush* v. *Kaelin,* 419 S.W. 2d 142 [Ky. 1967].) Secondly, it must be found that Shirley owed that absolute duty to Horn, even though there was no employer-employee relationship between them.

We find it unnecessary to discuss the first proposition, because in our opinion the trial court was right in holding that the absence of an employer-employee relationship rendered the Labor Department Act inapplicable to the fact situation presented by this litigation.

The Labor Department Act is a comprehensive statute containing 26 sections, most of which have no direct bearing upon this case. The appellant relies entirely upon sections 1 and 9 (a), which we quote:

> Section 1. DEFINITIONS. That when used in this Act, "employer," includes every person, firm, corporation, partnership, stock association, agent, manager, representative, or foreman, or other person having control or custody of any employment, place of employment, or of any employee. Provided this Act shall not affect any employer engaged exclusively in farming operations. Provided further it shall affect employers employing five persons or over only. Ark. Stat. Ann. § 81-101.
>
> Section 9. EMPLOYER'S DUTY AS TO SAFETY. (a) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees; . . . Id., § 81-108.

The appellant, in arguing that the Act imposes upon every employer subject to the statute a mandatory duty to insure the safety of persons other than his own employees, relies upon clauses in the quoted sections that refer to "employment" and to "place of employment" and to "employees." Specifically, Section 1 defines an employer as a person having control or custody of

"any employment, place of employment, or of any employee." Section 9 (a) requires an employer to adopt and use methods and processes reasonably adequate to render "such employment and place of employment" safe. With much ingenuity counsel argue that "employment" and "place of employment" and "employees" must all be treated as mutually exclusive terms, so that each must have been intended by the legislature to include throughout the Act some shade of meaning not subsumed by the other two. Upon that reasoning counsel insist that the employer's statutory duty to furnish employment which shall be safe for the employees therein and also to make both the employment and the place of employment safe must be construed to mean that the employer's duty extends to all employees who are working on the premises, whether they are employed by him or by someone else. Hence, it is said, the defendant Shirley owed the statutory duties to Horn because Horn was an employee, albeit not an employee of Shirley.

The argument being made is so involved and so tenuous that we have really found more difficulty in stating it than in answering it. We think it sufficient to discuss briefly a few of the considerations that compel us to conclude that counsel's interpretation of the statute goes far beyond the manifest intent of the legislature.

First, when the Act is read as a whole there were sound reasons for the definition of an employer to include a person having control or custody of any employment, place of employment, or employee—all three. The Act is a comprehensive measure having as its primary purpose the creation of a Department of Labor and the enumeration of the Department's powers and duties. Some sections have to do only with "employment," such as the duty of the newly created Commissioner of Labor to assist in avoiding lockouts, boycotts, black lists, and discriminations. Section 7 (e). Some sections have to do only with the place of employment, such as the Com-

missioner's duty to affix a warning notice to any machine or equipment found to be dangerous. Section 9 (c). Some sections have to do only with employees, such as the employer's duty to keep a record of the hours and wages of each of his employees. Section 14 (b). Obviously any definition of "employer" that did not refer to employment, place of employment, and employees—all three—might not have been broad enough to include all employers that were meant to fall within the reach of the statute.

Secondly, there was a similar reason for Section 9 (a) to require employers to render safe both the employment and the place of employment. Neither term includes the other in its entirety in every context. Employment is defined by the Random House Dictionary (1966) as the "state of being employed; . . . service; . . . an occupation by which a person earns a living; work; business." Those definitions refer essentially to conduct rather than to the physical place of employment. That the lawmakers thought it best to use both terms, for clarity, does not mean that they intended a strained construction by which their language would include something not fairly falling within the ordinary meaning of either term.

Thirdly, "employer" and "employee" are correlative terms. Each implies the existence of the other, just as "parent" implies the existence of a "child," and "husband" implies the existence of a "wife." A law that defines the rights and duties of husbands and wives has reference to the obligations of each husband to his own wife, not to the wife of another. Similarly, the duty of an employer to employees clearly means to his own employees and not to those of some other employer, unless the language permits no other conclusion. This precise problem was met by a similar Wisconsin statute, which encompassed not only employees but also "frequenters" of the premises. See *Globig* v. *Greene & Gust Co.*, 201 F. Supp. 945 (E.D. Wis. 1962). Our statute is markedly dissimilar from that one.

Fourthly, when the Labor Department Act was adopted we had no workmen's compensation law. Hence there was a much greater need for the legislature to provide the working man with a cause of action against his own employer for injuries resulting from unsafe conditions than there would be today. We must construe the act in its proper historical setting.

Finally, the Labor Department Act was a penal measure, imposing penalties of fines and imprisonment for violations of its provisions, with each day of violation constituting a separate offense. Section 21. We have held that the Act, being penal, must be strictly construed. *Gordon* v. *Matson,* 246 Ark. 533, . S.W. 2d (1969). If we had any doubt about the proper construction of the Act—and we have none—the rule of strict construction would set that doubt at rest.

To this point we have discussed only the appellant's main argument for reversal. He also contends that there is no substantial evidence to support the jury's verdict for the defendant. The obstacles in the path of such an argument were discussed in *Spink* v. *Mourton,* 235 Ark. 919, 362 S.W. 2d 665 (1962), and need not be re-examined. Here, under the evidence and the court's instructions, the jury might have found that the plaintiff failed to prove his charge of negligence in the defendant, that the plaintiff assumed the risk of the danger, or that the plaintiff's own negligence exceeded that of the defendant. Those matters all turn upon the preponderance of the evidence. As we observed in the *Spink* case, the trial judge may grant a new trial if he finds the verdict to be against the preponderance of the evidence. We, however, are bound by the substantial evidence rule. It cannot be said that there is no substantial evidence to support this verdict.

Affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice. I concur in the result reached by the court, but I do not agree with the route by which that end is reached. Nor do I agree that the instructions requested would make appellee the insurer of appellant's safety, because each was couched in statutory language requiring "reasonably adequate" methods and processes and other things "reasonably necessary" to protect the employee's life, health, safety and welfare. See Ark. Stat. Ann. § 81-108 (Repl. 1960). I take a view closely akin to that expressed by the Kentucky Court of Appeals in *Crush* v. *Kaelin,* 419 S.W. 2d 142 (1967). In considering a similar statute in which language is identical with that employed in the pertinent sections of Act 161 of 1937 (Ark. Stat. Ann. § 81-101 through § 81-121), that court held no duties greater than those imposed by the common law were imposed on the employer by the general provisions of their act for safe places of employment, safe methods and practices and reasonable safeguards. That court found the provision for formulation of standards by an administrative body inconsistent with any such purpose. That court recognized the possibility that a specific standard or regulation once promulgated might be the basis for a greater duty of the master to the servant. Our act contains Section 10 (Ark. Stat. Ann. § 81-109) conferring the power on the Commissioner of Labor to make reasonable rules for the prevention of accidents in every employment or place of employment and for the construction, repair and maintenance of places of employment.

While I adhere to the views expressed in my dissenting opinion in *Gordon* v. *Matson,* 246 Ark. 533, 439 S.W. 2d 627, when there is an allegation or proof that a specific regulation has been violated, I believe that Ark. Stat. Ann. § 81-108 is merely a statement of the purposes to be accomplished by promulgation and enforcement of the regulations adopted. If the employer's duty is to be measured by the general language of § 81-108, I can

see no useful purpose that was served by authorizing the promulgation of rules and regulations establishing safety standards to be followed by an employer, if his duty is established by the broad general language of the preceding section.

FRED HERSHEL CARMICAL v. ELIZABETH ANN CARMICAL

5-4943 441 S.W. 2d 103

Opinion Delivered June 2, 1969

W. W. Shepherd for appellant.

Russell & Hurley for appellee.

GEORGE ROSE SMITH, Justice. The parties were married in 1946 and separated in 1966. Two years later the appellee brought this suit for a divorce on the ground

of personal indignities. By counterclaim the husband also sought a divorce, for desertion. This appeal is from a decree awarding the divorce to the plaintiff and transferring to her the title to a small dwelling house which the parties ostensibly owned as tenants by the entirety.

The plaintiff, to prove the asserted indignities, testified that her husband was a drunkard, that he drank up every cent he earned, that he contributed nothing to the maintenance of the home, that he threatened to throw her off the place, and that he frequently embarrassed her publicly by using vulgar and filthy language toward her in the presence of her friends. There was sufficient corroboration of her testimony to satisfy the familiar rule that the corroborating proof may be comparatively slight when there is no indication of collusion.

Much of the plaintiff's evidence had to do with the defendant's alleged drunken conduct. The appellant now insists that the proof was insufficient to establish the plaintiff's cause of action, because drunkenness, to be a ground for divorce, must be shown to have been habitual and to have continued for at least a year. Ark. Stat. Ann. § 34-1202 (Repl. 1962).

That argument is based upon the mistaken assumption that proof of drunken conduct is pertinent only when the asserted ground for divorce is habitual drunkenness. Such a view is too narrow. Drunken conduct may be proved along with other acts to establish indignities rendering the plaintiff's condition intolerable. By analogy, we have held that false charges of adultery constitute indignities, despite the fact that adultry is itself a ground for divorce. *Relaford* v. *Relaford,* 235 Ark. 359 S.W. 2d 801 (1962). In other jurisdictions it has frequently been held that even though habitual drunkenness is a separate ground for divorce it may also be proved to support charges of cruelty that are interwoven with such intoxicated conduct. *Hayes* v. *Hayes*, 5 Cal.

Rptr. 509 (1960); *Robbins* v. *Robbins,* 257 S.W. 2d 92 (Mo. App. 1953); Annotation, 76 A.L.R. 2d 419, 430 (1961). Since we agree with the chancellor's finding that the appellant's actions justified the appellee in leaving the family home, we need not discuss the appellant's contention that he should have been awarded the divorce on the ground of willful desertion.

There remains for consideration that part of the decree that vested title to the dwelling house in the appellee. According to the proof, the house was originally bought in 1966 by these litigants' daughter and son-in-law, Joyce and Harold Don Gentry. The purchasers were not yet of age; so for their convenience the title was put in the name of Joyce's father and mother, the Carmicals. The Carmicals borrowed the money to make the down payment and executed a mortgage for that debt and the unpaid balance. The Gentrys, however, were the real purchasers and made the monthly payments until they separated in 1967. By agreement with the Gentrys, Mrs. Carmical then took over the property and began making the monthly payments from her own earnings. At the time of the trial Mrs. Carmical's investment in the dwelling, including taxes, was about $1,000. Her husband was obligated on the purchase-money note and mortgage, but he had paid nothing whatever toward the acquisition of the house.

The decree was right. At first the Gentrys were the real owners, under the rule that when the grantee advances the purchase price (or obligates himself therefor) as a loan to the true purchaser, a resulting trust arises in favor of the latter, but the grantee can hold the property as security for the loan. *Crain* v. *Keenan,* 218 Ark. 375, 236 S.W. 2d 731 (1951). The beneficiary of a resulting trust is the real owner of the property and may transfer his interest. Restatement of Trusts (2d), § 407 (1959). Hence the Gentrys could and did relinquish their interest to Mrs. Carmical.

The decree found that the appellant should be relieved of liability on the purchase-money mortgage. He now complains that this provision will not afford him protection if the mortgagee finds it necessary to enforce the obligation. Of course that is true, but all that the chancellor could do in this case was to adjust the rights of the parties between themselves. If the appellant is required to pay part of the mortgage debt, the decree will protect his right of subrogation against the appellee and against the property. No more can be done without the mortgagee's consent, the appellant having voluntarily incurred the debt.

Affirmed. The appellee is allowed an additional attorney's fee of $250 for the services of her attorney in this court.

RUTH ESTES v. STATE OF ARKANSAS

5-5417 442 S.W. 2d 221

Opinion Delivered June 2, 1969

[Rehearing denied July 14, 1969.]

Terral, Rawlings, Matthews & Purtle for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Ass't. Atty. Gen. for appellee.

LYLE BROWN, Justice. Custody of Ruth Estes' children had been awarded to their paternal grandparents and Mrs. Estes removed them to Puerto Rico without permission of the chancery court handling the custody matter. That action is prohibited by Ark. Stat. Ann. § 41-1121 (Repl. 1964). Mrs. Estes was convicted and sentenced to six months imprisonment. In appealing her conviction she alleges several diverse points of error which will be enumerated after a brief statement of facts.

To the union of Don Masner and Ruth Masner (now Estes) were born two children. In 1959 Don sued for divorce and custody of the children. He was granted a divorce but the court found the parents unsuitable to have custody of the children and placed them in the care of Mr. and Mrs. W. B. Masner, paternal grandparents. Those proceedings were in the Independence County Chancery Court. In August 1966, on motion of the mother, the court modified the 1959 custody provision to this effect:

> The defendant-petitioner, Ruth Masner Estes, is to be permitted to have the children . . . in her custody for a period of two weeks each summer period, the first period to commence August 15, 1966, and end August 29, 1966, the defendant-petitioner to pick up the children from Mr. and Mrs. Bernice Masner, paternal grandparents, who have hitherto been awarded custody of these children, at her own expense, and to return said children on said date at her own expense.

Pursuant to that order Mrs. Estes picked up the children. She first took them to Texas to visit relatives. A few days thereafter the mother and children flew from Dallas to San Juan, Puerto Rico, where the Esteses had resided since 1965. Mrs. Estes did not return the children on August 29 and the following day the present charge was filed against her.

The children have never been returned to Arkansas and Mrs. Estes testified she had no intention of returning them. She admitted taking the children out of this State. She defended that action on the grounds that (1) she thought all interested parties understood she so intended, and (2) that when she obtained the children she had no intention of keeping them beyond the two weeks allowed. She testified that she changed her mind thereafter when the children expressed a desire not to return.

One other pertinent fact should be noted because it has a bearing on one of the points in issue. Subsequent to her conviction by jury trial, the court granted a motion to set aside the verdict. At that time a stipulation between counsel for both sides was presented to the court and approved. It was agreed that the trial judge would retry the case without a jury and on the basis of the record made at the first trial. That stipulation had the effect of eliminating from the court's consideration the jury verdict and the instructions.

POINT I. *It was error to refuse to allow appellant to take the depositions of out-of-state witnesses.* A motion to take depositions of five witnesses who resided in Puerto Rico was filed in October 1967. That motion was not presented to the court until after the parties announced ready for trial. The presentation of such a motion at a stage in the proceedings when a continuance would result from the granting of the motion was disapproved in *Criner* v. *State,* 236 Ark. 220, 365 S.W. 2d 252 (1963).

POINT II. *The court erred in refusing to quash the information, the warrant, and in overruling the demurrer to the information.* It is first pointed out that the warrant was never served on appellant. That fact becomes immaterial because appellant admittedly returned from Puerto Rico to Independence County to contest the charges. A complete answer to the assertion is that the "Motion to Quash Bench Warrant" was not filed until after appellant announced ready for trial. Secondly, it is asserted that the Information does not state facts sufficient to allege a crime. The language of the Information is certain as to the title of the prosecution, the name of the court, the county in which the alleged offense was committed, and the name of the defendant. Those are the requirements of the contents of an Indictment or Information. Ark. Stat. Ann. §§ 43-1006, 43-1008 (Repl. 1964); See *Geoates* v. *State,* 206 Ark. 654, 177 S.W. 2d 919 (1944). The acts constitut-

ing the offense need not be stated unless the offense cannot be otherwise charged. When it is necessary that a defendant acquire additional facts in order to properly defend, he can request a bill of particulars and the State is required to respond.

POINT III. *Appellant was arrested during the course of the trial and served with a warrant for civil contempt issued out of another court, all to her prejudice.* A contempt citation had been issued out of the chancery court for failure to return the children as required by court order. Mrs. Estes testified that she was served with that process during the noon recess of the criminal trial. The record is void of any showing of prejudice. Additionally, the allegation is not set forth in the motion for new trial.

POINT IV. *Improper evidence was admitted and proper evidence was excluded.*

(a) *Improper evidence.* The petition for modification of the divorce decree, heretofore discussed, was introduced by the State over appellant's general objection. The petition recited excerpts from the original decree which related that neither parent was a proper party to have custody of the children. Appellant argues here that it was error for the jury to be informed that she had been adjudged an improper person to have custody of her children. That same information was contained in the 1959 decree, a copy of which was introduced without objection. Furthermore, the petition for modification was generally admissible because it explained the modified decree which resulted from the filing of the petition. A specific objection was therefore required if appellant desired a deletion. *Amos* v. *State,* 209 Ark. 55, 189 S.W. 2d 611 (1945).

(b) *Exclusion of proper evidence.* In September 1966, the father and the grandfather of the children went to Puerto Rico in an effort to retrieve the children. They

were restrained from removing the children by an order issued by the Superior Court of San Juan. The father and the grandfather left and abandoned any effort to resist the mother's petition in that court. In the case before us the appellant offered a transcript of the proceedings in San Juan and the trial court sustained the State's objection. The trial court was correct because those proceedings, occurring some time after the alleged offense for which Mrs. Estes was being tried, were immaterial. If Mrs. Estes illegally removed the children from Arkansas in August, a subsequent court procedure in a foreign jurisdiction could have no bearing on her defense.

POINT V. *The defendant was entitled to a directed verdict.* Appellant argues that "everyone knew she was taking the children out of Arkansas before she picked them up." She further states that at the time she obtained the children she intended to return them within the two-weeks period; and that a subsequent decision on her part not to return them would not bring her within the Act. The provisions of § 41-1121, insofar as they pertain to this case, are unambiguous. The stattute prohibits the taking of a child, by permission or otherwise, from the person having legal custody of the ward by virtue of a decree of any chancery court, and removing the child beyond our State without first obtaining the permission of the court which fixed the custody. It cannot even be properly inferred that the court which fixed the custody and subsequently awarded the two-weeks visitation period had any knowledge of Mrs. Estes' intent to remove the children beyond jurisdictional limits. Additionally, the grandmother who released the children to Mrs. Estes, testified that she was led to believe Mrs. Estes had been authorized by the court to take the children out of the State, which of course was not true.

POINT VI. *It was error to deny appellant's requested instructions.* Appellant overlooks the fact that

the jury verdict was set aside and she was convicted by the court sitting as a jury. Consequently the instructions were of no import.

Affirmed.

J. L. CLARK v. STATE OF ARKANSAS

5-5418 442 S.W. 2d 225

Opinion Delivered June 2, 1969
[Rehearing denied July 14, 1969.]

Bill H. Walmsley and *John Norman Harkey* for appellant.

Joe Purcell, Atty. Gen.; *Don Langston,* Asst. Atty. Gen.; *Mike Wilson,* Asst. Atty. Gen. for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was convicted in the Circuit Court of Independence County for the crimes of possessing intoxicants in a dry county for

purpose of sale and selling intoxicating liquors in a dry county. Since these convictions represented his third conviction of violation of the Intoxicating Liquor Penal Statutes, he was adjudged guilty of a felony and sentenced to one year in the penitentiary. Ark. Stat. Ann. § 48-811.1 (Repl. 1964).

Appellant's first point for reversal concerns the sufficiency of the evidence to support his conviction. The state's evidence consisted largely of the testimony of James Haigwood who related, in substance, the following: Arlis Lee approached Haigwood and requested that he (Lee) be driven to appellant's house for the purpose of purchasing some whiskey; Haigwood loaned Lee the money and together they drove over to appellant's house; they parked in the front of the house and Lee got out while Haigwood remained in the truck; Lee walked straight to the house and then returned with two pints of whiskey; Haigwood saw appellant hand Lee the whiskey.

The state introduced several witnesses who testified to appellant's reputation in the community for being a bootlegger, and also introduced the testimony of Deputy Sheriff King concerning appellant's attempt to get rid of a bottle of whiskey during a raid on his premises three days after the alleged sale to Lee.

Appellant's evidence was in direct conflict with that of the state. Arlis Lee testified on behalf of appellant and specifically denied that appellant sold him any whiskey. Lee stated that he went with Haigwood and parked in front of appellant's house, but that he got the whiskey out of his uncle's pickup which was parked just above appellant's house. He claimed that the whiskey was his. He said he only walked through appellant's yard because it was a shorter way to get to the pickup. The testimony of appellant's wife tended to corroborate Lee's story as did the testimony of Lonnie Lee, the uncle of Arlis Lee. Under these circumstances a clear question of fact was presented for the jury's determination.

The credibility of witnesses and the weight to be given their testimony is entirely within the province of the jury; they are not required to accept the testimony of any witness as true. *Bartley* v. *State,* 210 Ark. 1061, 199 S.W. 2d 965. In commenting on a situation similar to that which we have here this court, in *Melton* v. *State,* 165 Ark. 448, 264 S.W. 965, said, "The testimony of the witness for the state did not have to be corroborated, and it was for the jury to determine whether the same was overcome by the testimony of the witnesses for the appellant. *Meeks* v. *State,* 161 Ark. 489, 256 S.W. 863. The testimony of Mrs. Waters to the effect that she saw the appellant sell whiskey was sufficient to sustain the verdict." We hold that the evidence was sufficient to sustain the conviction.

During the trial appellee introduced, over appellant's objection, the testimony of Deputy Sheriff King. He stated that as he and several other officers approached appellant's home to search for additional whiskey and to arrest him, they observed appellant toss a bottle of whiskey out of his truck window. The introduction of this testimony, together with the bottle of whiskey which was retrieved, was objected to by appellant on the ground that it was evidence of prior criminal behavior. The admission of this testimony is appellant's second point for reversal. As a general rule evidence which shows or tends to show acts which constitute another crime wholly independent of, and unconnected with, that for which a person is charged is not admissible unless the evidence is shown to come under one of the exceptions to the rule. *Satterfield* v. *State,* 245 Ark. 332, 432 S.W. 2d 472.

Appellant argues that evidence of similar offenses is not admissible unless independently relevant to show intent, provided that intent is a real material element in the offense with which a person is charged. In support of this contention appellant relies on *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804. However, *Alford* did not

limit admissibility of similar offenses to those situations involving the question of intent; on the contrary the court there said, "We need not take the time to review in detail the cases in which proof of other recent similar offenses is competent under other so-called exceptions to the general rule, as to show motive, *Shuffield* v. *State,* 120 Ark. 458, 179 S.W. 650, to rebut the plea of an alibi, *Nash* v. *State,* 120 Ark. 157, 179 S.W. 159, to prove the transaction as a whole, *Autrey* v. *State,* 113 Ark. 347, 168 S.W. 556 and so forth. The present case centers upon proof offered to show intent; so we turn to representative decisions on that point." We have long recognized that evidence of illegal possession of intoxicants on prior and subsequent occasions from that charged in the indictment is admissible to show the character of the business of the accused. *Johnson* v. *State,* 177 Ark. 1051, 9 S.W. 2d 233; *McMillar* v. *State,* 162 Ark. 45, 257 S.W. 366; *Withem* v. *State,* 175 Ark. 453, 299 S.W. 739 (Reversed on other grounds.); *Gray* v. *State,* 212 Ark. 1023, 208 S.W. 2d 988; *Evans* v. *State,* 177 Ark. 1076, 9 S.W. 2d 320. In a recent case we held that evidence of subsequent criminal acts is admissible for the purpose of showing motive, design, particular criminal intent, habits and practices, or guilty knowledge. *Tolbert* v. *State,* 244 Ark. 1067, 428 S.W. 2d 264. There was no error in admitting this evidence.

Appellant argues as an additional point that the court should have instructed the jury to disregard this evidence or in the alternative instructed them that they could consider such evidence only as it related to a common scheme or design. If evidence is admissible for any purpose then the objecting party must ask the court to limit the evidence to the admissible purpose or the objection is wholly unavailing. *Amos* v. *State,* 209 Ark. 55, 189 S.W. 2d 611; *Edens* v. *State,* 235 Ark. 996, 363 S.W. 2d 923. The record fails to reveal any request on behalf of appellant for a limiting instruction.

Appellant's points 3 and 7 are without merit because of his failure to note his exceptions to the court's action

as required by our rules of criminal procedure. *Bivens v. State,* 242 Ark. 362, 413 S.W. 2d 653.

Appellant's fourth point for reversal is his allegation of error in the overruling of his objection to questions to the witness Roberta Clark, his wife, relating to previous appearances as a witness. The following excerpt appears in the transcript on cross-examination by the prosecuting attorney:

Q. Roberta, you have testified in court before, haven't you?

A. Yes, I have.

BY MR. WALMSLEY:

Object, that is not relevant in any way.

BY THE COURT:

Overruled; go ahead.

BY MR. WALMSLEY:

Note our exceptions.

Q. How many times?

A. I don't remember.

Q. You mean it is that many?

A. I didn't say it was, I just said I don't remember.

Q. 10 times?

A. No.

Upon repetition of appellant's objection at this point, this line of questioning was abandoned. We find no prejudicial error in the overruling of appellant's ob-

jections to the particular questions asked. A wide latitude is allowed counsel on cross-examination to elicit facts impeaching the credibility of a witness. *Huffman* v. *City of Hot Springs,* 237 Ark. 756, 375 S.W. 2d 795; *Carter* v. *State,* 196 Ark. 746, 119 S.W. 2d 913. The scope of this examination is largely within the discretion of the trial court. *Lee* v. *State,* 229 Ark. 354, 315 S.W. 2d 916; *Bartley* v. *State,* 210 Ark. 1061, 119 S.W. 2d 965; *Dawson* v. *State,* 121 Ark. 211, 180 S.W. 761; *King* v. *State,* 106 Ark. 160, 152 S.W. 990; *Zorub* v. *Missouri Pacific Railroad Co.,* 182 Ark. 232, 31 S.W. 2d 421 The exercise of the trial court's discretion as to the matter to be permitted on cross-examination will not be disturbed on appeal unless that discretion is abused. *Bartley* v. *State,* supra; *Hightower* v. *Scholes,* 128 Ark. 88, 193 S.W. 257.

It has been held in another jurisdiction that asking a witness how many times he had been before the court was within the permissible range of cross-examination. *State* v. *Callian,* 109 La. 346, 33 So. 363. While we might not go so far as to hold that such an interrogatory was permissible under all circumstances, we are unable to say that the court abused its discretion in this particular. In view of the abandonment of this line of questioning by the prosecuting attorney, we cannot say that there was any prejudice to the appellant in this case. We will not hold that a trial court abused its discretion in the control of the range of cross-examination when no prejudice is shown, no violation of rights appears and no authority is cited as sustaining the charge of impropriety. *Carter* v. *State,* 196 Ark. 746, 119 S.W. 2d 913.

Appellant also contends that the trial court erred in overruling his objection to using the same jury to try him on the felony charge which found him guilty on the misdemeanor charges. We have previously decided this question adversely to appellant in *Miller* v. *State,* 239 Ark. 836, 394 S.W. 2d 601.

Appellant argues that he was prejudiced by the reading of the names of the foremen of the juries that

had previously convicted him and the mentioning of more than two prior convictions in the presence of the jury. If there was error, it was harmless due to the fact that appellant received the minimum sentence under the statute.

Appellant's last point for reversal alleges that the court erred in overruling his objections to the testimony regarding his reputation in the community as a bootlegger. This point is without merit. Arkansas Statutes Annotated § 48-940 (Repl. 1964) specifically provides that such evidence is admissible in cases such as this one. We held this act constitutional in *Richardson* v. *State*, 211 Ark. 1019, 204 S.W. 2d 477.

The judgment is affirmed.

MAVIS D. WILSON v. UNITED AUTO WORKERS INTERNATIONAL UNION, ET AL

5-4939 441 S.W. 2d 475

Opinion Delivered June 2, 1969

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

Smith, Williams, Friday & Bowen by *George Pike, Jr.* for appellees.

JOHN A. FOGLEMAN, Justice. The widow of Harold Wilson, a staff representative of United Auto Workers International Union at the time of his death, asks us to reverse a judgment affirming the denial of death benefits by the Workmen's Compensation Commission. The commission found that Wilson's death on August 22,

1967, did not arise out of and during the course of his employment. As a point for reversal, appellant argues that the death of Wilson did so arise and that there is no substantial evidence to the contrary. As we understand the brief and argument on behalf of appellant, she contends that the evidence shows that Wilson's death arose out of and in the course of his employment as a matter of law. We do not agree.

The material testimony was as follows:

Wilson, a representative of United Automobile Workers, lived in North Little Rock. He worked under the supervision of the Little Rock office of the UAW, and his supervisor was Herbert Bingaman, Area Director. He had been going to Pocahontas off and on over a three-month period, during which he also spent some time in his business activities in Forrest City and Marianna. He went to Pocahontas on Monday, August 21, on the organizing mission that he had been conducting there. He was due to return to Little Rock on the following Saturday. He met a fellow organizer, Donald W. Slavens, at the Hillcrest Motel in Pocahontas where Wilson registered and obtained an air-conditioned room for the period of his stay there. Wilson was in charge of the campaign. He arrived at the motel about two o'clock and called on Slavens. The two discussed the program briefly and then went to the Shoe Workers' Hall to discuss plans. There they met with a committee around 2:00 p.m. and continued their discussion of plans until about 8:00 p.m. These parties separated for the evening meal, but later Wilson and Slavens met with two of the officers from the Shoe Workers' Lodge who were to help with the campaign. Wilson had his organizing material, files and papers in his room at the motel, along with the pamphlets and handbills and material normally used in this sort of campaign. The group was still engaged in this conference when Slavens asked to be excused about a quarter of eleven. Slavens and Wilson met between 7:30 and 8:00 a.m. on the following day and

had breakfast together, after which they picked up material at the motel and went to the Shoe Workers' Hall, each in his own automobile. There they prepared the hall for a meeting scheduled at 2:00 p.m. These preparations consisted of sweeping, moving tables and chairs, obtaining and icing soft drinks, and arranging for attendance prizes. They left the hall around 11:15, each going his separate way. Wilson advised Slavens that he made a practice of not eating lunch at noon. Slavens ate lunch and returned to the hall about 1:00 p.m. and awaited Wilson's arrival. Before the time scheduled for the meeting, Slavens was advised by an undertaker, who was also county coroner, that Wilson had suffered an accident. Slavens immediately went to the motel. He learned that Wilson had been found in the swimming pool at the motel clad in swimming trunks and had been taken to the funeral parlor. The coroner, the chief of police and a doctor examined Wilson's body in Slavens' presence. The only signs of injuries were bruises about Wilson's face and forehead. Slavens was advised that these were caused by attempted artificial respiration at the swimming pool.

Slavens stated that, as he recalled, the temperature was a moderate 82 or 85 and that the day was not a particularly humid one. The testimony indicates that Wilson was in good health. The only evidence of the cause of his death was the certificate made by the coroner who stated that Wilson apparently drowned accidentally while swimming in the pool at Hillcrest Motel. The cause of death is not seriously contested.

Wilson was paid an annual salary and a per diem when traveling. He was reimbursed for motel, telephone and other expenses. He was on call 24 hours per day, having no set hours of work. He was on his own initiative as to when he worked to accomplish his assignment. He had full authority to interrupt his work day for personal reasons but remained on call even during these interruptions. It was normal for those holding

positions as staff representatives to work out of the hotel or motel where they were staying during these campaigns. According to his supervisor, even though Wilson would be subject to call during self-designated periods of rest, relaxation or exercise, he was not required to leave word where he could be reached during these periods or to account to anyone for his time or whereabouts. He was expected to leave word at the home office as to where he could be reached. Wilson had advised this office that he would be at the Hillcrest Motel during his stay in Pocahontas.

UAW policy encouraged their employees to exercise and remain physically fit. They required annual physical examinations of these employees. They provided a $25 per year allowance for their representatives to enroll in YMCA programs. There is no evidence that Wilson ever took advantage of this allowance. Wilson had told his supervisor that swimming was one of his forms of relaxation and exercise. Other than this he had no knowledge of Wilson's practice of swimming at motels although he knew that Wilson spent a lot of time at motels. Bingaman stated that the Hillcrest Motel was the headquarters of both Wilson and Slavens during this campaign. Bingaman also testified that he had no objection to the usual practice of a staff member swimming in a motel pool when in operation, if the member enjoyed that type of recreation. The physical fitness program was voluntary, and some took advantage of it and some did not.

Appellant testified that she and her husband swam a lot when they stayed in a motel. She said he was never at home long enough to swim either in the pool or lake in the subdivision in which they lived. There was no reason for anyone to have called Wilson between 11:00 a.m. and 2:00 p.m. on the date of his death, although there was no reason to say with assurance that no one would call him. It was stipulated that Wilson was in the swimming pool alone and that no lifeguard was provided at the pool.

We find that there was a question of fact as to whether the death of Wilson arose out of and in the course of his employment and find substantial evidence to support the commission's finding that it did not. In its findings the commission stated:

> "The Commission concludes from all of the evidence that deceased's death did not arise out of and during the course of his employment. The Commission is unable to say what caused deceased's death. There is a lack of evidence to establish a causal connection between deceased going swimming, if he did, and his employment. Deceased's employment did not require him to go to the swimming pool and there is no evidence that he was performing any service for his employer by taking off from his work activities in the middle of the day to go sun bathing or swimming. He was engaged in an activity of his own choosing and it was not one that bore a causal connection with his employment."

In considering this case, it is necessary that we keep in mind basic fundamentals concerning review of workmen's compensation cases. The burden was on the claimant to show that the injury arose in the course of the employment and grew out of or resulted from the employment. *American Casualty Co.* v. *Jones,* 224 Ark. 731, 276 S.W. 2d 41. The findings of the Workmen's Compensation Commission have the same binding force, effect and verity as the verdict of a jury and are treated in this court in the same manner as a jury verdict. *Kelley* v. *Southern Pulpwood Co.,* 239 Ark. 1074, 396 S.W. 2d 305; *American Casualty Company* v. *Jones,* 224 Ark. 731, 276 S.W. 2d 41. In doing so, we must accept that view of the facts which is the most favorable to the commission's findings. *Albert Pike Hotel* v. *Trapner,* 240 Ark. 958, 403 S.W. 2d 73; *Burrow Construction Co.* v. *Langley,* 238 Ark. 992, 386 S.W. 2d 484; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S.W. 2d 113. We must also keep in mind that the commission must determine

the extent to which credit is given to testimony, even when it is undisputed. *Parrish Esso Service Center* v. *Adams,* 237 Ark. 560, 374 S.W. 2d 468; *American Casualty Co.* v. *Jones,* 224 Ark. 731, 276 S.W. 2d 41; *Meyer* v. *Seismograph Service Corporation,* 209 Ark. 168, 189 S.W. 2d 794. When we consider the findings of the commission in the same manner as we would a jury verdict on the question involved here, we must sustain the commission's findings.

Even though there is no conflict in direct evidence as to facts material to a determination whether an employee met death while in the course of his employment, the Workmen's Compensation Commission has a right to consider all circumstances and proven facts and to draw all reasonable inferences deducible therefrom. *United Steel Workers* v. *Walden,* 228 Ark. 1024, 311 S.W. 2d 787. The questions posed in this case are the same that confronted the court in *Woodmansee* v. *Frank Lyon Co.,* 223 Ark. 222, 265 S.W. 2d 521. They are: "Do the facts and circumstances of this case show, as a matter of law, that appellant's injury arose out of and in the course of his employment? Or, to the same effect, the question may be more specifically stated: Do the facts and circumstances shown by the record reveal a lack of substantial evidence to support the commission's finding that appellant's injury did not arise out of and in the course of his employment?" There we answered both questions in the negative, as we do here. In the opinion in that case it was carefully pointed out that the commission, in applying undisputed facts to the governing rules, must use some degree of discretion and judgment in this kind of a case. We quoted with approval from *Miller* v. *Keystone Appliances,* 133 Pa. Super. 354, 2 A. 2d 508. That court said:

> " 'Whether deceased was in the course of his employment when he was injured is a question of law. * * * But in determining that question we must bear in mind the liberal construction that this

term has received in the courts, and the exclusive function of the compensation authorities to find facts, whether from direct or circumstantial evidence, and the inferences therefrom.' ''

This case bears a great similarity to the *Woodmansee* case in that here, as there, portions of the testimony could be interpreted as indicating compensability while other portions, and in some instances the same testimony, can be interpreted as indicating noncompensability.

The rules governing activities commonly referred to as recreational are most succinctly stated in Larson's text on Workmen's Compensation Laws, Vol. 1,§ 22, page 349, an authority frequently cited and relied upon by this court. The rule is stated thus:

> ''Recreational or social activities are within the course of employment when
>
> (1) They occur on the premises during a lunch or recreational period as a regular incident of the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.''

Each of the three alternative tests stated by Professor Larson is quoted in the opinion in the *Woodmansee* case, with approval, where guideposts for determining compensability of a claim such as this were established. In view of the fact that the evidence would not justify any inference that the employer in this case would derive any

benefit from Wilson's swimming activities other than morale and efficiency benefits, we find that the third test was not met. In this respect, the comments of Professor Larson in Vol. 1, § 22.30, page 375, are pertinent:

> " 'Controversy is encountered also when the benefit asserted is the intangible value of increased worker efficiency and morale. Basically, the trouble with this argument is not that such benefits do not result, but that they result from every game the employee plays whether connected with his work or not. In this respect, the argument is reminiscent of the same view sometimes heard in connection with the personal comfort cases: eating, resting, and the like do indeed improve the efficiency of the employee, but this is equally true (and even more true) of the sleeping and eating which he does at home. And so, just as in the sleeping and eating cases some arbitrary time and space limitations must circumscribe the area within which the "benefit" establishes work-connection, the recreation cases must submit to some similar limitation, since otherwise there is no stopping point which can be defined short of complete coverage of all the employee's refreshing social and recreational activities. *It can be taken as the distinctly majority view that these morale and efficiency benefits are not alone enough to bring recreation within the course of employment.*' " (Emphasis added.)

Certainly it cannot be said that the commission was unjustified in drawing the inference that the UAW received no other benefit from the activity in which Wilson was engaged at the time of his death.

It could not be said that the employer expressly or impliedly required Wilson's swimming. There was nothing to indicate that Wilson, at this time, was engaged in any activity whatever on behalf of his employer. Even though he was expected to entertain and solic-

it employees of the company whom he was attempting to organize for his employer, there is no evidence whatever that he saw any of these on the day of his death, much less during the time that he was in and around the motel after leaving the union hall. Clearly, the evidence did not make Wilson's swimming a part of his services. Thus the second test was not met.

Appellant's strongest arguments for compensability must be tested by the first alternative stated by Professor Larson. She contends: that the entire premises of the Hillcrest Motel were the employer's premises under the circumstances here; that, since Wilson was subject to call at any time and place, the swimming pool constituted a part of those premises, as long as he was in Pocahontas on the mission assigned to him; that his swimming was in compliance with company policy encouraging physical fitness; that Wilson's death occurred around noon after he had done work in preparation for an afternoon meeting but before the meeting took place; that his recreational activity was accepted and normal.

While it might have been reasonable for the commission to draw the inference from these circumstances that Wilson's death occurred on company premises during a lunch or recreational period and that his swimming was a regular incident of the employment, we cannot say that it was not reasonable or proper for the Workmen's Compensation Commission to draw the opposite inferences, as it did. As we see it, the fact finder made a permissible finding on a close question of fact by resolving the inferences adversely to the claimant's contentions. What we said in *Herman Wilson Lumber Co.* v. *Hughes*, 245 Ark. 168, 431 S.W. 2d 487, is appropriate here:

> "Perhaps the trial court fell into error by reason of its conclusion that statutory law requires that testimony must always be given a liberal construction in favor of the claimant. It is true that it is

> the duty of the Workmen's Compensation Commission to draw every legitimate inference possible in favor of a claimant and to give him the benefit of the doubt in factual situations. (Citations omitted.) But it is not the province or duty of either the circuit court or this court to make a de novo application of this rule on review. Both courts are required to view the evidence in the light most favorable to the findings of the Commission and to give the testimony its strongest probative force in favor of the action of the full commission. (Citations omitted.) The question is not whether the testimony would have supported a finding contrary to the one made, but whether it supports the finding which was made."

Appellant cites and relies upon numerous cases from other jurisdictions, (the vast majority of which sustained commission findings of compensability) some of which might have persuasive value were it not for the fact that the Arkansas guideposts for compensability had been so definitely established in the *Woodmansee* case. None of the Arkansas cases relied upon by appellant have to do with activities that might be called recreational. Some of those cases have to do with activities of an employee which were not involved in precisely what he was hired to do by his employer. Many of them are cases in which a finding by the Workmen's Compensation Commission that the death arose out of and in the course of employment was affirmed. See *Arkansas Power and Light Co.* v. *Cox,* 229 Ark. 20, 313 S.W. 2d 91; *Williams* v. *Gifford-Hill and Co.,* 227 Ark. 340, 298 S.W. 2d 323; *American Casualty Co.* v. *Jones,* 224 Ark. 731, 276 S.W. 2d 41; *Blankinship Logging Co.* v. *Brown,* 212 Ark. 871, 208 S.W. 2d 778, *Lundell* v. *Walker,* 204 Ark. 871, 165 S.W. 2d 600.

Other cases have to do with acts of personal ministration, which are universally recognized as incidents of the employment and as such protected as injuries on

the actual employment, so long as they are only slight deviations, and are done with the consent or acquiescence of the employer. *Tinsman Mfg. Co.* v. *Sparks,* 211 Ark. 554, 201 S.W. 2d 573; *Williams* v. *Gifford-Hill and Co.,* supra. Others recognize exceptions to the "going and coming rule," where the employer furnishes the method of transportation, or when the employee is injured at a place so close to the employer's premises as to be considered a part thereof, or when the employee has a duty to perform for the employer while en route home or under the traveling salesman rule, where the travels of the salesman are within the course of his employment from the time he leaves home until he returns, for the reason that the traveling itself is a large part of the job. *Hunter* v. *Summerville,* 205 Ark. 463, 169 S.W. 2d 579; *Tinsman Mfg. Co.* v. *Sparks,* supra; *Bales* v. *Service Club,* 208 Ark. 692, 187 S.W. 2d 321; *Owens* v. *Southeast Arkansas Transportation Co.,* 216 Ark. 950, 228 S.W. 2d 646; *Frank Lyon Co.* v. *Oates,* 225 Ark. 682, 284 S.W. 2d 637.

The decision in the case of *Fine Nest Trailer Colony* v. *Reep,* 235 Ark. 411, 360 S.W. 2d 189, is also distinguishable. There the salesman's death did not occur during any period of recreational activities, but from activities of the salesman in preparation of a meal in a house trailer he had endeavored successfully to sell to a prospective customer who accompanied him to the house trailer which was located on a tract of land occupied by the salesman. The negotiations were over an extended period, and the steak which the salesman was preparing to eat had been purchased while he and the customer were en route to the trailer. The sale was concluded about 8:30 p.m., and the salesman's invitation to the customer to stay and eat with him had been declined. It was pointed out in that opinion that it was necessary that the salesman bring the house trailer to his employer's place of business the next morning in order to complete the sale and that he was driving a company truck equipped to tow house trailers. In that case the court clearly stated that if a reasonable inference had been deducible from the

evidence that the salesman's death did not grow out of and in the course of his employment, the decision of the commission denying compensation must have been affirmed. The court found that the *only* reasonable inference to be drawn was that the death, under the circumstances, grew out of and in the course of the employment. We do not consider that to be the case here.

The judgment of the circuit court is affirmed.

GEORGE ROSE SMITH, JONES, and HOLT, JJ., dissent.

J. FRED JONES, Justice. I do not agree with the majority opinion in this case. The known facts are not in controversy. There is no serious contention that Mr. Wilson's death was not the result of an accident within the meaning of the Workmen's Compensation Act, and there is no question, in my opinion, that it occurred within the course of his employment. Had Mr. Wilson died as a result of slipping in the shower at the motel or by being struck by an automobile while crossing the street to a cafe for lunch, the compensation coverage under the other facts in this case, including the nature of the duties of his employment, would not be questioned.

The commission seems to have found that the accident did not grow out of, or occur within, the course of the employment because Mr. Wilson had stepped out of, or deviated from, the course of his employment and was engaged in recreational activity for his own personal pleasure and benefit when his death occurred. The majority finds substantial evidence to support this finding, but I do not.

I do not consider this a recreational injury case at all under the facts in the record. Mr. Wilson did not go to the municipal swimming pool for an hour or so of recreation and to get away from it all, neither was he on an outing in quest of recreation. The record does not reveal how late Mr. Wilson worked on the night before his death, but Mr. Wilson's associate had gone to bed

tired and worn out at "a quarter till eleven" the night before and left Mr. Wilson still working. Mr. Wilson was up before 7:30 on the day of his death and had worked that morning at a Union Hall preparing it for a 3:00 p.m. meeting. Rather than take time out for lunch on the day of his death, instead of stepping outside the course of his employment for recreational purposes, Mr. Wilson stepped outside his motel room for a dip in the motel pool before going to the afternoon meeting. What was Mr. Wilson's state of mind in selecting the pool rather than the shower, if one was available, is not in the record, but I do not consider the difference of any importance. Whether Mr. Wilson felt that he was too strained and tense to face the organizational work in the afternoon and was attempting to relax before attending the scheduled meeting will probably never be known. But in my opinion a motel room door between the shower and the motel pool is too narrow a dividing line between course of employment and recreation for personal pleasure, and certainly I am of the opinion that the claimant widow was entitled to the benefit of any doubt.

It is much more logical to me, under the facts of this case, that Mr. Wilson was attempting to freshen up and relax in preparation for his afternoon meeting rather than foregoing his lunch for a swim in a motel pool for exercise and personal pleasure. It seems to me that to conclude otherwise would require an assumption that Mr. Wilson preferred the pleasure of swimming to the necessity of eating.

It is my opinion that Mr. Wilson was within the course of his employment when he returned to his motel room following his work at the Union Hall in preparation for the afternoon meeting, and it is my further opinion that he did not abandon, or deviate from the course of his employment, when he stepped across the threshold of his motel room and entered the swimming pool which the motel had provided for the use of its guests.

I would reverse.

I am authorized to state that GEORGE ROSE SMITH and HOLT, JJ., join in this dissent.

E. A. GARRISON v. HAROLD J. WILLIAMS, JR., ET AL

5-4937 442 S.W. 2d 231

Opinion Delivered June 2, 1969
[Rehearing denied July 14, 1969.]

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

McMath, Leatherman, Woods & Youngdahl for appellees.

J. Fred Jones, Justice. This is an appeal by E. A. Garrison from an order overruling his motion for judgment notwithstanding a jury verdict rendered against him in the Pulaski County Circuit Court, Second Division.

On June 21, 1965, Mr. Garrison entrusted his 1965 Thunderbird automobile to his minor son, Gary, then fifteen years of age, for the purpose of going to a picture show at the Park Theatre in North Little Rock. Gary's young friend, George Baugher III, also fifteen years of age, had been with Gary all day and was with him when the automobile was entrusted to Gary. The two boys had planned the trip to the theatre and knew that Pamela Williams, young Baugher's fourteen year old girl friend, would be at the theatre with a group of girls who had planned a bunking party at one of their homes following the show. Upon arrival at the theatre young Baugher immediately located Pamela sitting among her friends. He obtained the automobile keys from young Garrison and took Pamela for a ride in Mr. Garrison's Thunderbird automobile. There is some conflict in the testimony at this point, but in any event when young Baugher agreed to tell that he had stolen the automobile in the event of an accident or inquiry by the police, young Garrison surrendered the possession of the ignition keys to young Baugher and Pamela. Pamela says that she thought they were going to just sit in the auto-

mobile and talk while listening to the radio, but that young Baugher attempted to drive the automobile, lost control of it about two blocks from the theatre, and crashed into a concrete wall. The automobile was demolished and Pamela sustained serious injuries.

Mr. Williams filed suit in his own right for medical expenses and for Pamela for her personal injuries against Mr. Garrison and young Baugher. The complaint alleged facts constituting negligent entrustment on the part of Mr. Garrison, and willful and wanton negligence in the operation of the automobile on the part of young Baugher. The complaint alleged damages as a proximate result of the joint and concurring negligence of Mr. Garrison and young Baugher. Both Mr. Garrison and young Baugher answered by general denial. A jury trial resulted in a verdict against Mr. Garrison in favor of Pamela Williams for $5,500, and in favor of Mr. Williams for medical expenses in the amount of $1,858.15. The jury found for George F. Baugher III on the complaint against him and judgment was entered accordingly.

On appeal to this court Mr. Garrison narrows the issues within the point he relies upon for reversal. He states the point as follows:

> "The trial court erred in overruling appellant's motion for judgment notwithstanding the verdict."

In narrowing the issues within the point, appellant Garrison states:

> "The sole question presented by this appeal is whether or not in a suit based upon the theory of negligence entrustment it is permissible for a jury to exonerate the driver of the borrowed automobile but at the same time find that the owner of the entrusted automobile is liable for plaintiff's damages. It is appellant's position that an examination of the

relevant authorities clearly shows that in cases of this nature in order for the owner to be held liable it is a condition precedent that the driver of the borrowed vehicle must be found to have been negligent and liable to the injured party."

The appellant cites, and seems to rely heavily on, our 1937 decision in the case of *Chaney* v. *Duncan*, 194 Ark. 1076, 110 S.W. 2d 21, wherein we said, as quoted by the appellant:

> "An automobile is a machine that is capable of doing great damage if not carefully handled, and for this reason the owner must use care in allowing others to assume control over it. If he intrusts it to a child of such tender years that the probable consequence is that he will injure others in the operation of the car, or if the person permitted to operate the car is known to be incompetent and incapable of properly running it, although not a child, the owner will be held accountable for the damage done, because his negligence in entrusting the car to an incompetent person is deemed to be the proximate cause of the damage. *In such a case of mere permissive use, the liability of the owner would rest, not alone upon the fact of ownership, but upon the combined negligence of the owner in intrusting the machine to an incompetent driver, and of the driver in its operation.*" (Appellant's emphasis.)

In the *Chaney* case we also said:

> "If Chaney was on a mission for his father, or was acting as the agent or servant of his father in driving the truck, his father would, of course, be liable for his negligence in operating the truck. But, *regardless of whether he was his father's agent or on a mission for him, if the father, knowing his habit of recklessness and incompetency because of drunkenness, permitted the son to drive the truck, and*

> *any injury occurred as a result of the son's negligence, the father would be liable.''* (Our emphasis added.)

In the *Chaney* case we were talking about a common law liability which has never been repealed by statute. *Additional liability* has been added by statute, however, where the entrustee is a minor child or ward who is incompetent under the statute to drive an automobile.

Arkansas Statutes Annotated § 75-342 (Repl. 1957) provides as follows:

> ''No person shall cause or knowingly permit his child or ward under the age of eighteen (18) years to drive a motor vehicle upon any highway when such minor is not authorized hereunder or in violation of any of the provisions of this act.''

And Ark. Stat. Ann. § 75-343 (Repl. 1957) provides:

> ''No person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized hereunder or in violation of any of the provisions of this act.''

By Act 495 of 1961, Ark. Stat. Ann. § 75-315 (Supp. 1967), the legislature authorized an instruction permit or driver's license for a child under 18 years of age upon the application of parents or responsible person (in the absence of parents) who will assume the responsibility imposed under the act. Subsections (c) and (d) of § 75-315 provide as follows:

> ''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."

Thus it is seen that in addition to the common law liability, as expressed in *Chaney* v. *Duncan,* supra, there is additional vicarious liability imposed by statute upon those persons who come within the statute and violate its provisions.

There is no question that the appellant violated the statute. He admits that he entrusted the automobile to his fifteen year old son, Gary, and had done so before. He knew that young Baugher was with Gary when the entrustment was made and that they planned to use the automobile in going to a picture show theatre together. But, the appellant simply contends that the jury finding against him is inconsistent with the jury finding for the driver of his automobile in the same verdict and that a judgment entered thereon cannot stand.

This case was not submitted to the jury on interrogatories apportioning negligence as between the parties and the verdict was general in nature. Section 75-

315 (c) and (d), supra, impose vicarious liability on the parent who is required to sign the application for his minor child's driver's license whether he does so or not. Neither the appellant nor Baugher affirmatively alleged contributory negligence or assumption of risk in their answers to the complaint, and neither of them actually pleaded the guest statute in avoidance of liability. It seems admitted, however, that the appellee was the guest of young Baugher in appellant's automobile.

The court's instructions under which the jury rendered its verdict are not abstracted by the appellant, but at the request of the appellee the trial court gave to the jury AMI instruction 203 as the court's instruction No. 5, as follows:

> "Harold J. Williams and Pamela Williams claim damages from E. A. Garrison and have the burden of proving each of four essential propositions:
>
> First, that they have sustained damages;
>
> Secondly, that E. A. Garrison was negligent in entrusting his automobile to his son, Gary Garrison;
>
> Third, that George A. Baugher III the driver of the automobile, was guilty of operating the automobile wilfully and wantonly in disregard of the rights of others.
>
> Fourth, that the negligence of E. A. Garrison and the operation of the automobile wilfully and wantonly in disregard of the rights of others by George A. Baugher III were proximate causes of plaintiffs damages.
>
> If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for the plaintiffs against E.

A. Garrison; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for E. A. Garrison."

The court gave as its instruction No. 6, AMI instruction 203, at appellees' request, as follows:

"Harold J. Williams and Pamela Williams claim damages from George Baugher III and have the burden of proving each of three essential propositions:

First, that they have sustained damages;

Second, that George A. Baugher III was guilty of operating the automobile wilfully and wantonly in disregard of the rights of others;

And third, that such operation of the automobile wilfully and wantonly in disregard of the rights of others was a proximate cause of plaintiffs' damages.

If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for the plaintiffs against George A. Baugher III; but if, on the other hand, you find from the evidence that any of these propositions has not been proved, then your verdict should be for George A. Baugher III."

The record contains only one instruction requested by the defendant Baugher, and none at all requested by the appellant. Baugher's requested instruction is designated court's instruction No. 15A, which is AMI 612, and is as follows:

"The defendant George A. Baugher III contends that Pamela Williams assumed the risk of her own injuries. To establish that defense George A.

Baugher III has the burden of proving each of the following propositions:

First: That a dangerous situation existed which was inconsistent with the safety of Pamela Williams.

Second: That Pamela Williams knew the dangerous situation existed and realized the risk of injury from it.

Third: That Pamela Williams voluntarily exposed herself to the dangerous situation which proximately caused her claimed injuries.

If you find that all of these propositions have been proved by a preponderance of the evidence, then your verdict should be for George A. Baugher III. If, on the other hand, you find that any one of these propositions has not been proved by a preponderance of the evidence, the defense of assumption of risk on the part of George A. Baugher III would fail."

The trial court, at appellees' request, gave its instructions Nos. 10 and 11, AMI 501 and 502, as follows:

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

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

When the acts or omissions of two or more persons work together as proximate causes of damage to another, each of those persons may be found to be liable. This is true regardless of the relative degree of fault between them."

The trial court also gave AMI 609 and 601 as the court's instructions Nos. 14 and 15, at the request of the appellees, as follows:

"It is the duty of the owner of a motor vehicle to use ordinary care not to entrust it to a person who he knows or reasonably should know might permit it to be driven by an incompetent driver.

There was in force in the State of Arkansas at the time of the occurrence a statute which provided that no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be driven upon any highway by any person who is not authorized under the statutes of the State of Arkansas. (Ark. Stat. Ann. § 75-343 [Repl. Vol. 1957])

A violation of this statute, although not necessarily negligence, is evidence of negligence to be considered by you along with all of the other facts and circumstances in the case."

The appellant does not complain of the instructions on this appeal, but simply contends that the appellant could not be liable until the jury first found young Baugher to be liable and appellant argues that the jury did not even find that young Baugher was negligent. We do not share appellant's view that the jury, by its general verdict, found that young Baugher *was not negligent.*

Under the court's instruction No. 5 it was necessary for the jury to find that Baugher was guilty of operating

the automobile willfully and wantonly in disregard for the rights of others in the actual operation of the automobile before the jury could find against the appellant. How then, inquires the appellant, could the jury find for the appellees against the appellant and not against Baugher under the instructions of the trial court. The answer lies in the court's instruction No. 15A, supra, requested by Baugher and given *as to him,* on the assumption of risk. The appellant requested no such instruction and no such instruction was given as to the appellant.

The jury could have found, and apparently from its verdict it did find, that although young Baugher was guilty of willful and wanton negligence, the appellee assumed the risk of riding with him and thereby waived her right to recovery against him. If such was the finding of the jury, then the question is whether the appellee's assumption of risk as to Baugher's driving inures to the benefit of appellant and protects him against liability for his own separate negligence in placing the automobile in the possession and exclusive control of his fifteen year old son in violation of the statute. Although Ark. Stat. Ann. § 75-315 (c) and (d), supra, imputes the negligence or willful misconduct of a minor in possession of an automobile to the parent owner who places the minor in possession, the statute does not transfer to the owner, as a bar against his own negligence, all of the defenses the driver of such automobile may have against lawsuits for injuries to third parties.

As to the proximate cause and causal connection between the negligent operation of the automobile by young Baugher and the negligence of the appellant in entrusting the automobile to his fifteen year old son, it has been uniformly held that, in order to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence and that it ought to have been foreseen in the light of the attending circumstances.

Meeks v. *Graysonia, Nashville & Ashdown R. Co.*, 168 Ark. 966, 272 S.W. 360; *Pittsburg Reduction Co.* v. *Horton*, 87 Ark. 576, 113 S.W. 647, 18 L.R.A.N.S. 905; *St. L. & S. F. R. Co.* v. *Whayne*, 104 Ark. 506, 149 S.W. 333; *St. L. Kennett & S. E. Rd. Co.* v. *Fultz*, 91 Ark. 260, 120 S.W. 984; *Hays* v. *Williams*, 115 Ark. 406, 171 S.W. 882; and *Bona* v. *Thomas Auto Co.*, 137 Ark. 217, 208 S.W. 306.

A short excerpt from the appellee Pamela's testimony is somewhat revealing on this point. She testified that Gary had let Harold King, Claudia Muller, Sherry Odom and others drive the car and then testified: "Gary was the only one who had a car and he had it every Sunday or every other Sunday and we would all sit in the car and talk..."

"Q. ...When did you and George decide to go outside?

A. In the theatre we decided to go outside and get in the car and talk and Gary handed me the keys and I thought well, a '65 Thunderbird he'd keep it locked, and I just thought that was what it was for. And we were sitting in the car and he put the keys in the ignition and I thought we were going to listen to the radio and he started the car and I had seen him drive a Volkswagen before and so I just took it for granted that he could drive and then when he started the car up, it was power brakes and power steering, and there's a difference in driving a Volkswagen and when he applied the brakes to stop at a stop sign he hit them real hard and it killed the car and it started rolling, almost hit a tree then and that's when I decided I wanted to get out of the car.

* * *

Q. Then what happened?

A. Well, it was raining and the streets were real slick and when he went to turn the curve it—he turned the wheel too far and it started fish tailing and we started going into the wall and that's when I screamed."

We conclude that the jury could have found that the appellant should have foreseen the natural and probable consequence of his negligence under the attending circumstances in this case.

The Arkansas guest statute, Ark. Stat. Ann. § 75-913 (Repl. 1957) provides as follows:

> "No person transported as a guest in any automotive vehicle upon the public highways or in aircraft being flown in the air, or while upon the ground, shall have a cause of action against the owner or operator of such vehicle, or aircraft, for damage on account of any injury, death or loss occasioned by the operation of such automotive vehicle or aircraft unless such vehicle or aircraft was wilfully and wantonly operated in disregard of the rights of others."

The Kansas case of *Bisoni* v. *Carlson,* 237 P. 2d 404, was very much like the case here, on the principal points involved, and under similar statutory provisions. In that case an administrator brought suit for the wrongful death of a sixteen year old youth named Bisoni, against Clayton D. Carlson and his father, A. J. Carlson. A demurrer was sustained to the complaint by the trial court. It was alleged in the complaint that the decedent, Bisoni, and several other boys, were invited by young Carlson to take a ride in a 1933 Ford automobile owned by his father, A. J. Carlson, the automobile having defective steering apparatus and defective brakes. The complaint then alleged that young Carlson drove the automobile in such manner as to constitute willful and wanton negligence and as a result he lost control of the auto-

mobile causing Bisoni to suffer the injuries from which he died. The complaint alleged that A. J. Carlson knew, or had reasonable cause to know, of his son's negligence and careless disposition, and that he negligently allowed young Carlson to drive and operate the automobile. The counsel for appellant argued that the complaint was ample, if established, to hold A. J. Carlson liable *either under the rules of the common law or under the statute.* Counsel for appellee admitted that if it were not for the guest statute, the complaint stated a cause of action against A. J. Carlson, but he contended that unless the plaintiff, under the allegations of the complaint, was entitled to recover against the defendant driver, Clayton D. Carlson, under the guest statute, he would not be able to recover from either of the defendants. The statute relied upon by the appellant read as follows:

> "Every owner of a motor vehicle causing or knowingly permitting a minor under the age of sixteen years to drive such vehicle upon a highway, and any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable with such minor for any damages caused by the negligence of such minor in driving such vehicle."

In reversing the trial court, the appellate court said:

> "Statutes of this kind extend the common law rule of liability of the owner. They have been sustained as a valid exercise of the police power and have been applied in harmony with their terms to the facts alleged or established. *The negligence of A. J. Carlson occurred when he permitted his son, Clayton, to use the car on the highways, although the amount of his liability would be measured by the extent of the damages resulting from the negligence of Clayton in driving the car.* (Emphasis supplied.) The statute as applied here makes A. J. Carlson and Clayton '*jointly and severally liable*' for such damages.

* * *

> . . . here we have a statute fixing a *severable liability*. We thing the word 'severally' in the statute cannot be ignored. (Emphasis supplied.)
>
> Here the tort was not jointly committed. A. J. Carlson committed his wrong when he consented to Clayton D. Carlson driving the car, and Clayton D. Carlson having committed his wrong later when he was driving it. A. J. Carlson had previously made himself liable for any damages caused by Clayton's negligence.
>
> G. S. 1949, 8—122b, relied upon by appellees, reads: 'That no person who is transported by the owner *or operator* of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner *or operator* for injury, death or damage, unless such injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle. (Our italics.)'
>
> Counsel for appellant contend that the only 'owner' mentioned in this statute is the one who *is transporting* a person who claims damages. That conclusion seems to be justified by the language of the statute, as seems clear by omitting the words we have italicized, 'or operator,' in the two places where they occur. In this interpretation the statutes are not conflicting. We think the result is that A. J. Carlson is liable under G. S. 1949, 8—222, and that G. S. 1949, 8—122b, does not limit that liability.''

It will be noted that under the 1961 Act, Ark. Stat. Ann. § 75-315, supra, the liability of the owner of an automobile under subsection (c) is not limited to the negligence of the minor *when driving a motor vehicle up-*

on the highway, nor is it limited to negligence or willful misconduct of such minor *in the operation of a motor vehicle.* On the contrary, § 75-315 (c), supra, provides that where a parent knowingly causes or permits his child under the age of eighteen years to drive a motor vehicle upon any highway then the *negligence* or *willful misconduct* of said minor shall be imputed to such parent and he "shall be jointly and *severally* liable with such minor for any damages caused by such *negligence or willful misconduct.*"

The jury apparently found that the appellee assumed the risk of the willful and wanton negligent conduct of young Baugher and thereby waived her right of recovery against him. The jury did not find, nor were they requested to find, that the appellee assumed the risk of appellant's own wrongful act of negligent and unlawful entrustment and we are unable to say, that as a matter of law, she waived her right of recovery against him.

The judgment is affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice. I concur only because appellant is in no position to complain of inconsistent verdicts. The "assumed risk" instruction was given as to Baugher. It was not requested by Garrison. Thus, a defense available to Baugher was not available to appellant.

STATE OF ARKANSAS v. MARLIN REEVES

5-5420 442 S.W. 2d 229

Opinion Delivered June 2, 1969
[Rehearing denied July 14, 1969.]

Joe Purcell, Atty. Gen.; *Don Langston*, Asst. Atty. Gen. *Mike Wilson*, Asst. Atty. Gen. for appellant.

Howell, Price & Worsham for appellee.

CONLEY BYRD, Justice. The State of Arkansas, pursuant to Ark. Stat. Ann. § 43-2720 (Repl. 1964), appeals from an order dismissing a charge of grand larceny against appellee Marlin Reeves upon the basis that Prairie County was not the proper venue. It is stipulated that all acts of appellee occurred in Pulaski County and that he was at no time present in Prairie County where the tractor was stolen—i.e., appellee Reeves only aided and abetted in the theft of the tractor.

To sustain the dismissal appellee relies upon Art. 2, § 10 of the Constitution of Arkansas, Ark. Stat. Ann. § 43-1424 (Repl. 1964) and *Green* v. *State*, 190 Ark. 583, 79 S.W. 2d 1006 (1935). Article 2, § 10 of the Constitution provides:

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

Arkansas Stat. Ann. § 43-1424, being § 97 of chapter 45 of the Revised Statutes of 1838, provides:

> "An indictment against any accessory to any felony, may be found in any county where the of-

fense of such accessory may have been committed, notwithstanding the principal offense may have been committed in another county; and the like proceedings shall be had therein, in all respects, as if the principal offense had been committed in the same county."

In *Green* v. *State, supra,* Green was prosecuted as an accessory before the fact. We there held that under Art. 2, § 10 of the Constitution Green could only be prosecuted in a county in which the accessorial acts were committed. In doing so we relied upon *State* v. *Chapin,* 17 Ark. 561 (1856).

In the *Chapin* case we held that a citizen of Ohio could not be prosecuted in Arkansas as an accessory before the fact for the burning of a boat at Helena in Phillips County. In so doing, however, we said:

"Again, if a person absent from the State, commits a crime here, through or by means of an innocent instrument or agent, it seems that the law would regard him as personally present, and hold him responsible for the offense. As, for example, if the defendant had fired the *Martha Washington* through the agency of an idiot. *Foster's Crown Law* 349; 1 *Chit. Crim. Law* 191; *Wheat. Crim. Law* 115. Or where one utters forged notes through an innocent agent. *People* v. *Rathburn,* 21 *Wend. Rep.* 509. Or obtains money by false pretenses, through such agency. *People* v. *Adams,* 3 *Denio* 190. Or sends poison to another through a letter, intending to poison him, and succeeds. *Queen* v. *Garrett,* 22 *Eng. Law and Eq. Rep.; People* v. *Rathburn, ubi sup.* 540.

Again, it seems, that in misdemeanors, where there are no accessories, but all are regarded as principles who, in any manner, participate in the commission of the crime, if a person in one State procure the commission of a crime of that grade in

> another State, through even a *guilty* agent, the procurer is regarded as a principal in the offence, and as being present, in contemplation of law, where it is committed, and answerable there for the crime. *Commonwealth* v. *Gillespie et al.,* 7 *Serg.* & *Rawle* 478; *People* v. *Adams, ubi sup; Barkhamsted* v. *Parsons,* 3 *Conn. Rep.* 1; The *King* v. *Johnson,* 6 *East Rep.* 583."

The theoretical distinction of why Chapin could not be prosecuted as an accessory before the fact on a felony charge but could be prosecuted on a misdemeanor charge is explained in *Cousins* v. *State,* 202 Ark. 500, 151 S.W. 2d 658 (1941), where we said:

> "If a crime covers only the conscious act of the wrongdoer, regardless of its consequences, the crime takes place and is punishable only where he acts; but, if a crime is defined so as to include some of the consequences of an act, as well as the act itself, the crime is generally regarded as having been committed where the consequences occur, regardless of where the act took place, . . ."

See also Leflar, "*The Criminal Procedure Reforms of* 1936—*Twenty Years After,*" 11 Ark. L. Rev. 117, 131, 132 (1957).

Shortly after the *Green* case was handed down, the people of this state, by Initiated Act No. 3 of 1936, § 25 (Ark. Stat. Ann. § 41-118 [Repl. 1964]), provided:

> "The distinction between principals and accessories before the fact is hereby abolished, and all accessories before the fact shall be deemed principals and punished as such . . ."

Therefore, as we now understand Ark. Stat. Ann. § 41-118, the distinction between accessories before the fact and principals has been abolished and the effect

thereof is to change the definition of the crime so as to include the consequences of the act, as well as the act itself. Thus, under the language of the *Cousins* case, the crime committed by appellee Reeves was in Prairie County, for that is where the consequences occurred and according to art. 2, § 10 of the Constitution that is the only county in which the trial can be held.

For the reasons herein stated we reverse and remand.

BOBBY GENE BALLEW ET AL v. STATE OF ARKANSAS

5-5411 441 S.W. 2d 453

Opinion Delivered June 2, 1969

Marvin L. Kieffer for appellants.

Joe Purcell, Atty. Gen.; *Don Langston,* Asst. Atty. Gen.; *Mike Wilson,* Asst. Atty. Gen. for appellee.

FRANK HOLT, Justice. The appellants, who are brothers, were jointly charged by information with the offense of assault with intent to kill. A jury found them guilty and assessed the punishment of Bobby Gene Ballew at fifteen years and Rodger Huey Ballew at twelve years imprisonment in the state penitentiary. From the judgments on these verdicts comes this appeal.

For reversal, the appellants, through court appointed counsel, contend that the evidence is insufficient to support the verdicts. On appeal we must review the evidence in the light most favorable to the appellee and if there is any substantial evidence to support these verdicts then the verdicts must be sustained. *Finley* v. *State,* 233 Ark. 232, 343 S.W. 2d 787 (1961).

The appellant, Bobby Ballew, had been "dating" Omega Wallace Coots, the prosecutrix, for about a year. Eventually, Mrs. Coots informed him that she desired to return to her children's father from whom she was divorced. The appellant threatened, on several occasions, to kill her, if this should happen. The night before the alleged assault, she and this appellant argued most of the night at her house about her intention to return to her former husband. Bobby Ballew again repeated his threat to kill her. About noon the following day he left her house. Both appellants had spent the night there.

About 2:00 A.M. the next day both appellants appeared at a friend's house and borrowed his shotgun and some shells with the explanation that they were going to use it to go rabbit hunting. They were given several shells. Among the shells were some old ones and one containing a deer slug. They were told that the latter would fire since it was a new shell. They knew that Mrs. Coots was not at her residence and was spending

the night at her father's. Appellants parked their car about three blocks from the father's house. They took the gun and walked this distance to his house where Rodger Ballew knocked on the door and called Mrs. Coots to the door telling her that his brother wanted to talk to her. Bobby Ballew then asked the prosecutrix if she was going back to her former husband. When she replied affirmatively, Bobby Ballew told his brother, Rodger Ballew, "Go back of the house and make damn sure nobody comes around front where I'm at." Rodger Ballew complied. Mrs. Coots went back in the house and closed the door. The appellant, Bobby Ballew, shot through the door. Mrs. Coots' father found her lying on the floor suffering from a wound from the deer slug that penetrated her side and stomach. Bobby Ballew heard what appeared to be "her scream."

The appellants fled the scene and went to a relative's residence, got some breakfast, and prevailed upon the relative to take them to a nearby river boat landing. They were apprehended later in the day in this vicinity.

In *Nunley* v. *State,* 223 Ark. 838, 270 S.W. 2d 904 (1954), we find the applicable rule of law governing the sufficiency of the evidence in this case. There it is said:

> "While the intent to kill cannot be implied as a matter of law, it may be inferred from facts and circumstances of the assault, such as the use of a deadly weapon in a manner indicating an intention to kill, or an act of violence which ordinarily would be calculated to produce death, or great bodily harm. In determining whether or not the intent to kill should be inferred, the trier of the facts may properly consider the character of the weapon employed and the way it was used, the manner of the assault and the violence attendant thereon; the nature, extent and location on the body of the wound inflicted, if any; the state of feeling existing between the

> parties at and interior to the difficulty; statements of the defendant, if any; and all other facts and circumstances tending to reveal defendant's state of mind. [Citing cases.] It is not essential that the intent should have existed for any particular length of time before the assault, as it may be conceived in a moment.' "

To the same effect see *Murry* v. *State,* 209 Ark. 1062, 194 S.W. 2d 182 (1946).

The distinction between an accessory and a principal is now abolished and an accessory is equally as guilty of a crime as is his principal. Ark. Stat. Ann. § 41-118 (Repl. 1964); *Rush* v. *State,* 239 Ark. 878, 395 S.W. 2d 3 (1965).

In the case at bar we are of the view that there is ample evidence of a substantial nature to support both verdicts rendered by the jury. It follows that the court correctly refused to direct a verdict of not guilty requested by the appellant, Rodger Ballew, and properly denied the motion of both appellants for a new trial based upon insufficiency of the evidence.

For reversal it is further urged that the trial court erred in denying the motion to suppress the introduction of the shotgun as evidence. We cannot agree. When the officers discovered the appellants they were ordered to stop running and walk toward the officers from a distance of approximately 500 feet, with their hands raised. It was necessary for the appellants to wade a shallow "seep ditch" at a levee. At times the weeds and brush were of such a height that the appellants were partially obscured. When the appellants were approaching the officers one of them stooped down. They were asked the whereabouts of the shotgun. The officers were told that it was nearby in a "hollow log." It was found there contemporaneous with the arrest. It is argued that this procedure is in violation of *Miranda* v. *Arizona,*

384 U.S. 436 (1966), which requires that the accused must be warned of his constitutional rights against self-incrimination before any interrogation is begun. In other words, it is insisted that a *Miranda warning* should have preceded the inquiry.

We have recently held that a *Miranda* warning is not required to be given in every instance the moment a suspect is taken into custody. *Edington* v. *State,* 243 Ark. 10, 418 S.W. 2d 637 (1967); *Haire* v. *State,* 245 Ark. 293, 432 S.W. 2d 828 (1968). In those cases we held that a spontaneous statement was admissible. In the case at bar, we think the statement that the shotgun was in a "hollow log" was in the nature of a spontaneous admission. We do not agree that *Miranda* can be construed or is intended as being applicable in these circumstances.

Further, in the case at bar the officers, based upon probable cause, were effecting the legal arrest of the appellants who were fleeing from the scene of an alleged crime which had recently been committed by the use of a shotgun. In the circumstances it must be said that officers had a right to inquire of the presence or whereabouts of the weapon for their own safety as well as to prevent escape and the destruction of evidence as being incidental to a lawful arrest.

We find no merit in appellants' contention that there was an infringement of any constitutional right by the shotgun being thus discovered and used as evidence in the case at bar.

It is asserted that the court erred in denying appellant Bobby Ballew's motion to suppress his confession. The appellants both testified that they were wet, cold, hungry, and sick; that the police told them it would go easier on them if they made a statement; that they were interrogated and signed a waiver of rights and confessions in a police dominated atmosphere, all of which

rendered their statements coerced and involuntary. There was evidence contradicting these assertions. Evidence was adduced by the state that the *Miranda* warning was given and that appellant, Bobby Ballew, signed a "waiver of rights" before he was questioned and thereafter voluntarily signed the questioned confession. The trial court, in a *Denno* procedure in chambers, found that appellant, Bobby Ballew, was thirty-one years old and had made a voluntary statement with the knowledge and intelligence to understand the *Miranda* warning with reference to his constitutional rights. From our independent review of the record, we think the trial court's ruling is sustained by the evidence. *Harris* v. *State,* 244 Ark. 314, 425 S.W. 2d 293 (1968); *Mosley* v. *State,* 246 Ark. 358, 438 S.W. 2d 311 (1969). Therefore, we find no merit in this contention.

It is next contended that the trial court erred in denying appellant Rodger Ballew's motion for a severance. In his motion he asserted that he was only sixteen years of age and that a joint trial would be prejudicial to him because of his confession which contained inadmissible references to himself as well as cross-implicating references to his codefendant. The trial court ruled his statement inadmissible in the *Denno* proceeding. The motion for severance was denied. It is within the discretion of the trial court to permit a severance or a separate trial when defendants are jointly charged with a felony less than a capital offense. Ark. Stat. Ann. § 43-1802 (Repl. 1964). We do not disturb the refusal of a severance unless there was an abuse of discretion. *Finley* v. *State, supra.* We find no abuse of discretion in the case at bar.

It is further asserted that the trial court erroneously refused appellant Bobby Ballew's motion to discharge appellant, Rodger Ballew, as a defendant in the case under the provisions of Ark. Stat. Ann. § 43-2118 (Repl. 1964). This motion seeks dismissal of the charges against his codefendant on the basis that his codefendant

took no part in the alleged crime and that his codefendant was needed by him as a witness. In support of the motion is the affidavit of the appellant, Rodger Ballew, that he, in effect, was not guilty of the crime with which he was charged and that his codefendant desired him as a witness. Suffice it to say that this statute provides that if "the court is of [the] opinion that the evidence in regard to a particular individual is not sufficient to put him on his defense," then the trial court is authorized to grant appellant's motion to discharge his codefendant in order that he could be a defense witness. Trial courts must have much latitude and discretion in conducting the trial of a cause and we do not interfere unless there is a clear abuse of discretion. *Pixley* v. *State,* 203 Ark. 42, 155 S.W. 2d (1941). Certainly it cannot be said that the trial court abused its discretionary authority in view of the evidence adduced by the State.

The appellants argue that it was error for the trial court to permit, over appellants' objection, medical testimony relative to and photographs of the wound on the victim's body. The doctor testified about the nature and extent of the wound and identified the accuracy of the photographs portraying the same. His testimony and the accompanying photographs were proper to show the corpus delicti and to corroborate the testimony. *Stewart* v. *State,* 233 Ark. 458, 345 S.W. 2d 472 (1961). Photographs are admissible when they fairly represent the objects portrayed and aid the witness in his testimony and the jury in understanding the evidence. *Harris* v. *State,* 239 Ark. 771, 394 S.W. 2d 135 (1965). In the case at bar the medical testimony and the photographs were properly admissible in evidence.

It is urged for reversal that it was error for the court to permit evidence of appellant Rodger Ballew's "prior juvenile convictions." The appellant took the witness stand in his own behalf. He was asked when he was last convicted of any crime. In overruling appellant's objection, the court told the jury that if answered

in the affirmative it must be considered only as affecting the credibility of appellant as a witness. This admonition was proper. Ark. Stat. Ann. § 28-605 (Repl. 1962); *Stewart* v. *State,* 240 Ark. 701, 402 S.W. 2d 116 (1966). The appellant answered that three or four years ago he had stolen a truck and burglarized a cafe. An objection was again overruled. The disposition of those acts was not elicited. We have often held that the general rule is that a defendant, on cross-examination, can be asked about specific acts of misconduct for the purpose of discrediting his testimony, subject to the right of the witness to make an explanation in justification. *Wright* v. *State,* 243 Ark. 221, 419 S.W. 2d 320 (1967); *Sullivan* v. *State,* 171 Ark. 768, 286 S.W. 939 (1926); *Trotter* v. *State,* 215 Ark. 121, 219 S.W. 2d 636 (1949); and *Skaggs* v. *State,* 234 Ark. 510, 353 S.W. 2d 3 (1962). These inquiries and the responses given were permissible when considered within the limitation placed upon the testimony by the court.

In answer to a further inquiry the appellant stated that he had been sent to the Arkansas Boys' Industrial School by his mother. Ark. Stat. Ann. § 45-205 (Repl. 1964) provides that the disposition of a juvenile case in a juvenile court proceeding cannot be used as evidence against the juvenile for any purpose in any other court. We cannot determine from the record whether the appellant was sent to the Industrial School from the circuit court pursuant to Ark. Stat. Ann. § 46-306 (Repl. 1964), or the juvenile court. Further, since no objection was made to this latter inquiry, we cannot consider appellant's contention. *Randall* v. *State,* 239 Ark. 312, 389 S.W. 2d 229 (1965).

The appellants finally argue that the punishment as to each appellant is excessive. We hold, as in other cases, that since there was substantial evidence to support the verdicts which were within the limits prescribed by law [1-21 years, Ark. Stat. Ann. § 41-606 (Repl. 1964)], the jury had the right and the authority to as-

sess those penalities.

Affirmed.

FOGLEMAN, J., not participating.

THOMAS EDWARD STEVENS v. STATE OF ARKANSAS

5-5414 441 S.W. 2d 451

Opinion Delivered June 2, 1969

Garner & Parker for appellant.

Joe Purcell, Atty. Gen.; *Don Langston,* Asst. Atty. Gen.; *Mike Wilson,* Asst. Atty. Gen. for appellee.

FRANK HOLT, Justice. The appellant was charged with the crime of first degree rape. The jury found him guilty of assault with intent to rape and assessed a penalty of 21 years in the penitentiary. From the judgment on this verdict comes this appeal. For reversal appellant contends, through court appointed counsel, that the evidence is insufficient to establish that the appellant was capable of forming the necessary specific intent to commit the alleged offense.

The victim was a seven-year old child who was attending a drive-in theater with her mother and other relatives. The offense occurred about midnight. Earlier in the evening, or about 7:30 p.m., the appellant, who is nineteen years of age, accompanied by his uncle and two other boys, drove approximately fifteen miles from Fort Smith where they engaged in a two hour beer-drinking and glue-sniffing party. The appellant drank two or three six-packs of malt liquor and sniffed two or three tubes of glue. En route back to Fort Smith the appellant consumed about one-half of a pint bottle of whiskey.

When the appellant and his party returned to Fort Smith, they went to a local drive-in theater. Because of lack of funds, the appellant and two in his party gained entrance by climbing over the fence while the driver of the vehicle proceeded to pay for his admission. All of them met at the automobile for a short time. The appellant observed some children playing on the movie playground. He then gave them some firecrackers and rode on the merry-go-round with them. The appellant picked up the seven-year old victim and forcefully carried her behind the movie screen. Her small brother fought him and then sought the assistance of the adults in his party. Appellant was found by the victim's mother and

another adult on top of the child with one hand around the child's throat and the other hand in a position "somewhere down below" the waistline. The child's dress was pulled up. The appellant was forcefully pulled off the child. His attempt to escape by climbing a nearby fence was prevented and he was taken into custody. There was evidence of bruises on the child's neck, right arm and leg and a bleeding laceration of her female organs.

Appellant testified that his memory was "spotty" and he could not remember the assault. There was evidence adduced by him that he appeared to be something worse than "dog-drunk" and "out of his head". A psychiatrist testified in his behalf that, in his opinion, the appellant was in a state of limited awareness and his intoxication reduced and diminished appellant's level of consciousness. The psychiatrist further stated that the appellant might be aware of his intentions and yet be unaware of the results to him; that glue-sniffing can produce amnesia, hallucinations and delusions; and that it produced a short period of intoxication lasting from fifteen minutes to an hour.

The appellant as a witness recalled his acts immediately preceding the commission of the crime; the method of gaining entrance into the theatre; giving the children firecrackers and playing with them on the merry-go-round; remembered having the struggling little girl in his arms and her small brother asking him to release her, which request he thought he complied with; recalled trying to effect his escape by climbing the fence; and remembered that his escape was thwarted and someone set on him to prevent a further attempt to escape. There was evidence offered by the state that the appellant, although he had been drinking, was not intoxicated and appeared rational and responsible for his acts when he was observed and questioned a short time after being apprehended.

Where an offense can only be committed by doing a particular thing with a specific intent it may be shown that at the time the offense was committed the accused was so intoxicated that he could not have entertained the intent necessary to constitute the crime. *Chowning* v. *State,* 91 Ark. 503, 121 S.W. 735 (1909). However, the determination as to whether a defendant is intoxicated to the extent of being incapable of forming the required specific intent to commit a crime is solely within the province of the jury. *Murry* v. *State,* 209 Ark. 1062; 194 S.W. 2d 182 (1946); *Hankins* v. *State,* 206 Ark. 881; 178 S.W. 2d 56 (1944); *Casat* v. *State,* 40 Ark. 511 (1883). In *Murry* v. *State,* supra, we said:

> "...It is a matter of common knowledge that many of the most atrocious and deliberate crimes are committed by persons more or less under the influence of intoxicants, indeed in many instances, the intoxicant is used to supply the necessary fortitude to commit the criminal act, and if appellant was not intoxicated to the extent of being incapable of having the specific intent to kill, the fact that he was intoxicated, but in a less degree, is no defense..."

In the case at bar, the evidence was in conflict as to the appellant's being capable of forming the required specific intent. There is substantial evidence to support the verdict. Therefore, we find no merit in appellant's contention that he was incapable of formulating the required specific intent.

The appellant next asserts for reversal that the court erred in refusing an instruction on child molesting. Ark. Stat. Ann. § 41-1124 (Repl. 1964). This is a misdemeanor. The statute provides for punishment by a fine not exceeding $500.00 or six months imprisonment or both for "Every person who annoys or molests any child * * *." We cannot agree with the appellant. The court gave instructions on first, second and third degree rape and assault with intent to rape. In addition, the

court instructed the jury on unlawful fondling of a child. Ark. Stat. Ann. § 41-1128 (Repl. 1964). This statute provides for a penalty of not less than one nor more than five years for any person who fondles a child with lascivious intent. This latter instruction was as favorable to the appellant as he was entitled to demand. Even then the jury refused to apply this statute with its lesser penalty. No error was committed. See *Talley* v. *State,* 236 Ark. 908, 370 S.W. 2d 604 (1963). Further, the trial court is not required to give an abstract instruction. An instruction must be germane to the factual issues before the refusal of the trial court to give an instruction can be assigned as error. *French* v. *State,* 231 Ark. 677, 331 S.W. 2d 863 (1960). See, also, *Stevens* v. *State,* 231 Ark. 734; 332 S.W. 2d 482 (1960). As we have already indicated the evidence is sufficient to support the verdict of assault with intent to rape.

In the case at bar, we perceive no prejudice to the appellant by the refusal of the trial court to give the requested instruction on child molesting since the instructions given fully declared the law.

Affirmed.

MANPOWER, INC. OF TENN. v. MANPOWER, INC. OF PULASKI COUNTY

5-4933 441 S.W. 2d 796

Opinion Delivered June 9, 1969

Smith, Williams, Friday & Bowen by *G. Ross Smith* for appellant.

Willis V. Lewis for appellee.

CARLETON HARRIS, Chief Justice. On October 1, 1962, Malcolm Keith Baker, appellee herein, contracted to purchase the franchise of Manpower, Inc. of Pulaski County, from Manpower, Inc. of Tennessee, hereafter called Manpower of Tennessee, for the sum of $11,000.00. The franchise was to remain in effect for a period of five years, with the option of renewal, except that appellant had the right to cancel, if certain conditions of the agreement were not complied with. The nature of the business consists in offering a variety of services to business concerns, including the supply of temporary employees. Manpower, Inc. of Tennessee is a subsidiary of Manpower, Inc. of Delaware, hereafter called Manpower, the home office being located in Milwaukee, Wisconsin.

On October 15, Baker, while at the home office in Milwaukee for training, executed a note for $7,500.00 to the First National Bank of Milwaukee, this note subsequently being assigned to Manpower, the note being endorsed by Baker's wife. This note was payable in monthly installments, which were to be concluded on November 15, 1963. Thirty-five hundred dollars was paid.

The first point of disagreement arose between the parties when Baker returned to Little Rock. It was, and is, his contention that the $11,000.00 sale price paid to Manpower included approximately $6,000.00 of office furniture and equipment; Baker found this equipment had been moved from the building when he returned from Milwaukee. Manpower denies that the agreement included this furniture and equipment.

When Baker commenced his operation, he was instructed to draw on the company bank account in Milwaukee as a matter of paying the Pulaski County employees, and this proceedure was followed for the next several months. After the first of the year, various officials of the company called Baker, insisting that he sign a note for the amount that had been drawn to pay employees, and finally, on July 7, 1963, Baker signed this note in the amount of $5,718.45, the note being a demand note dated April 15, 1963. On January 14, 1965, Manpower instituted suit against Baker and wife, asserting that no part of the principal or interest of the $7,500.00 note had been paid, and seeking judgment in that amount. On the same date, Manpower of Tennessee instituted a complaint against Manpower, Inc. of Pulaski County and Baker, alleging non-payment of the note for $5,718.45, and seeking judgment for that amount, together with interest. The Bakers answered, denying the allegations of the complaints, and filed their own cross-complaint, (counter-claim), asserting that appellants had wrongfully taken possession of Baker's business, furniture and assets; it was alleged that he had been damaged in the sum of $34,000.00. Punitive damages were also sought in the amount of $50,000.00. Appellants responded to the cross-complaint, denying all allegations. The cases were consolidated for trial, and on hearing, the court, sitting as a jury, at the conclusion of the evidence, announced its findings, a part of which was incorporated into the judgment, as follows:

> "There will be judgment for the defendant on the suit—on the notes in both cases, and there will be judgment for the defendant on the cross-complaint against the plaintiff for damages to his business in the sum of $7,500.00."

Judgment was then entered for appellee on both notes, and appellee was also awarded judgment for $7,500.00 on the cross-complaint. From the judgment so

entered, appellants bring this appeal.[1] Several points are urged for reversal, but we discuss only the first, since error was committed and the judgment must be reversed, and the case remanded.

It is first argued by appellants that the court committed error in failing to enter judgment for appellants on the two promissory notes, admittedly executed by appellee; that even if appellee established the right of set-off against the amount owing on the notes, such a finding would not constitute a defense to the execution of the notes, and there was no legal basis for the court to simply refuse to grant a recovery. We agree that error was committed. Baker does not allege forgery or fraud in the execution of the instruments; to the contrary, the signing of the notes is admitted. It was likewise admitted that no payments had been made on either note. It is true, of course, that any set-off established by a counter-claim could properly be allowed as a credit against the amount of the note. In *Harris* v. *Perron*, 232 Ark. 162, 334 S.W. 2d 705, we said:

> "The record reveals the testimony to be undisputed that there is a balance due on the note of $5,783.48. Endorsement of the note was admitted by appellees. Therefore, the only question presented in trial of the case was the amount of set-off due appellees. The only testimony introduced on behalf of appellees regarding the set-off claimed is that of appellee, Ruby Perron. This testimony consisted of claims for specific amounts for the removal, by appellants, of three specific items which, according to appellees' testimony, were to remain with the house."

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[1]This case was tried by Judge Tom Gentry, but Judge Gentry resigned from office before judgment was entered. The judgment was subsequently entered, on Gentry's findings, by the present Circuit Judge of the Pulaski County Circuit Court, Third Division, the Honorable Tom Digby.

The court, in rendering its findings, heretofore quoted, gave no explanation for disallowing any recovery on either of the notes, and one would have to assume that he found nothing to be due because of the fact that amounts due under the counter-claim were greater than the total amount claimed by appellants. In fact, to conform to the judgment entered, it was necessary that the court find that the counter-claim by appellees exceeded appellants' claim by $7,500.00, meaning that the counter-claim had a value of $20,718.45. Here, again, the trial judge did not explain the basis of the award, though in remarks preceding those appearing in the judgment, it appears that an allowance of $6,000.00 might have been made on the basis of the court's finding that the furniture and equipment had been purchased by appellee, but had been removed by appellant. There is nothing in the remarks of the trial judge indicating the basis for the balance of the counter-claim allowed, $14,718.45,[2] though the figures indicate that a part of the judgment was based on cancellation of the notes.

Since this case is being remanded for another trial, it might be here said that it is rather difficult to follow parts of the testimony, and a portion of the evidence is somewhat vague and speculative. It would seem that more specific evidence could be offered by all parties to the litigation on some of the questions involved.

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[2]Appellee argues a number of items which he contends supports recovery; however, he took no cross-appeal. It is asserted that, because of the wrongful cancellation of his franchise, and the taking over of the business by appellants, he lost $118,560 00 in net profits, this figure being based on a five-year operation, the length of the franchise. It is further contended that he was entitled to a credit of at least $1,787.42, a part of the money on deposit in the Union National Bank at the time of the cancellation of the franchise; it is contended that Manpower of Pulaski County held accounts receivable in the amount of $10,000.00; appellee argues that he was due the return of the $3,500.00 cash paid on the contract price; that he was due $7,500.00 that he invested in the business (not the $7,500.00 mentioned in the note); other lesser items are also included.

In accordance with the views herein set out, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

PAUL SHICK v. BEN DEARMORE

5-4894 442 S.W. 2d 198

Opinion Delivered June 9, 1969
[Amended on denial of Rehearing July 14, 1969.]

Thomas B. Tinnon for appellant.

Roy E. Danuser for appellee.

George Rose Smith, Justice. In 1967 the appellee, Ben Dearmore, sold a vacant residential lot to Norbert Nelson, who was to pay for the lot in monthly installments over a period of two years. Nelson took possession of the lot by moving a trailer house to it and began the construction of a permanent dwelling house on the land. Nelson employed the appellant, a well driller, to drill a water well on the property. Shick successfully completed a well by drilling to a depth of 284 feet and installing 191 feet of pipe. Nelson ran out of money without having paid Dearmore for the lot or Shick for the water well. Nelson abandoned the project and apparently left the state, his whereabouts thereafter being unknown.

Later on it was learned that Nelson and Shick had made a mistake in locating the well, which was actually drilled at a point a few inches past Nelson's boundary line and upon an adjoining lot also owned by Dearmore. When Shick threatened to assert a well-driller's lien against the lot, Dearmore brought this suit in equity to enjoin Shick from either claiming a lien or destroying the well. By counterclaim Shick asserted that Nelson had acted as Dearmore's agent in employing Shick to drill the well. Shick asked that he be given judgment against Dearmore for the contract price of $992, that the judgment be declared a lien upon the land, that the lien be foreclosed, and that Shick have such other relief as he might be entitled to.

At the trial Shick, not having Nelson as a witness, was unable to prove the asserted agency. Dearmore testified that Nelson had not been authorized by Dearmore to contract for the well and that Dearmore knew nothing about the drilling until the well had been completed. At the end of the trial the chancellor apparently ruled in Dearmore's favor but went on to say that Shick might remove the pipe and restore the land as nearly as possible to its original condition. Upon objection, however, the court invited briefs on the question

and later rendered a decree holding that the casing installed in the well was a permanent improvement that became part of the realty; so Shick had no right to remove it. This appeal is from that decree.

Dearmore first insists that Shick has no standing in this court to seek the return of the pipe, because he did not pray for that relief in his counter-claim. There is no merit in that contention. In *Grytbak* v. *Grytbak,* 216 Ark. 674, 227 S.W. 2d 633 (1950), we considered on rehearing just such a contention—that an issue had not been before the trial court because it was not raised by the prayer for relief. In denying the contention we said: "We have held that the statement of facts in a complaint or cross-complaint, and not the prayer for relief, constitutes the cause of action, and that the court may grant whatever relief the facts pleaded and proved may warrant, in the absence of surprise to the complaining party. *Albersen* v. *Klanke,* 177 Ark. 288, 6 S.W. 2d 292. We conclude that the facts pleaded and proved warrant the allowance of alimony, and that appellee is not in a position to plead surprise."

So in the case at bar. Shick's counter-claim pleaded his contract with Nelson and the ensuing completion of the well; so Dearmore could not have been surprised by the proof. Shick failed, however, to prove that Dearmore had authorized the drilling of the well. Hence the question on appeal is whether, upon the facts actually pleaded and proved, Shick is entitled to remove the casing that he installed on Dearmore's land in good faith but by mistake.

We are convinced that in a court of equity Shick should be given the right to remove the casing and restore the land to its original condition, if that can be done without damaging the land. Any other holding would allow Dearmore to be unjustly enriched by obtaining a flowing water well to which he has no equitable claim.

The chancellor followed the strict common-law rule in holding that a permanent improvement placed upon another's land by mistake becomes a part of the realty and cannot be removed. Such a rule is obviously unjust when the improvement can be removed without damage to the freehold. Justice Joseph Story, while trying a case in Maine as circuit justice, first pointed out the inequities of the common-law rule and refused to follow it in a proceeding in equity. His language, often quoted since, appears in his opinion in *Bright* v. *Boyd,* 4 F. Cas. 127 (No. 1,875) (C.C. Me. 1841):

> Take the case of a vacant lot in a city, where a bona fide purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just, that in such a case, the true owner should recover and possess the whole, without any compensation whatever to the bona fide purchaser? To me, it seems manifestly unjust and inequitable, thus to appropriate to one man the property and money of another, who is in no default? The argument, I am aware is, that the moment the house is built, it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold, what in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection; but merely and dryly stating, that the law so holds. But, then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief?

Among the many cases that have adopted Justice Story's view we may mention *Union Hall Assn.* v. *Morrison,* 39 Md. 281 (1873); *Hardy* v. *Burroughs,* 251 Mich. 578, 232 N.W. 200 (1930); *Hatcher* v. *Briggs,* 6 Ore. 31 (1876); *Herring* v. *Pollard,* 23 Tenn. (4 Humph.) 362 (1843); *Murphy* v. *Benson,* 245 S.W. 249 (Tex. Civ. App. 1922).

When the Restatement of Restitution was published in 1937 the American Law Institute took the position in § 42 that the harshness of the common-law rule had been mitigated in most states at least to the extent of allowing restitution as a defense or set-off to affirmative relief sought by the land-owner. Since then the steady trend of the decisions has been to allow the removal of the improvements in an equitable proceeding whenever that course can be followed without substantial damage to the land. A typical statement of the modern view was made three years ago by the South Carolina court in *Citizens & So. Nat. Bk.* v. *Modern Homes Const. Co.*, 248 S.C. 130, 149 S.E. 2d 326 (1966):

> While common law principles strongly affected our earlier decisions in dealing with the rights of one who improved the land of another, there is no sound reason to deny the plaintiff a remedy in equity under the facts alleged. If the plaintiff is allowed to remove the building, the defendant would be deprived of nothing to which he is justly entitled and would be compensated for any damage that might result from the removal of the building. Both parties would be made whole. It would be clearly inequitable, under the facts alleged, to allow the defendant to be enriched by the construction of the building on its land. Courts in other jurisdictions have found no difficulty in granting relief in such cases, not upon the theory of the betterment statutes, but upon the broad power of equity. See: *Salazar* v. *Garcia*, Tex. Civ. App., 232 S.W. 2d 685; *Toalson* v. *Madison*, Mo., 307 S.W 2d 32; *Hardy* v. *Burroughs*, 251 Mich. 578, 232 N.W. 200; *Murphy* v. *Benson*, Tex. Civ. App., 245 S.W. 249; *Pull* v. *Barnes*, 142 Colo. 272, 350 P. 2d 828.

We are so strongly in favor of the equitable view that has been taken more and more widely in the past several decades that we have no hesitancy in adopting it in the case at hand. Thus the chancellor's immediate

reaction at the close of the proof was right—that Shick should be allowed to remove his casing and restore the land to its original condition. It is not entirely clear, however, that such a course can be followed without damage to the land that might fairly be considered to be substantial when compared to the pecuniary loss that Shick would otherwise sustain. Pursuant to our discretionary power to remand a chancery case for further proof, *General Box Co.* v. *Scurlock*, 224 Ark. 266, 272 S.W. 2d 678 (1954), we think it best to remand this cause to give the parties an opportunity to develop the proof upon the point mentioned, with leave to the Chancellor to dispose of the watter by an award according to the principles of equity.

Reversed and remanded.

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

JOHN A. FOGLEMAN, Justice. I respectfully dissent. The majority opinion, based upon the chancellor's finding that this fixture is a permanent improvement, allows appellant to come upon the land and reclaim it. However equitable this result may seem in this case, it amounts to an overruling of a long standing rule of property, i.e., that permanent fixtures become part of the realty and belong to the owner thereof. See *Ozark* v. *Adams*, 73 Ark. 227, 83 S.W. 920. We have held on several occasions, upon a finding that the fixture was a permanent improvement, that it cannot be removed from the land because it has become a part of the realty. *DePriest* v. *Peikert*, 211 Ark. 460, 200 S.W. 2d 804; *Dent* v. *Bowers*, 166 Ark. 418, 265 S.W. 636; *Waldo Fertilizer Works Inc.* v. *Dickens*, 206 Ark. 747, 177 S.W. 2d 398.

The cases cited by the majority, except one, all involve situations where equity has granted some sort of remunerative relief to a person who has mistakenly placed a permanent improvement on another's property. They are not support for the relief granted by the court

here. Admittedly *Citizens & So. Nat. Bk.* v. *Modern Homes Const. Co.*, 248 S.C. 130, 149 S.E. 2d 326 (1966) allows the removal of improvements where it can be done without substantial damage to the land, but the short answer to this is that it is not the law in Arkansas. In *Wallace* v. *Snow*, 197 Ark. 632, 124 S.W. 2d 209, we said, "It is further argued that the court should have allowed him judgment for improvements. In *Marlow* v. *Adams*, 24 Ark. 109, it was held that a party in possession of lands who fails to establish his title thereto, cannot be allowed for improvements more than the value of the rents. And in *McDonald* v. *Rankin*, 92 Ark. 173, 122 S.W. 88, it was held that at common law the true owner had a right to improvements placed thereon even by a bona fide possessor; but that equity adopted the doctrine requiring the value of permanent improvements placed by a bona fide possessor to be off-set against the rents and profits, whenever the true owner applied to equity for an accounting by the possessor of the rents and profits. *In this case there is no demand by appellees for rents and profits, and appellant cannot recover for his improvements.* Not having color of title to the disputed strip of land he cannot claim under the betterment statute. # 4658, Pope's Digest. See also, *Foltz* v. *Alford*, 102 Ark. 191, 143 S.W. 905, Ann. Cas. 1914A, 236." (Emphasis mine.) I am unable to distinguish the *Wallace* case from the case at bar. See also *Buswell* v. *Hadfield*, 202 Ark. 200, 149 S.W. 2d 555.

If it were the rule in Arkansas that the relief the majority would afford could be successfully asserted against a suit for equitable relief it should have been applied in *DePriest* v. *Peikert*, supra; *Dent* v. *Bowers*, supra; *Wallace* v. *Snow*, supra, where the claim was asserted in such an action.

HARRIS, C.J., joins in this dissent.

ARKANSAS STATE HIGHWAY COMMISSION v.
RUSSELL C. ROBERTS ET UX

5-4934 441 S.W. 2d 808

Opinion Delivered June 9, 1969

Thomas B. Keys and *Kenneth R. Brock* for appellant.

Guy H. Jones and *Clark, Clark & Clark* for appellees.

George Rose Smith, Justice. This is a condemnation case by which the highway department is taking, as a right-of-way and interchange for Interstate 40, a 9.63 acre tract in Conway, owned by Circuit Judge Roberts and his wife. No severance damages are involved, the taking being total. Four expert witnesses and Judge Roberts himself testified. For the landowners, the witness Barnes valued the land at $108,000, the witness Pearce at $105,750, and Judge Roberts at $129,750. For the commission the witness Adams valued the land at $27,000, and the witness Lieblong at $24,200. The verdict was for $125,000. For reversal the commission questions the admissibility and substantiality of the landowners' evidence.

Some description of the property and its location is essential to an understanding of the case. On the date of the taking, June 6, 1966, the Roberts tract, approximately square, lay about a mile north of the Conway central business district. The tract was bounded on the south by U. S. Highway 65. At the back of the property, away from the highway, it sloped upward steeply to a ridge 60 feet higher than the front of the tract. The improvements consisted of a four-room house, a barn, and three stock ponds, but no witness attributed any value to the improvements in arriving at an estimate of just compensation for the land.

U. S. Highways 64 and 65 are of critical importance throughout all the testimony. The two routes run northward together from downtown Conway to a point about a quarter of a mile southwest of the Roberts tract. At

that point there is a "Y" by which No. 65 diverges in an easterly direction and No. 64 diverges in a westerly direction.

. . .

At the beginning of the trial the landowners were allowed to introduce two composite aerial photographs showing the land in its setting with relation to the city and the two highways. Counsel for the commission had no objection to the photographs, but they did object, unsuccessfully, to the introduction of a plastic overlay for each picture, showing the proposed location of Interstate 40 after its construction. The overlays were readily separable from the photographs and should have been excluded. They had no possible relevancy to the value of the land on the date of the taking and could only divert the jury's attention to the higher values that might be expected to flow from the construction of the interstate route. Needless to say, one who offers evidence has the burden of showing its admissibility. Wigmore, Evidence, § 18 (3d ed., 1940). Even in their briefs in this court counsel for the landowners have offered no sound basis for the introduction of the overlays, their argument being in effect that the evidence was not prejudicial. The error, however, must be considered to have been prejudicial unless the absence of prejudice is shown. *Equitable Discount Corp.* v. *Trotter*, 223 Ark. 270, 344 S.W. 2d 334 (1961). In view of the size of the award—which was the only issue for the jury—it certainly cannot be said that the absence of prejudice affirmatively appears.

The main issue, however, is the substantiality of the landowners' testimony. That issue is singularly uncomplicated in this case, because all the witnesses used only one method of evaluation—that of comparable sales—in reaching their conclusions. Nichols points out that the four factors generally considered in the determination of market value are sales, cost, income, and use. Nichols, Eminent Domain, § 12.1 (3d ed., 1962). We have considered all four factors in cases too numerous

to mention. Comparable sales, cost (or reproduction cost) less depreciation, and capitalization of income are *methods* of evaluation recognized universally by the authorities. See especially *Sill Corp.* v. *United States,* 10th Cir., 343 F. 2d 411 (1965). The highest and best use of the property is an added element of value that in many instances is not inherent in the method of evaluation being used and that may therefore be considered along with it.

In the case at bar the improvements on the tract were of such relatively slight value and presumably were rented for so little that no witness used either the method of cost less depreciation or the method of capitalization of income. Barnes, testifying for the landowners, mentioned a number of nebulous considerations such as the proposed development of the Arkansas River, the rate of population increase, and similar matters that obviously would be reflected in comparable sales and in the year-to-year tendency toward rising prices that was also brought out by the testimony. Neither Barnes nor any other witness assigned definite weight to such vague considerations.

Thus the substantiality of the landowners' evidence rests, when objectively considered, on the comparability of the sales upon which they relied for their conclusions. In the study of that vital issue two points must be kept in mind:

First, a sale must be comparable even to be admissible in evidence. *City of Little Rock* v. *Sawyer*, 228 Ark. 516, 309 S.W. 2d 30 (1958). We described comparability in this paragraph in *Ark. State Highway Commn.* v. *Witkowski*, 236 Ark. 66, 364 S.W. 2d 309 (1963):

> There can be no fixed definition of similarity or comparability. Similarity does not mean identical, however it does require some reasonable re-

semblance. See Nichols, Eminent Domain, Vol. 5 § 21.31, p. 439. There are certain criteria of similarity which can be utilized to establish a reasonable resemblance. Important factors of similarity to be considered are location, size and sale price; conditions surrounding the sale of the property, such as the date and character of the sale; business and residential advantages or disadvantages; unimproved, improved or developed land. None or any combination of these criteria were sufficiently shown, "connected up" or "tied in" as between the Caldwell and Witkowski tracts to establish a reasonable resemblance. In the case at bar the jury could only speculate in applying the evidence in question to the market value of the subject property.

Secondly, although an expert witness may state his opinion on direct examination without first detailing the facts on which it is based, his testimony is not substantial evidence if he is unable to give a sound and reasonable factual basis for his conclusions. *Ark. State Highway Commn.* v. *Johns,* 236 Ark. 585, 367 S.W. 2d 436 (1963). With those points in mind we turn to the evidence in the case at bar.

Barnes, the first witness called, gave the most comprehensive testimony for the landowners. He described the land as having a 660-foot frontage on Highway 65 and about an equal depth. The tract was zoned for commercial use to a depth of 200 feet from the highway with the rest being zoned for residential use. In valuing the entire tract at $108,000, Barnes valued the commercial strip at $100 a front foot, making a total of $66,000, and the rest at 15 cents a square foot, or $42,000 in round numbers. Converting his figures to acreage, Barnes stated that he valued the commercial strip at $21,780 an acre and the rest at $6,534 an acre.

On cross examination Barnes explained that he had checked about 250 sales and selected those that he thought to be comparable to the Roberts tract. It ap-

pears from the record that five of the sales were outlined on a blackboard and referred to repeatedly by the landowners' expert witnesses. Those five sales, as nearly as can be determined from a study of the record, were as follows:

Identification of Sale	Price per Acre	Price per Front Foot
Covington to Bell	$ 8,000	$ 78.50
Bailey to Lynch	16,370	90.00
Lieblong to Clawson	7,000	83.33
Tyler to Leonard	13,333	130.00
Watering to Starkey	14,800	93.50

An analysis of the record demonstrates beyond question that the sales relied upon did not involve properties comparable to the Roberts land. The first sale—the only one involving land on Highway 65—must be laid aside quickly. The testimony shows without contradiction that the purchaser, Bell, bought it as a speculation in the expectation that the interstate highway would be located nearby. That speculation proved to be correct. A Holiday Inn was eventually built on the parcel. The public, however, cannot be compelled to pay prices based either upon speculation or upon a value that accrues by reason of the improvement for which the land is being taken. *Ark. State Highway Commn.* v. *Watkins*, 229 Ark. 27, 313 S.W. 2d 86 (1958); *Ark. State Highway Commn.* v. *Griffin*, 241 Ark. 1033, 411 S.W. 2d 495 (1967).

The other four sales may be considered together. All four parcels were on Highway 64—not Highway 65—at or near the "Y" They were in a small area that had already been developed to commercial use. Each tract, at the time of its sale, was the site of a going business occupying a building whose value had to be estimated and subtracted from the purchase price in the determination of the value of the land alone. The traffic count on Highway 64 was about double that on 65.

By contrast, the Roberts property fronted on Highway 65. That area had not been developed commercially. Quite the opposite, there is no contradiction of the commission's testimony that only 18% of the property in that vicinity had been developed commercially; that the other 82% was either vacant or devoted to residential use only; and that there had never been "any business out 65 that didn't go broke or quit."

Barnes made an adroit effort to harmonize the discordant facts by saying that owing to the higher traffic count the other tracts would be more valuable for a "traffic oriented commercial use," but the Roberts property would be better for a commercial use that "wanted to avoid traffic congestion." The inherent contradiction is too plain to be overlooked. Barnes used the "traffic oriented" parcels to establish a front foot value, which he then applied to the Roberts tract. But obviously front footage on the highway derives its primary importance from the tract's attractiveness to businesses that are dependent upon the heavy flow of traffic. Comparability at once disappears when that essential similarity is wanting. Moreover, in arriving at his front-foot figures Barnes entirely disregarded the depth of the property. For instance, the Lieblong property was described as being 600 feet deep, but Barnes made no allowance for that fact in comparing it to the commercially zoned strip of the Roberts land, only 200 feet deep. It is manifest that on a front-foot basis a lot 600 feet deep is not fairly comparable to one 200 feet deep.

Barnes valued the back part of the Roberts tract as a potential site for apartment houses and other multi-family uses. His testimony was, to say the least, conjectural. There was no showing of any active demand for apartment houses in the neighborhood. None had been built, nor had any property been bought or sold for that purpose. There were such structures in other parts of Conway, but the witness did not have definite information about them. In fact, he ultimately admitted on

cross examination that he did not have "a single sale of property in Conway comparable to [the Roberts tract] which was bought for multi-housing units." Since he was using only the comparable sale method of evaluating the property, there was in reality no basis for his conclusions. His entire testimony should have been stricken on motion of the highway commission's counsel. We need not detail the testimony of the landowners' other expert witness, Pearce. He worked with Barnes in the preparation of his testimony and really added nothing to what had already been said.

Judge Roberts was the other witness for himself and his wife. He admitted with candor that he paid only $1,750 for the ten acres in 1946 and that at the time of the taking it was assessed for taxation at $1,500 (which, however, would ostensibly be only 20% of its market value. Ark. Stat. Ann. § 84-476 [Repl. 1960]). The judge differed with his expert witnesses by assigning a value of $125 a front foot to the commercial part of his land, but he stated no basis for that figure—other than mentioning a sale somewhere east of Conway which he himself said was not comparable.

We find no substantial evidence in the record to support the amount of the verdict or anything approaching that figure. At the same time, the testimony of the commission's expert witnesses is not altogether convincing. It appears that in earlier condemnation cases their testimony with respect to the same subject matter was more favorable to the landowner than that given in the case at bar. As in *Ark. State Highway Commn.* v. *Darr,* 246 Ark. 203, 437 S.W. 2d 463 (1969), we cannot with confidence arrive at a minimum sum which the landowners should in any event recover. The judgment must therefore be reversed and the cause remanded for further proceedings consistent with this opinion.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice. I agree that this case must be reversed for the reasons stated in the majority opinion. However, it seems to me that the flaw in the testimony of appellees and their witnesses consists of a failure of the witnesses to satisfactorily explain the extent of the effect of various factors upon market value of the land in question rather than in considering them in arriving at an opinion.

In considering this case, we do not have a question as to the admissibility of direct evidence of sales of other lands. Instead, we are considering the opinion testimony of experts based, at least substantially, upon such sales. Since the majority opinion states that the testimony of appellees and their witnesses should have been stricken on motion of appellant (a point not relied upon here), it seems to me to imply that upon retrial their opinions cannot be substantial evidence. It is my opinion that they would have been substantial evidence if the witnesses had given a satisfactory explanation of the effect of the various factors considered by them and of the adjustments made in evaluation of the sales considered by them as pertinent to market value.

Nichols' "The Law of Eminent Domain" is perhaps the leading authority on this subject. In treating the determination of market value, this authority states that the following are to be considered, among other things (4 Nichols on Eminent Domain 84, § 12.31 [2]):

(a) A view of the premises and their surroundings.

(b) A description of the physical characteristics of the property and its situation in relation to the points of importance in the neighborhood.

(c) The price at which the land was bought, if sufficiently recent to throw light on present value.

(d) The price at which similar neighboring land has sold at or about the time of the taking.

This test, so conclusive in the case of articles of personal property commonly bought and sold, is so much less valuable in the case of real estate that in some jurisdictions it is rejected altogether, but it is generally considered that it should be used for what it is worth.

(e) The opinion of competent experts.

(f) A consideration of the uses for which the land is adapted and for which it is available.

It is to be noted that sales of neighboring lands and opinions of experts are two separate and distinct factors. We have said that the determination of the value of lands taken by eminent domain is largely a matter of the opinion of the witnesses who are familiar with the lands and the use for which they are best suited, having such weight only as the jury may be convinced they should have by the reasons given for the respective opinions. *Southwestern Bell Telephone Co.* v. *Biddle,* 186 Ark. 294, 54 S.W. 2d 57.

This does not mean that opinions of experts without a reasonable basis can be considered See 5 Nichols on Eminent Domain 240, § 18.42 [1]; *Arkansas State Highway Commission* v. *Stanley*, 234 Ark. 428, 353 S.W. 2d 173; *Arkansas State Highway Commission* v. *Johns,* 236 Ark. 585, 367 S.W. 2d 436. Still, the opinion of an expert as to market value need not be based upon comparable sales alone. 5 Nichols on Eminent Domain 245, § 18.42 [1]. The question of who are competent to express opinions on the value of lands taken must be largely left to the discretion of the trial court. *Ft. Smith & Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 147 S.W. 440. The inquiry is not confined to testimony relating to sales of similar property for like purposes, but may be determined from opinions of witnesses having knowledge of the subject and whose business or experience entitles their opinions to weight. *Ft. Smith & Van Buren*

Bridge District v. *Scott,* supra. This rule was applied in the cited case in sustaining the admission of testimony by witnesses who had no knowledge of land sales or prices realized under like conditions for like purposes. Apparently these witnesses were "non-expert."

An even greater latitude is allowed expert witnesses. The difference in latitude is demonstrated by the rule which permits a witness whose qualifications and familiarity with the subject are shown, to express an opinion, without first detailing the facts upon which his opinion is based as a non-expert witness would be required to do. *Arkansas State Highway Commission* v. *Johns,* 236 Ark. 585, 367 S.W. 2d 436. *Arkansas State Highway Commission* v. *Dixon,* 246 Ark. 756, 439 S.W. 2d 912. We have said that in considering testimony based on comparable sales reasonable latitude must be allowed in evaluating sales and adjusting or compensating for differences in similar lands. *Arkansas State Highway Commission* v. *Sargent,* 241 Ark. 783, 410 S.W. 2d 381; *Arkansas State Highway Commission* v. *Duff,* 246 Ark. 922, 440 S.W. 2d 563.

In this connection, the following statement from Nichols' text is pertinent (Vol. 5, p. 253, § 18.42 [1]):

> "A distinction must also be drawn relative to the foundation which must be laid for such evidence based upon whether the comparable sales data is used as support for an expert's opinion or as indedendent substantive evidence of value. Quite obviously, when evidence of the price for which similar property has been sold is offered as substantive proof of the value of the property under consideration, a foundation should be laid showing that the other property is sufficiently near that in question and that it is sufficiently like the property in question as to character, situation, usability and improvements to make it clear that the tracts are comparable in value. However, where evidence of sales of similar property is offered not as substantive

proof of value, but merely in support of, and as background for, the opinion of an expert as to the value of the land in question, the requirement of such foundation is not so strict.

Testimony of an expert can be considered though he did not base his opinion entirely on comparable transactions.

The supporting data testified to by the opinion witness must be relevant and competent although the use of hearsay, in and of itself, is not sufficient to condemn the competency of the opinion especially where the witness shows that his own knowledge and experience require agreement with such hearsay evidence. The fact that certain elements are not independently admissible in evidence, however, does not bar their consideration by an expert witness in reaching an opinion. Thus, it has been said:

> 'An integral part of an expert's work is to obtain all possible information, data, detail and material which will aid him in arriving at an opinion. Much of the source material will be in and of itself inadmissible evidence but this fact does not preclude him from using it in arriving at an opinion. All of the factors he has gained are weighed and given the sanction of his experience in his expressing an opinion. It is proper for the expert when called as a witness to detail the facts upon which his conclusion or opinion is based and this is true even though his opinion is based entirely on knowledge gained from inadmissible sources.' ''

This principle was followed by us in holding that there was no error in refusing to strike the testimony of an expert when his knowledge of prices paid by the condemnor in the area entered into his determination of value. *Arkansas State Highway Commission* v. *Kennedy*, 234 Ark. 89, 350 S.W. 2d 526.

With the more liberal approach required in considering the basis for the testimony of an expert witness, an examination of our authorities governing sales of other lands will demonstrate that the testimony of appellees and their witnesses would not have been subject to being stricken, if adequate explanations had been given. Perhaps the leading case in Arkansas on the admissibility of the value of other lands is *St. Louis I. M. & S. R. Co.* v. *Theodore Maxfield Co.,* 94 Ark. 135, 126 S.W. 83. There, it was held that testimony relative to the value of lands similar to that taken, and of lands not similar if accompanied with explanations sufficient to show the difference between market values of such lands, is admissible by way of comparison to show the market value of the lands in question. This is the authority relied upon in *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S.W. 2d 30, cited in the majority opinion. In passing, it should be noted that this court in that case merely approved the ruling of the trial court in denying the condemnor the right to cross-examine condemnee's value expert about a certain sale of lands he described as being so dissimilar as to preclude a comparison. We said that there was no error in the trial court's holding that the condemnor must first develop a similarity between the properties before the question would be proper.

This court has also held that an objection to the introduction of evidence relative to the sale price of a one-acre tract purchased by appellant for a particular purpose because it was not similar in location or topography to the damaged lands was without merit. *Sewer and Water Works Imp. Dist. No.* 1 v. *McClendon,* 187 Ark. 510, 60 S.W. 2d 920. There we said that "sales of other lands in the same locality is a fair criterion to aid in establishing market value." The contention that there was reversible error in admitting testimony by a landowner as to the value of his farm situated about seven miles from the lands involved was also rejected. We said:

"* * * There were similarities detailed by him between his tract and appellee's land; so the testimony was admissible notwithstanding they were separated by a distance of seven miles. In these days of good roads and rapid means of transit, it cannot be said as a matter of law that the lands were in different localities. The description of the two tracts make the testimony of Everett admissible under the rule of evidence announced in the case of *St. Louis Iron Mountain & Southern Railway Company* v. *Maxfield,* 94 Ark. 135, 126 S.W. 83, 26 L. R. A. (N.S.) 1111."

The holdings in the cases cited above are not affected in any way by the opinion in *Arkansas State Highway Commission* v. *Witkowski,* 236 Ark. 66, 364 S.W. 2d 309. There the action of the trial court in permitting direct testimony as to a sale of property by a witness was found erroneous. The only evidence as to proximity was conjectural. There was no evidence to show a comparison *or* similarity between this property and the property of the condemnee.

In this case, appellant has not contended that either appellees or their witnesses are not qualified to testify. Each of them clearly qualified to express an opinion. Witnesses who are properly qualified are in much better position to know the considerations which determine market value, i.e., influence prospective buyers and sellers, than most judges, either at the trial or appellate level. Yet they should be able to give some means of evaluating the effect of such factors on values of property about which they testify. They should also be able to measure to some degree the adjustments to be made in comparing sale prices of other lands because of differences in the properties involved. For example, the location of property on a different highway where traffic is greater should not render a sale thereof improper as a basis for an expert opinion when adjustment is made for the difference.

In evaluating the testimony of the witness Barnes, it must be remembered that he is not only an appraiser but a real estate counselor engaged in the business of making analyses with respect to demands and needs for real estate and advising a client with respect thereto. When asked whether he considered sales in the community and neighborhood comparable to this property, he stated that there were no sales comparable to this property. He added that he used sales that had been made and compared the factors that went to make up the value of that property with the factors which affected the value of the Roberts property. This is in keeping with rules governing such testimony. Yet I agree that the witness failed to adequately explain the effect of any particular factor. Specifically, he failed to adequately explain a front foot value for commercial property higher than that given for property which would seem to command a higher price. The differences pointed out in the majority opinion as to the four sales treated there together, unexplained, would render the basis insubstantial. I do not think then we can say, as a matter of law, that they could not be considered if an evaluation of similarities and differences is given. They could have a very real effect on prospective buyers and sellers of property like that of appellees. According to appellant's witness Adams the first sale considered by him was the sale by Lieblong to Clawson, one of the sales held to be dissimilar in the majority opinion. Mr. Lieblong, appellant's other value witness and the seller in that sale, also considered it. I cannot help asking whether the court is saying that the witnesses for neither party can consider this sale on retrial.

Furthermore, I do not think we can rule out the sale by Covington to Bell as speculative as a matter of law. Although Barnes answered a question as to whether the purchaser was speculating as to the location for a Holiday Inn site in the affirmative, he stated that Bell was hopeful that he would be located near enough to the interstate facility "to work something out" but did not

feel that he paid any increment for the land on account of that speculation. Barnes also stated that the site was suitable for a Holiday Inn whether the interstate highway was built or not. That this sale should not be discarded as speculative is best demonstrated by its use by appellees' expert witness Adams in considering the market value of the condemned property.

I cannot agree that the testimony as to the highest and best use of part of the property for multifamily housing is necessarily conjectural. Barnes investigated rental housing in Conway and found an insufficiency of both single and multifamily units available. The zoning ordinances permitted this use of the property. Barnes did not think that other properties which could be used for that purpose were as well located with reference to community facilities, the Arkansas Children's Colony or Hendrix College. The advantage of the view of the community from the high elevation was pointed out by the owners and by Barnes. Both Barnes and Pearce testified that this was its highest and best use. The fact that such developments have not been made in the immediate vicinity would go only to the weight to be given to the testimony. Someone always has to have the first such development in an area, but the fact that such development is the first does not eliminate the adaptability and availability of the property for that use. The experts simply disagreed on the highest and best use.

It seems to me that the majority has weighed the evidence while considering its substantiality.

HORATIUS WILLIAMS v. JEFFERSON HOSPITAL ASS'N INC.

5-4949 442 S.W. 2d 243

Opinion Delivered June 9, 1969

[Rehearing denied July 14, 1969.]

Alonzo D. Camp for appellant.

Bridges, Young, Matthews & Davis for appellee.

Spitzberg, Mitchell & Hays Amicus Curiae Brief.

LYLE BROWN Justice. Horatius Williams brought a tort action against Jefferson Hospital Association, Inc., and two doctors. The hospital moved for summary judgment in its behalf on the basis of our doctrine that charitable institutions are immune from tort liability. That motion was granted and Williams appeals.

The complaint alleges that Williams was admitted to Jefferson Hospital in Pine Bluff following a vehicular accident; that he was treated and observed for some seven hours; that not withstanding his serious condition he was negligently discharged by the doctors and an unnamed agent of the hospital; and that they released him to law enforcement authorities knowing that action would result in his being placed in "a common jail." For their alleged negligence in abandoning him after assuming

professional responsibility for treatment plaintiff prayed for actual and punitive damages.

To its motion for summary judgment, Jefferson Hospital attached a copy of its articles of incorporation which describe it as a charitable, scientific, educational, and non-profit organization. Other supporting affidavits were exhibited. The response to the motion for summary judgment did not deny the allegations of the motion; the court was asked—in the event it found Jefferson Hospital to be a charitable institution—to enter an order "abandoning the doctrine of charitable immunity from tort liability." The court entered an order finding Jefferson Hospital to be a charitable institution and dismissed it from the action.

Aside from electing not to controvert the hospital's assertion that it was in fact dedicated to the operation of a charitable facility, appellant concedes in his brief that Jefferson Hospital "falls into the category of charitable institutions, and, under present law, is exempt from tort liability under the charitable immunity doctrine." With that candid admission appellant presses the single point that our doctrine of charitable immunity from tort should be abolished.

Appellant advances most of those persuasive arguments favoring the uprooting of the doctrine and which are well known to lawyers and jurists. Charities, as many respected authorities contend, should not be placed beyond the reach of a rule of law generally applicable to most individuals and organizations; they assert that the value of life and limb is of greater importance than the property of a charity; that legal scholars who condemn the doctrine of charitable immunity are in the great majority; and that such immunity created by ancient judicial fiat is not consonant with modern day principles of social justice. The arguments are buttressed with citations reflecting a decided judicial trend toward relief, in various forms, from some or all the inequities of the rule.

We would be less than candid if we did not concede the collective argument to be impressive, forceful, and even tempting. But of course we are duty bound to examine the other view of the issue.

First, we are faced with our own case law, promulgated initially in 1906, in *Fordyce* v. *Woman's Christian Nat'l. Lib. Ass'n.,* 79 Ark. 550, 96 S.W. 155. It was there held that the property of a charitable institution could not be levied upon to satisy a judgment obtained by one who had been injured by the negligence of an employee of the Association. It was said that funds, as well as real property, held by and dedicated to public charity, were included in the exemption. The opinion in *Fordyce* relied strongly on *Grissom* v. *Hill,* 17 Ark. 483 (1856), concluding that the latter case established the exemption as a rule of property:

> We believe that the case of *Grissom* v. *Hill* was rightly decided; but, if we thought otherwise, we should think it inexpedient to reverse a rule of property so long acquiesced in. The Legislature can change the rule, if it likes; but it has shown no desire to do so.

In *Cabbiness* v. *City of North Little Rock,* 228 Ark. 356, 307 S.W. 2d 529 (1957), a unanimous court held that a boys' club, being a charitable corporation, was immune from tort liability; and that it was for the Legislature to effect a change because the immunity had become a rule of property.

The latest case in which this court considered the question of hospital immunity from tort judgment was *Helton* v. *Sisters of Mercy,* 234 Ark. 76, 351 S.W. 2d 129 (1961). In declining to overrule our position we said:

> It will be noticed that in the *Cabbiness* case it is stated that the rule of immunity of a charitable corporation from tort liability has become a rule of property. In *Pitcock* v. *State,* 91 Ark. 527, 121

S.W. 742, Chief Justice McCulloch, speaking for the Court, said: "Decisions which become rules of property should never be overruled, whether they are right or wrong." And in *Burel* v. *Grand Lodge I.O.O.F.*, 163 Ark. 131, 259 S.W. 369, it is said: "The decision has become a rule of property, and should not be disturbed, even if the court was otherwise disposed to do so."

Appellant argues that the harshness of the doctrine requires its abandonment. Concededly that attack would be more persuasive if our court applied the doctrine in a broad and liberal manner, as has been true in some jurisdictions. Our court has in fact given the term "charitable immunity" a rather narrow construction. "A hospital . . . *free to all who are not pecuniarily able,* and supported partly by private contributions and partly by fees from patients, but producing no profit, is a purely public charity." (Italics supplied.) That statement is found in the early case of *Hot Springs School Dist.* v. *Sisters of Mercy,* 84 Ark. 497, 106 S.W. 954 (1907). In *Crossett Health Center* v. *Croswell,* 221 Ark. 874, 256 S.W. 2d 548 (1953), reference was made to those agencies, including hospitals, entitled to the immunity and they were described as created and maintained *exclusively for charity.* (Italics supplied.) In that case the hospital was found to fall short of "purely benevolent and charitable purposes essential to clothe its property with trust attributes." A tort judgment was affirmed. In *Helton,* supra, we discussed the many factors which led to the conclusion that the hospital was a public charity. Those were the articles of incorporation; the exemption from all forms of taxes; the free labor of the Sisters; and "its doors are always open to anyone, regardless of creed, needing hospitalization" irrespective of ability to pay. It would indeed be enlightening to know just how many hospitals in Arkansas which are designated as charitable institutions can meet the tests we have enumerated from the three cited cases.

Appellant points to our holding in *Parish* v. *Pitts*, 244 Ark. 1239, 429 S.W. 2d 45 (1968), in which we abrogated municipal immunity from tort liability. That decision is not controlling here and at most might be persuasive. *Parish* dealt exclusively with municipalities and a number of reasons there cited for subjecting them to tort liability are peculiar to units of government as compared with charitable institutions. The ability of the cities to spread by taxation the cost imposed by torts is one example. Again, we were there dealing with an antiquated doctrine that "the king can do no wrong."

There is another reason why the *Parish* case is not controlling. The Legislature acted within less than one year after *Parish* v. *Pitts*. By Act 165 of 1969 that holding was overturned. That Act declares the public policy to be that all political subdivisions of the State be immune from tort liability. The Act does require all such subdivisions to acquire public liability insurance on their vehicles. It is further provided that such governmental units may hear and settle tort claims against them. It can well be argued that this expression of legislative intent to retain governmental immunity would bring forward a similar expression in the field of charitable immunity if this court abrogated the latter rule.

Another factor to be considered is the broad impact that would result from renouncing the rule of tort immunity as it applies to charitable hospitals. If such hospitals are not entitled to the immunity then there are a multitude of similar charitable organizations which should likewise be subjected to liability. Some of them administer care to the crippled and persons otherwise afflicted, such as crippled children's clinics and homes for expectant unwed mothers; then there are orphans' homes and homes for the aged which are operated by charity and whose clientele are medically treated. We do not say that the varied problems which would result from the outright overruling of charitable immunity make it impossible to mitigate any harshness in the rule. We

do say it could much better be resolved by legislation based on comprehensive study than by this court. Doubtless the Legislature could evolve a method to lighten substantially the load of the injured and at the same time avoid any devastating impact on the involved charities. That procedure has been followed by the Legislature in at least four instances that are cited in *Parish* v. *Pitts*, supra. Likewise, by Act 165 of 1969, the harshness of municipal tort immunity was considerably reduced.

When we consider *collectively* the reasons we have recited which do not favor the overruling of charitable tort immunity of hospitals we conclude that appellant should not prevail.[1]

Affirmed.

HARRIS, C.J., not participating.

SHIRLEY E. MCFARLIN, ET AL v. WILLIAM T. KELLY, ET AL

5-4853 442 S.W. 2d 183

Opinion Delivered June 9, 1969

[1]The admission by appellant that Jefferson Hospital is a charitable institution is binding only for purposes of this particular case.

Henry Woods for appellants.

Richard B. Adkisson for appellees.

JOHN A. FOGLEMAN, Justice. This opinion is filed pursuant to per curiam order of November 15, 1968.

Each of the appellants was a candidate in the general election for a position as delegate to the Arkansas Constitutional Convention from District 22, consisting of Pulaski and Perry Counties. In a petition filed No-

vember 11, 1968,[1] they sought judgment against the Board of Election Commissioners of Pulaski County (appellees here) declaring the election on November 5 void, insofar as the election of delegates to the convention was concerned. They asked that the board be enjoined from certifying the results of the election and holding of the runoff election scheduled for November 19, 1968, as required by Act 42 of 1968 upon the basis of those returns. They also sought a writ of mandamus directing the appellees to hold another election for choice of delegates. The only defendants were the members of the Pulaski County Board of Election Commissioners. Relief was denied and appellants' complaint dismissed by the circuit court after a hearing on November 12. We were asked to stay the runoff election pending appeal filed on November 14.

Relief was sought because of the arrangement of the names of candidates in Pulaski County for the positions of delegate to the convention where more than two aspirants had qualified to have their names on the ballot for a position. Appellants alleged that a drawing for ballot positions in these races had been conducted without adequate notice to any of them, and without any notice at all to some of them. It was their contention that when they learned from a sample ballot how the names would appear upon the voting machines to be used in the election, it was too late for them to take any action other than the filing of their pleading in the circuit court.

The ballot arrangement complained of was alleged to be different from all other races for positions where there were more than two candidates. Appellants showed that in programming the voting machines and preparing ballots in other races in Pulaski County the names of all

[1]This was subsequent to the time fixed by law for the furnishing of ballots for absentee voting [Ark. Stat. Ann. § 3-1109 (Repl. 1956)] and for placing of voting machines with ballot labels in the precincts for demonstration [Ark. Stat. Ann. § 3-1711 (Supp. 1967)].

candidates for an office appeared on a horizontal line on the machine. On the other hand, part of the names of candidates for delegate appeared on one horizontal line, the remainder on a line immediately beneath that line. The names of candidates drawn for odd-numbered ballot spots appeared on the top line, and the names of those drawn for even-numbered slots appeared on the lower line. The names of all of the appellants were assigned to the lower line, and none of them received enough votes to be eligible for the runoff election. There was testimony that every "top-line" candidate having the name of no "bottom-line" candidate appearing below his name was successful in attaining a runoff position. Some of the candidates whose names appeared on the bottom line also achieved the runoff.

Evidence was introduced tending to show, and the trial court found, that those candidates whose names appeared on the top line had an advantage greater than the normal advantage held by a candidate who drew a "top-line" ballot position. This condition existed only in the precincts where voting machines were used. Paper ballots were used for absentee voters in Pulaski County. Presumably, paper ballots were used in all precincts in Perry County.

The trial court held that public interest in the election was too great to warrant the granting of any relief to appellants and that any election held on a day other than that fixed by the General Assembly would be void, relying upon our decisions in *Simpson* v. *Teftler,* 176 Ark. 1093, 5 S.W. 2d 350, and *McCoy* v. *Story,* 243 Ark. 1, 417 S.W. 2d 954. While we agree with the trial judge on this point appellants have raised other questions which require a more extensive answer than mere affirmance of the judgment entered.

Insofar as the action was for a declaratory judgment, the necessary jurisdictional requirements were not met. The applicable statute requires that all those whose

interests are affected be made parties to the action. Ark. Stat. Ann. § 34-2505 (Repl. 1962). Those candidates who apparently attained runoff election positions on the basis of the November 5 elections, voters in Perry County, and the Perry County Board of Election Commissioners all had rights and interests that would be materially affected by this action. The failure to make any of them parties was a defect requiring the denial of a declaratory judgment. *Johnson* v. *Robbins,* 223 Ark. 150, 264 S.W. 2d 640; *Laman* v. *Martin,* 235 Ark. 938, 362 S.W. 2d 711; *Southern Farm Bureau Casualty Co.* v. *Robinson,* 236 Ark. 268, 365 S.W. 2d 454; *Block* v. *Allen,* 241 Ark. 970, 411 S.W. 2d 21. Before declaratory relief is granted, it should appear that the relief sought would terminate the controversy. Ark. Stat. Ann. § 34-2505. *Johnson* v. *Robbins,* supra. It appears to us that the granting of the relief sought here and in the trial court would not terminate, but would actually complicate, the controversy.

Declaratory and injunctive relief are remedies to be sparingly used by the courts to prevent the holding of a regularly scheduled election. *Brown* v. *McDaniel,* 244 Ark. 362, 427 S.W. 2d 193. Such remedies should never be resorted to in cases where there is available to those seeking it an adequate pre-election or post-election remedy. See *Orr* v. *Carpenter,* 222 Ark. 716, 262 S.W. 2d 280; *Brown* v. *McDaniel,* supra; *Ellis* v. *Hall,* 219 Ark. 869, 245 S.W. 2d 223. Under Ark. Stat. Ann. § 3-814 (Repl. 1956) appellants had a pre-election remedy. That section provides for the correction of any error in the printing of ballots by order of the circuit judge. If this remedy had proven inadequate, no doubt a petition for mandamus would have been available. While statutory provisions having to do with election procedures [such as Ark. Stat. Ann. §§ 3-810—3-830 (Repl. 1956), §§ 3-1709—3-1718 (Supp. 1967), having to do with preparation of ballots and voting machines] are often considered as only directory after an election, compliance before election is mandatory. *Orr* v. *Carpenter,* supra:

Henderson v. *Gladish,* 198 Ark. 217, 128 S.W. 2d 257; *Ellis* v. *Hall,* supra; *Henley* v. *Goggin,* 241 Ark. 348, 407 S.W. 2d 732; *Rich* v. *Walker,* 237 Ark. 586, 374 S.W. 2d 476.

Appellants contend, however, that lack of notice of drawing for ballot position prevented their taking pre-election corrective action. An unfortunate situation contributed to an apparent failure of a substantial number of appellants to receive notice. The latest permissible date for drawing for ballot positions is 40 days before the election. Ark. Stat. Ann. § 3-824 (Repl. 1956). The time to qualify as a candidate for delegate to the convention was also not less than 40 days preceding the general election. Section 4, Act 42 of 1968. By coincidence the drawing was held on the last day for qualifying and employees of appellees obtained the names of those qualifying as candidates in District 22 by going to the office of the Secretary of State. These employees then commenced an effort to give the required notice by telephone. They testified that they left word at the homes or offices of those candidates who were not reached by this method. No doubt this system failed in several instances, as only two of the appellants were present. While it may well be that this notice requirement should be viewed as directory after the election,[2] the appellants were not prevented from having corrective action prior to the election. Testimony that printed facsimile ballots and sample machines were displayed as required by law [Ark. Stat. Ann. § 3-1711 (Supp. 1967)] is undisputed. There was also testimony that a facsimile ballot was published in newspapers published in the county. At least two of appellants who were not present at the drawing but who had seen the ballots and machines in the courthouse appeared before the appellees to protest on October

[2]See **Ashby v. Patrick,** 181 Ark. 859, 28 S.W. 2d 55, where the order of a trial court voiding an election because of the arrangement of the ballot was reversed.

28. One of them had been advised of the situation by an employee even before he saw a machine on display. Under these circumstances all candidates had an opportunity to ascertain ballot positions assigned and to apply to the courts for action preceding the election. Post-election remedies were still available to them by way of contest. On oral argument, appellants stated that they were satisfied with the results of the election in Perry County and conceded that these results could not be affected by this action. We do not understand, nor could appellants explain, how the results of the election in Perry County could have been correlated with the results of new elections in Pulaski County so that an integrated result of the election in District 22 could be determined. Neither was any suggestion forthcoming about the time and manner in which the runoff election could have been conducted in Perry County.

Appellants contend that results of the election should be voided because the wrong of which they complain was clear and flagrant, and in nature, so diffusive in its influences, that it rendered the result uncertain so as to defeat a free election under the test announced in *Patton* v. *Coates*, 41 Ark. 111, and applied in *Baker* v. *Hedrick*, 225 Ark. 778, 285 S.W. 2d 910. This rule is applicable in election contests, but this proceeding is not of that nature.[3]

Appellants also urge that the trial court should have granted the remedies sought by them because Art. 2, Section 13, of the Arkansas Constitution recites that every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character, in effect denying him due process of law. Our answer to this contention is threefold. In the first

[3]Contests of this sort might be subject to the jurisdiction of the constitutional convention only. Section 8 of Act 42 of 1968 provides that the convention shall be the sole judge of the qualification and election of its own membership. See **Pendergrass v. Sheid**, 241 Ark. 908, 411 S.W. 2d 5.

place, appellants had both pre-election and post-election remedies, as hereinabove pointed out. Secondly, the rights protected are personal and property rights, not political rights as are asserted by appellants here. See *Molloy* v. *Collins,* 66 R.I. 251, 18 A. 2d 639. The distinction in these rights is pointed out in *Walls* v. *Brundidge,* 109 Ark. 250, 160 S.W. 230, Ann. Cas. 1915C 980.

Thirdly, it is the function of the legislature, not the courts, to create rights of action, or provide relief where means of redress have not been designated. *Lucas* v. *Bishop,* 224 Ark. 353, 273 S.W. 2d 397.

If we should have declared the election void, no means of calling an election existing, the selection of delegates representing District 22 might well have been left to the delegates from other districts. Section 3, Act 42 of 1968. This would have been a highly undesirable result and would have been a greater deprivation of the rights of voters in the district than could have resulted from this unfortunate situation.

The judgment and our order per curiam are affirmed.

HOLT, J., not participating.

ARTHUR DOREY, JR. ET AL v. HARRY MCCOY AND MONTE NE SHORES, INCORPORATED

5-4952 442 S.W. 2d 202

Opinion Delivered June 9, 1969

Davis Duty for appellants.

Hardy Croxton for appellees.

JOHN A. FOGLEMAN, Justice. Appellants instituted an ejectment action in which they claimed that appellees had constructed a road across appellants' lands (consisting of lots 20, 22 and 40) for a connection with appellees' adjacent lands. Included in the complaint was a prayer for damages in the sum of $5,000. It was not seriously disputed that appellees had caused such a road to be constructed, the old road having been inundated by the waters of Beaver Lake. The principal items in dispute were the location of the particular lots in relation to the road and the amount of damages. During the trial the court permitted the jury to view the premises. The court instructed them to stay together under the charge of the bailiff and to talk to no one about the case.

One of the jurors left the group and proceeded to the site on his own in advance of the others.

Appellants introduced the testimony of Harold J. Pranter, who was a consulting engineer and land surveyor, together with a survey of the lands in question prepared by him. The survey indicated a road superimposed over portions of lots 20, 21, 22, 30 and 40. On cross-examination the witness indicated that the lot lines were not certain from an engineering standpoint because the plats available did not contain bearings or distances. He testified that his survey was predicated on calculations based on the Corps of Engineers' estimate of where the original town of Monte Ne was placed on their grid map. Mr. Pranter calculated that the portion of the road shown on his survey constituted roughly 12,000 square feet and was 300 feet long.

Marvin Head, who was in the earth moving business, testified on behalf of appellants that removal of the entire road would involve moving 2,000 yards of material at a cost of $1.00 to $1.10 per yard.

Arthur Dorey, Jr., one of the appellants, testified on cross-examination that approximately one-quarter of the road is in lot 21 which they did not claim.

Appellees' witness Bob Crafton, civil engineer and land surveyor, testified that no lot on the W. T. Patterson plat could be located with any degree of accuracy and that basically everything in Monte Ne is a guess. He stated that by the method of scaling and estimating and assuming some information he could possibly get within five hundred feet but that he could not get as close as a hundred feet to the actual lines.

At the close of the evidence the case was submitted to the jury which returned a verdict in favor of appellants for damages in the sum of $1,800 and a judgment ejecting appellees from the lands in question. There-

after, appellees made a motion which alleged that the undisputed testimony established that $2,200 was the maximum figure introduced into evidence for the cost of removing the entire road and that appellees had admitted on cross-examination that one-quarter of the road was on lot 21 which appellees did not claim; therefore the judgment should be reduced to $1,650 notwithstanding the verdict of the jury. The court granted this motion and a judgment was entered in the amount of $1,650 against appellants.

Subsequently, appellees made a motion for a new trial and as grounds therefor alleged, among others, that the verdict or decision was not sustained by sufficient evidence and was contrary to law, and that after entry of said judgment it became known to appellees that a member of the jury had, in violation of specific instructions of the court, independently proceeded to the situs of the property and arrived there approximately one hour prior to the other jurors. Accompanying the motion was an affidavit by the bailiff which reiterated the substance of the allegation in the motion. The court granted the motion for a new trial on the grounds that the verdict was excessive and because of the action of the juror in leaving the body of the jurors in violation of the court's instruction. Appellants appeal from the granting of the new trial and from the granting of the motion to reduce the jury verdict from $1,800 to $1,650.

Appellants argue that the trial court erred in granting appellees' motion for a new trial for excessiveness of the verdict. Arkansas Statutes Annotated § 27-1901 (Repl. 1962) provides, in part, that a new trial may be granted when there is "error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury or detention of property." Whenever a trial judge grants a motion for a new trial we will not reverse his ruling unless it appears that he abused his discretion. *Bobbitt v. Bradford*, 241 Ark. 697, 409 S.W. 2d 339; *Meyer v. Bradley*, 245 Ark. 574, 433 S.W. 2d 160.

In order to sustain an action in ejectment plaintiff must establish that he is legally entitled to possession of the property. Ark. Stat. Ann. § 34-1401 (Repl. 1962). Plaintiff must succeed, if at all, on the strength of his own title and cannot depend on the weakness of the defendant's title. *Bunch* v. *Johnson,* 138 Ark. 396, 211 S.W. 551; *Knight* v. *Rogers,* 202 Ark. 590, 151 S.W. 2d 669. The evidence in this case does not establish by a clear preponderance where lots 20, 22, and 40 are in relation to the road. Appellants' witness admitted his survey, which purported to show those portions of the lots which had been taken by the road, had been prepared upon the assumption that the Corps of Engineers' plat was correct, and he stated that he had no personal knowledge whether it was correct or not. He further testified that if he were told to locate lot 1, block 54, or any lot in any part of Monte Ne, he could not find and stake out that lot with any reasonable degree of certainty. He admitted that his survey was based on the only available information. This witness's testimony actually agreed with appellees' witness, Bob Crafton, except that they differed as to the degree of error likely in trying to locate the lots in question. Because of this uncertainty, the trial judge obviously felt there was error in the amount of damages awarded. We cannot say that he abused his discretion in granting a new trial.

Inasmuch as the court's action in granting a new trial on the basis of insufficient evidence to support the verdict was not an abuse of discretion, we need not consider the question of whether the granting of a new trial because of the actions of the juror was an abuse of that discretion.

Appellants argue that it was error for the court to grant the motion for a new trial after it had already granted the motion to reduce the jury award. Appellants style the first motion as a motion for a judgment notwithstanding the verdict and argue that it is inconsistent to grant both. Actually, the first motion was

in the nature of a request for a remittitur such as is provided for in Ark. Stat. Ann. § 27-1903 (Repl. 1962) and not a motion for judgment notwithstanding the verdict. See *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S.W. 2d 49. The two motions would not be inconsistent because, under the statute, the alternative to remittitur is a new trial. If there was error in granting the motion for reduction of the verdict it was harmless error in view of the fact that the trial judge did not abuse his descretion in granting a new trial.

Even if this motion were considered as one for a judgment notwithstanding the verdict it would not have been inconsistent with a motion for a new trial. In *Montgomery Ward & Company* v. *Duncan,* 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147, it was said, "A motion for judgment notwithstanding the verdict did not, at common law, preclude a motion for new trial. And the latter motion might be, and often was presented after the former had been denied."

The judgment is affirmed.

BYRD, J., concurs.

ARTHUR DOREY, JR., ET AL, *v.* HARRY MCCOY AND MONTE NE SHORES, INCORPORATED

5-4952 442 S.W. 2d 202

Supplemental Opinion on Rehearing July 14, 1969

Davis Duty for appellants.

Hardy Croxton for appellees.

JOHN A. FOGLEMAN, Justice. In their petition for rehearing, appellants call our attention to a statement

in our original opinion that they appealed from the trial court's action reducing the damages awarded by the jury from $1,800 to $1,650. This statement was erroneous, even though one of the points relied upon by appellants here was the sufficiency of the evidence to support the jury award of $1,800. The opinion should have stated that appellants appealed from the granting of the new trial and argued, on appeal, that the evidence was sufficient to support the jury's award of $1,800 in damages.

Appellants also allege that we have totally disregarded evidence adduced by appellants tending to show adverse possession of the lands on which the road in question was located in holding that there was such uncertainty as to the location of the lots upon which they claimed the road in question had been placed that we could not say that the trial judge abused his discretion by granting a new trial for error in the assessment of the amount of recovery. There was testimony by one of the appellants that the land occupied by his father, under whom appellants claim, included the road. On cross-examination this witness admitted that he never knew the exact boundary lines other than his father's house and its immediate environment. On redirect examination, these questions were asked and answers given:

"Q. You have stated you didn't know exactly where your boundaries were until the survey was run?

A. That's right.

Q. Did you have a general idea of the land that you claimed?

A. I know what my father claimed, yes.

Q. Did the land that your father, and you subsequently, claimed the land that now has a road on it?

A. Yes. I couldn't verify that till afterwards, though.

Q. Pardon?

A. I say I couldn't verify it till after, but it was the part that we thought was ours.

Q. The land you claimed is the part the road is on?

A. Yes."

The same witness then admitted that approximately one-quarter of the road was on a lot not claimed by appellants. We agree with appellants' statement in their original brief that evidence as to the portion of the road located on lands other than those claimed by appellants was not direct or definitive and that it might have left the jury wandering in the realm of conjecture. We do not agree with appellant that the burden of producing direct and definitive evidence on this essential element of appellants' measure of damages was upon appellees. Even though this evidence was not specifically mentioned in our original opinion, it was considered. We are still unable to say that the evidence so clearly preponderated in appellants' favor on the question of damages that the trial judge abused his discretion by granting a new trial. Under such circumstances, we sustain the action of a trial court granting a motion for new trial. *Bobbitt* v. *Bradford*, 241 Ark. 697, 409 S.W.2d 339.

Appellants also vigorously urge that the trial court acted under Ark. Stat. Ann. § 27-1903 (Repl. 1962) and was thereby barred from granting a new trial after having ordered a reduction of the damages. Although it was stated in the original opinion that appellants' motion for reduction of the verdict was in the nature of a motion under that section, neither the appellants, the trial court nor this court categorized the motion as

having been filed under that section.[1] That section is not the basic authority for reduction of a jury verdict by a trial court. Such action is within the inherent powers of the trial court aside from and independent of that statute. *Dierks Lumber & Coal Company* v. *Noles,* 201 Ark. 1088, 148 S.W. 2d 650. Section 27-1903 only purports to limit that basic power in certain cases. This court has reversed the judgment of a trial court and ordered a new trial in a case wherein the appellee's attorneys offered to file a remittitur in the amount by which the trial judge found the verdict to be excessive. See *Jamison* v. *Spivey,* 197 Ark. 698, 125 S.W. 2d 453. While it is true that this court found that that verdict was still excessive, there would be no reason why the trial court could not grant the same relief, if it felt that there was still error in the assessment of damages in actions upon contracts or for injury to or detention of property.

If it is applicable at all, § 27-1903 might have prevented the filing of a motion for new trial, if appellees had offered, or could be required, to file and enter of record a release of all errors that may have accrued at the trial upon appellants' remitting the amount by which the judgment was held to be excessive. There is no indication that appellees waived any errors in the trial nor is there any showing that appellants remitted the excess. The requirement that a litigant surrender his right of appeal as a condition upon which he may accept the reduction of an excessive verdict by the trial court has been held to be beyond the power of the legislature as a violation of Article 7, Section 4 of our Constitution. *St. Louis & N. A. Rd. Co.* v. *Mathis,* 76 Ark. 184, 91 S.W. 763, 113 Am. St. R. 85. If we accepted appellants' theory that the two motions were so inconsistent that the motion to reduce precluded a motion for new trial, we would be imposing the same

[1]This section may be applicable only to those cases wherein the damages are not susceptible of definite pecuniary measurement, as in cases involving pain and suffering, etc.

penalty upon a litigant. There is no logical reason why this court could so deny the right of appeal under the constitutional provision if the General Assembly could not.

Not only did appellants fail to enter a remittitur in the amount found excessive by the trial court, but they argue here that the court erroneously treated the jury's verdict of $1,800 as excessive. Their action is tantamount to a refusal to enter the remittitur, and would have justified the granting of a new trial, if § 27-1903 applies. *Kroger Baking Company* v. *Melton,* 193 Ark. 494, 102 S.W. 2d 859. Appellants cite no authority for their position that the filing or granting of a motion to reduce a verdict precludes the granting of a motion for a new trial.

Appellants also insist that the first motion was for judgment notwithstanding the verdict. Ordinarily that motion is for the purpose of obtaining a judgment reaching the opposite result from the jury's verdict, e.g., a judgment for defendant when the verdict was for the Plaintiff. It can only be granted when the judgment sought by the movant is the *only* result that could be reached on the basis of the pleadings or the undisputed evidence. *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S.W. 2d 176; *Spink* v. *Morton,* 235 Ark. 919, 362 S.W. 2d 665. A motion for judgment notwithstanding the verdict may only be entered before the entry of Judgment. *Oil Fields Corporation* v. *Cubage,* 180 Ark. 1018, 24 S.W. 2d 328. A litigant should not be required to waive the right to seek a new trial in order to ask for judgment notwithstanding the verdict, when the latter relief cannot be sought after judgment is entered. Failure to make a timely motion to reduce a verdict would constitute a waiver of that relief.

While there are some decisions to the contrary, it is held in a number of jurisdictions that a successful

or unsuccessful motion for judgment notwithstanding the verdict does not constitute a waiver of or bar to the granting of a new trial. See *Jolley* v. *Martin Bros. Box Co.,* 158 Ohio St. 416, 109 N.E. 2d 652 (1952), and cases cited therein. See also *Sallden* v. *City of Little Falls,* 102 Minn. 358, 113 N.W. 884, 13 L.R.A. (n.s.) 790, 120 Am. St. R. 635 (1907). The case cited in the original opinion, even though based upon the Federal Rules of Civil Procedure, supports this position. The Supreme Court of the United States there held that a trial court should pass on an alternative motion for new trial even though it granted judgment notwithstanding the verdict. Partial support for that holding was found in the common law rule quoted in the original opinion. Even if the motion here is properly one for judgment notwithstanding the verdict, it did not bar the granting of a new trial.

While it may well be that the trial court in instances such as this would not err in giving a moving party his election of a reduction of a verdict or a new trial, we still cannot say that his failure to do so is an abuse of discretion.

BERNIE (BURNNIE) EDWARD FIELDS v. STATE OF ARKANSAS

5-5419 441 S.W. 2d 803

Opinion Delivered June 9, 1969

Claude Carpenter, Jr. for appellant.

Joe Purcell, Atty. Gen. and *Don Langston,* Ass't. Atty. Gen. for appellee.

J. Fred Jones, Justice. On November 26, 1968, the appellant, Bernie (Burnnie) Edward Fields, was tried and convicted in the Pulaski County Circuit Court for the crime of armed robbery, and on December 3, 1968, he was sentenced to prison for 21 years with seven years to be served before becoming eligible for parole. He has appealed to this court and relies upon the following point for reversal:

> "The trial court erred in failing to grant appellant motions to dismiss the charge here in issue under the provisions of Arkansas Statute 43-1708 which provides for charges to be dismissed if not brought to trial prior to the end of two terms of court following the filing of the indictment or information."

Arkansas Statutes Annotated § 43-1708 (Repl. 1964) is as follows:

> "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court hav-

> ing jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner."

The terms of the Pulaski County Circuit Court begin on the 4th Monday in September and the 1st Monday in March of each year and each term extends to the beginning of the next term. Ark. Stat. Ann. § 22-310 (Repl. 1962).

On February 12, 1967, appellant was arrested in Pulaski County on two charges of robbery and one charge of assault with intent to kill. He waived preliminary hearing on arraignment and before informations were filed by the prosecuting attorney in Pulaski County, he was surrendered by the sheriff of Pulaski County to the authorities in Lonoke County where on February 20, 1967, he was tried and convicted on felony charges pending against him in that county, and was sentenced to four years in the Arkansas Penitentiary. On February 28, 1967, the prosecuting attorney of Pulaski County filed informations charging the appellant with two counts of robbery and one count of assault with intent to kill committed in Pulaski County. A bench warrant was issued on these informations and mailed to the superintendent of the penitentiary where the appellant was incarcerated under his sentence from Lonoke County.

On March 30, 1967, the appellant wrote a letter to the trial judge as follows:

> "Dear Sir,
>
> The reason I'm writing this letter is too ask you when I'll be able too appear in your court.
>
> I went too a preliminary hearing on are about Feb. 13, 1967, and at that time I waved perliminary hear-

ing and was bound over too your court. But was not notified of when my court date was. I would like very much too appear in your court with end the next (30) days if possible, so I can clear the Books."

On May 1, 1967, the appellant was brought before the Pulaski County Circuit Court, where attorney Harry Robinson was appointed to defend him. A plea of not guilty was entered to each charge and the cases were passed to October 6, 1967, for jury trial. On September 5, 1967, the cases were passed to October 2, 1967, to be reset. On October 2, 1967, the appellant was brought before the court and the cases were passed to March 27, 1968, for a jury trial, and on February 29 the appellant's attorney was advised by the prosecuting attorney that case No. 66886 (robbery) would be tried on March 27, 1968.

On March 15, 1968, the court ordered the appellant brought from the penitentiary for the purpose of trial on March 27. The record is vague as to what happened on March 27, 1968, but on April 1, 1968, the appellant was brought before the court, his previously appointed attorney Harry Robinson was relieved, and attorney Claude Carpenter was substituted. The case was passed to April 24, 1968, for a hearing on appellant's motion to dismiss, and the appellant was remanded to the Pulaski County jail pending the hearing.

On April 24, 1968, appellant's written motion to dismiss pursuant to Ark. Stat. Ann. § 43-1708, supra, was filed, heard and overruled by the court and the cases were passed to May 10, 1968, for jury trial. The docket entry on this date is as follows:

"This day comes the State of Arkansas by James R. Howard, Deputy Prosecuting Attorney, and comes the defendant in proper person in custody of the Sheriff and by his Attorneys, Harry

Robinson and Claude Carpenter, appointed by the Court, and defendant's Motion to Dismiss is hereby filed, heard and overruled and the cases are passed to May 10, 1968, for a jury trial."

On June 10, 1968, an appeal from the order of April 24, overruling appellant's motion for dismissal, was prayed and granted. The appellant was given an additional 60 days for perfecting his appeal to this court and was given 45 days to prepare his bill of exceptions. The bill of exceptions was approved and certified by the trial judge on July 2, 1968, but was not filed in this court until March 14, 1969, when it was filed as a part of the record on this appeal.

On October 29, 1968, the appellant filed a petition in this court for a writ of prohibition to the trial court permanently prohibiting any further prosecution on the informations filed against the appellant and we denied this petition on November 18, 1968. On November 4, 1968, the appellant was brought before the trial court and his case was passed to November 18, 1968, for jury trial. On November 18, 1968, the case was reset for jury trial on November 26, 1968.

When this case finally came to trial on November 26, 1968, the appellant renewed his motion to dismiss. The motion was overruled and the trial resulted in the jury verdict and judgment thereon forming the basis for this appeal.

The appellant's motion for a new trial is entirely directed to the jury verdict and is as follows:

"The defendant respectfully moves the Court for an order granting him a new trial in this matter and for cause states:

1. The verdict is contrary to the law.
2. The verdict is contrary to the evidence.

3. The verdict is contrary to the law and the evidence.

4. The defendant moves the Court for an order setting the jury's verdict aside and for either a new trial or a directed verdict notwithstanding."

The evidence in this case was more than sufficient to sustain the verdict of the jury and the judgment rendered thereon.

Mrs. Mattie Nix identified the appellant as the person who came into her cafe and while drinking a cup of coffee made numerous inquiries about the liquor store across the street. She saw the appellant leave her cafe, walk across the street and enter the liquor store. She saw the appellant come out of the liquor store and walk down the street. Mrs. Nix testified that a short time after she saw the appellant come out of the liquor store, she saw the owner of the liquor store, Joe Bauer, come out of the back part of the liquor store "bloody all over."

Joe Bauer positively identified the appellant as the man who came into his liquor store and ordered a half pint of brandy. He says that when he turned to face the appellant after looking for the brandy, the appellant was pointing a pistol at him. He testified that the appellant forced him into a back room of the liquor store, robbed him of the money in his pocket, forced him to wait on a customer and then robbed the cash register. He testified that after the appellant robbed the cash register he again forced him to the rear of the liquor store and told him that he, the appellant, was going to have to put him to sleep, whereupon the appellant struck him twice on the head with the pistol and that when he fell to the floor, the appellant left the store.

The police officers found a broken piece from a pistol handle grip in Bauer's place of business following

the robbery and assault, and when appellant was arrested while hitchhiking out of Little Rock, a pistol with a broken handle grip was found on his person. The piece of pistol grip found in the liquor store matched the part missing from the pistol the appellant was carrying.

If the jury believed the state's witnesses, as they evidently did, there was substantial evidence to sustain the conviction.

The appellant's argument on this appeal, however, is primarily directed to his contention that the trial court committed reversible error in overruling his motion to dismiss. The appellant did not perfect his appeal from the judgment of April 24, 1968, as he had a right to do. (*Ware* v. *State*, 159 Ark. 540, 252 S.W. 934.) Instead of perfecting his appeal, the appellant filed a petition in this court for a writ of prohibition.

The appellant is correct in his statement that "Article 2, Section 10, of the Arkansas State Constitution provides for a speedy trial in criminal matters with Arkansas Statutes 43-1708 implementing this constitutional provision." But, neither Article 2, Section 10 of the constitution, nor Ark. Stat. Ann. § 43-1708 automatically entitles a prisoner to discharge at the end of the second term of the court having jurisdiction of the offense. There are statutory exceptions to such rule. Section 43-1708, supra, ends with the phrase "unless the delay shall happen on the application of the prisoner."

Ark. Stat. Ann. § 43-1709 (Repl. 1964) provides:

> "If any person indicted for any offense, and held to bail, shall not be brought to trial before the end of the third term of the court in which such indictment is pending, which shall be held after the finding of such indictment, and such holding to bail on such indictment, he shall be discharged, so far as relates to such offense, unless the delay happened on his application."

And Ark. Stat. Ann. §43-1710 provides:

> "Nothing in the two preceding sections shall be so construed, as to discharge any person who may have been indicted for any criminal offense, on account of the failure of the judge to hold any term of the court, or for the want of time to try such person at any term of the court."

The statutory exceptions are the reasons that alleged error in overruling a motion for discharge under the statute must be reached by appeal on the record rather than by prohibition as a matter of law.

After the appellant wrote his letter to the trial judge on March 30, 1967, he appeared in court on May 1, 1967, an attorney was appointed to represent him and he entered his plea of not guilty. There is no question that the appellant was represented by court appointed counsel at all stages of the procedure after May 1, 1967, and there is no evidence that he requested a speedy trial after he was represented by counsel, and there is no evidence that he, or his counsel, objected to the postponements of his trial. The state contends that the delays in trial happened on the application of the appellant and the appellant contends that he made no such application and did not authorize his attorneys to do so. The record before us is fairly complete as to the events that did occur, but the record is woefully inadequate as to why they occurred. At the hearing on motion to dismiss, the record, in part, is as follows:

"THE COURT:

On 9-5-67 it was passed to October 2nd to be reset.

MR. ROBINSON:

Wasn't it set for a jury trial on 9 something?

THE COURT:

On 5-1-67 it was set for a jury trial.

MR. ROBINSON:

But the record doesn't show who passed it, or why.

THE COURT:

You know who passed it. I know, too. You did.

MR. ROBINSON:

You did it because you wanted to set something else on that day.

THE COURT:

Maybe I did."

Mr. Robinson, the appellant's court appointed counsel, testified on cross-examination as follows:

"Q. Is it your recollection that you weren't in court at any time these cases were passed, that the docket reflects?

A. Jim, I wouldn't say.

Q. Do you recall the case ever being passed while you were not in court at any of these dates that are on this docket?

A. It is my recollection, the best I can remember, that the case was passed in October while it—I mean passed in September when it had been set for jury trial in October, and it was passed for some reason convenient to the State—The State or Court, I won't testify which. I wouldn't swear to which one by my recollection.

Q. Your testimony is that these dates here where it says the case was passed were not done at your request?

A. Absolutely not.

Q. Did you raise any objections to these passages at any time?

A. I did not. I had no opportunity, according to my recollection of it."

The appellant in this case was serving a penitentiary sentence from another county on conviction for a separate and different offense when the informations were filed against him in Pulaski County. The record before us indicates that the appellant was represented by an attorney each time his case was continued. Although appellant's attorney says that he did not request a continuance, he admits that he raised no objection to a continuance and states: "I had no opportunity, according to my recollection of it."

After attorney Robinson was relieved as appellant's attorney on April 1, 1966, and Mr. Carptenter was substituted, both attorneys continued to represent the appellant by mutual agreement. After an appeal was granted on June 10, 1968, from the judgment overruling appellant's motion to dismiss, instead of perfecting the appeal to this court the appellant filed his petition for a writ of prohibition which was denied. The appellant then renewed his motion for dismissal at the trial of the case and now contends, after trial and conviction, that he is entitled to be discharged from the penalty of his conviction because he was not tried within two terms of the court as provided by statute and was not given a speedy trial as required by the constitution.

The verdict of the jury is sustained by substantial evidence and from the state of the record before us, we are unable to say, as a matter of law, that the trial court erred in refusing to discharge the appellant on motion when no appeal was perfected from such refusal and the

alleged error is not brought forward in appellant's motion for a new trial.

In *Randall* v. *State,* 239 Ark. 312, 389 S.W. 2d 229, we said:

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

In the earlier case of *Yarbrough* v. *State,* 206 Ark. 549, 176 S.W. 2d 702, this court had occasion to explain the necessary procedure in preserving a point on appeal, and we did so in these words:

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

Of course, a new trial would avail the appellant nothing in the case at bar on the only point he designates for reversal and on which an appeal was originally granted but never perfected.

The judgment is affirmed.

BYRD, J., dissents.

CONLEY BYRD, Justice. As I read the record here there is ample evidence to sustain the jury's finding that appellant Bernie Edward Fields is guilty of armed robbery. The record also shows without contradiction that he was not brought to trial before the end of the second term of the court after the filing of the information against him.

Since I concede that the evidence is sufficient to sustain the jury's finding that appellant is guilty of armed robbery, the question arises as to why I should say he ought to be discharged. My answer is that the law says:

> "If any person indicted for any offense, and committed to prison, shall not be brought to trial before the end of the second term of the court having jurisdiction of the offense, which shall be held after the finding of such indictment, he shall be discharged so far as relates to the offense for which he was committed, unless the delay shall happen on the application of the prisoner." [Ark. Stat. Ann. § 43-1708 (Repl. 1964)].

I find it abominable to me to say that this man must go to prison under such circumstances that he can legitimately and truthfully say, "There ain't no justice according to law in the Courts of this State". The matter is further compounded when we crutch our decision on the basis that no appeal was perfected within the time allowed and the alleged error was not properly brought forth in the motion for new trial, because with the ordinary defendant for whom counsel is appointed, such failures only occur because of negligence or failure of counsel or because of incompetency of counsel. *Anders* v. *California,* 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967); *Entsminger* v. *Iowa,* 386 U.S. 748, S. Ct. 1402, 18 L. Ed. 2d 501 (1967). Further, I think that the motion for new trial here which asserted that the conviction was contrary to the evidence and contrary to the law is sufficient to raise the issue.

The statute here involved comes to us from the Revised Statutes of 1838 (Ch. 45, § 169) and is an obvious implementation of Article 2, § 10 of the Constitution of Arkansas which provides:

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

Therefore I would discharge the prisoner in accordance with the statute.

FIREMAN'S FUND INSURANCE COMPANY v. FORT SMITH PIZZA COMPANY

5-4872 442 S.W. 2d 238

Opinion Delivered June 9, 1969
[Rehearing denied July 14, 1969.]

Barber, Henry, Thurman, McCaskill & Amsler for appellant.

H. B. Stubblefield for appellee

J. FRED JONES, Justice. This is an appeal by Fireman's Fund Insurance Company from an adverse decision of the Pulaski County Circuit Court, Second Division, in a suit by Fort Smith Pizza Company on an insurance policy.

The appellant insurance company entered into a contract with the appellee pizza company, agreeing to insure the appellee with a coverage of $2,500 against loss of money and securities by the actual destruction, disappearance or wrongful abstraction thereof within the premises or within any banking premises or similar recognized places of safe deposit.

The appellee alleged in its complaint:

> "That from July 14, 1967, to July 20, 1967, inclusive, during which time said insurance policy was in full force and effect, plaintiff suffered a loss of money and securities in the amount of $1,757.57 (being $388.07 on 7/14/67; $395.91 on 7/15/67; $145.52 on 7/16/67; $191.68 on 7/17/67; $211.60 on 7/18/67; $181.14 on 7/19/67 and $243.65 on 7/20/67) by actual destruction, disappearance or wrongful abstraction thereof for which loss defendant is liable to plaintiff under the provisions and within the meaning of the aforementioned insurance policy."

A jury was waived and the case was tried before the trial judge sitting as a jury. Judgment was rendered for the full amount sued for, together with statutory penalty and attorney's fee, and on appeal to this court the appellant relies upon the following point for reversal:

> "The trial court should have found for the defendant, as a matter of law."

We agree with the appellant. The appellee attempted to prove that the separate deposits listed in its complaint, totaling $1,757.57, mysteriously disappeared from the night depository of the Merchants National Bank of Fort Smith after being deposited there. We find no substantial evidence in the record before us that any part of said amount ever reached the bank.

The record reflects that the usual procedure followed at the three pizza parlor locations was as follows: At each of the pizza parlors six hundred dollars, one hundred of which was in change, was kept on the premises at all times for operating expenses. At the close of each business day the local manager would count the daily receipts, put back the $600 for the next day's operation, and make out bank deposit slips in triplicate for the balance of the receipts to be deposited in the bank. A daily report form would then be made out showing the amount and kind of merchandise sold, the amount received in each category, the total receipts, and the total cash to bank. A copy of this report, together with a copy of the bank deposit slip was mailed each day to the president of the appellee in Little Rock. The manager of the particular parlor would then make the actual deposits in the bank. More than one day's receipts would sometimes be deposited at the same time. The usual procedure was to make the bank deposits at odd times for security reasons and usually by physical deposit in the drive-in night depository. Under this procedure no receipt was obtained from the bank when the deposit was made, but a receipted copy of the deposit slip would be returned by the bank when the deposit was credited to the account. These receipted deposit slips would bear the date they were prepared, and the date the amount was credited to the account but they would not bear the date they were placed in the night depository. Only the retained copy of the deposit slip, made out by the local manager, was mailed to the Little Rock office with the daily report.

Mr. George Batchelor, a certified public accountant, testified that he was doing the accounting work for the appellee during the time of the alleged loss. He identified daily reports with copy of deposit slips attached as having been sent in by the manager of the Fort Smith Parlor and testified that all the managers followed the same procedure. Mr. Batchelor testified that the amounts shown on the reports and copy of deposit slips

made out and sent in by Mr. Blaloch, the local manager at Fort Smith, were never credited by the bank to appellee's account.

Mr. John Bauman testified that he was general manager of three Shakey's Pizza Parlors owned by Mr. Murry, including the one at Fort Smith. He testified that a Mr. Blaloch was the local manager at Fort Smith and that he went to Fort Smith on Saturday, July 22 and discharged Mr. Blaloch. He testified that he went with Mr. Blaloch to the bank and they deposited the previous day's receipts in the night depository; that the deposit slips for this deposit were dated July 21, and that this deposit was made on the 22nd and was credited to the account of the appellee the following Monday, July 24.

Mr. Ike Murry, majority stockholder and president of the appellee, testified, in part, as follows:

"Q. And is the same form of those daily reports that are introduced as Exhibits 8 through 14 required daily from each of your operations?

A. That's right. Same form.

Q. And including your operation there at Fort Smith?

A. Right.

Q. Nor only during this period but during each day's operation?

A. That's right. Each day we pick up a daily report from the three Fort Smith. I mean the three pizza parlors and attach to each one of them *a deposit slip which has been executed by the manager indicating the money has been sent to the bank or that it will be sent to the bank.*

* * *

Q. And are those daily reports in your regular course of business up there at Fort Smith?

A. That's right.

Q. And the information shown thereon, quote—total cash to bank—end quote, is shown on each one of those daily reports?

A. That's right.

Q. And I believe that's required of your manager of each one of your operations?

A. That's right." (Emphasis supplied.)

On cross-examination Mr. Murry testified that the local manager of the business in Fort Smith would mail the daily reports, together with copy of deposit slip to him in Little Rock. He also testified as to reasons for discharging the Fort Smith manager, but further recitation of the testimony would add nothing but volume to this opinion.

The only person who knew what went with the money indicated on the daily reports and copies of the deposit slips made out and mailed from Fort Smith to Little Rock by Mr. Blaloch, was Mr. Blaloch himself. He was the one who made out the reports indicating that the money had been or would be deposited in the bank and he was the one charged with the responsibility of depositing the money in the bank. Mr. Blaloch had been discharged and had gone to Tennessee before it was ever discovered that the amounts he reported had been or would be deposited in the bank were never credited to the appellee's account.

The appellee relied entirely on Ark. Stat. Ann. § 28-928 (Repl. 1962) which provides as follows:

> "In any court of record of the State, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or rec-

ord of any act, transaction, occurrence, or event shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

Mr. Blaloch did not testify in this case and his daily reports made out and mailed to his superiors in the regular course of business indicating the amount of money he collected and had or would deposit in the bank, certainly are no evidence at all that he ever reached the bank with the money he indicated he had or would deposit. It is clear from the evidence, including the daily records and deposit slips, that the daily records or reports were made out at the end of each day's business reflected therein. The deposit slips were dated the same day the records were dated and obviously the deposit slips were made out before the deposit was actually made. The most these business records of the appellee could show is the amount of money on hand which the appellee's manager indicated that he *would deposit in* the bank.

It appearing from the record that the facts in this case might be more fully developed on retrial, the judgment of the trial court is reversed and this cause remanded for that purpose.

BYRD and HOLT, JJ., dissent.

CONLEY BYRD, Justice. As I read the majority opinion I understand the facts to be that the manager Blaylock in the regular course of his daily business at the end of each day made out a deposit slip showing the amount

of money deposited or to be deposited in the bank account and also a report which he mailed to the home office in Little Rock together with the deposit slips. I also understand that the deposits were made as soon after the close of the business day as security would permit. Under these circumstances it appears to me that the majority is doing violence to the Business Records statute or "shopbook rule."

Even under the common law shopbook rule, the business records here introduced would have been sufficient evidence of delivery of the deposits to the night depository. See *Mansfield* v. *Gushee,* 120 Maine 333, 347, 114 A. 296 (1921). It was there held:

> "Where the person making the entries is the only person having knowledge of the delivery of the goods or the performance of the services, and he is dead, insane, or out of the jurisdiction of the court, or unable to attend court to give his testimony or give his deposition, upon proof of his handwriting and that the books were kept in the regular course of business, and that it was his duty or practice to make such entries at or near the time of delivery of goods or performance of services, the books themselves, if they otherwise appear to be regularly and fairly kept may be sufficient proof of delivery of goods or services performed."

In 30 Am. Jur. 2d *Evidence* § 950, the stated purpose of the Business Record Statutes such as Ark. Stat. Ann. § 28-928 (Repl. 1962) is as follows:

> "The Model Act for Proof of Business Transactions, which has been adopted in a few states and by Congress, permits a writing or record made in the regular course of business to be received in evidence without the necessity of calling as witnesses all the persons who had any part in making it. In other words, the act does away with technical rulings which excluded records ordinarily used in business

transactions when not formally identified by the makers."

In *Scowcroft & Sons Co.* v. *Roselle,* 77 Idaho 142, 289 P. 2d 621, 55 A.L.R. 2d 1 (1955), there was involved an action by a wholesaler to recover for merchandise shipped and delivered to a store operated by the retailer's agent. Under a statute similar to ours the court held:

> "The records of account of respondent, introduced in evidence, constitute sufficient evidence to sustain a finding by the jury that respondent had sold and delivered to the Summitt Supply Company the merchandise therein listed for the price therein set out, and a finding as to the payments made upon the account and the balance due thereon."

In our own case of *Harrison* v. *State Farm Mutual Insurance Co.,* 230 Ark. 630, 326 S.W. 2d 803 (1959), the question involved was whether State Farm had cancelled an insurance policy by mailing a notice of cancellation addressed to Harrison. We there held that the business records of State Farm were evidence under Ark. Stat. Ann. § 28-928 of the mailing of the notice of cancellation.

The record here shows that the whereabouts of manager Blaylock was unknown to appellee at the time of trial. Under these circumstances it appears to me that the records kept by Blaylock showing the deposits that he either made or was to make within a reasonable time of the making of the business record entry are sufficient either under common law or the statute to show delivery of the deposits to the night depository.

Since business records of State Farm in the *Harrison* case constituted evidence to show that State Farm had properly addressed, stamped and deposited a letter of cancellation in the post office, I am at a loss to under-

stand why the records here are not sufficient to show a placing of the daily deposit in a bank's night depository.

Therefore, I dissent.

HOLT, J., joins in this dissent.

UNITED STATES FIRE INSURANCE COMPANY v. STATE FARM FIRE AND CASUALTY COMPANY AND NATIONAL INVESTORS FIRE AND CASUALTY INSURANCE COMPANY

5-4924 441 S.W. 2d 787

Opinion Delivered June 9, 1969

[redacted]

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

Shackleford & Shackleford for appellees.

J. Fred Jones, Justice. This appeal arises from litigation between three insurance companies as to their proportionate liability under separate liability policies issued to three separate individuals. The facts giving rise to the litigation came about in this manner:

On April 19, 1965, several young people were water skiing behind motor boats on the Ouachita River near Camden, Arkansas. Walter Horne owned a motor boat and Harry Parker III was driving the boat, with Horne's permission. Parker was pulling Eric Davis on water skis behind the boat. In the course of this activity, one Gerald Carney sustained personal injuries and filed suit for damages against Horne, Parker and Davis. A jury trial resulted in a judgment against Parker and Davis for $40,000 and under instructions on separate interrogatories, the jury found that Parker and Davis were engaged in a joint enterprise and apportioned the negligence between Parker and Davis as 90% to Parker and 10% to Davis.

Horne's boat was covered under a liability policy issued to him by State Farm Fire and Casualty Company with maximum coverage of $25,000 and with the following provision:

> "To pay all sums which the insured shall become legally obligated to pay as damages because of bodily injury sustained by other persons and property damages, arising out of the ownership, maintenance or use of owned watercraft, and the company shall defend any suit against the insured alleging such bodily injury or property damage and

seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient."

Parker was covered under a home owner's liability policy issued by National Investors Fire and Casualty Company with a maximum coverage of $25,000, and Davis was covered by an identical policy issued by United State Fire Insurance Company. The two policies covering Parker and Davis contained identical provisions as follows:

> "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage . . .
>
> * * *
>
> If the Insured has other insurance against a loss covered by this policy, this Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss, provided that with respect to loss arising out of the ownership, maintenance, operation, use, loading or unloading of . . .
>
> (2) watercraft, this insurance shall not apply to the extent that any valid and collectible insurance, whether on a primary, excess or contingent basis, is available to the Insured."

The $40,000 judgment against Parker and Davis was paid by the three insurance companies with State Farm paying the full amount of its primary coverage on the watercraft in the amount of $25,000. United States

Fire paid $4,000 on its secondary liability, or excess coverage, for Davis' 10% negligence and National Investors paid the remaining $11,000 on its secondary liability or excess coverage in satisfaction of the judgment. Upon satisfying the judgment, at the original trial, the insurance companies through their respective insureds, reserved the right by stipulated agreement, to adjust their proportionate liabilities under their policy coverages in subsequent litigation between themselves.

As a result of this agreement, United States Fire instituted the present litigation by complaint against State Farm and National Investors setting out the above facts and alleging as follows:

> "[T]hat the coverage available to the said Harry Parker III, under the foregoing provision was excess to that of the aforementioned Horne Policy; that the defendant, National Investors Fire and Casualty Company, is liable for contribution under the Judgment described above to the extent of ninety per cent (90%) of any amount remaining on said Judgment in excess of the coverage provided by said Horne Policy, or the sum of $13,500.00.
>
> * * *
>
> [T]hat the coverage available to the said Eric Davis under the foregoing provision was excess to that of the aforementioned Horne Policy; that the plaintiff is liable for contribution under the Judgment described above, to the extent of ten per cent (10%) of any amount remaining on said Judgment in excess of the coverage provided by said Horne Policy, or the sum of $1,500.00; . . .
>
> That plaintiff should be given judgment of and from the defendant, National Investors Fire and Casualty Insurance Company, for the sum of $2,500.00 paid by it in contribution upon satisfaction

of said judgment in excess of that required under the terms of said policies and Judgment; that plaintiff should also be given judgment of and from said defendant for 12% penalty on said $2,500.00, together with a reasonable attorney fee;

That under the terms of the Horne Policy, the defendant, State Farm Fire and Casualty Company, was required to provide the said Eric Davis with a defense to said suit, and to pay all costs of said suit adjudged against Eric Davis; that the said defendant failed to offer or provide Eric Davis with a defense, and this plaintiff was required to expend the sum of $2,981.38 to provide Eric Davis with such defense, and also contributed the sum of $64.49 toward payment of the court costs adjudged against the said Harry Parker III, and Eric Davis; that plaintiff should also be given judgment of and from the defendant, State Farm Fire and Casualty Company, in the amount of $3,045.87 for reimbursement of said costs of defense and court costs, together with a penalty of 12% of said sum and a reasonable attorney fee."

United States Fire prayed judgment against National Investors for $2,500, together with penalty and attorney's fee. United States also prayed judgment against State Farm for $3,045.87, together with penalty and attorney's fee.

State Farm answered admitting coverage on the boat to the extent of $25,000 which amount had been paid toward satisfaction of the $40,000 judgment. State Farm denied that it had failed to perform its full duties under its contract and that if it had any duty to provide defense counsel for Davis, he waived such right by not requesting State Farm to defend him and is now estopped to assert such claim.

National Investors answered by general denial and counterclaim against United States Fire for $3,500 con-

tending that Parker and Davis were equally liable for the judgment in excess of the $25,000 State Farm had paid, and that National Investors had overpaid its proportionate liability in the amount of $3,500. A jury was waived and the trial court entered judgment as follows:

> "IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by the court that the complaint of the plaintiff be and the same is hereby dismissed with prejudice and the defendants are entitled to recover of and from the plaintiff their costs herein expended; and
>
> IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED by the court that the defendant, National Investors Fire and Casualty Insurance Company, do have and recover of and from the plaintiff, United States Fire Insurance Company, the sum of $3,500 together with interest at the rate of 6% per annum until paid."

United States Fire has appealed and relies on the following points for reversal:

> "The Uniform Contribution Among Tort-Feasors Act applies to joint tort-feasors who are joint adventurers.
>
> Appellant as an excess liability insurer, is entitled to contribution from appellee, National Investors, another excess insurer, in proportion to the relative degrees of fault of the respective insured.
>
> As an excess liability insurer appellant is entitled to recover costs of defense of its insured from State Farm the primary carrier."

The appellant contends that Parker and Davis were joint tort-feasors and that the Uniform Contribution Among Tort-Feasors Act (Ark. Stat. Ann. § 34-1001 et seq [Repl. 1962]) applies to them even though they may have also been joint adventurers. The appellant con-

tends that it had paid for Davis more than his pro rata share of the loss and is entitled to contribution from Parker.

The appellee National Investors states its position, as well as that of the appellant, in its brief as follows:

> "The arguments advanced by the appellant in its brief ignored the real issue before the Court. We are here concerned with relative rights between Davis and Parker. The claims of U. S. Fire cannot exceed the rights of Davis against Parker, and, likewise, the claims of National Investors against U. S. Fire cannot exceed those of Parker against Davis.
>
> The most determinative factor to resolve this issue is the finding by the jury that Parker and Davis were engaged in a joint enterprise at the time of the occurrence. Thus, the rights as between them is determined from this relationship.
>
> * * * [A]ppellant attempts to apply the contribution theory based upon the percentage of negligence attributable to each Davis and Parker. These terms are used where separate and distinct tortious acts, committed by different persons, unite and culminate in injurious results. It is a matter which goes to liability as between the injured party and the tortfeasors, not as to the rights between the tortfeasors."

The pertinent provisions of the Contribution Among Tortfeasors Act are as follows:

> "§34-1001. For the purpose of this act . . . the term 'joint tortfeasors' means two [2] or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

§ 34-1002. (1) The right of contribution exists among joint tortfeasors.

(2) A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.

(3) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(4) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of determining their rights of contribution among themselves, each remaining severally liable to the injured person for the whole injury as at common law.

§ 34-1006. This act [§§ 34-1001—34-1009] does not impair any right of indemnity under existing law.

§ 34-1007 (5). As among joint tortfeasors against whom a judgment has been entered in a single action, the provisions of section 2, subsection (4) [§ 34-1002] of this act apply only if the issue of proportionate fault is litigated between them by cross-complaint in that action."

The appellant has cited numerous cases recognizing the right to contribution between joint tort-feasors and recognizing that an insurer of a tort-feasor is entitled to seek contribution by subrogation from another tort-feasor or his insurer.

The appellees have cited numerous cases holding that the negligence of each member of a joint venture is imputable to the other and each is liable for one hundred per cent of the damages caused thereby and entitled to equal contribution from each other.

None of the cases cited reach the exact question presented here. The appellant contends that based on its 10% negligence as related to the entire judgment of $40,000, it paid more than its proportionate share of the remaining $15,000 for which it and the appellee, National Investors, were liable in excess of the primary liability of $25,000 paid by State Farm.

The appellee, National Investors, contends that it has paid more than its proportionate share of the excess by its payment of the $11,000. It contends that since the jury found that its insured Parker and the appellant's insured Davis were engaged in a joint adventure, their respective negligence was imputed to each other and that each of them, as between themselves, would be liable for 50% of the $15,000 excess coverage. The appellee relies on the jury finding of joint enterprise, but overlooks the significance of the jury's allocation of the negligence as between the joint tort-feasors.

The appellees cite the case of *Shultz* v. *Young,* 205 Ark. 533, 169 S.W. 2d 648, for the proposition of why apportionment should not be allowed under the Contribution Act, and the appellees cite a quote in that case from the National Conference of Commissioners on Uniform State Laws, as follows:

> "The apportionment device is intended to work as follows: If the evidence indicates that there is a disproportion of fault as among the tortfeasors, the court shall instruct the jury that if it finds the tortfeasors to have been negligent, they shall also fix their relative degrees of fault. Thus if the

court believes that an apportionment of fault is inappropriate in a particular case, none will be made . . . ''

The Commissioners' note continues as follows:

> ''Naturally, a court trying a case without a jury will itself make the apportionment of fault when appropriate. Under the English tort contribution act the court always makes the apportionment; but the draftsmen feel that in the United States this had best be left to a jury within the ordinary power of a court to keep the issue of negligence from a jury when the evidence indicates that submission thereto would not be warranted.''

The *Shultz* case was an action for damages against two defendants for an assault upon the plaintiff. Quoting from the opinion in that case:

> ''The court charged the jury that there might be a recovery against either or both appellants, and the jury was further told that the damages might be apportioned between appellants. The instructions also defined the conditions under which exemplary damages might be assessed. A verdict was returned against Shultz for $2,000 and a separate verdict was returned against Myrtle Liberto for $500, and from the judgments rendered upon these verdicts is this appeal.''

On appeal in the *Shultz* case, the appellants contended that as appellee was injured through the concurring willful acts of appellants, she cannot have satisfaction in a sum exceeding the smallest verdict returned against either of the tort-feasors, this upon the theory that damages for a joint tort must be assessed in a single sum, and the recovery of damages cannot be in excess of the smallest amount awarded against any one of the tort-

feasors. The appellants relied on the case of *Southwestern Gas & El. Co.* v. *Godfrey,* 178 Ark. 103, 10 S.W. 2d 894, and other cases cited.

In sustaining the judgments, this court said:

> "These cases sustain this [appellants'] contention, but, subsequent to the rendition of those opinions, act 315 of the Acts of 1941, p. 788, was enacted. This is an act entitled: 'An act concerning contribution among tort-feasors, release of tort-feasors, procedure enabling recovery of contribution, and making uniform the law with reference thereto.'
>
> * * *
>
> The testimony is sufficient to sustain the verdicts, and the jury had the power to apportion the damages. As no error appears, the judgments must be affirmed, and it is so ordered."

Prosser on Torts, Contribution, p. 278, § 47, par. 8, 3rd ed. says:

> "Normally the apportionment of liability effected by contribution is on the basis that 'equality is equity,' which means that each tortfeasor is required ultimately to pay his pro rata share, arrived at by dividing the damages by the number of tortfeasors. In some instances, as where the owner and the driver of a car are joined as defendants, equity may require treating the two together as liable for a single share, or that the share of a tortfeasor who is insolvent or absent from the jurisdiction be borne by the others. *In some jurisdictions, however, either by express provision of statute or by interpretation of it, the distribution of the liability is in proportion to the comparative fault of the defendants.*" (Emphasis supplied.)

Under the italicized sentence of the above paragraph, Prosser cites *Little* v. *Miles,* 213 Ark. 725, 212

S.W. 2d 935, as falling within this rule. The *Miles* case followed *Shultz* v. *Young,* supra, and in both cases jury verdicts apportioning the liability between joint tort-feasors were permitted to stand under the provision of the contribution among joint tort-feasor act providing that "When there is such a disproportion of fault among joint tort-feasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tort-feasors shall be considered in determining their *pro rata* share."

As pointed out by Prosser "there is an important distinction between contribution, which distributes the loss among the tort-feasors by requiring each to pay his proportionate share, and indemnity which shifts the entire loss from one tort-feasor who has been compelled to pay it to the shoulders of another who should bear it instead." Contribution, and not indemnity, is involved in the case at bar.

The appellant, as well as the appellee National Investors, agreed by contract to pay what their respective insureds were legally obligated to pay. We can see no point in submitting the comparative negligence as between the two tort-feasors to the jury except in aid of an equitable distribution of the liability as between the two tort-feasors, and in arriving at their pro rata share of the loss for determining their rights of contribution among themselves.

As stated by Dr. Robert A. Leflar in footnote 28 to his article "Contribution and Indemnity Between Tort-Feasors," U. Penn. L. Rev., vol. 81 (1932-33), p. 136: "Law courts freely recognize the equitable origin and nature of the remedy of contribution."

We agree with the appellant that the Uniform Contribution Among Tortfeasors Act applies to joint tort-feasors who are joint adventurers. If it were other-

wise, the legislature would have surely excepted joint adventurers from the provisions of Ark. Stat. Ann. § 34-1002 (4) (Repl. 1962).

We hold that under the jury verdict, *as between Parker and Davis,* Parker was legally obligated to pay 90% of the excess amount of $15,000, amounting to $13,-500; and that Davis was legally obligated to pay 10% of the excess amount of $15,000, amounting to $1,500, and that the appellant and the appellee National Investors contracted to pay these amounts. We conclude that the appellant has paid more than its pro rata share of the $15,000 and is entitled to recover from the appellee National Investors the excess paid in the amount of $2,500. We are of the opinion that the trial court erred in dismissing appellant's complaint and entering judgment for the appellee National Investors Fire Insurance Company.

As to appellant's third point, we agree with the appellees and the trial court. Each of the parties to this lawsuit agreed to defend the suits against their respective insureds. The appellant did defend its insured under its contract and cannot now render its account for services rendered to the appellee State Farm, who may have also been obligated to defend Davis under its contract with Horne if Davis was using the boat within the meaning of the policy. Neither Davis nor the appellant requested State Farm to provide a defense for Davis and State Farm was under no obligation to force its services upon Davis to the exclusion of Davis' own insurance carrier who is the appellant in this case. Davis might have even considered that there would arise a conflict of interest between himself and his codefendants and certainly he had a right to call on his own insurance carrier for his defense.

The judgment of the trial court is reversed as to the appellant and the appellee National Investors Fire Insurance Company, and is remanded for entry of judg-

ment consistent with this opinion. The judgment is affirmed as between the appellant and the appellee State Farm Fire and Casualty Company.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. v. LOIS A. LYNCH, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF JUDE J. LYNCH, DECEASED

5-4931 441 S.W. 2d 793

Opinion Delivered June 9, 1969

Wright, Lindsey & Jennings by *William R. Overton* for appellant.

Herrod & Cole for appellee.

CONLEY BYRD, Justice. In a wrongful death action by appellee, Lois A. Lynch, individually and as executrix of the estate of Jude J. Lynch, deceased, against appellant Chicago, Rock Island & Pacific Railroad Co., the

jury returned a verdict finding the railroad 61% negligent and appellee's decedent 39% negligent. By proper motion the railroad has raised in this court the sufficiency of the evidence to sustain the verdict.

The record shows that the railroad tracks in the city of Carlisle run east-west, with the main line being immediately north of a team line. Highway 13 crosses the railroad at right angles in a north-south direction. At the time of the collision, appellee's decedent was driving north on Highway 13 when he was struck by a westbound freight train. The testimony when stated most favorably to appellee shows that the railroad grade crossing is frequently used by the traveling public, that trains pass over it at least five times a day, and that because of the surrounding circumstances, such as parked boxcars, a reasonably careful person could not use the crossing with safety in the absence of special warnings. However, it is on the issue of special warnings that we find appellee's evidence to be insufficient to support the verdict.

Appellee's and appellant's witnesses all state that decedent approached the crossing from the south slowly and without ever stopping. Three motorists headed south had stopped north of the tracks and were waiting for the train to pass. The motorist closest to the tracks was Billie Sue Perciful, behind her was Louis Lee and the third was Ethel Loftis. Louis Lee was called as a witness by appellee. Billie Sue Perciful and Ethel Loftis were called as witnesses by the railroad. All three stated that the signal lights on the north side of the tracks to warn southbound motorists were working. Gwendolyn Medford, a witness called by appellee, stated that she was about a block south of the crossing when she heard the impact and that when she parked her car near the signal lights for warning northbound motorists, the lights were blinking. Steve Carrick, a witness called by appellee, testified that he was on a motorcycle following right behind the decedent at the time of the accident.

Steve Carrick said that as he approached the track behind decedent the blinker lights were working but that he did not hear the bell on the north side of the track nor did he hear the train coming until he heard the air-brakes.

In addition to the foregoing testimony, Billie Sue Perciful says that she saw the decedent slowly approach the crossing without ever stopping and that he was hit while looking down the railroad tracks to his left.

In support of her contention that there was enough evidence on the insufficiency of the warning to go to the jury, appellee argues:

> "...Because of the objection of the railroad company we were not allowed to show what suggestions the Mayor and City Council made to the railroad company in regard to changing the signals or what the reasons were. But, even so the jury does not check its common sense when it goes into the jury box. Men of common sense know that Rock Island could have installed *gates* at the crossing or could have had a *flagman* at this crossing to warn of the abnormal dangers. The Court told the jury that if the crossing was abnormally dangerous, then the railroad company was required to use "ordinary care to give a warning sufficient to permit the traveling public to use the crossing with reasonable safety." The jury knew of *gates* and *flagmen.* The jury did not have to speculate about such safety measures. We insist that the evidence made a jury question as to whether this was an abnormally dangerous crossing where Mr. Lynch was killed: And that disposes of appellant's first point."

However we find that the decision in this case is controlled by *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Carruthers, Admr.* 204 Ark. 419, 162 S.W. 2d 912 (1942), where we said:

> "... Either he saw and heard these signals and the noise of the approaching train and thought he could beat it across, or he was preoccupied with something else and failed to see and hear what was plainly to be seen and heard and what every one else saw and heard, including his own witnesses. In either case, there can be no recovery, because his own negligence was the proximate cause of his death."

In view of the possibility of a new trial we think it necessary to comment upon the testimony introduced with reference to three other accidents at this crossing. The testimony shows that these accidents occurred in 1953, 1961 and 1964, all of which involved northbound motorists and westbound trains. In *Bush, Receiver* v. *Taylor*, 130 Ark. 522, 197 S.W. 2d 1172, 7 ALR 262 (1917), we pointed out that before such proof could be received, there must be a showing of such substantial similarity of conditions in the proof as to make it reasonable and probable that the same cause existed to produce the same result. The evidence here falls far short of the substantially similar conditions involved in *St. Louis Southwestern Railway Co.* v. *Jackson, Admr.*, 242 Ark. 858, 416 S.W. 2d 273 (1967). There the proof showed that the Jackson automobile was the third car in a two-week period to collide with a southbound train at the Fair Oakes crossing and that in each of the three collisions the automobiles were driving into the sun either toward the east in the morning or toward the west in the afternoon. In each instance the automobiles hit either the second or third diesel of a southbound train and in each instance the automobiles hit the train with considerable force after having skidded for a distance. Here the testimony with reference to other accidents is not only remote in time but there is little or no testimony to show that the same conditions existed at the time of each collision or that the automobiles were traveling under substantially similar conditions. Without attempting to itemize the many factors which might be introduced to

show the substantially similar nature of the prior accidents, we have mentioned enough here to demonstrate that the proof made was not sufficient to make it reasonable and probable that the same cause existed to produce all the accidents involved.

We come now to the question of whether to dismiss or remand. The motion of the Railroad Co. questioning the sufficiency of the evidence was both for judgment notwithstanding the verdict and for a new trial. Our procedure under Ark. Stat. Ann. § 29-111 (Repl. 1962) with reference to judgments n.o.v. is not exactly clear. See 17 Ark. L. Rev. 226. However, under the strongest interpretation given to a motion for judgment n.o.v., it constitutes nothing more or less than a request for directed verdict. We had the same issue before us in *St. Louis Southwestern Railway Co.* v. *Clemons,* 242 Ark. 707, 415 S.W. 2d 332 (1967), and we there pointed out that the general rule is to remand common law cases for a new trial. It is only in an exceptional case that reasons arise for a dismissal. Here there was an attempt to show that the Railroad had so operated its warning system that the traveling public had become justified in having a disrespect for the warnings given. Such evidence may be available. In accordance with the rule laid down in the *Clemons* case we remand this case for a possible new trial.

Reversed and remanded.

MISSOURI PACIFIC RAILROAD COMPANY v. DERMOTT GROCERY AND COMMISSION COMPANY

5-4955 441 S.W. 2d 798

Opinion Delivered June 9, 1969

William J. Smith and *Michael G. Thompson* for appellant.

W. K. Grubbs, Sr. for appellee.

CONLEY BYRD, Justice. The issue on this appeal is whether the appellant Missouri Pacific Railroad Company is entitled to collect from appellee Dermott Grocery and Commission Company, as consignee, unpaid charges on intrastate shipments of freight on bills of lading marked "prepaid." The Railroad claims an absolute right to collect the unpaid freight charges under Ark. Stat. Ann. §§ 73-1505—73-1507 (Repl. 1957). The consignee, after receipt of the goods, had paid consignor not only for the goods but also for the freight charges. On this basis it claims that the railroad is estopped to collect the charges.

The stipulated facts show that the Railroad, pursuant to Interstate Commence Commission Ex Parte Order No. 73, had extended a line of credit to the shipper, Horse Shoe Mills, Inc., and charged the freight bills herein sued for against the line of credit so extended. However, the Railroad has not received payment on the credit extended to Horse Shoe Mills, Inc., the latter having been adjudged a "no-asset" bankrupt.

This is a case of first impression under Arkansas law. However there are numerous authorities constru-

ing 49 U.S.C.A. § 3(2) containing language similar to the statute here involved. See *Pitsburgh, C. C. & St. L. R. Co.* v. *Fink,* 250 U.S. 577, 63 L. Ed. 1151, 40 S. Ct. 27 (1919). Even under the authorities construing this statute, appellant recognizes that it would be less than candid if it did not admit that there is a divergence of authority on the estoppel issue. Here the record shows:

> "1. That the carrier made the full and proper charge for the freight shipped;
>
> "2. That the carrier itself marked the bills of lading 'prepaid' pursuant to a line of credit extended to the consignor under rules and regulations of the Interstate Commerce Commission; and
>
> "3. The consignee has paid both for the goods and the freight charges to the consignor."

Under these circumstances we are unable to see how the consignee received or retained any preference contrary to the statute and hence how the public policy against preferences is involved at all. In *Griffin Grocery Co.* v. *Pennsylvania R. Co.,* 93 Ga. App. 546, 92 S.E. 2d 254 (1956), and in *Missouri Pacific Railroad Co.* v. *National Milling Co.,* (D.N.J. 1967), 276 F. Supp. 367, one will find set forth the many reasons supporting the conclusion we have reached.

Affirmed.

F. L. MILES, ET AL v. F. A. TEAGUE, ET AL

5-4908 441 S.W. 2d 799

Opinion Delivered June 9, 1969

Putman, Davis & Bassett for appellants.

Hardy W. Croxton for appellees and cross-appellants.

FRANK HOLT, Justice. The appellees brought this action to foreclose a second mortgage. In January, 1966 the appellees sold their turkey and stock farm to the appellants for a total price of $140,000.00 which included some farm machinery and other personal property. The appellants assumed an existing first mortgage in the amount of $42,500.00, payable $5,000.00 annually. They gave appellees a note for $47,500.00, secured by a second mortgage on the farm, payable at the rate of $4,-750.00 annually beginning on January 15, 1967. By oral agreement, the purchase price balance of $50,000.00 was considered as a down payment and to be paid by appellants as an unsecured open account.

Appellees filed their foreclosure suit in February, 1968 alleging that no payments had been made on the note and asked for judgment against the appellants in the sum of $47,500.00, plus accrued interest, costs and

attorney fees. Appellees also alleged that the appellants had agreed to make a $50,000.00 down payment of which "the sum of $25,000.00 was to be allocated for the personal property and $25,000.00 for the real property." In their answer the appellants denied the default and alleged that they were current in the payment of all installments due on the second mortgage and that they had made sufficient payments on the personal property to entitle them to an agreed bill of sale. The appellants asked that the appellees' complaint be dismissed and that appellees be ordered and directed to deliver to appellants the warranty deed, together with a bill of sale to the personal property. With the issues thus joined, the cause was submitted to the chancellor.

The appellants contended that according to the oral agreement their payments were first to be applied to the two mortgages and then any balances were to be applied to the payment of the personal property first and then to the real property. Further, that when the sum of $25,000.00 was paid on the down payment, appellees were to deliver a bill of sale to the personal property. Appellants admit that the $50,000.00 down payment has not been paid in full by them. The appellees assert, however, the oral agreement was that all of the net payment received from appellants was to be first applied to the full $50,000.00 down payment account and the deed and bill of sale were not to be delivered until there was payment in full; that there was a balance due on the full down payment; that all payments had been applied entirely to the down payment, with appellants' knowledge; that no payments had been made on the second mortgage and, therefore, it was in default.

The chancellor found:

> "That nothing had been paid upon the principal or interest on the note. That said note is now in default, and plaintiffs are entitled to a judgment on said note. That said note was secured by a real estate mortgage . . .

"The court finds that the agreement between the parties was that payments made by defendants would first be applied to the $25,000.00 sale price of the personal property, and payments would next be applied to the remaining $25,000.00 of the down payment.

"That the said plaintiffs shall have and recover from the said defendants the sum of [$54,981.25] principal and interest due and interest at the rate of 6 percent per annum from this date, and the additional sum of $4,750.00 for attorney fees and interest at the rate of six percent per annum from this date until paid. The Court finds that the defendants have paid the plaintiffs in full for the personal property described in said Bill of Sale, and the said plaintiffs are ordered to deliver the Bill of Sale to said personal property to the defendants and the title of said personal property is vested in the defendants.

"While it is apparent that monies are due plaintiffs from the defendants in connection with the down payment, the defendants agreed to make upon the lands and property in addition to the debt evidenced by the note and mortgage, relief was not sought for this item in the pleadings. That the plaintiffs are not required to deliver the deed to the above lands to the defendants in the event of the payment of the judgment herein provided for, until the balance of the agreed down payment is paid in full . . ."

The chancellor ordered foreclosure of the second mortgage and delivery of the bill of sale.

On appeal, the appellants contend for reversal that the trial court erred in holding appellants in default on the note and mortgage and in rendering judgment for the appellees thereon, and, further, that the appellees are

precluded by the doctrines of waiver and estoppel from accelerating the payment of the note and mortgage.

On cross-appeal, the appellees assert that the Court erred in holding that the payments made by the appellants would first be applied to the personal property and that the personal property now belongs to the appellants. Further, that the Court erred in not sustaining the appellees' motion and plea that the pleadings be amended to conform with the proof wherein appellees sought judgment for the balance of the down payment.

The appellants were permitted to take possession of the farm and personal property before making any payments. During 1966 appellants paid to the appellees $32,000.00 in cash. It is appellants' position that during the years of 1966 and 1967 the appellees received from appellants a total of approximately $65,000.00 which included cash payments together with income from the operation of the farm by the appellants. Further, that appellees had refused a tender of a $20,000.00 cash payment about a month before the foreclosure action. The appellees' position is, however, that during this period they had only received from the appellants the gross sum of $53,520.84 out of which the appellees had to pay the sum of $26,261.02 for agreed necessary expenses in the operation of the farm which included insurance, taxes, and other agreed items, leaving a balance of $27,259.82 as net receipts from the appellants.

There was evidence by the appellees that the oral agreement provided that the $50,000.00 down payment would be paid immediately; that appellees would first deduct from the receipts the payments of certain costs that would become necessary in the operation of the farm as well as taxes, insurance, etc.; that any net payments would then be applied to the $50,000.00 unsecured open account until it was fully paid; that this application of the payments was with the full knowledge of appellants, leaving a balance of $22,740.18 due on the down payment;

that no payment had been applied on the second mortgage; that no payment had been made by appellants on their note and mortgage; that appellants had been warned repeatedly by the appellees of the default and on two occasions appellees' attorney had written appellants about their delinquency on payments on this mortgage; that appellees had exercised forbearance during two and one-half years in bringing this foreclosure proceeding and further, in the collection of the full down payment; that appellees were to retain and not record the deed and second mortgage nor deliver the bill of sale to the personal property until the full down payment account was paid; that appellees had not agreed to accept a $20,000.00 cash payment a month before foreclosure; that if appellees had accepted such a payment and applied it according to their oral agreement there would still be a balance due on the open account.

The appellants do not dispute the $50,000.00 account as a down payment. They do dispute the oral agreement as to the priority in the application of their payments and as to when they would be entitled to the bill of sale to the personal property. They offered evidence that their payments were first to be applied to the two mortgages and then any balances were to be applied first to payment of the personal property; that whenever their payments on the open account amounted to $25,000.00, it was understood that the bill of sale, which was itemized and completed, would be delivered to them; that this was necessary and so understood for purposes of needed collateral and additional financing which they had made an effort to do; that it was understood that appellants could not make a full and immediate down payment; that their payments depended upon the profits from the purchased farm and the sale of property they owned in another state; that appellants had offered a $20,000.00 down payment to appellees about a month before foreclosure proceedings were started and that appellees insisted upon a $25,000.00 payment plus a $4,-

000.00 boat and a rewriting of the deed, note and mortgage, to which appellants would not agree.

It is a familiar rule of law that "as between debtor and creditor, where the debtor fails to designate the debt and there are several debts to which the payment can be applied, the creditor may apply it as he chooses." *Cooper* v. *Sparrow,* 222 Ark. 385, 259 S.W. 2d 496 (1953); *Hawkins* v. *Hawkins,* 200 Ark. 38, 137 S.W. 2d 904 (1940); *Johnson* v. *Gammill,* 231 Ark. 1, 328 S.W. 2d, 127 (1959); *Snow* v. *Wood,* 163 Ark. 280, 259 S.W. 733 (1924). Further, the burden was on the appellants, the debtors, to show that their payments were given and to be applied first in satisfaction of the installments due on the second mortgage rather than upon the agreed down payment. *Hill* v. *Green,* 127 Ark. 406, 192 S.W. 209 (1917). On this issue, as well as the other facets of this case, the evidence was in conflict as to the oral agreement between the parties. Their testimony and exhibits tended to support their respective contentions. When we, on appeal, consider the question of the preponderance of the evidence, the judgment of the chancellor will be considered as persuasive in situations where "the evidence is conflicting, and evenly poised, or nearly so." *Turnage* v. *Matkin,* 227 Ark. 528, 299 S.W. 2d 831 (1957); *City of Little Rock* v. *Newcomb,* 219 Ark. 74; 239 S.W. 2d 750 (1951); *City of Little Rock* v. *Tucker,* 234 Ark. 35, 350 S.W. 2d 531 (1961). In *Hunter* v. *Dixon,* 241 Ark. 725, 410 S.W. 2d 389 (1966), we said:

> "This court has held in a long line of cases that while chancery cases are tried de novo in this court, a decree of the chancery court will not be reversed where there is a disputed question of fact unless the findings are clearly against the preponderance of the evidence."

Upon a review of the issues presented by the pleadings, the testimony and the exhibits in the case at bar, we

cannot say that the findings of the chancellor are against the preponderance of the evidence.

Affirmed on direct and cross-appeal.

THE MULLERS MUTUAL FIRE INSURANCE COMPANY OF TEXAS v. DAVID RUSSELL, ET AL

5-4919 443 S.W. 2d 536

Opinion Delivered June 9, 1969
[Rehearing denied August 25, 1969.]

Wright, Lindsey & Jennings for appellant.

Frank H. Cox for appellee (Russell).

Hall, Tucker & Lovell and *Rose, Meek, House, Barron, Nash & Williamson* for appellee (Nelson).

FRANK HOLT, Justice. The appellee, David Russell, brought this action to recover on a fire insurance policy in the amount of $9,000.00 together with a twelve percent penalty and attorney's fee as provided by Ark. Stat. Ann. § 66-3238 (1966 Repl.). The appellee, Herman Nelson, and the Veterans' Administration, were made parties to the action for the purpose of determining their respective interests in the property destroyed by fire. The appellant insurer, the Millers Mutual Fire Insurance Company of Texas, denied coverage in its answer, relying upon the clause in the policy suspending the insurance "while the hazard is increased by any means within the control or knowledge of the insured." The appellant cross-complained against appellee, Nelson, for any amounts which it might be adjudged to pay as a result of the suit on the policy. During the trial, the appellant admitted liability as to the interest of the Veterans' Administration as a mortgagee. The trial court directed a verdict in favor of appellee Russell for the full amount of the policy coverage, including penalties and attorney fees. The trial court refused to direct a verdict in favor of appellant against appellee Nelson for any of the amounts it was liable to pay under the policy. The appellant's claim against appellee Nelson was submitted to the jury which returned a verdict in favor of appellant in the amount of $72.44. This represented an uncollected increase in premium.

For reversal of the judgment, the appellant contends that the lower court erred in failing to direct a verdict for appellant on its cross-complaint against appellee Nelson for the full amount of any judgment rendered against appellant. We do not agree.

When the policy was first issued by the appellant, the building was covered as a "frame, approved roofing, one-family, tenant dwelling." It was owned by appel-

lee Nelson, an independent insurance agent, who had been appellant's agent since 1951. A standard mortgagee clause provided coverage for the Veterans' Administration as a mortgagee. The policy contained the following provision:

> "Conditions Suspending or Restricting Insurance. Unless provided in writing adding hereto, this company shall not be liable for loss occurring
>
> (a) While the hazard is increased by any means within the control or knowledge of the insured; . . ."

The insured building was used as a residence until it was sold in October, 1966 by appellee Nelson to appellee Russell who used it as a terminal for his trucking company until September, 1967 when it was completely destroyed by fire.

Nelson learned in February 1967 of the change in the use of the building and promptly requested an inspection and rating from the Arkansas Inspection and Rating Bureau in order to determine the premium rate to be applied to the new use of the building. About the same time, Nelson issued an endorsement which amended the name of the insured on the policy to read: "Herman Nelson, Vendor, David Russell, Vendee." This endorsement was sent to the appellant. In March, Nelson received a rating notification from the bureau that the building was classified for insurance rating purposes as "office occupancy, frame, unprotected", which is a risk unacceptable to appellant according to an underwriting guide for its agents.

This classification reflected an increase in the hazard and a corresponding increase in premiums if accepted. The change in rate was approximately six times greater than the rate that was being paid. Upon a routine billing by Nelson's office, this lower annual prem-

ium was paid in April by the Veterans' Administration, the mortgagee. This premium was forwarded by Nelson, less his commission, to the appellant. Nelson never notified appellant of the change in use or occupancy of the building. According to him, this was due to his understanding that appellee Russell was in the process of placing his insurance elsewhere.

The issue of the negligence of appellant's agent, appellee Nelson, was submitted to the jury upon proper instructions and approved by the appellant. The jury found from an interrogatory that Nelson knew, or should have known, that the risk or hazard was increased by appellee Russell's use of the building. In another interrogatory, the jury found that appellee Nelson did not know, nor should have known, that the risk in insuring the property as a truck terminal was a prohibited risk for which appellant would not extend coverage. As stated previously, the jury awarded $72.44 to the appellant for the increase in premium for the added risk.

In determining whether the trial court should direct a verdict, we review the evidence on appeal most favorable to the party against whom the directed verdict is requested. It is not error for the trial court to refuse the request if there is any substantial evidence tending to establish the issue favorable to the party against whom the request is made. *Home Mutual Fire Insurance Company* v. *Cartmell,* 245 Ark. 44, 430 S.W. 2d 849 (1968); *Barrentine* v. *The Henry Wrape Company,* 120 Ark. 206, 179 S.W. 328 (1915); *Yahraus* v. *Continental Oil Company,* 218 Ark. 872; 239 S.W. 2d 594 (1951). In the case at bar, appellee Nelson had been an agent of appellant for approximately seventeen years. He admitted that he determined there was an increase due in the premium rate and that he failed to collect and forward the additional premium for which the jury found him liable. However, other than the testimony of another agent, Nelson's testimony stands practically undisputed that appellant would have accepted the addi-

tional coverage. He testified that he had placed a big portion of his general type business with appellant during his seventeen years as their agent; that from his experience and business practices with appellant it would have accepted an endorsement by him showing a change of occupancy and an increase in premium; that this was the only thing that was not done by him according to the usual business practices with the appellant. In substance, his testimony is largely uncontradicted that, based upon his own experience and business practices with the appellant, if he had endorsed this policy to cover the new classification, and forwarded the additional premium, appellant would have accepted it. We must hold that there was substantial evidence to support the verdict on the issue as submitted to the jury and that the court properly refused to direct a verdict for the appellant.

Appellant next insists that the lower court erred in failing to direct a verdict in favor of appellant and against appellee Russell. Appellant argues that the coverage was suspended as of the time of appellee Russell's change in the use and occupancy of the building because of the undisputed increase in "the hazard" prohibited by the policy. We cannot agree. Appellee Russell, as an insured, paid and appellant received the annual premium on the policy. In *Allemania Fire Ins. Co.* v. *Zweng*, 127 Ark. 141, 191 S.W. 903 (1917), we said:

> "Where an agent does anything within the real or apparent scope of his authority it is as much the act of the principal as if done by the principal himself."

We have consistently followed the general rule that a provision in a fire insurance policy included for the benefit of the insurer can be waived by the insurer through the conduct of its agent acting within the real or apparent scope of his authority. *Capital Fire Ins. Co.*

v. *Montgomery,* 81 Ark. 508, 99 S.W. 687 (1907) and *Queen of Arkansas Ins. Co.* v. *Laster,* 108 Ark. 261, 156 S.W. 848 (1913) [warranty against incumbrances]; *Kansas City Fire & Marine Ins. Co.* v. *Kellum,* 221 Ark. 487, 254 S.W. 2d 50 (1953) [sole ownership clause]; *Farmers Union Mutual Ins. Co.* v. *Hill,* 205 Ark. 139, 167 S.W. 2d 874 (1943); *Washington County Farmers Ins. Co.* v. *Reed,* 218 Ark. 522, 237 S.W. 2d 888 (1951) and *Peoples Indemnity Ins. Co.* v. *Mashburn,* 233 Ark. 575, 345 S.W. 2d 922 (1961) [occupancy clauses].

It is undisputed in the case at bar, that appellant's agent was fully aware of the change in occupancy and the increased hazard in the use of the building by the insured.

Affirmed.

HARRIS, C.J., and BYRD, J., dissent.

CARLETON HARRIS, Chief Justice. I disagree with the majority insofar as this case relates to Nelson. Though the property occupied by Russell was being used as a truck terminal as early as February, 1967, and though Nelson was familiar with this fact, he did not, at any time before the fire, on September 28, 1967, advise the company by letter, endorsement, new policy, or in any other manner, that the status of the property had changed from residential to commercial. He admitted that he had a duty as appellant's agent to notify the company of the change of use, and his only defense was to say that the company would have accepted the policy, even though it had been endorsed to cover the new classification. This evidence is not only speculative, but is also contrary to the evidence offered by appellant.

James Arthur Dunaway, also an agent for appellant, testified that the company furnished an underwriting guide and handbook to its agents, which showed whether a particular company would or would not write insur-

ance on a particular type of risk. The witness said that the risk accepted by Nelson was on the Millers Mutual prohibited risk list.

The result of Nelson's negligence in failing to notify appellant is that Millers Mutual Fire Insurance Company of Texas is liable under a risk that it did not know it held—a risk that it never had the opportunity to refuse. I am of the opinion that the company is entitled to recover from Nelson the full amount of the judgment rendered against it.

I therefore respectfully dissent.

BYRD, J., joins in this dissent.

DAVID TURNER v. WILLIAM O. ROSEWARREN, ET AL

5-4883 440 S.W. 2d 769

Supplemental Opinion on Rehearing
Delivered June 9, 1969

[Original opinion delivered May 5, 1969, p. 798.]

CARLETON HARRIS, Chief Justice. We find no merit in the petition for rehearing on the main case, but, in line with our decisions in *St. Louis Southwestern Railway Company* v. *Clemons*, 242 Ark. 708, 415 S.W. 2d 332,

and *Hayes Brothers Flooring Company* v. *Carter, Admx.*, 240 Ark. 522, 401 S.W. 2d 6, the cause is remanded for another trial, rather than dismissed. In *Hayes* v. *Carter, supra,* we said:

> "Appellant asks that we reverse and dismiss, but, after due consideration, we think it is possible that the case has not been fully developed. In fact, our ordinary procedure in reversing judgments in law cases is to remand for another trial, rather than dismiss the cause of action. It is only where it clearly appears that there can be no recovery that we consider it proper to dismiss the cause. *Pennington* v. *Underwood,* 56 Ark. 53, 19 S.W. 108, and *Arkansas Natural Gas Company* v. *Gallagher,* 111 Ark. 247, 163 S.W. 791."

It might be added that, in remanding this cause, we have given no consideration whatsoever to the so-called "petition for new trial."