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ARKANSAS STATE MEDICAL BOARD *v.*
DR. J. BYRON GRIMMETT

5-5461 463 S. W. 2d 662

Opinion delivered March 1, 1971

Warren & Bullion, for appellant.

John M. Fincher, for appellee.

CARLETON HARRIS, Chief Justice. This appeal comes from the action of the Pulaski County Circuit Court in reversing and setting aside an order of the Arkansas State Medical Board which suspended the license of J. Byron Grimmett a physician of Waldo, to practice medicine. Grimmett had been charged with acts of unprofessional conduct, including charges that he aided and abetted an unlicensed person to practice medicine, violated the laws governing the possession and distribution of amphetamines and barbiturates, and laws relating to the possession and distribution of narcotic drugs. Grimmett, appellee herein, was also charged with failing to possess the moral character requisite for the proper practice of medicine. After a lengthy hearing, the board found appellee guilty of the acts with which he was charged, and suspended his license to practice. The following provision concludes the order:

"Grimmett may, at the next regular meeting of the Board, present any relevant evidence to the Board which he believes may cause the Board to reconsider its action and reinstate his license. This hearing should not be closed at this time, but should be continued subject to the request of Grimmett or his attorney to appear before a subsequent regular meeting of the Board and present other evidence."

A Petition for Review was filed in Pulaski Circuit Court. After reviewing the evidence, that court made *inter alia* the following findings pertinent on this appeal:

"3. That a cursory weighing of the proof indicates that there was substantial evidence to warrant the action of the Board in suspending petitioner's license but a careful and considered examination of the evidence convinces that the Board should have warned and admonished the petitioner in the areas upon which the Board predicted its order; that such warning and admonition was justified and would have been proper; and that such warning and admonition would have been sufficient instead of the harsh, severe and drastic action taken which deprived the community in which he practiced of acutely needed medical services. * * *

5. That Ark. Stats. 5-713 provides that a reviewing court can stay enforcement of the Board's order and can reverse the Board's action on such terms as may be just."

The court then found that it would be unjust to continue the suspension of appellee's license to practice medicine and surgery while the issues are being litigated, and accordingly reversed the order of the Arkansas State Medical Board, restoring Dr. Grimmett to all the rights and privileges of a duly licensed physician, subject however to the following provision.

"It is further CONSIDERED, ORDERED AND ADJUDGED that said restoration of the right to prac-

tice medicine shall be subject to the following conditions: That Dr. Grimmett shall not maintain any stock of any drug the use and possession of which is subject to regulation under the Arkansas Uniform Narcotic Drug Act, the Arkansas Drug Abuse Control Act, nor shall he maintain any stock of drugs which are designated as 'legend' drugs under the Federal Food Drug and Cosmetic Act. This condition shall not be interpreted to prevent Dr. Grimmett from maintaining a supply of emergency drugs for his personal office use provided said supply does not exceed the amount of emergency supplies normally stocked by non-dispensing physicians."

From the order so entered, the Arkansas State Medical Board brings this appeal. It is first contended that there was substantial evidence to support the order of the board and the court erred in reversing that order.

In *Bockman* v. *Ark. State Medical Board,* 229 Ark. 143, 313 S. W. 2d 826, this court said:

"The appellant contends that the board's findings of fact are not sustained by any substantial competent evidence. Upon this point it is our rule in proceedings like this one that the board's action will not be set aside on certiorari unless there is an entire absence of substantial evidence to sustain the findings, in which case the board's action is deemed to be arbitrary. [citing cases]"

In *McCain, Labor Commissioner* v. *Collins,* 204 Ark. 521, 164 S. W. 2d 448, a case involving misconduct of a Supervisor of the Security Division of the State Labor Department, this court quoted from *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041,[1] as follows:

"We are not called on to decide primarily whether or not the decision of the board was correct. The law-

[1]This case dealt with an action instituted by the Board of Control of State Charitable Institutions against the Superintendent of the State Hospital for Nervous Diseases, seeking his ouster for alleged misconduct.

makers have placed that authority in the board of control, and it would be clearly an encroachment by the courts upon the authority of another department of government to undertake to substitute the judgment of the judges for that of the members of the tribunal vested with authority to manage the institutions of the state and to appoint and remove those who are placed in charge. When all the testimony in the case is considered and viewed in the strongest light to which it is susceptible in support of the board's findings, it cannot be said that there is an entire absence of evidence of a substantial nature tending to establish the charge of inattention and neglect of duty on the part of the superintendent. This being true, it becomes the duty of the courts, upon well-settled principles of law, to leave undisturbed the action of the tribunal especially created by the lawmakers to pass upon those questions. Any other view would make the board of control a mere conduit through which a decision on the removal of an unfaithful or inefficient superintendent would be passed up to the courts instead of leaving the matter where the lawmakers have placed it, in the hands of the board."

That language is likewise *apropos* in the case now before us. Accordingly, let us examine the evidence to determine if it is of a substantial nature.

Dr. Grimmett was charged with a violation of Ark. Stat. Ann. § 72-613 (Supp. 1969), it being asserted that he was guilty of aiding and abetting Pat Kimbell, an unlicensed person, to practice medicine. Two persons, in addition to Dr. Grimmett, testified to facts pertinent to this charge. Sgt. Bruce Atkinson, Supervisor of the Narcotic and Dangerous Drug Bureau of Arkansas State Police, testified that he visited the Grimmett Clinic at Waldo on three occasions. On August 8, 1969, he went there and talked with Mrs. Pat Kimbell, who appeared to be in charge. The sergeant, who used the name of Dale Henry Attwood, told her that he was from out-of-state and desired to purchase some diet pills. He said he kidded with Mrs. Kimbell about what he wanted diet

pills for, and she said that the doctor was not there, but she could handle anything he wanted; that she was taking care of the medicine and pills and that the doctor would sign a prescription later. The witness stated that she first took his blood pressure, saying that the doctor had so authorized her; that the reading was 160 over 100, and Mrs. Kimbell stated that this was too high to permit him to purchase amphetamines. He replied that he had been drunk at a party and Mrs. Kimbell said that would account for it, and went ahead and made the sale to him. He purchased a bottle containing thirty pills which were later identified as Dexamyl spansules. On leaving the clinic, he sealed the drugs and marked them as evidence. The pills were turned over to the Arkansas Food and Drug Laboratory, which is customarily used by the State Police for analysis. A subsequent report by two chemists with Arkansas Food and Drug found the pills to be amphetamines and amobarbitals. Sgt. Atkinson testified that he paid $7.11 to Mrs. Kimbell, and received a receipt for that amount.

The witness stated that on December 3, 1969, he made another purchase from a lady on duty, asking for a refill of the prescription of August 8. He did not have the bottle nor a signed receipt. The lady filled that prescription, and he then asked her for some quarter, or half, grain codeine pills for headaches. She also filled that prescription, stated that Dr. Grimmett would sign the prescription pad at a later date. Sgt. Atkinson received twenty-four codeine pills, and paid $12.30, apparently for both prescriptions. He said these pills were also identified by the above mentioned laboratory as Dexamyl amphetamines and codeine phosphate.

Atkinson testified that on January 27, 1970, he went back to the clinic, Mrs. Kimbell being in charge, and she again made a sale of amphetamines to him. He requested additional codeine tables for headaches and "hang over" and she also furnished that.

Woodrow Little, an Investigator for the Arkansas State Medical Board, also, on this occasion, made two

purchases, in the presence of Sgt. Atkinson, these drugs later being identified by the chemists as Overdrin LA, a controlled drug.

Atkinson testified that Dr. Grimmitt had never examined him, and that on the night of the arrest of Grimmett, made on January 27, the doctor admitted that he had never before seen Atkinson. Little also testified that he was never examined by Grimmett, and had never been to the doctor as a patient. Little's testimony reveals that he had been observing Grimmett's Clinic for about two years, and had been there seven times posing as a detail man.[2] Little said that he would sit in the clinic and would observe people bringing in empty bottles and asking for pills and would then observe the ladies working in the clinic delivering pills to customers. Grimmett testified that he had examined Atkinson "some time last summer" when Atkinson came in as a patient, and that he had prescribed Dexamyl spansules for him. He denied that he had admitted to Atkinson on the occasion of his arrest that he had never seen the sergeant before. He also testified that Little had never bought any drugs from his clinic to his knowledge.

A handwriting expert testified that the ledger page for August 8, 1969, reflected that Pat Kimbell had made an entry reflecting a sale to Dale Attwood, and that entries immediately under this particular entry were made by Dr. Grimmett. Similar testimony was offered concerning other transactions, and it is difficult to believe that the doctor would not have noticed the entry made by Mrs. Kimbell when making his own entries.

Ark. Stat. Ann. § 72-604 (Repl. 1957) defines the practice of medicine as follows:

"(1) The term 'practice of medicine' shall mean: (a) holding out one's self to the public within this state as being able to diagnose, treat, prescribe for, palliate or prevent any human disease, ailment, injury,

[2]He never went when Grimmett was present.

deformity, or physical or mental condition, whether by the use of drugs, surgery, manipulation, electricity, or any physical, mechanical or other means whatsoever; (b) suggesting, recommending, prescribing or administering any form of treatment, operation or healing for the intended palliation, relief, or cure of any physical or mental disease, ailment, injury, condition or defect of any person with the intention of receiving therefor, either directly or indirectly, any fee, gift, or compensation whatsoever; * * *"

Appellee says there is no evidence that Mrs. Kimbell performed the acts heretofore related with the intention to receive "any fee, gift, or compensation". The short answer to this contention is that the testimony reflects that she did receive compensation for the drugs furnished Atkinson and Little. It is also argued that it is not shown that Mrs. Kimbell was not licensed as a nurse. Mrs. Kimbell did not testify, and while, if she were licensed as a nurse, it would appear that some mention of that fact would have been made during the course of the evidence, her status or lack of status as a nurse is immaterial to the disposition of the matter before us. Ark. Stat. Ann. § 72-729 (Supp. 1969), subsection d, states:

"The practice of professional nursing means the performance for compensation of any acts in the observation, care and counsel of the ill, injured or infirm or in the maintenance of health or prevention of illness of others, or in the supervision and teaching of other personnel, or the administration of medications and treatments, *as prescribed by a licensed physician,* [Our emphasis] or dentist; requiring substantial specialized judgment and skill and based on knowledge and application of the principles of biological, physical and social science. *The foregoing shall not be deemed to include acts of diagnosis or prescription of therapeutic or corrective measures.* [Our emphasis]"

Mrs. Kimbell's acts went beyond nursing care. Let it be remembered that the testimony reflects that she

took Sgt. Atkinson's blood pressure, and told him that it was too high for him to purchase amphetamines, but after being told that he had been drunk at a party, agreed that that would account for it, and made the sale. Further, when Atkinson asked her for codeine pills for relief of his headaches, she furnished the pills to him, taking pay. As previously stated, there is evidence that Dr. Grimmett was aware that employees were making sales. The facts testified about constituted substantial evidence that Dr. Grimmett was aiding and abetting an unlicensed person to practice medicine.

Ark. Stat. Ann. § 72-613 (Supp. 1969) provides that the board may revoke or suspend a license to practice medicine for *inter alia* violation of the laws of the United States or the State regulating the possession, distribution or use of narcotic drugs, or drugs, the sale and distribution of which is regulated by the Arkansas Barbiturate and Benzedrine Law.

The Arkansas Drug Abuse Control Act, Ark. Stat. Ann. § 82-2101 *et seq* (Supp. 1969) defines various types of drugs. Among other definitions appear the following:

"(d) The term 'depressant or stimulant drug' means:

(1) Any drug which contains any quantity of (A) barbituric acid or any of the salts of barbituric acid;* * *

(2) Any drug which contains any quantity of (A) amphetamine or any of its optical isomers; (B) any salt of amphetamine or any salt of an optical isomer of amphetamine; * * * "

Under authority of a court order, Grimmett was arrested and the premises searched for drugs. Officer Atkinson, Mr. Little, Kenneth (Phillip) Melancon, employed by the Bureau of Narcotics and Dangerous Drugs, and William H. Hogue, an employee of the Food and Drug Division of the Arkansas State Health Department, all participated in the search. An attorney for Grimmett

was also present while the stock of drugs was being inventoried. The officers found drugs in almost every room in the building, locating them in all types of containers, including coffee cans and orange juice bottles. They were not under lock and key. Apparently, labels which had been taken from samples of various drugs which the doctor had received, had been taken from the samples and placed on whatever container was used as a matter of identifying the particular drugs in that container. The labels taken from the samples would show that a few doses had been included in the sample, but some of the containers held several thousand pills or tablets.[3] Hogue said that many of these were controlled drugs. The inventory revealed a total of 1,812,976[4] dosages of drugs at the time Grimmett was arrested. Mr. Melancon testified that Grimmett had over 300,000 dosages of Fiorinal, which is a controlled drug containing barbiturates. Sgt. Atkinson testified that Grimmett himself stated upon being arrested that he (Grimmett) doubted if he could come within a million of the actual drugs on hand due to the fact that they were physician's samples. The fact that tabs from the samples had been placed on containers holding hundreds or thousands of pills is, of course, a clear indication that these sample drugs were being sold. Melancon testified that Grimmett made the statement that most of his money came from the dispensing practice and if he

[3]From the testimony of Mr. Hogue: "A number of these drugs have monograms on the tabs from the manufacturer and a number of these bottles contained a small label for instance taken from a physicians sample package the label says 'four tabs or four caps of physicians samples' and this small label would be taken and put onto a container of a gallon coffee can or half gallon can or orange juice bottle or container other than the original package. This would constitute mislabeling and misbranding for a number of these sample packages. * * * These small labels have on each label each physicians sample package 'control or lot number of that particular drug'. As you know, a thousand, two thousand, fifty or what not broken down from packages that originally contained four or six samples constitute a number of different lot or control numbers over a period of time."

[4]This figure was taken from the brief. A tabulation compiled on an adding machine, from exhibits in the record, reveals 1,834,052.

didn't have his dispensing practice, he didn't want to operate. Under the provisions of Art. Stat. Ann. § 82-2107 (Supp. 1969), every person engaged in manufacturing, compounding, processing, selling, delivering or otherwise disposing of any depressant or stimulant drug shall, upon the effective date of the Act (June 29, 1967), prepare a complete and accurate record of all stocks of each drug on hand and shall keep such record for three years. Mr. Hogue testified that Grimmett told him that he had not made this inventory of amphetamines and barbiturates in 1967, and the testimony reflected that there were as many as 3000 controlled drugs in some of the containers found in the clinic. The testimony is somewhat confusing in that Sgt. Atkinson stated that Grimmett later produced an inventory; however he stated that this inventory "carried prices but no quantities". Be that as it may, it is very clear that whatever inventory there might have been did not come close to covering all the drugs in the possession of Grimmett.

Ark. Stat. Ann. § 82-1005 (Supp. 1969) requires that a written order for any narcotic drug shall be signed in quadruplicate by the person giving the order, or his duly authorized agent. The section provides what shall be done with these copies, including a requirement that one should be sent to the State Health officer not later than the 10th of the month following the month during which the order was made. In event the order is filled, there is a further requirement that each party shall preserve his copy of the order for a period of two years in such a way for it to be readily accessible for inspection by any public officer or employee engaged in the enforcement of the act. Mr. Hogue testified that Grimmett did not have such a complete and accurate record of drugs received by him. "Some of his order forms that he has to mail in when he places an order for narcotic drugs were missing. We have not received all order forms on orders he had placed". It would appear from this testimony that Hogue checked copies of drug orders found in Grimmett's office with files at the State Health Department, thus making his determination that copies

had not been sent to the Health Department. Appellee makes a vigorous attack upon this evidence,[5] and we agree that Mr. Hogue could have been much more definite and specific in his testimony, explaining exactly how he knew that this provision of the law had not been complied with, and offering into evidence whatever exhibits supported his testimony.

Ark. Stat. Ann. § 82-1009 (Supp. 1969), provides:

"Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. * * *"

Mr. Hogue testified that he could not find complete records of the dispensing of drugs. Appellee complains that Hogue did not even bother to produce "an inaccurate and incomplete record for the inspection of the Board". Of course, Mr. Hogue's testimony was that he could not find a complete record and, after all, if such a record existed, only Grimmett, or those to whom he had confided, would know where to locate such a record. Certainly, though the over-all burden was on the complainants to establish their case, Dr. Grimmett had the opportunity to present records of compliance

[5]From appellee's brief: "This is not substantial competent evidence because (1) all we have is his naked word, (2) there is no evidence to show how these records are received, filed, stored, etc., by the Health Dept. so the conclusion that Mr. Hogue's Dept. *lost* the records could be as easily drawn as the conclusion that Dr. Grimmett did not mail them in as required, (3) 'some of them were missing' is so vague and indefinite no conclusion can be drawn, (4) the witness did not say *which* ones are missing, so appellee had no opportunity to make specific rebuttals to Mr. Hogue's assertions, (5) the records that had been sent were not produced at the hearing so Appellee could not ascertain by inspection which, if any, of the records were missing, and for that matter, (6) if they are missing, how does Mr. Hogue KNOW they are missing. No foundation whatever has been laid in the record that could lend credibility to the testimony on this point."

with the law, and it would seem that one so charged would very quickly do so—if such records existed. He did testify briefly, though he reserved the right to claim the privilege granted under the Fifth Amendment to the Federal Constitution, and actually did invoke the protection of that Amendment at one point.

Witnesses Hogue, Atkinson, and Melancon all testified that the cabinets containing the drugs were not locked as required, some narcotics even being on the shelves. Appellee says that the Statute (Ark. Stat. Ann. § 82-1025 [Supp. 1969]), which requires that narcotic drugs be kept in a safe or other receptacle equipped with a lock sufficient to secure such narcotic drugs against theft, only applies to a licensed pharmacist. There is no necessity for us to go into the requirements of the state's statutes relative to this subject for it has been previously pointed out in this opinion that subsection (5) of Ark. Stat. Ann. § 72-613 provides that violation of the laws of the United States, as well as state laws, regulating possession or use of narcotic drugs, constitutes "unprofessional conduct", and is a ground for revocation of a medical license. 26 CFR 151.471, under the topic, "Safeguarding of Narcotics" states that *"Narcotic drugs and preparations shall at all times be properly safeguarded and securely kept* (our emphasis) where they will be available for inspection by properly authorized officers, agents, and employees of the Treasury Department and the Department of Justice".

The testimony makes clear that the drugs under discussion were neither "safeguarded" nor "securely kept".

In addition to the violations heretofore discussed, the board found Grimmett guilty of failing to possess the moral character requisite for the proper practice of medicine. This finding was based upon the testimony of three young women, all of whom testified that they had been patients of Dr. Grimmett; that he had prescribed for them various drugs, and had made advances to them. Two of the women testified that they had sexual relations with Dr. Grimmett, the third testifying

that the doctor had endeavored to have relations with her. All testified that he consistently prescribed different drugs and one was finally committed for treatment as a drug addict. Dr. Grimmett admitted sexual relations with one of these women, although he stated that he did not recall whether this occurred while she was a patient or after she was a patient, but he denied the testimony of the other two. Admittedly, he also had fathered an illegitimate child by still another woman, while married and living with his wife.

It is strenuously argued by appellee that, though there is a requirement that one possess good moral character before being licensed to practice, there is no statutory authority for the board to revoke a license because of immorality.

This opinion is already lengthy, and the facts previously enumerated (disregarding the charge of immorality) are, we think, clearly sufficient to sustain the findings and order of the board. Accordingly, no good point would be served by discussing this particular charge.

Some dozen witnesses, residents of the area in which Dr. Grimmett has practiced, testified in his behalf, stating that their association with the doctor as patients had been pleasant and without any flaw; some said that they had tried to get drugs refilled but were unable to do so. Several mentioned various courtesies that had been extended, and one related that when called to the patient's home, the doctor took his shoes off in order to keep from tracking up the rug. Other persons said that the people in the community needed his services. Of course, in a case of this nature, this is what might be termed "negative" evidence. For the fact that he did not act in the manner, heretofore discussed, with these particular patients, in nowise disproves the evidence already mentioned; the witnesses, after all, were only saying that no violations occurred during their contacts with the doctor.

We think the evidence relating to the violations of drug laws was very convincing, and apparently the trial court was likewise of the view that, at least, the testimony relating to the drugs was true, for in its judgment providing that Dr. Grimmett could continue to practice, a proviso was inserted that the doctor could not maintain any stock of any drug that was subject to regulations under the Arkansas Uniform Narcotic Drug Act and the Arkansas Drug Abuse Control Act; nor legend drugs under the Federal Food and Cosmetology Act (except for a supply of emergency drugs for personal office use not exceeding a supply normally stocked by a non-dispensing physician).

We do not agree with the trial court that the action taken by the board was "harsh", "severe", or "drastic"; in fact, from the evidence introduced, and entirely aside from the question of possession the requisite moral character to practice, we are of the opinion that the board's order was not only justified, but rather restrained. Dr. Grimmett's license was not revoked, and the suspension was not for a particular period of time. To the contrary, Grimmett was given the opportunity to present, at the next regular meeting of the board, any relevant evidence which might cause the board to reconsider its action to reinstate his license. The order of the board specifically provided that the hearing was not closed, but should be continued, subject to the request of Grimmett or his attorney to appear and present other evidence. Thus, appellee still has the right, if he so desires, and can furnish additional evidence of extenuating circumstances, to take this step.

There was substantial evidence to support the action of the Board, and it follows from what was said in *McCain, Labor Commissioner* v. *Collins supra* that the Court erred in entering the judgment appealed from.

Accordingly, it is the order of this Court that the judgment of the Pulaski County Circuit Court is re-

versed, and the cause is remanded with directions to reinstate the order of the board.

It is so ordered.

HARRY L. PARKIN ET AL *v.* WALTER M. DAY ET AL

5-5477 463 S. W. 2d 656

Opinion delivered March 1, 1971

Spitzberg, Mitchell & Hays and *Smith, Williams, Friday & Bowen,* for appellant.

Joe Purcell and *Lyle Williams,* for appellees.

GEORGE ROSE SMITH, Justice. By Act 100 of 1967 the General Assembly authorized state agencies to purchase duplicating equipment, which is used for making multiple copies of documents, forms, and other papers. Ark. Stat. Ann. §§ 14-354 to -356 (Repl. 1968). Under the

authority of the act the appellees, who constitute the Legislative Joint Auditing Committee, decided to buy a Multilith Duplicator, made by the Addressograph Multigraph Corporation. The Auditor of State, relying upon opinions delivered by the Attorney General from time to time, refused to approve the purchase, on the ground that the machine would produce "printing," contracts for which must be let to the lowest responsible bidder under Article 19, § 15, of the Constitution of 1874.

The appellees then brought this suit for a declaratory judgment with respect to the validity of Act 100 insofar as it authorizes the purchase of a machine such as a Multilith Duplicator. Interventions were filed by the appellants, who are printers or representatives of the printing industry. After a trial at which many witnesses were heard, the chancellor concluded that Act 100 is valid and that the proposed purchase is not forbidden by the Constitution. The correctness of those conclusions is the issue on appeal.

A Multilith Duplicator appears, from the testimony and exhibits in the record, to be a machine about four feet long, two feet wide, and four feet high. The operator inserts the original paper that is to be duplicated. By a series of processes that are largely automatic in the sense that great skill on the part of the operator is not required, the machine turns out duplicates at speeds up to 250 copies a minute. The machine first makes a "master," which is a reverse-reading (mirror image) copy of the sheet to be duplicated. The "master" may be imprinted on paper if only a few copies are needed or on aluminum if a great many copies are required. The machine produces copies by the application of ink to the surface of the "master," which in turn is applied to blank pieces of paper in much the same way as a lithographic printing press produces printed matter. A more elaborate model of the Multilith Duplicator is capable of turning out copies that have written or printed matter on both sides of the paper.

The emergency clause of Act 100 contains a legislative finding that the use of modern duplicating equip-

ment will save thousands of dollars in state printing costs. There is testimony that the use of such equipment by the Revenue Department and by the Joint Auditing Committee may save as much as $20,000 a year. Although that testimony is not entirely undisputed, it is fair to say from the proof that the legislature was justified in finding that the use of modern equipment can effect a saving of tax dollars.

The constitutional provision in question was manifestly designed to save money by requiring that certain contracts be let by competitive bidding. The pertinent sentence in Article 19, § 15, reads as follows:

> All stationery, printing, paper, fuel, for the use of the General Assembly and other departments of government, shall be furnished and the printing, binding and distributing of the laws, journals, department reports and all other printing and binding, and the repairing and furnishing the halls and rooms used for the meetings of the General Assembly and its committees, shall be performed under contract to be given to the lowest responsible bidder, below such maximum price and under such regulations as shall be prescribed by law.

In Section 1 of Act 100 the General Assembly recognized the existence of a constitutional question, in this language:

> In the passage of this act, the General Assembly is cognizant of the requirements of Section 15 of Article 19 of the Constitution of the State of Arkansas that all printing required by the General Assembly and state agencies and departments shall be performed under contract to be given to the lowest responsible bidder, with such contract to be approved by the Governor, Auditor and Treasurer. The General Assembly is further aware of the fact that improved technology has made available various types of duplicating equipment and processes which were not in existence at the time of the

> adoption of the Constitution, and which are not printing processes for which contracts were to be let pursuant to the provisions of Section 15 of Article 19 of the Constitution. It is, therefore, the purpose and intent of this act to define such duplicating equipment and processes to the extent that the same may be used by state agencies, yet preserving the requirements that all printing needs of state agencies let under contract shall be as provided in the Constitution. [Ark. Stat. Ann. § 14-354.]

In the second section of Act 100 the General Assembly set forth a comprehensive description of duplicating equipment that may be purchased and used by state agencies. Section 14-355.

At the trial the various parties to the case attempted to show by knowledgeable witnesses what is printing and what is not printing. The only conclusion to be drawn with confidence from the record is that it is impossible to arrive at a precise definition of printing. Among the factors stressed by one or another of the witnesses were: (a) Whether the particular process involves the production of an original or the mere duplicating of an existing original; (b) whether the work is done on the premises or outside in a commercial printing establishment; (c) the comparative size of the equipment being used; (d) the degree of skill needed to operate the equipment; (e) whether lithography is involved; (f) whether an offset process is involved; (g) whether photography is involved; (h) the distinction between the use of ink and the use of powder, as in xerography; (i) the number of copies being made; and (j) whether the particular process or machine has been generally accepted and used by the printing industry.

The proof clearly establishes what several of the witnesses stated in substance: Printing and the various modern methods of duplicating all have some characteristics in common and some points at which they tend to overlap one another. In between the two extremes represented by commercial printing on the one hand and the simpler forms of duplicating on the other, there is a

middle ground occupied by machines and processes that cannot be classified one way or the other with absolute assurance.

In this court, both in the briefs and in the oral arguments, the appellants have put their principal emphasis upon factor (j)—the usages within the printing trade itself—as the most reliable method of distinguishing printing from duplicating. By using that test the appellants profess to have no objection to the use by state agencies of the simpler methods of making copies, such as typewriting with carbon paper, stenciling, and mimeographing, or to the use of certain duplicating equipment identified by brand names, such as Ditto, Thermofax, Verifax, and Xerox.

The weight of the evidence does not support the appellants' contention that printing is properly defined as the product of the processes and machines that have been generally accepted and used by the printing industry. That definition appears to be merely a self-serving conclusion expressed by interested witnesses who are engaged in the printing business. To accept that point of view would mean in reality that the effect of the constitutional provision in question would be not so much to effect economies in state government as to establish a monopoly in the field of modern duplicating equipment, regardless of the comparative expense to the state.

Moreover, the evidence does not show that the Multilith Duplicator has been accepted and used exclusively or even predominantly by the printing industry. To the contrary, the record shows that 85% of all Multilith Duplicators have been purchased for in-office or on-premises use by private businesses or governmental agencies. Some of the remaining 15% of sales have been to printers, but the same thing could be said of typewriters, mimeographs, and other office machines that are useful in large business establishments.

We conclude from the preponderance of the testimony that modern on-premises duplicating equipment

comprises a separate category that came into existence after the adoption of the Constitution of 1874. Such machines have some aspects and characteristics in common with printing presses, but it does not follow that duplicating equipment produces "printing" as that term was understood in 1874 or as it is understood today. To the contrary, it is the essential and intended suitability of duplicating machines to in-office use that is their distinguishing quality. We are unwilling to say that the General Assembly exceeded its constitutional authority in permitting state agencies to use the same type of modern office machinery that is customarily used in business establishments throughout the country.

Affirmed.

FOGLEMAN, J., not participating.

SIMMONS LUMBER CO. ET AL *v.*
ANTHONY ZEILER, GUARDIAN ET AL

5-5485 463 S. W. 2d 659

Opinion delivered March 1, 1971

Daily, West, Core & Coffman, for appellants.

Wright, Lindsey & Jennings, for appellees

GEORGE ROSE SMITH, Justice. This is a death claim filed under the workmen's compensation law by the widow and minor children of Opal Lee Zeiler, who was accidentally killed in the course of his employment on March 27, 1967. At the time of his death Zeiler was a sawyer cutting timber for his employer, Wendell Nelms, who in turn was a logger working under a contract with the appellant Simmons Lumber Company. The principal question for the commission was whether the primary liability for the Zeiler death claim rested upon Simmons and its insurance carrier or upon Nelms and his insurance carrier. The commission put the responsibility upon Simmons and its insurer, upon a finding of fact that Simmons had orally agreed to provide workmen's compensation insurance coverage for Nelms and his employees. This appeal is from a circuit court judgment sustaining the commission's decision. We hold that the judgment should be affirmed.

Nelms testified that for some time prior to March, 1967, he had been cutting and hauling timber for Nebo Lumber Company at a contract price of $29 per thousand feet. Nelms was then carrying workmen's compensation insurance upon his own employees, with Reliance Insurance Company. About two weeks before Zeiler's death Nelms, with his men, began working for Simmons. Nelms testified that he and Mr. Simmons agreed upon a contract price of only $28 a thousand, instead

of $29, because Simmons was to carry the compensation insurance. This is Nelms's testimony upon that point:

> [Simmons] said, well, you ought to be able to knock off a dollar per thousand feet and us carry the insurance on it. I said, yeah, that sounds about right. It'd take that to pay the insurance. He said, well, now in the meanwhile we request you to carry liability on your truck, and we'll carry workmen's compensation on your crew, and that's all there was to it.

The appellants argue that the Simmons-Nelms agreement for compensation insurance coverage was not valid, principally because Simmons would not have agreed to provide the coverage if he had known that Nelms himself had a policy that was not to expire until about two months later. There was, however, certainly no fraud or concealment. According to the undisputed testimony, the two men simply made no reference whatever during their discussion to the possibility that Nelms might have a policy of his own.

Thus there is ample proof to support the commission's finding that Simmons agreed to provide compensation insurance for Nelms and his crew. In fact, there is no evidence to the contrary. The validity of such an agreement is thoroughly established by our decisions. *Hale* v. *Mansfield Lbr. Co.,* 237 Ark. 854, 376 S. W. 2d 670 (1964); *Hughes* v. *Hooker Bros.,* 237 Ark. 544, 374 S. W. 2d 355 (1964); *Stillman* v. *Jim Walter Corp.,* 236 Ark. 808, 368 S. W. 2d 270 (1963). It may be true, as the appellants argue, that the Simmons compensation policy would not have prevented Zeiler's dependents from bringing a wrongful death action against Simmons, as the prime contractor, had such a cause of action existed. Even so, that possibility does not entitle Simmons to repudiate its contract. Any such election would lie with the claimants, not with the primary contractor or its insurer.

The appellants also contend that the full commis-

sion should have allowed them to introduce a deposition of Howard Simmons that was not taken until almost six months after the referee had handed down his decision in favor of the claimants. The commission held that, under its own procedural rules, the deposition was taken and tendered too late; for the referee would have received the deposition if it had been offered earlier. We find no abuse of discretion in that ruling. Moreover, in the deposition Mr. Simmons admitted with candor that if Nelms had testified "that he'd talked to you wanting $29 and that you offered him $28 and agreed to carry insurance," that testimony would "likely be correct." Thus no prejudice is shown, for Simmons corroborated Nelms upon the pivotal point of fact in the case.

Affirmed.

JONES, J., dissents.

J. FRED JONES, Justice, dissenting. I do not agree with the majority opinion in this case.

Ark. Stat. Ann. § 81-1305 (Repl. 1960) provides, in part, as follows:

> "Every employer shall secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of employment, without regard to fault as a cause for such injury; * * * The primary obligation to pay compensation is upon the employer and the procurement of a policy or insurance by an employer to cover the obligation in respect to this act shall not relieve him of such obligation."

Apparently Nelms was legally obligated to secure compensation for his employees under § 81-1305 and there is no question that he did so. There is no question that Nelms was a subcontractor, and there is no question that the decedent, Zeiler, was an employee of Nelms

at the time of Zeiler's accidental death within the course of his employment by Nelms.

The compensation law is not concerned with the enforcement of verbal agreements between the prime and independent subcontractors. The compensation law is concerned with providing compensation benefits for injured employees coming under the act, and is not concerned with relieving prime contractors of common law tort liability by such subtle device as a verbal agreement between prime and subcontractors.

Section 81-1305, supra, prescribes the obligation of Nelms to his employee, Zeiler, in this case, and Nelms fulfilled his obligation under this statute.

Section 81-1306 prescribes Simmons' liability in the event that Nelms had not secured the compensation for which he was liable under § 81-1305. Section 81-1306 pertaining to subcontractors is as follows:

> "Where a subcontractor fails to secure compensation required by this act [§§ 81-1301—81-1349], the prime contractor shall be liable for compensation to the employees of the subcontractor. Any contractor or his insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employee of his subcontractor may recover from the subcontractor the amount of such compensation paid or for which liability is incurred. The claim for such recovery shall constitute a lien against any moneys due or to become due to the subcontractor from such prime contractor. A claim for recovery, however, shall not affect the right of the injured employee or the dependents of the deceased employee to recover compensation due from the prime contractor or his insurance carrier."

Now under the facts in the case at bar, Nelms had fully secured compensation to his employees, including Zeiler, and this security (workmen's compensation in-

surance policy) was in full effect at the time of Zeiler's death while in the employment of Nelms in the execution of Nelms' subcontract for the prime contractor, Simmons. Simmons had simply made a verbal agreement with Nelms to secure compensation covering Nelms' employees, including Zeiler, and Nelms testified that he entered into this agreement in order to secure compensation to himself as well as to his employees.

I agree that the majority opinion apparently does no violence to death claims arising in favor of dependent claimants in this particular case, but it is my view that the majority opinion does do violence to the compensation law as it is now written and as we have heretofore interpreted it.

I can readily visualize a situation where Zeiler might have been injured or lost his life because of the common law negligence of the prime contractor. In such event he, or his dependents, would have been entitled to workmen's compensation benefits from Nelms (who had secured compensation under the act) without losing or affecting any third party tort action claim for negligence he, or his dependents, might have had against the prime contractor, Simmons. *Baldwin & Co.* v. *Maner,* 224 Ark. 348, 273 S. W. 2d 28.

The effect of the majority opinion, as I view it, is to permit a subcontractor who has secured compensation for his employees, to barter away, through verbal agreement, his employees' right of recovery in negligence tort actions against a prime contractor, in exchange for individual compensation security to the subcontractor.

I cannot accept as an intent of the law that such substantial rights of an employee are to be weighed on such delicate scales as verbal executory agreements between an employer subcontractor and a third party prime contractor.

I would reverse.

MARY NOWLIN *v.* PAULINE SPAKES, Ex'x

5-5474 463 S. W. 2d 650

Opinion delivered March 1, 1971

Branscum, Schmitt & Mazzanti, for appellant.

John W. Elrod, for appellee.

LYLE BROWN, Justice. Appellant Mary Nowlin challenged the validity of the will purportedly executed by her son and which named his sister, appellee Pauline Spakes, as his sole beneficiary. At the conclusion of appellant's case the court sustained appellee's demurrer to the evidence. Appellant contends that the demurrer should have been overruled because she made a *prima facie* case supporting her allegations of incompetency, undue influence, and execution of the will contrary to statutory requirements.

The testator, Allen Nowlin, died in August 1969. For a number of years he suffered from Parkinson's disease. For some six or seven years prior to his death, Allen was so crippled that he had to have assistance in

feeding and bathing himself. He had a mother and nine brothers and sisters and he lived with several of those relatives during that period. Those facts are undisputed.

Nine witnesses testified for appellant. The appellant-mother described the testator's hands as being so drawn and distorted that he did not use them for the last ten years of his life. She said the testator could not sign his own name and that others had to endorse social security checks. "He got progressively worse and his mind was affected. He would see things and think the army was coming in on him with guns, and he accused people of spraying arsenic in his room."

A brother, Grady Nowlin, testified that Allen's speech was so impaired that he was hardly understandable. He also said Allen was unable to sign his checks between 1964 and 1969. Allen lived with Mr. and Mrs. Paul Nowlin from 1965 until 1968. She described Allen's hands as being so drawn together that he could not hold anything. Mrs. Nowlin said she could not handle Allen by herself and that she brought in paid male help to assist her. "His mind was just about completely gone. He didn't remember anything . . He talked of planes crashing in his room . . . sometimes he wouldn't eat because he said we had his food poisoned."

Two of the attendants hired by Mrs. Paul Nowlin testified. George Goss said he bathed Allen, fed him, and gave him medicine. He asserted that it was impossible for Allen to sign his name, even if someone were to place a pencil between his fingers and guide the pencil. He said Allen could barely make a cross on his checks. As to Allen's mentality, Mr. Goss said "He talked crazy like someone was after him and spraying him." Attendant Calvin Kearney testified as to Allen's physical helplessness. He also said he never saw Allen sign his name.

Another brother, Norman Nowlin, testified that he visited Allen when he was staying with appellee and that Allen was out of his mind. He described Allen's fingers as being so stiff and distorted that it was impossible to get a pencil between them.

On March 1, 1968, Allen left the home of Mr. and Mrs. Paul Nowlin and went to visit his sister (appellee), Mrs. Pauline Spakes. That sister was called as an adverse witness. She testified that about two weeks after arrival, Allen told her he wanted to make a will and leave everything to her if she would take care of him until his death. She said she called the lawyer and gave him the information; that the will was drawn and brought to her house; that she put a pencil between Allen's fingers and helped him write his name; and that it would have been impossible for Allen to write his own name without assistance. She conceded that during Allen's stay of eighteen months prior to death, that was the only instance in which he signed his own name. She was asked to identify checks drawn on Allen's account which reflected that she signed the checks "Mrs. Pauline Spakes, for Allen W. Nowlin." Appellee said she told her mother about the will but did not tell her what disposition Allen made of his estate.

In considering the demurrer to the evidence it was the duty of the trial court to give the evidence "its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if [her] evidence when so considered fails to make a *prima facie* case." *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225 (1950). "On demurrer to the evidence we view the proof in the light most favorable to the plaintiffs." *Keck* v. *Gentry,* 238 Ark. 672, 384 S. W. 2d 242 (1964). Gauged by the recited principles we think it clear that appellant made such a case as would support a finding in her favor unless evidence sufficient to controvert it is forthcoming. All appellant had to do was to establish a *prima facie* case with respect to only one of her three allegations, namely, incompetency, undue influence, or execution of the will contrary to statutory requirements. As we review the evidence we have summarized we think appellant met her burden on at least one of her allegations.

Reversed.

BURKS MOTORS, INC. *v.* INTERNATIONAL HARVESTER COMPANY, INC. ET AL

5-5425 466 S. W. 2d 907

Opinion delivered March 1, 1971
[Rehearing denied May 10, 1971.]

Wootton, Land & Matthews, for appellant.

Wright, Lindsey & Jennings, for appellees.

JOHN A. FOGLEMAN, Justice. This is an appeal by Burks Motors, Inc., from that part of the judgment involved in *International Harvester Company* v. *Pike,* 249 Ark. 1026, 466 S. W. 2d 901, relating to contribution by International to Burks. This judgment in favor of Pike was against appellant and appellee, jointly and severally, for $87,000. Burks was granted judgment against International for contribution of 91% of the judgment. Burks appealed from this judgment, contending that it was entitled to a greater contribution by International. Burks does not question the issues of liability or the amount of the judgment, but seeks only to modify the judgment in respect to contribution. It asserts that it was liable to Pike for negligence only, that the jury found that Burks' negligence and that of International Harvester contributed only 10% to the cause of Pike's damages, and that

Burks' only responsibility was limited to 9% of the *negligence* involved as a concurring cause. We do not agree with appellant's construction of the jury verdict.

Pike's cause of action against both Burks and International was based upon both breach of warranty and negligence. Burks prayed for determination of relative fault between it and International, and judgment over against International under the Uniform Contribution Among Tortfeasors Act [Ark. Stat. Ann. § 34-1001, et. seq. (Repl. 1962)] for its proportionate liability. Burks also asked judgment over against International for any recovery for breach of warranty.

The case was submitted to the jury upon interrogatories. No interrogatory was submitted as to whether Burks was liable for breach of warranty, because it was clearly entitled to judgment over against International for any breach of implied warranty. The circuit judge stated that he would be willing to submit further interrogatories to the jury after it had answered those submitted, if any were necessary to have further information from it to avoid any confusion.

Before any interrogatory was submitted, it was agreed by all parties that, if the jury found that International was guilty of negligence which was a proximate cause of Pike's damages, and answered other interrogatories submitted, the court would then submit a final interrogatory requiring allocation of International's liability between negligence in design on the one hand and negligence in assembly and repair on the other for the purpose of an action by International against Hendrickson Manufacturing Company, the alleged supplier of the torque rod assembly.[1] When the jury first retired, the only interrogatories submitted were directed to findings whether International Harvester was guilty

[1]International filed a third party complaint against Hendrickson. Quashing of the service thereon by the trial court was reversed in *International Harvester* v. *Hendrickson Mfg.*, 249 Ark. 298, 459 S. W. 2d 62.

of negligence constituting a proximate cause, whether Burks was guilty of such negligence, whether International was guilty of a breach of warranty which was a proximate cause, and whether Pike assumed the risk of his own injury. After these interrogatories were answered, the circuit judge submitted an interrogatory calling for apportionment of *responsibility* between International and Burks. The interrogatory and the answer are as follows:

> Using 100% to represent the total responsibility for the occurrence and any injuries or damages resulting from it, apportion the responsibility between the parties whom you have found to be responsible.
>
> ANSWER:

International Harvester Co.	91%
Burks Motors, Inc.	9%
Total	100%

s/C. O. Shuffield, Foreman

This interrogatory was requested by Pike. Objection was made by Burks only on the ground that it failed to submit the issue of negligence on the part of Pike.

The circuit judge then submitted interrogatories as to damages. After answers to these were returned into court, he then submitted the interrogatory as to apportionment of negligence of International between negligence in design and negligence in assembly and repair.

This interrogatory to which no one objected, either as to form or substance, was answered as follows:

INTERROGATORY NO. 11

> Having answered Interrogatory No. 1 in the affirmative finding International Harvester negligent, you will now again using 100 as a percentage figure apportion the degree of fault as between negligence in design and negligence in assembly or repair.

90%	Design
10%	Assembly or repair
100%	

s/C. O. Shuffield
Foreman

Judgment was then entered. In it, Burks was given judgment against International for 91% contribution.

Appellant argues that because the jury attributed 90% of International's negligence to negligence in design, appellant could only be liable to Pike for its pro rata part (9%) of the negligence in assembly and repair and was entitled to contribution for all of the judgment over and above that percentage (0.9%).

There is no question but what Burks was entitled to judgment over against International for any liability for breach of warranty and no objection was made by anyone to the circuit judge's statement that, upon a finding that there was such a breach which was a proximate cause, he would enter judgment against International in Burks' favor.

We do not agree with appellant's construction of the interrogatories and their answers. Liability for breach of warranty could be said to overlap or include negligence in both design and assembly, but not negligence in repair. Thus, International's breach of warranty could have contributed more than 90% to the cause of the occurrence. But this is consistent with the jury's finding that 91% of the responsibility for the occurrence lay upon International and 9% on Burks. That finding of responsibility must have included both liability for breach of warranty and negligence on the part of International, but as to Burks' responsibility, only negligence could have been considered by the jury. The plain language of the interrogatory, when considered along with the answers to the interrogatories, can lead to no other conclusion. If this was not clear, Burks had the opportunity to request further interrogatories, even after in-

terrogatory 11 was answered. The record does not indicate that any such request was made.

Appellant's prayer for modification of the judgment is denied.

DOLPHE SHEARER, ADMINISTRATOR OF THE ESTATE OF AUDIE SHEARER, DECEASED *v.* RUDOLPH NEWSOM, SPECIAL ADMINISTRATOR OF THE ESTATE OF BESSIE NEWSOM, DECEASED

5-5470 463 S. W. 2d 642

Opinion delivered March 1, 1971

Frierson, Walker, Snellgrove & Laser, for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

JOHN A. FOGLEMAN, Justice. This is a wrongful death

action wherein the personal representative of a guest in an automobile sought recovery from the estate of the driver. Both guest and driver died from injuries received in a collision with another vehicle. Judgment was rendered against appellant, as personal representative of the guest, pursuant to jury verdict. The sole question on appeal is whether the circuit court committed reversible error in refusing appellant's requested instruction covering certain common law and statutory rules of the road. We find no error.

The instruction was patterned after AMI 901, in setting out rules governing duties as to lookout, control and speed, omitting the opening clause "In determining whether the driver was negligent" and the closing sentence, "A failure to meet the standard of conduct required by any of these three rules is negligence." The tendered instruction then incorporated the format of AMI 903, quoting Ark. Stat. Ann. § 75-601 (c) 3 (Supp. 1969), Ark. Stat. Ann. § 75-607 (Repl. 1962) and Ark. Stat. Ann. § 75-611 (a) (Repl. 1962) and (b) 1 (Supp. 1969) and pertinent portions of § 75-611 (b) 3 (Supp. 1969). The proposed instruction was concluded, however, by the following sentence: "The statutes and rules of the road may be considered by the jury in determining whether or not the deceased operator was guilty of wilful and wanton misconduct in the operation of her vehicle." This conclusion was apparently substituted for the usual concluding sentence in both AMI 901 and 903. The trial judge gave both AMI 205 and AMI 402 in proper form for a guest-host case.

Appellant relies principally upon *Spence* v. *Vaught,* 236 Ark. 509, 367 S. W. 2d 238. We do not think that our holding in that case required the giving of the instruction requested by appellant. In that case, we said that the giving of an instruction delineating duties of a driver of an automobile with reference to control and speed and declaring failure to observe them to be evidence of negligence, was not an incorrect statement of the law or misleading to the jury, when considered with all the other instructions given. The instruction on rules

of the road there given was followed immediately by this instruction:

> Now should you find from a preponderance of the evidence that the defendant, Lucy Spence, was guilty of negligence in one or more of the respects alleged by the plaintiff, as just related to you, this negligence, without more, would not entitle the plaintiffs to maintain this action, or to recover their damages, if any. As you have previously been instructed, to recover in this action, if at all, plaintiffs must prove by a preponderance of the evidence that the defendant was guilty of wilful and wanton conduct. They must prove not only that the defendant was negligent, but also that she knew, or had reason to believe that her act of negligence was about to inflict injury, and that she continued in this course of conduct with a conscious indifference to the consequences thereof, exhibiting a wanton disregard of the rights and safety of others.

As offered, with the concluding sentence worded as it was, appellant's requested instruction would undoubtedly have led the jury to the patently erroneous belief that violation of the rules of the road set out would be evidence of wilful and wanton misconduct. Since the instruction offered was erroneous and our attention is not directed to any instruction limiting its effect as given in *Spence* v. *Vaught,* we must affirm the judgment.

CONTINENTAL CASUALTY COMPANY *v.* ROBERT H. DAVIDSON

5-5475 463 S. W. 2d 652

Opinion delivered March 1, 1971

Rose, Barron, Nash, Williamson, Carroll & Clay, for appellant.

McMath, Leatherman & Woods, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant asserts that the circuit court's instructions defining total disability were erroneous, in the light of the policy on which appellee sued. We find reversible error in that regard.

A review of the evidence would serve no useful purpose. It is sufficient to say that there was evidence sufficient to support a finding of total disability whether the court's definition or appellant's is used. The pertinent policy provision is as follows:

> TOTAL DISABILITY. When, as the result of injury and commencing within thirty days after the date of the accident, the Insured is wholly and continuously disabled and prevented from performing each and every duty pertaining to his occupation, the Company will pay periodically the Monthly Indemnity stated in the Schedule for the period the Insured is so disabled, not to exceed twelve consecutive months. Subject to the "Maximum Period Total Disability Accident Indemnity" stated in the Schedule and after the payment of Monthly Indemnity for twelve months as aforesaid, the Company will continue the periodic payment of Monthly Indemnity so long as the Insured is wholly and continuously disabled and prevented by reason of said injury from engaging in each and every occupation or employment for wage or profit for which he is reason-

ably qualified by reason of education, training or experience.

It is conceded that appellant paid total disability benefits to appellee for more than 12 months prior to September 17, 1968. Appellee then sued for benefits from that date until the date of trial and recovered judgment for these payments at the policy rate of $100 per month with statutory penalty and attorney's fees. As one of its defenses appellant denied that appellee was permanently disabled so that in the future he would be unable to return to his former employment or engage in any occupation for wages or profit.

The circuit judge gave only the following instruction defining total disability:

> You are instructed that the provisions of the policy which I have quoted relating to disability do not mean a state of absolute helplessness. But they mean that, if there was any substantial and material acts necessary to be done pertaining to his occupation that he could not perform in the usual and customary way, he would be totally disabled within the meaning of this policy.

Appellant objected because the instruction would preclude the jury from considering appellee's ability to engage in any occupation for which he was reasonably qualified by reason of education, training and experience, other than his previous occupation.

Appellant offered, and the court refused, the following instructions pertaining to total disability:

NO. 2

> The term "total disability," as contemplated by an accident insurance policy such as the one sued on in this case, does not mean what a literal reading would require, that is, a state of absolute helplessness, but rather contemplates such a disability as renders the insured unable to perform all the sub-

stantial and material acts necessary to the prosecution, in a customary manner, of any occupation or business for which the insured is reasonably (R. 94) qualified by reason of his education, training and experience.

NO. 5

You are instructed that even though you believe from the evidence in this case that the plaintiff is and has been unable to return to his former occupation with the Missouri Pacific Railroad, yet if you further believe from the evidence that the plaintiff has not been prevented as a result of his injury from performing all the substantial and material acts necessary to the prosecution, in a customary manner, of any occupation or business for which he is reasonably qualified by reason of his education, training or experience, then the Court instructs you that the plaintiff would not be entitled to the benefits for which he is suing, and your verdict should be for the defendant.

Appellant concedes that the instruction given by the court would be correct were it not for the fact that total disability benefits are payable under two different conditions, *i. e.*: (1) benefits for a maximum of 12 months while the insured was totally disabled from performing any substantial and material duties of his *former* occupation; and (2) benefits thereafter so long as the insured is disabled from performing the material duties of *any* occupation for which he is reasonably qualified by reason of education, training and experience. We agree with appellant that all our previous cases, save one, have dealt with policies that were substantially similar, but which did not have two separate and distinct categories for payment of disability benefits. While the one exception involved only the question of liability for total disability in the usual sense, it was clearly recognized there that different considerations might have been involved had liability in the second category set out above been in issue. See *Franklin Life Insurance Company* v. *Burgess,* 219 Ark. 834, 245 S. W. 2d 210.

Part I of the policy there involved entitled the insured to monthly benefits for a maximum of 12 months while prevented by illness or injury from performing each and every duty pertaining to his occupation. Thereafter, the payments were to be continued so long as the insured should be wholly, necessarily and continuously disabled and prevented by such injury or illness from engaging in any occupation for wages or profit. In reducing the amount of attorney's fees allowed, the court noted that we had previously approved fees in excess of the amount of recovery in similar cases where the determination of questions involved also determined the liability of the insurance company for future disability payments. We said:

> It is noted that the second paragraph of Part I of the policy provides for payment of monthly indemnity after the twelve-month period provided in paragraph one on certain conditions and uses language somewhat different from that employed in the first paragraph. It is true that a recovery in the present suit preserves appellee's right to seek further recovery for future installments under paragraph two, but it does not establish a right to future payments after the twelve-month period or determine appellant's liability therefor.

While this language does not constitute binding authority for appellant's argument, it is clear recognition that the language in that policy defined two entirely different bases for liability for total disability. The language of the policy here is strikingly similar. If the words in the two clauses of each of the respective policies defining the total disability meant the same thing, then nothing short of recovery by the insured would prevent a judgment under the first clause from being res judicata as to future liability under the second clause. Such a result does not seem to be a sensible one in light of the disparate language of the two clauses. In construing a contract, even one for insurance drawn by the insurer, we must assume that the use of different language to define different obligations was deliberate and accompanied by an intention to convey different

meanings rather than the same one. Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible, and, giving effect to one clause to the exclusion of another on the same subject where the two are reconcilable, is error. *Kelsey and Fletcher* v. *Brown and Hackney,* 165 Ark. 613, 264 S. W. 930; *American Indemnity Co.* v. *Hood,* 183 Ark. 266, 35 S. W. 2d 353. A construction which neutralizes any provision of a contract should never be adopted if the contract can be construed to give effect to all provisions. *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S. W. 2d 611. What we said in *Fowler* is particularly appropriate here, viz:

> It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered not from particular words and phrases but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be the entire instrument and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause. Every word in the agreement must be taken to have been used for a purpose, and no word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. The contract must be viewed from beginning to end, and all its terms must pass in review, for one clause may modify, limit, or illuminate the other. Taking its words in their ordinary and usual meaning, no substantive clause must be allowed to perish by construction, unless insurmountable obstacles stand in the way of any other course. Seeming contradictions must be harmonized, if that course is reasonably possible. Each of its provisions must be considered in connection with the others, and, if possible, effect must be given to all.

The rights and liabilities of the parties to an in-

surance contract must be determined by considering the language of the entire policy. *American Indemnity* v. *Hood,* supra. Legal effect must be given to all the language used, and the object to be accomplished by the contract should be considered in interpreting it. *Aetna Life Insurance Company* v. *Spencer,* 182 Ark. 496, 32 S. W. 2d 310. Whatever the construction of a particular clause standing alone may be, it must be read in connection with other clauses limiting or extending the insurer's liability. *Aetna Casualty & Surety Co.* v. *Sengel,* 183 Ark. 151, 35 S. W. 2d 67. In considering the phraseology of an insurance policy the common usage of terms should prevail when interpretation is required. *National Investors Fire & Casualty Co.* v. *Preddy,* (March 23, 1970), 451 S. W. 2d 457.

When we read the clear language of the two sentences of the total disability clause, giving their terms the meaning ascribed by common usage, the intention to describe two different types of total disability is inescapable. Whatever construction we might give the language of the second sentence describing total disability if it stood alone, when both clauses are read together we simply cannot say that it was contemplated that they define the same kind of disability. Consequently, appellant's specific objection was well taken and the instruction was incorrect for the reason stated by appellant. Therefore, we must reverse the judgment and remand the case for new trial.

It does not follow, however, that appellant's offered instructions must be given. While the giving of one of them might not be error, it can be said that both are ambiguous in that they would require appellee to be unable to perform *all* the substantial and material acts necessary to the prosecution, in a customary manner, of any occupation or business for which the insured is reasonably qualified by reason of his education, training and experience. It is only necessary that he be unable to perform *any* of such acts in order to qualify for benefits. *Avemco Life Insurance Company* v. *Luebker,* 240 Ark. 349, 399 S. W. 2d 265, 21 A. L. R. 3d 1378; *Alexander* v. *Mutual Benefit Health & Accident Assn.,*

232 Ark. 348, 336 S. W. 2d 64; *Franklin Life Insurance Co.* v. *Burgess,* 219 Ark. 834, 245 S. W. 2d 210. We clearly expressed a preference for an instruction using the word "any" in *Avemco.* If the words "any of" had been substituted for "all" in the offered instructions, appellant would have clearly been entitled to have one of them given. While both would then appear to be correct, appellant's requested instruction no. 2 would be preferable because it is more in keeping with our per curiam order of April 16, 1965, requiring that instructions not covered in AMI, Civil, be simple, brief, impartial and free from argument..

In passing, we note that appellant's failure to request a correct instruction on the issue of total disability does not bar him from relief on appeal because he made a specific objection pointing out the respects in which the instruction given was an erroneous declaration of law. *Collier Commission Co.* v. *Wright,* 165 Ark. 338, 264 S. W. 942.

In view of the disposition we make, we do not reach appellant's point as to the amount of attorney's fees allowed appellee.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

U. D. MOORE ET AL *v.* JACK EAST SR. ET AL

5-5494 464 S. W. 2d 52

Opinion delivered March 1, 1971
[Rehearing denied March 29, 1971.]

Bethell, Callaway, King & Robertson, for appellants.

Kemp & Whitmore, for appellees.

J. FRED JONES, Justice. This is an appeal by U. D. Moore et al, from a decree of the Pulaski County Chancery Court denying their petition for an injunction to prevent the Little Rock Airport Commission from entering into a contract with the Arkansas Power & Light Company for the installation of electrical power facilities and the furnishing of electrical energy for the lighting of a new parking lot and air terminal for the City of Little Rock without advertising for bids under the provisions of Act 159 of 1949. (Ark. Stat. Ann. § 14-611 [Repl. 1968]).

The City of Little Rock intervened contending that the Airport Commission is simply an agency of the city and that the agreement it contemplates with the Arkansas Power & Light Company is an agreement for electrical distribution and services not within the provisions of Act 159 of the Acts of 1949; and that the arrange-

ment contemplated by the Commission is simply an extension of the city's agreement with the Arkansas Power & Light Company entered into in September, 1958, for the furnishing of lighting service to public streets and ways in the City of Little Rock.

The chancellor dismissed the petition with prejudice and on appeal from the chancellor's decree, the appellants rely on the following point for reversal:

> "The making of a contract by a city for the construction and installation of lighting fixtures and facilities for a parking lot at a cost in excess of $10,000.00 is subject to the requirements of Act 159 of 1949, and the chancellor erred in holding to the countrary."

Act 159 of 1949, as digested in Ark. Stat. Ann. § 14-611 (Repl. 1968), reads as follows:

> "No contract providing for the making of major repairs or alterations, or for the erection of buildings or other structures, or for making other permanent improvements shall be entered into between the State, or any agency thereof, or any county, municipality, school district, or other local taxing unit, with any contractor in those instances where the estimated cost of such work shall exceed the sum of $10,000.00, unless such taxing unit shall have first published notice of its intention to receive bids therefor once each week for not less than two [2] consecutive weeks in a newspaper of general circulation published in the county in which the proposed improvements are to be made, or in a trade journal reaching the construction industry. The date of publication of the last of such notices shall be not less than one [1] week before the day fixed therein for the receipt of bids. If there be no such newspaper regularly published in the county in which the proposed work is to be done, the notices may be published in any newspaper having a general circulation in such county. Nothing in this Section contained, however, shall be construed

as limiting to two [2] the number of weeks the notices may be published."

The action which brought on this litigation was the action authorized by the Little Rock Airport Commission as indicated by excerpts from the minutes of a regular meeting of the Commission on January 12, 1970, as follows:

"Mr. W. M. Alley, representing Arkansas Power and Light Company, presented a choice of several proposals whereby the Arkansas Power and Light Company would install street and parking area lighting in the new terminal area. These proposals follow for the record.

Mr. Carl Harris spoke to the Commission in opposition to Arkansas Power and Light Company's proposal, advising the Commission that in his judgment the lights should be installed by private contractors. City Attorney Joe Kemp advised the Commission that in his opinion installation of street and parking area lighting in the new airport terminal area by Arkansas Power and Light Company was legal. Thereupon, Mr. Beauchamp moved that plan III of Section 'B', providing for the lighting of parking area and the streets adjacent to the terminal, requiring a monthly cost of $436.70, be adopted by the Commission and that the Airport Manager be authorized and directed to notify proper officials of the City of Little Rock the recommendation of the Commission in this respect. The motion was seconded by Mr. McLean and carried unanimously."

It was stipulated by the parties that on September 30, 1958, the City of Little Rock entered into a contract with the Arkansas Power & Light Company under which the city, in effect, went out of the electric power distribution business, and Arkansas Power & Light Company took over the electrical distribution system then owned by the City of Little Rock. Under this agreement, Arkansas Power & Light Company be-

came the owner of the facilities and agreed to repair, maintain and expand the street lighting system in the City of Little Rock. The contract was for a period of 20 years, and was renewable for five year periods. In the event the contract should expire and not be renewed, Arkansas Power & Light Company had a right to dismantle and remove the facilities.

The appellees contend that the contract now contemplated is only an extension of the original street lighting contract, and the appellants contend that it is immaterial whether the contract they seek to enjoin is an extension of the old contract or a completely new one; they both are covered by Act 159 and that bids must be taken and the contract let to the lowest competent bidder as provided in the act.

In support of the petition for the injunction, Mr. Moore testified that he is a resident of Little Rock and is an electrical contractor. He says that he is familiar, to some degree, with the proposed expansion of the Little Rock Municipal Airport, and that part of the plans for such expansion is to provide lighting fixtures, wiring and so forth. He testified that he would be willing to bid on such project on the basis of furnishing it on a *monthly rental basis as distinguished from selling* it to the city outright. He testified that he had never been offered the opportunity to do so.

On cross-examination Mr. Moore testified that in order for him to furnish electrical energy for the illumination of lamps to be installed under the proposed contract, it would be necessary for him to purchase it from the Arkansas Power & Light Company or the servicing utility. He says that it is possible for him to do this however, and he supposes he would be permitted to resell it to the City of Little Rock.

"Q. You suppose or do you know?

A. No, I don't know. I would assume it is. I would assume that if we installed an electric service out there and paid the deposit, neces-

sary deposits and signed a contract for service they would be obligated to serve us."

Mr. O. V. Holeman, director of rates and research for the Arkansas Power & Light Company, testified that he was familiar with the proposed plans for expansion of the Municipal Airport and of the lighting requirements. He testified that under the proposed contract, the lighting facilities would be of the normal type of ornamental facilities supplied by an underground distribution system, and that the system would be permanent in nature but capable of being removed. He testified that the proposals that the Arkansas Power & Light Company and the city had under consideration would be for lighting service to the airport area, including the streets adjacent to the new airport; and that the proposals were made pursuant to the provisions of their municipal street lighting rate schedule which became effective November 10, 1966. Mr. Holeman then explained that the lighting installation and service would consist of approximately ninety, 400 watt mercury vapor street lighting fixtures mounted on 40 ornamental standard poles approximately 35 feet in height. He then testified as to the cost in monthly charge under the standard street lighting rate schedule for servicing each unit. He testified that under the proposed contract the Arkansas Power & Light Company would install, own and maintain the facilities, and that in the event the term of the contract should end and should not be renewed, the facilities would be dismantled and removed by the company. He testified that the rate schedule under which the city would be charged for service would be the rate schedule approved by the Arkansas Public Service Commission for such service and would cover the cost of production and distribution necessary in furnishing street lighting service, including the purchase and depreciation of steel poles and underground cables and conduits. He testified that the rate schedule base included the annual cost of owning, operating and maintaining the facilities, together with the cost of producing the energy that supplies the street lighting.

On cross-examination Mr. Holeman testified that if the city should install the facilities and own them, that Arkansas Power & Light Company would furnish electrical current and at a lower rate than if the company installed and owned the facilities and were required to maintain and service them. He testified that the electrical energy supplied to cities for street lighting purposes is distributed in exactly the same manner as to residential customers, but at a different rate and under a different schedule approved by the Arkansas Public Service Commission.

We agree with the chancellor that neither the original contract entered into on September 30, 1958, nor the proposed contract for servicing the new airport terminal, access routes and parking area, comes within the provisions of Act 159 of 1949, § 14-611.

It is difficult to tell from the record before us whether the appellants are attempting to force the city into installing, owning and maintaining part of a public utility distribution system, or whether they are attempting to force the city to put them into the public utility distribution and maintenance business. The effect of the appellants' contention would amount to one or the other.

If Act 159 applies to the contract under consideration, there is no reason why it should not also apply to contracts for natural gas and telephone service.

The above testimony as to the type of installation and the cost to the city is beside the issue in this case. The issue is not whether the city could more economically install, own and maintain its own electrical distribution system. The issue is whether the proposed contract comes within the provisions of Act 159, and the determining factor is the ownership of the facilities to be erected or installed, or the improvements to be made under the proposed contract.

We are of the opinion that Act 159 could only apply to such contracts as the city is authorized to make

for major repairs or alterations, or for the erection of buildings or other structures, or for making other permanent improvements. The city only has such contractual power and authority as is granted to it by the legislature, and the legislature has never granted to cities the power or authority to enter into contracts for the repair or alteration of property, or for the erection of buildings or other structures, or for making other permanent improvements, on or to other peoples' property, including that of utility companies.

The decree is affirmed.

BYRD, J., not participating.

CLEVELAND UMBAUGH *v.* STATE OF ARKANSAS

5563 463 S. W. 2d 634

Opinion delivered March 1, 1971

Daily, West, Core & Coffman, for appellant.

Ray H. Thornton, Jr., Attorney General; *Mike Wilson,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. By information filed by the prosecuting attorney in the Sebastian County Circuit Court, Cleveland Donald Umbaugh was charged with the crime of kidnapping, in that he did unlawfully, feloniously and forcibly take Joselyn Howard and carry her, against her will, from one place to another place in this state for the purpose of committing a felony. Umbaugh was found guilty at his trial before a Sebastian County jury and was sentenced by the trial judge to 30 years in the Arkansas Penitentiary. Umbaugh has appealed to this court and relies on the following point for reversal:

> "The testimony of Mrs. Birtie Smith involved solely a prior bad act allegedly committed by Appellant. This testimony was wholly irrelevant to the charge for which Appellant was on trial, was highly inflammable and its admission resulted in prejudicial error."

The evidence is in conflict as to the felony intended, but there is little question that one was committed. On the afternoon of March 25, 1970, the prosecuting witness, Joselyn Howard, a 17 year old Negro high school girl (small for her age), was walking along the sidewalk on her way home from school. The appellant, a 22 year old married white man, and his 19 year old white companion, Darrell Wayne Hurley, were sitting in a parked automobile owned by the appellant as Miss Howard passed by. They stopped Miss Howard, took her into the automobile and drove to a secluded area known as "Wildcat Mountain" near the Arkansas River and there they both, according to their own testimony, had sexual relations with her.

Miss Howard, or Joselyn, as she will hereafter be called, testified that as she passed the alley where the automobile was stopped, Hurley got into the back seat

as Umbaugh seized and gagged her; forced her into the front seat of the two-door automobile and locked the door. She testified that he then drove to near the Arkansas River where he forced her to disrobe and where he raped her in the front seat of the automobile. She testified that she lost consciousness during the assault by Umbaugh and does not know whether Hurley also assaulted her or not; but that when she regained consciousness, Umbaugh had placed a "rag" around her face and was pulling her from the automobile. She says that Umbaugh then forced her down the hill toward the Arkansas River and said that he was going to throw her into the river. She testified when Umbaugh ordered her to wade into the water, she kicked her shoes off and started running. She says that she ran through some water and fell down and that while she was on her knees in the water, Umbaugh picked up a rock and threw it down near her and directed her on toward the river. She says that she again got away from Umbaugh and Hurley and that they both ran after her and tried to catch her. She says that while they were chasing her they were also throwing rocks at her, but that she finally eluded them and called the officers from the home of Margaret Cook, who lived in the first house she came to.

Hurley testified for the state. He testified that he and Umbaugh had been drinking beer and that Umbaugh asked Joselyn if she wanted a ride; that when she declined and stated that she only lived a short distance from where they were, Umbaugh got out of the car and ordered Joselyn into the automobile. He testified that Joselyn got into the automobile; that Umbaugh locked the car door and drove to "Wildcat Mountain." The rest of Hurley's testimony corroborated that of Joselyn. He testified that he also had sexual relations with Joselyn after Umbaugh did. He testified that Umbaugh then blindfolded Joselyn and led her away from the car and told her he was going to kill her. He testified that Umbaugh then told Joselyn that he was going to throw her into the river and drown her, but that she got away by outrunning Umbaugh.

Umbaugh's statement given to the police was read

in evidence. He admitted that he picked Joselyn up in his automobile; that he and Hurley then took her to "Wildcat Mountain" where they both had sexual relations with her. He stated that she willingly entered the automobile and went with them upon Hurley's invitation, and that she affirmatively consented to sexual relations.

Birtie Smith testified, over the appellant's objections, that her brother married Umbaugh's sister and that while visiting her brother in December of 1968, Umbaugh offered to drive her and her three year old child to their home at Arkoma, Oklahoma, in Umbaugh's automobile. She testified that instead of driving her home, Umbaugh drove to "Wildcat Mountain" near the Arkansas River and there he forced her to have sexual relations with him by threatening to kill the child. She testified that Umbaugh actually did choke the child until she finally submitted to him.

Umbaugh testified in his own defense. The substance of his testimony was that Joselyn, as well as Mrs. Smith, willingly accompanied him to "Wildcat Mountain" and willingly engaged in sexual relations with him. He admits blindfolding Joselyn and telling her that since they had no further use for her, he was going to throw her into the Arkansas River and drown her. He admits throwing rocks at her and trying to overtake her when she finally escaped. But, he testified that this was all in fun just to torment, tease and scare Joselyn, and that he intended no harm to her at all. He did admit, however, that he was no longer amused by his conduct.

The appellant has cited 15 cases in support of his contention that the trial court committed reversible error in admitting the testimony of Mrs. Smith. We have examined all the cases cited by the appellant and they all turn on the nature and facts of the case being tried, and the purpose for which the evidence of prior acts were offered. We will not attempt here to analyze and distinguish all the cases cited because the various categories attending the most of them were thoroughly dis-

cussed in the two latest ones; *Moore, et al* v. *State,* 227 Ark. 544, 299 S. W. 2d 838; *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804.

In *Alford,* as well as in *Moore,* the extraneous evidence was offered to show intent in connection with the crime charged, but intent was not an actual element in either case. In *Alford* the charge was rape, the conviction was for rape, and the penalty was death. There was no question as to identity of the defendant, there was no question as to his intent, and there was no question that his intent was carried out under the persuasive blade of a hunting knife. The defendant did not testify. The facts in *Alford* bring that case squarely within the rule stated in one paragraph of that opinion, as follows:

> "No one doubts the fundamental rule of exclusion, which forbids the prosecution from proving the commission of one crime by proof of the commission of another. The State is not permitted to adduce evidence of other offenses for the purpose of persuading the jury that the accused is a criminal and is therefore likely to be guilty of the charge under investigation. In short, proof of other crimes is never admitted when its only relevancy is to show that the prisoner is a man of bad character, addicted to crime."

In another paragraph in *Alford* we also said:

> "The rule is designed to protect the innocent, but it is often invoked as a basis for excluding *any* evidence that tends to show the commission of another offense. We have repeatedly rejected unfounded appeals to the protection of the basic rule of exclusion. If other conduct on the part of the accused is independently relevant to the main issue—relevant in the sense of tending to prove some material point rather than merely to prove that the defendant is a criminal—then evidence of that conduct may be admissible, with a proper cautionary instruction by the court. 'While the principle is usually spoken of

as being an exception to the general rule, yet, as a matter of fact, it is not an exception; for it is not proof of other crimes as crimes, but merely evidence of other acts which are from their nature competent as showing knowledge, intent or design, although they may be crimes, which is admitted. In other words, the fact that evidence shows that the defendant was guilty of another crime does not prevent it being admissible when otherwise it would be competent on the issue under trial.' *State* v. *DuLaney,* 87 Ark. 17, 112 S. W. 158."

In analyzing the various categories where proof of other crimes is offered in evidence, such as to show motive, to rebut the plea of an alibi, etc.; as to the issue of intent in *Alford,* we said:

"The issue of intent is *theoretically* present in every criminal case, and for that reason it is here that we are most apt to overlook the basic requirement of independent relevancy. * * * What has happened is that the emphasis has shifted from evidence *relevant* to prove intent to evidence *offered for the purpose* of proving intent, by showing that the defendant is a bad man. If this transfer of emphasis is permitted the exclusionary rule has lost its meaning.

* * *

Quite evidently this category includes the many charges of assault with intent to commit a specified crime, for here the State must prove not merely the assault but also that it was made with a certain intent. Hence, since the accused's purpose is at issue, proof of other similar offenses is independently relevant. *Stone* v. *State,* 162 Ark. 154, 258 S. W. 116; *Hearn* v. *State,* 206 Ark. 206, 174 S. W. 2d 452; *Gerlach* v. *State,* 217 Ark. 102, 229 S. W. 2d 37, Wigmore on Evidence (3rd Ed.), § 357.

* * *

Thus our cases very plainly support the commonsense conclusion that proof of other offenses is com-

petent when it actually sheds light on the defendant's intent; otherwise it must be excluded. * * *"

In the *Moore* case, supra, the four defendants were convicted of murder in the perpetration of a robbery. They confessed the crime and led the officers to the scene of the crime and to the decomposed body of their victim. The trial court accepted into evidence testimony that two of the defendants had beaten and robbed another man, under similar circumstances, five days after the murder for which they were being tried. In reversing the conviction for error in admitting the evidence, this court again reviewed the decisions on the point but added nothing to the opinion in *Alford.* Intent was not an element involved in either case.

In 2 Wigmore on Evidence, 3rd Ed., § 302 the reasoning and basis for the admission of prior criminal acts as evidencing intent is set out in the following language:

> ". . . similar results do not usually occur through abnormal causes; and the recurrence of a similar result (here in the shape of an unlawful act) tends (increasingly with each instance) to negative accident or inadvertence or self-defence or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, *i. e.* criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent. The general canon of logical inference already examined (*ante,* §§ 31, 32) is here applied and illustrated.
>
> Such is the theory of evidencing Intent, as expounded, in various phrasings and for all sorts of offenses, in repeated judicial utterances.
>
> * * *

It will be seen that the peculiar feature of this

process of proof is that the *act itself is assumed to be done,*—either because (as usually) it is conceded, or because the jury are instructed not to consider the evidence from this point of view until they find the act to have been done and are proceeding to determine the intent. This explains what is a marked feature in the rulings of the Courts, namely, a disinclination to insist on any feature of common purpose or general scheme as a necessary requirement for the other acts evidentially used. It is not here necessary to look for a general scheme or to discover a united system in all the acts; the attempt is merely to discover the intent accompanying the act in question; and the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent. The argument is based purely on the doctrine of chances, and it is the mere repetition of instances, and not their scheme, that satisfies our logical demand.

Yet, in order to satisfy this demand, it is at least necessary that prior acts should be *similar.* Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance.

* * *

It is just this requirement of similarity which leaves so much room for difference of opinion and accounts for the bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction and in cases of the same offense. Some judges incline to treat the judicial test of probative value as identical with the common-sense test, and to admit such instances as bear a similarity liberally interpreted by the standard of every-day reasoning. Other judges set their faces firmly against every instance which is not on all fours with the offense in issue, regardless of the consideration that justice consists quite as much in protecting the public

against evil doers as in showing mercy to those whose guilt has been more or less skillfully concealed. It is hopeless to attempt to reconcile the precedents under the various heads; for too much depends on the tendency of the Court in dealing with a flexible principle. One Court will be certain to exclude everything that is not too clearly probative for even technical quibblers to oppose and sometimes will exclude even that. Another Court will accept whatever has real probative value. Something, however, may perhaps be gained by realizing, as to the former, that it is not the law, nor precedent, nor principle, nor policy, that will account for such rulings, but merely a rooted inclination to take the stricter view and a preference to err in favor of defendants and against innocent victims."

In the case at bar, intent to commit a crime (rape) is a primary element of the kidnapping charge under which the appellant was tried and for which he was convicted. The prosecuting witness and the appellant's accomplice testified that the appellant forcibly and without her consent transported her to a secluded area on "Wildcat Mountain" and there put her in fear of her life and ravished her. The appellant testified that the prosecuting witness voluntarily accompanied him to "Wildcat Mountain" and voluntarily submitted to him.

Now, under these circumstances, if the state had proven by the testimony of ten other women that the appellant had also in recent months taken them to this "Wildcat Mountain" against their will and there ravished them, there would be little question but that such testimony would be admissible; not to prove the crime of rape, or as for that matter, to prove that the prosecuting witness was taken to "Wildcat Mountain" by force or against her will, but for the purpose of showing the appellant's motive and intent in taking her to the secluded area on "Wildcat Mountain."

Hearn v. *State,* 206, Ark. 206, 174 S. W. 2d 452, was a case in which intent *was* an element in the crime involved.

The defendant in that case was convicted of assault with *intent* to rape. The prosecuting witness definitely identified the defendant and testified that sometime after 10 o'clock at night she was proceeding alone to her home and "he walked up behind me. I heard somebody starting to speak, I looked up and kept thinking I recognized him and didn't. He said, 'How far are you going?' I said, 'I live right here.' That was Mr. Tanner's house. Then he reached up with his hands and put them around my throat, attempted to choke me, and I screamed. Then he said something as he turned me loose and ran and I don't know what it was." The questionable evidence in the *Hearn* case was the testimony of another woman who testified that about two months previously the appellant had torn a screen from a window and had come to her bedroom where she was sleeping; grabbed her and started to twist her leg and that when she screamed, the defendant ran. Another witness testified that about two months before the act involved in the case being tried, he had seen the defendant one night peeping in the window of the home of the witness's brother and that he had taken the defendant and turned him over to the officers. This court affirmed the conviction in *Hearn* and approved the admission of the evidence as to the prior acts. To the same effect is *Gerlach* v. *State,* 217 Ark. 102, 299 S. W. 2d 37, where the appellant was convicted of an assault with intent to rape one Mabel Reeder, who was a 12 year old child.

The appellant in the case at bar admitted, both in his pretrial statement and in his testimony, that he was 22 years of age, married and had a little girl of his own. He admitted that he picked up the prosecuting witness whom he had never seen before, and took her in his automobile out to "Wildcat Mountain" and that she was agreeable to, and acquiesced in, everything that happened to her. He does not say what his intent was in picking her up in the first place or in taking her to "Wildcat Mountain." He does state that his intent in threatening to kill and drown her and in throwing rocks at her was simply to torment, tease and scare her, and he explains his intent in attempting to take her into the Arkansas River was to wash mud from her clothing, as

well as his own. He explains his intent in running after her when she finally eluded him, was to get her to return to the automobile so that he could take her home.

Even without the testimony of Mrs. Smith, there was ample evidence to sustain the conviction. The testimony of Mrs. Smith was an anticlimax to what the jury had already heard even before the appellant testified. Yet, the jury only found the appellant guilty as charged and left it to the trial court to fix the punishment when the jury could have sent him to the penitentiary for 99 years. So it would appear from the verdict that the minds of the jurors were not greatly inflamed by the testimony of Mrs. Smith.

It is not a question at this point whether the state *should* have offered the testimony of Mrs. Smith or whether the trial court *should* have admitted it. The question is whether the acceptance of the evidence constituted reversible error.

According to Mrs. Smith she is even related by marriage to the appellant and when she accepted his offer to take her to her home in Oklahoma, he took her instead *via* a "short cut" to "Wildcat Mountain" and there he treated her as he did Joselyn, except he didn't throw rocks at her and threaten to drown her after he had accomplished his purpose.

We are of the opinion that the testimony was admissible, under all the facts of this case, for the limited purpose it was offered; and that the trial court did not commit reversible error in admitting it under the proper instructions given by the court as to its use and purpose.

The judgment is affirmed.

PEARLINE SUTTON *v.* FELIX A. SUTTON

5-5471 463 S. W. 2d 644

Opinion delivered March 1, 1971

William E. Johnson, for appellant.

Ovid T. Switzer, Bruce D. Switzer and *Tom Tanner,* for appellee.

CONLEY BYRD, Justice. Appellant Pearline Sutton questions the sufficiency of the evidence and the corroboration to sustain the award of a divorce to appellee Felix A. Sutton on the ground of personal indignities. No property rights are involved, on this appeal.

Felix testified that he and Pearline were married in 1950 and had one daughter who is now of age. When they married, they moved into a house with his parents and were still living with his father and mother when Felix left on July 5, 1969. When his daughter was old enough to be in a room by herself, Pearline moved into the daughter's room and stayed almost two years. During that time they rarely had marital relations. When Pearline moved back into his room, their relations did not improve. He then told his wife that something had to be done, or he would leave when his daughter grew up. In 1960 he took a job as a timber contractor. His work hours were from 5:30 A.M. to 9:00 or 10:00 P.M. About the same time his wife's brother was permanently injured while working in the timber woods. Felix helped the brother's family take him to hospitals for treatment. In addition, his logging business required record keeping,

food supplies for his timber cutters and storage for his equipment. The brother's wife had had some college bookkeeping courses and also ran a grocery store. Felix arranged for the brother's wife to keep his books and to make out his payrolls and tax returns. Also his men assembled at the store each morning and parked his equipment there each evening. This arrangement continued after the brother's death. During the last few years of their marriage Pearline falsely accused him of going with other women. About a year before he left, she refused to have marital relations with him. At that time he moved into a separate room.

Jim Sutton, Felix's father, testified that on more than one occasion he had heard Pearline accuse Felix of adultery. On cross-examination Jim Sutton was specific as to only one accusation some two years before the date of trial.

Pearline testified that she went to bed with her daughter because the daughter was scared. That, even then, she did not intend to stay but would drop off to sleep before Felix went to bed. She corrected the matter by getting a night light. Pearline also stated that people in the community had told her that Felix and her sister-in-law were having an affair. On August 5, 1968, Felix came home about 2:00 A.M. That night he wanted to make love and she refused. In refusing she told him that if she couldn't be his wife, she wasn't going to be his mistress. The next night Felix moved into a separate room. On cross-examination she readily admitted that she had accused Felix of having an affair with her sister-in-law.

Peggy McGaha, appellant's niece and the daughter of appellant's brother, testified that appellant did not come around while her father lay confined as an invalid. She considered the gossip that her mother and Felix were having an affair ridiculous. According to her, in that community gossip without any basis was not uncommon.

The Chancellor here had the opportunity to observe

the parties and their demeanor in the court room. Admittedly Pearline did not continuously and systematically accuse Felix of "going with" her sister-in-law but she did allow a rumor, supported by her uncorroborated suspicion, to create an "Iron Curtain" between her and Felix. As a result the marriage had been an empty shell for more than a year before the separation. Under such circumstances we are unwilling to say that the Chancellor's findings resulting in the decree of divorce are not supported and corroborated by the weight of the evidence.

Affirmed.

HARRIS, C. J. and FOGLEMAN & JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent because I do not find any evidence of grounds of divorce, much less corroboration of appellee's testimony. I am unable to recognize the evidence which shows indignities to the person, which I understand to be a course of conduct evidencing settled hate, alienation and estrangement, habitually and systematically pursued by one spouse, which renders the condition in life of the other spouse intolerable. See *Settles* v. *Settles,* 210 Ark. 242, 195 S. W. 2d 59.

The action was based upon appellee's charge that appellant had accused him of running around with her brother's wife and had denied him conjugal relations.

These parties were married December 31, 1950. Appellee said that they began having difficulties soon after their marriage when their child was two or three years old. He claimed that the wife then moved into the child's room for two years. She then moved back in with him, but even though he claimed that their relationship did not improve, he did not move into another room until a year before the separation. Five days after leaving appellant without notice, appellee also left Louisiana and came to Arkansas.

His testimony to support his allegation relating to accusations was the simple statement that during the last few months of their marriage, Mrs. Sutton had accused him of going with other women. He could not remember the dates on which she made these accusations, but said that the first such accusation was made five or six or seven years ago. He said that only a month or two before he left, while they were in bed together, she said he had no right to be her husband because he had been running around with other women. He said that one other time about a year earlier she accused him of running around with a woman, but he couldn't recall any details. He could not recall any other specific incident where there was an accusation. According to him, she never accused him in front of other people, and he did not discuss it with anyone or know of anyone who heard the accusations.

Appellee said that he and his wife spent little time together during the last year. He explained that he went to work at 5:00 a.m., and he was often home late because of his job. He said he didn't spend much time with her on weekends because they had things to do. Mrs. Sutton and their daughter usually went to church on Sunday, but he hadn't gone with them for years. He would go fishing or do other things. He admitted that he made no effort to get things straightened out with his wife. He said he told her several years ago that unless some changes were made, he was going to leave when their daughter was grown, and he did. He admitted that she was no more at fault than he. He doesn't feel that she hates him, and he doesn't hate her. He admitted that she did *not* exhibit hate toward him or deliberately try to do evil. He also admitted that it was possible that the time he spent with his wife's sister-in-law might have given some reason for the suspicions expressed by Mrs. Sutton.

Appellee's father's testimony was vague. On direct cross-examination, he only said he knew that the couple had experienced some difficulties and that he had heard appellant accuse his son of going with her sister-in-law. It was brought out on cross-examination that

this occurred two years earlier, before appellant's brother died. He said Mrs. Sutton only said she didn't think it was right for him to do that. He only heard a little bit of conversation between them, and described it as not being anything much. On redirect examination, he said he had heard Mrs. Sutton accuse Sutton more than once clear up to the separation, but then admitted, on recross-examination, that he really couldn't say that she had accused him more than the one time.

Significantly, the chancellor found that Mrs. Sutton did not continuously and systematically accuse her husband of "going with" her sister-in-law, but had allowed a rumor supported by her suspicion to create an "Iron Curtain" between her and her husband, causing the marriage to become an empty shell. He found authorities relied upon by appellant persuasive and said that they would probably be followed if there was any evidence of possibility of reconciliation. The issue of lack of sexual relationship was noted but not considered by the trial court.

Among the authorities relied upon by appellant to which the chancellor referred was *Smiley* v. *Smiley,* 247 Ark. 933, 448 S. W. 2d 642. This is probably the latest expression of the court on the ground for divorce relied upon here. We there reiterated the long standing rule that in order to sustain this ground for divorce there must be clear evidence of unavoidable and unendurable evils incapable of relief by reasonable exertion and of settled hate, enduring alienation and estrangement.

Sutton's testimony itself casts grave doubt upon the unavoidability of the evils of which he complains. He has made no effort to conduct himself in a manner which might allay the suspicions of his wife which he admits are not unreasonable, though he claims total innocence. Not only has he failed to show that the evils of which he complains cannot be relieved by reasonable exertion, he admits that he had made no effort at all. His admission that the situation was as much his fault as hers should settle this matter and bar

the relief he is getting. Where the parties are equally at fault, there must at least be something that makes cohabitation unsafe before the courts will interfere. *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1.

By his own testimony there is no evidence of any hate. The chancellor found that the conduct relating to the accusations was not systematically and habitually pursued, thus totally eliminating a primary ingredient of this ground of divorce. *Preas* v. *Preas,* 188 Ark. 854, 67 S. W. 2d 1013; *Sutherland* v. *Sutherland,* 188 Ark. 955, 68 S. W. 2d 1022.

Other language of *Meffert* is pertinent. There we sustained the denial of a divorce upon somewhat similar evidence. We said:

> There appears to have been nothing in the conduct of the husband with the member of the choir referred to in this record other than that which may be characterized under the well-known term, "flirting." Still the husband persisted in his attention to her after he knew that his wife objected to it. He knew that his wife's condition was such that she was easily excited and, under the circumstances, he should have refrained from paying any further attention to another woman, but should have devoted his life to his wife and children.

In *Preas* there is also language appropriate to this case:

> In the case at bar, there is nothing in the testimony of Preas tending to show that the acts of his wife complained of arose from any fixed malevolence or settled hate, but the proper inference is that her conduct was occasioned by a physical and mental condition caused largely by his own acts.

In *Sutherland* v. *Sutherland,* supra, we held that a few trivial instances of petulance were not sufficient to constitute grounds for divorce. We further said:

> The most charitable view of the testimony presented in this record in behalf of appellee is to say that both parties were somewhat in fault, and that both, by failure to exercise that mutual forgiveness which the relationship demanded, aggravated, rather than tended to ameliorate their conjugal state. Had the parties to this unfortunate marriage heeded the admonitions of this court, "A little confessed, a little endured, a little forgiven and all is cured," as announced in *Arnold* v. *Arnold,* supra, this now unhappy couple would be enjoying the associations usually consequent to the marriage status.

Furthermore, accusations of infidelity, in order to constitute any basis for this ground for divorce must have been not only false, but with the intent to wound, and are not to be treated as indignities if based upon doubts and suspicions reasonably born of appearances. *Cooper* v. *Cooper,* 223 Ark. 235, 265 S. W. 2d 4. See also, *Relaford* v. *Relaford,* 235 Ark. 325, 359 S. W. 2d 801.

This is clearly not a case where unfounded accusations were made in conversations with others as was the case in *Dennis* v. *Dennis,* 239 Ark. 384, 389 S. W. 2d 631; and *Relaford* v. *Relaford,* supra. I repeat that appellee's own testimony bars any relief to him. It is not a matter of credibility of witnesses as appellee suggests.

Little attention need be given the question of corroboration. While it may be slight in a case clearly not collusive, it must have some substance. The isolated instance of which appellee's father knew certainly does not meet the test any more than did the corroborating testimony about isolated instances we rejected in reversing a divorce decree in *Smiley* v. *Smiley,* supra. No resort can be had to appellant's testimony or admissions for corroboration. *Stearns* v. *Stearns,* 211 Ark. 568, 201 S. W. 2d 753.

Society's interest in the preservation of marriages seems to me to be as great as ever. The many assaults

being made upon the institution seem to me to intensify that interest. Our society will not fall with the result of one divorce case. Yet when we of the judiciary fail to regard established principles, a process of erosion is accelerated. There may come a day when hope of reconciliation or its lack determines the results in divorce cases. We have said that futility of any such hope coupled with utter incompatibility is not sufficient. *Davis* v. *Davis,* 163 Ark. 263, 259 S. W. 751. If this principle has become obsolete and the preservation of marriage ties is to depend upon hope of reconciliation, the legislative branch of this government should amend our laws on grounds for divorce to so state.

Unlikelihood of reconciliation has, on occasion, been considered by the courts when grounds for divorce have been shown by one party or the other or both. *Edwards* v. *Edwards,* 222 Ark. 626, 262 S. W. 2d 130; *Ayers* v. *Ayers,* 226 Ark. 394, 290 S. W. 2d 24. It is inappropriate here.

I would reverse this decree.

I am authorized to state that HARRIS, C. J. and JONES, J., join in this opinion.

LOIS ROGERS *v.* STATE OF ARKANSAS

5560 464 S. W. 2d 56

Opinion delivered March 1, 1971
[Rehearing denied March 29, 1971.]

Jeff Duty, for appellant.

Ray H. Thornton, Jr., Attorney General; *Mike Wilson,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Lois Rogers was tried before the court, sitting as a jury, upon a grand larceny charge. The trial court found appellant guilty of a misdemeanor in the taking of a 1969 Chevrolet truck from the Skull Creek D-X Station on or about the 12th day of May, 1970.

Appellant contends that the judgment of conviction is void on its face. We do not agree. Larceny is defined by Ark. Stat. Ann. § 41-3904 (Repl. 1964), as "the taking and removing away any goods or personal chattel. . . with intent to steal the same. . ." By Ark. Stat. Ann. § 41-3907 (Repl. 1964), larceny is a felony if the value of the property taken is more than $35 and a misdemeanor if less than $35. In *Rogers* v. *State,* 248 Ark. 696, 453 S. W. 2d 393, we refused to take judicial notice of the value of a vehicle. Thus upon failure to prove the value of the vehicle, appellant could still have been found guilty of a misdemeanor upon proof of the taking with intent to steal. As we read the record it is sufficient on its face to show that the trial court so found.

Affirmed.

GRAY'S BUTANE WHOLESALE, INC. *v.* ARKANSAS LIQUEFIED PETROLEUM GAS BOARD

5-5446 463 S. W. 2d 639

Opinion delivered March 1, 1971

Wright, Lindsey & Jennings, for appellant.

Paul Schmidt and *Warren Bullion,* for appellee.

FRANK HOLT, Justice. Appellant corporation applied for a Class 1 Permit to operate a retail liquefied petroleum gas outlet designed to service an area of 2,490 square miles (later revised to 2,060 square miles) surrounding Brinkley, Arkansas. The organizer and principal stockholder of appellant corporation is Mr. Edwin Gray who is also the owner and operator of other liquefied petroleum businesses and a former member of appellee Board. Mr. Gray testified in behalf of appellant corporation, and two witnesses testified in behalf of protestants, at a hearing before the Board which resulted in an order denying the application. Appellant then appealed by filing with the circuit court a petition to review the action of the Board. From a judgment by the circuit court affirming the order of the Board, appellant brings this appeal.

The thrust of appellant's argument for reversal is basically that there is no substantial evidence to support the findings of the Board. It is true that orders of administrative boards are to be reversed if not supported by substantial evidence of record [Ark. Stat. Ann. § 5-713

(Supp. 1969)]; however, the position of the Board is simply that appellant "has not submitted sufficient evidence of adequate safeguard and protection of the public to justify the granting of a permit. . . as applied for."

Two of the Board's findings, for example, are:

> The Board does not believe that the safety of the public is adequately protected and safeguarded by one serviceman in an area of two thousand and sixty square miles.
>
> * * *
>
> Applicant would start business with one or two trucks.

Appellant first attacks these findings on the basis that there is no evidence that one serviceman and one or two trucks could not adequately service the area. But this evades the real issue; there is no burden on the Board to present evidence that the proposed personnel and equipment are not adequate, rather it is appellant's burden to demonstrate to the satisfaction of the Board that the operation will assume safety to the public. We have observed on a prior occasion: "The safety of the public and the assurance that the applicant can render competent service are by Act 31 [Ark. Stat. Ann. §§ 53-701—729 (Supp. 1969)] made primary; the right of an individual to possess a permit is declared secondary." *Summers Appliance* v. *George's Gas Co.*, 244 Ark. 113, 424 S. W. 2d 171 (1968).

Appellant then argues that there is no evidence that it intends to begin business with only one serviceman, particularly in light of Mr. Gray's testimony that he can "move in" qualified personnel, as the needs arise, from other gas outlets which he owns and operates in the state. However, this testimony reflects that business would be commenced with "a serviceman"; it was never indicated that more than one serviceman would initially be employed. Again, the asserted argument incorrectly imposes some illusive type of burden upon the Board, as a condition of denying the permit, to

offer proof of the absence of that which it is properly appellant's duty to demonstrate the presence of—*i. e.*, adequate safeguard and protection of the public. The possibility of moving in qualified personnel from other outlets lacks significance unless it is shown this could be accomplished without jeopardizing the safety of its other operations. As the Board correctly found, this showing was not made.

Similarly, appellant contests the finding that:

> The Board does not consider the safety of the public adequately protected by the employment of a safety supervisor who does not live in the district and who flies into the district from some other district even though the flight may be made in one hour.

Appellant argues "there is absolutely no evidence in the record that the safety of the public would be in any manner affected by the residence of the safety supervisor." Once again the burden is appellant's to demonstrate the contrary. Moreover, it does not seem unreasonable that the Board should be skeptical about the efficiency and effectiveness of a "Safety Supervisor," as described in § 53-723 (A) (6) (Supp. 1969), who could be on the scene only after a one hour flight plus time to and from the airport, should weather and availability of air transportation permit.

The tenor of appellant's argument appears to reflect an underlying presupposition that mere compliance with the mandatory provisions of the Liquefied Petroleum Gas Board Act [§§ 53-701—729] *ipso facto* assures safe operation and, therefore, absent a "clear and convincing showing of lack of safety," entitles an applicant to a permit. Appellant expressly states:

> The fulfillment of the mandatory requirements in and of itself assures that [appellant] will conduct a safe, efficient retail outlet. This does not mean to imply that the Liquefied Petroleum Gas Board has no investigatory responsibilities after the mandatory requirements have been fulfilled. The Act clearly provides to the contrary. It is submitted, however, that compliance with the mandatory provi-

> sions forms a solid base for a safe operation. A denial of a permit after compliance with the mandatory provisions should be done only upon a clear and convincing showing of lack of safety. Compliance with the mandatory provisions of the Act by itself entitles [appellant] to the permit for which [it] has applied, because there was no showing of lack of safety at the hearing before the Board.

This position is not well founded for two reasons. First, as previously indicated, it erroneously shifts onto the Board the burden of establishing that the proposed retail operation would be detrimental to public safety. Secondly, it significantly narrows, if not completely divests, the Board of its recognized discretion which is so necessary for its effective functioning and proper discharge of its responsibilities. It appears that the members of the Board are experienced in the liquefied petroleum industry and possess an expertise with reference to their duties and responsibilities. If mere compliance with all mandatory requirements were sufficient to entitle an applicant to a permit, then the Board would have no discretionary powers and, therefore, there would be no need for the Board. We have said in *Summers Appliance* v. *George's Gas Co., supra:*

> The discharge of the enumerated responsibilities, as well as the others pertaining to issuing a Class 1 Permit, are not purely ministerial acts. Most of them require the exercise of considerable judgment and discretion.

Of course, this is not to be interpreted as granting the Board license to arbitrarily and capriciously exercise its powers.

We do not think that the Board abused its discretion in the case at bar, nor do we find merit in appellant's contention that the Board's findings were not supported by substantial evidence.

Affirmed.

JONES, J., dissents.

HOWELL ALLEY AND LOUELLA ALLEY HASTINGS *v.* JOE MARTIN

5-5449 464 S. W. 2d 591

Opinion delivered March 1, 1971
[Rehearing denied April 5, 1971.]

Elbert S. Johnson, for appellants.

Gardner & Steinsiek, for appellee.

FRANK HOLT, Justice. This is a boundary line dispute between adjoining landowners. Appellee, who owns the southern or "lower" tract, brought suit in equity to enjoin appellants, owners of the northern or "upper" tract, from trespassing upon a 33-foot-wide strip of land which runs along and inside of the southern edge of the upper tract. Appellee claims ownership of this strip by adverse possession, whereas appellants claim it as a part of their upper tract by warranty deed. From a decree apportioning the strip of land between the parties and enjoining further trespass, appellants bring this appeal. For reversal appellants contend that the decree is contrary to the law and the evidence and that the court erred in refusing the appellants' motion for a new trial. Basically, the appellants contend for reversal that the findings of the

chancellor are against the preponderance of the evidence. We cannot agree.

About 45 years prior to this action, the two tracts constituted a single parcel. The then owner excavated a drainage ditch traversing, in an east-to-west direction, the half-mile width of that parcel. Thereafter, upon purchasing the upper tract in 1945, appellants' predecessor in title caused a survey to be made which revealed that the boundary of the upper tract extended from approximately 25 to 30 feet south of the drainage ditch. Since the severed southern strip of this upper tract was not convenient to farm, it had been, prior to this 1945 purchase, converted into a utility roadway servicing both the upper and lower tracts. Appellants continued, as did their predecessor in title, to use the strip for this purpose.

Appellee purchased the lower tract in 1969, apparently under the misconception that its northern boundary extended to the drainage ditch. He instructed his tenant farmer to plow up the roadway and to plant crops up to the ditch. Appellants thereupon caused another survey to be made which reestablished their southern boundary line as extending from 25 feet beyond the drainage ditch at one end to 33 feet beyond the ditch at the other. Appellants then disked up appellee's crop to this survey line. Appellee secured a quitclaim deed, executed by his two immediate predecessors in title, which described the lower tract as extending northward to the center of the ditch. He then instituted the present action.

Testimony established, and appellants admit, that the lower tract had, since at least 1946, been farmed up to the roadway. However, appellants contended, and adduced other testimony, that the roadway occupied the total width and length of the severed strip. Appellee's evidence, on the other hand, was to the effect that the roadway extended no further in width than 10 feet south of the ditch. There is no question that if the roadway was of a width less than that of the half-mile severed strip (25 to 33 feet), then appellee, through his predecessors in title, gained title to the

remainder of the strip by adverse possession. The only real issue, therefore, concerns the width of the roadway prior to being plowed up by appellee's tenant farmer. The chancellor's decree established the boundary line as running 15 feet from the center of the drainage ditch. This was, as we understand it, to have the effect of allowing appellants a 10-foot-wide roadway between their drainage ditch and the new boundary.

In no event, however, has appellee acquired title to the actual space occupied by the roadway. Adverse possession without color of title does not extend beyond actual occupancy. *Coslin* v. *Crossett Co.,* 233 Ark. 13, 342 S. W. 2d 303 (1961); *Fee* v. *Leatherwood,* 232 Ark. 817, 340 S. W. 2d 397 (1961); *Cooper* v. *Cook* 220 Ark. 344, 247 S. W. 2d 957 (1952). Obviously, it was appellee's purpose to gain such color of title by acquiring, two days before he instituted this action, a quitclaim deed from his predecessors in title describing the lands therein conveyed as extending northward to the drainage ditch. But this deed is ineffective to extend appellee's claim to include the actual roadway since the roadway was continuously in use by appellants, thus repelling the assertion of adverse possession.

Equity cases are, of course, reviewed de novo on appeal; and the chancellor's findings, unless against the preponderance of the evidence, must be affirmed. In regard to the width of the roadway, we note that upon examining the record, the conflicting evidence appears to be evenly poised. In such instances we defer to the judgment of the chancellor who was in a superior position to determine the credibility of the witnesses. *Munn* v. *Ratcliff,* 247 Ark. 609, 446 S. W. 2d 664.

In the case at bar, the decree of the chancellor is affirmed.

STATE FARM MUTUAL AUTOMOBILE INS. CO. *v.* DALE H. CARTMEL

5-5472 463 S. W. 2d 648

Opinion delivered March 1, 1971

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

Wootton, Lands & Matthews, for appellee.

FRANK HOLT, Justice. This is an appeal from a declaratory judgment holding an exclusionary clause void in a policy issued by appellant and requiring appellant to defend appellee and to pay, up to its policy limits, any judgment that may be returned against appellee in an action currently pending before the circuit court. For reversal, appellant contends that the trial court erred in holding the exclusionary clause void. We think appellant is correct.

Appellee was driving an automobile owned by Howard and Faye Owens. The car was involved in a collision in which Mrs. Owens, riding as a passenger, allegedly sustained serious injuries. It is undisputed that at the time of the accident Mrs. Owens was a named in-

sured in one of appellant's policies of liability insurance and that appellee, since he was driving with the permission of Mrs. Owens, was also an insured by the terms of the policy. Mrs. Owens instituted suit against appellee to recover money damages for her injuries. Appellant declined to defend and denied any obligation to pay because of an express exclusion in its policy which states:

> This insurance does not apply * * * (i) . . .to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured.

Appellee thereupon brought an action for declaratory judgment to define the rights and obligations of the respective parties. In his pleadings, appellee asserted that the above policy exclusion is violative of Ark. Stat. Ann. § 75-1466 (Supp. 1969) and § 66-3211 (Repl. 1966) and that it is contrary to public policy and void.

We need not belabor a discussion of the relevance of § 75-1466 to the present circumstances. That statute is part of our Motor Vehicle Safety Responsibility Act which, as we have already had occasion to note, "has no application whatever to an insurance policy which has not been used as proof of financial responsibility in the future." *Aetna Casualty & Surety Co.* v. *Simpson,* 228 Ark. 157, 306 S. W. 2d 117 (1957). In the case at bar, as in the cited case, nothing appears in the pleadings to indicate that the policy had been used for that purpose.

Likewise, we find no merit in appellee's argument that the exclusionary clause is violative of § 66-3211 which provides in part:

> Insurance contracts shall contain such standard or uniform provisions as are required by the applicable provisions of this code . . .

Appellee's position, as we understand it, is that a particular policy provision is to be considered "standard" within the meaning of the statute if, as a matter of proof, such a provision was recognized as standard at the

time of the enactment of the statute. Appellee adduced testimony from a qualified insurance agent that the contested exclusionary provision was not included in the standard automobile insurance policy at the time of enactment of Act 148 of 1959 which contains § 66-3211. However, the provision, according to the agent's testimony, could be found in "substandard" policies at that time; and appellee therefore concludes that the policy offends the statute.

Section 66-3211 is self-explanatory. The standard provision which must be included in insurance contracts are those "required by the applicable provisions of [the] code." An examination of the code discloses no requirement that the named insured not be excluded from coverage for his own bodily injury. Furthermore, the policy form containing the exclusionary clause in question has been expressly approved by the Arkansas Insurance Commissioner, and appellee readily admits that most automobile insurance policies issued in this State and approved by the Commissioner also contain similar clauses.

These exclusionary clauses were designed and are approved to protect the insurance companies from collusive claims. Although they are quite far reaching and at times appear to have unfortunate effects, such clauses, absent statutory strictures to the contrary, are generally enforced according to their terms. See 7 Appleman on Insurance § 4409 and 7 Am. Jur. 2d Automobile Insurance §§ 127—129. Certainly we cannot say that such a widely accepted clause is against public policy.

The judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

ARKANSAS STATE HIGHWAY COMM'N *v.* RUSSELL C. ROBERTS ET UX

5-5443 464 S. W. 2d 57

Opinion delivered March 8, 1971

Ken Brock, for appellant.

Gordon, Gordon & Eddy, Guy H. Jones and *Clark, Clark & Clark,* for appellees.

CARLETON Harris, Chief Justice. This is the second appeal of an eminent domain proceeding instituted by the Arkansas State Highway Commission, appellant herein, against Judge Russell C. Roberts and Violet Lee Roberts, his wife, for the acquisition of a 9.63 acre tract of land in Conway needed for right-of-way purposes for the construction of Interstate Highway No. 40 and its

facilities in Faulkner County, Arkansas. Judge Roberts and two expert witnesses testified on his behalf, the landowner testifying that just compensation for the taking of the the 9.63 acres was $129,750.00, Lloyd Pearce testifying that just compensation amounted to $105,750.00, and James Larrison, the second expert, testifying that just compensation was $114,500.00. According to these witnesses, the Roberts acreage was valuable for two purposes, the highest and best use for the front 200 feet (3.03 acres) being for commercial property, and the highest and best use of the remaining 6.37 acres being multi-family residential. The land said to be suitable for commercial use had a value, according to Pearce of $67,100, or $22,145 per acre. Pearce said that the property had 660 feet of frontage 200 feet deep on Highway 65 which was zoned for commercial use. He described a usable frontage of 610 feet, leaving a 50 foot right-of-way as access to the rear of the property, and he estimated that the frontage had a value of $110.00 per front foot. The land said to be suitable for multi-family residential, according to Pearce was worth $37,650 or $5,910 per acre. This part of the property, the back 460 feet, was zoned for residential use, and Pearce said that it would support 135 units for multi-family residential purposes. The witness stated that in 1966, the traffic count along the highway was 5,000 vehicles per day, and that this constituted an increase of 600 per day over the year 1965. According to Larrison, the acreage commercially valued (the witnesses agreed on the amount of land that was best suited for each purpose) was worth $75,900 or $25,050 per acre, and the multi-family residential was valued at $34,445, or $6,035 per acre. As to the commercial value, Larrison valued the front 200 foot depth at $115.00 a front foot, and, as to residential, he said there was a need in Conway for 360 additional family units.

Two experts on behalf of the state testified that, in their view, just compensation would amount to $24,000.00 and $27,500.00 respectively. On trial, the jury returned a verdict in the amount of $113,300.00, and from the judgment so entered, appellant brings this appeal. For reversal, five points are asserted by the department, but

under the view that we take, it is not necessary that all of these points be discussed.

Background of the litigation is set out in the second and third paragraphs of the first opinion, *Arkansas State Highway Commission* v. *Russell C. Roberts, et ux,* 246 Ark. (June 9, 1969), 441 S. W. 2d 808, as follows:

"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. [1]

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."

As stated in the earlier case, the principal issue is the substantiality of the testimony offered on behalf of appellees; there are many similarities in the testimony in both cases, and a great deal of what we have said in *Arkansas State Highway Commission* v. *Russell C. Roberts, et ux, Supra,* is likewise applicable here. As in the first case, all of the appellees' witnesses used only one method of reaching their conclusions—that of comparable sales, and the first requirement in using this method is that the sales must be comparable before they are even admissible in evidence. *City of Little Rock*

[1] Likewise, in the instant litigation, no witness on behalf of appellees attributed any value to these improvements.

v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30. In *Arkansas State Hwy. Comm.* v. *Witkowski,* 236 Ark. 66, 364 S. W. 2d 309, it was pointed out that important factors in determining whether a sale is comparable are location, size, sale price, conditions surrounding the sale of the property, business and residential advantages or disadvantages, and whether the land is unimproved, improved, or developed land. At the first trial, appellees' experts only mentioned one sale involving land on Highway 65 said to be comparable to the Roberts property, and we quickly disagreed that this sale was indeed comparable. We disagreed also that four other sales offered by appellee as to commercial value, were comparable, and the language used in rejecting those sales is applicable to some of the sales used in the present case. For instance, in addition to pointing out that all parcels were on Highway 64 rather than Highway 65, we pointed out that the sales "were in a small area that had already been developed to commercial use." That is true of three of the sales offered by appellee in the present litigation. Draught to Kerr McGee, about ½ acre, Rogers to Farmer's Fire Insurance Company, about .14 of an acre, and Threshing to Central Arkansas Production Credit Assn., about an acre, were all sales in a small area, within the city limits, *that had already been developed for commercial use.* Three other sales, all outside the city limits, *in an undeveloped area,* were also used. The largest tract involved was a sale from Carter to Burford, and it only contained approximately an acre. The other two only contained approximately ½ acre and 1/3 acre respectively. All three were vacant at the time they were sold, except that one contained a small residence, which was considered of no value. Pearce and Larrison testified that they made adjustments in the differences between the lands covered in the sales mentioned, and the land owned by Judge and Mrs. Roberts, in finding the properties to be comparable. These adjustments included such factors as topography, utilities, size and shape, access, surrounding area, etc. It is at once evident that comparing all of these factors, finding the Roberts property better in some respects, and not as good in others, is rather a complicated process, particularly when some of the

comparable sales used differ substantially from some of the other sales used, *i. e.,* some were in the city limits, (3) in highly developed commercial districts, while others were out of town, (3) with no zoning, sewer, police, or fire protection. Apparently the witnesses then averaged the sales to reach their figures. This seems to us to be a matter, on the one hand, of using sales that were dissimilar to the Roberts property, because the lands (used for comparison) sold were more valuable, and on the other hand, using sales which were dissimilar because the lands were not as valuable, bringing the one group down, and the other group up, in order to reach a comparable figure.[2] That this was done is evident from the testimony. Mr. Larrison testified "By taking the six sales which we have considered and striking an average, we come up with $125 a front foot. Now in applying this to the subject property, I considered we already had 610 feet of effective property, 200 feet deep, so in placing my value on this property I said 660 feet at $115 which is the same thing as saying 610 feet at $120." This explained the figure that he had reached on the property valued for commercial use, $75,900. Of course, it is entirely proper for an expert to reconcile differences in the sales used and the principal property, particularly if there is no property in the vicinity actually comparable in nearly all respects, but one noticeable, and somewhat confusing fact here, is that some of the properties used as comparable were not at all comparable with each other, and the points of dissimilarity, between these separate tracts and the Roberts lands greatly varied from one extreme to another. As an example, let us say that the principal property is C. The expert compares C with A, which is in a highly developed area, finding some points of similarity and some dissimilar points. He then uses B, lands in an undeveloped area, which also bear some similarities to C, but of an entirely different nature from A, the dissimilarities also being of a different nature. Using these properties for comparison, he reaches the conclusion that A is worth so much *more* per land measure than C; likewise he reaches the conclusion

[2]The Roberts property was found to be more valuable than four tracts and less valuable than two.

that B is worth so much per land measure *less* than C. He then takes this analysis, hits an average, and uses the average to arrive at a value for C. Bear in mind that the comparison made by appellees' experts involved going through a similar process in six sales rather than two.

Mr. Pearce added a rather unusual basis in support of the value of the front portion of the lands for commercial purposes. He testified that the back portion of the property would support 110 units of multi-family residential use, and then stated:

"When we are speaking in terms of 110 units of multi-family residential use which could very easily be located on the land *we create a need by the erection or construction of those 110 units for commercial facilities such as a barber shop, beauty shop, small sundry shop.* [Our emphasis]"

This is what is known as "begging the question", which is simply basing a conclusion upon a fact not yet proved.[2a] Of course, the 110 units are not already there, and filled to capacity, a fact which will be subsequently discussed.

As previously stated, all sales used were on Highway 64. Mr. Larrison was questioned about this on cross-examination as follows:

"Q. Are you telling the jury that there were no sales of commercial properties comparable to the Roberts property on Highway 65 and that you had to go clear down to Highway 64 east of Conway to get comparable sales?

A. If there were any sales of comparable size on

[2a] Also defined as "founding a conclusion on a basis that needs to be proved as much as the conclusion itself." *Johnson* v. *Hall, Secy. of State,* 229 Ark. 400, 316 S. W. 2d 194.

Highway 65 they were not comparable in location. I couldn't see them.[9]

Q. You have any explanation to the jury as to why you had all these sales out on 64 for all these high prices and not one single sale on Highway 65 for four years?

A. There were some sales on Highway 65 right at the "Y" but I have been instructed by our attorney not to consider them.

Q. Why were you instructed not to consider them?

MR. JONES: I think that is a question of law, purely of law. We will object to that question. We think it is an improper question.

THE COURT: Overruled.

A. Because of the Supreme Court ruling in the prior trial of this case. They instructed me in their opinion that the Supreme Court has said these sales were not admissible in evidence.

Q. All right. The sales of the property or these properties were exactly like the property you have used on Highway 64 are they not, in size, in development and in what they are being used for?

A. Well, I won't split hairs."

Of course, one cannot help but wonder, if property on 65 was so valuable for commercial purposes, why there were no sales.

Four sales were used by witnesses in reaching the values testified about for the 6.37 acres considered for

[9] There is an incongruity in this testimony for Mr. Larrison stated that if there were any sales of comparable size on Highway 65, they were not comparable in location. Yet, along with Mr. Pearce, the sales actually used were neither comparable in size or location.

multi-family residential. Three of these sales were in a developed residential area, one being located on Clifton Street, one on Cleveland Street, and the other on Independence Avenue. All were on paved streets, all had utilities, and were zoned multi-family use. Two of these were within 500 feet of Hendrix College, one being right across the street. Two of the three are less than ½ an acre, and the other is less than an acre. The fourth sale referred to was that of Western Bell Motel, located at the intersection of Highway 64 West and Washington Street, a well developed area. Less than ½ an acre was involved, and the property had sixteen units when it was sold. In stating that these properties were comparable, the same procedure was used as with the commercial property, already outlined. Appellees did make a better case in this phase of the litigation than in *Arkansas State Highway Commission* v. *Russell C. Roberts, et ux, Supra,* in that testimony was offered relative to a need for rental housing units. Dr. Harold Love, Chairman of Special Vocations at State College of Arkansas, testified that in 1966 there was a very strong demand for rental housing units near the college, not only for graduate students, but for faculty members as well. He stated that although there had been many apartments built in the last few years, the rental charge was too high for graduate students. He said that since 1966, there had been one large multi-housing unit built by the college, and that a small one had also been constructed; however, he said that the large unit was not always full and, as a matter of fact, probably was about only 60% full, the reason being that the unit was too expensive. He added that he thought $1,000.00 per acre was a rather high price for land upon which multi-housing units would be built, and that he was not testifying that rental housing could be built on the Roberts land, only that there was a need in 1966 that was not met. Mr. Wilburn Smith, business manager for Hendrix College, testified that since 1963, he had not found it easy to find proper rental quarters for new faculty members, and he agreed that in early 1966, there was a strong demand for rental housing units in the city of Conway. He said that the student enrollment increased by approximately 100 to 150 from 1963 to 1966, and had increased from

1966 to the present by approximately 250 students; that during the three year period between 1963 and 1966, there would have been an increase of 18 faculty members. As to the last group, Mr. Smith admitted that no one had failed to find a place to live, and he also said that Hendrix student housing was not full; that he was not saying that there was a demand for student housing. The witness said he knew nothing about the Roberts property.

Judge Roberts used the same sales as his two experts. His evaluation of $129,750.00 was the same as that in the first case. The Roberts property is already zoned for multi-family units, and has a 660 foot frontage on the highway; however, 50 feet will have to be used for a private service drive into the proposed complex. Judge Roberts said that the property was purchased in 1945 for the sum of $1,750 or $175.00 per acre. The three ponds on the Roberts property occupy about an acre, the largest of these being about six feet deep. All of the ponds are located in the "commercial area" of the property.[4] As previously stated, the witness did not go into detail in explaining the valuations he had reached, but he did say that he was not familiar with any piece of property in the area that was zoned commercial on the front and residential on the back that could be used for multi-family structures; subsequently he stated that the property was the only piece of property in the city limits of the city of Conway, relative to size, topography, location and utilities, that could be developed on June 6, 1966 (date of the taking) in the manner testified about. Judge Roberts, strictly speaking, was correct in this statement, but the evidence reflects that there are two other pieces of property *on Highway 65* which are almost in the same category. One of these is a ten acre tract adjoining the Roberts property on the west, the distinctive difference being that this latter tract is not right on the highway.[5] The

[4]These would of course, have to be filled in.

[5]This property was sold in 1963, in a sale of DuVall to Meadowwood Builders for a consideration of $15,500, reflected by cash, and the trade of a house. Mr. Larrison stated that he did not consider this sale because it was not "an arm's length market transaction", although testimony on the part of the state indicated to the contrary.

other is a sale from Berry to McCracken and Wilson which took place on November 30, 1961; this tract is composed of 16 acres, fronts along the same highway, and has the same zoning as the Roberts property, with commercial on the highway frontage and residential on the back part.[6]

While it appears that in the instant case appellees' experts have gone into more detail in endeavoring to show comparability of the subject property with the properties used in comparison, we cannot agree that this effort was entirely successful.[7] The reason can be stated in one simple sentence, *viz,* there are *too many differences* to support the award given. In Vol. 5, *Nichols on Eminent Domain,* 3rd Edition, Sec. 21.31 (1), it is said:

"The location of the property sold must be considered, and evidence of the price paid at sales of other land, to be admissible in a land damage case, must be confined to land similarly situated and of the same character as that taken; and, as a general proposition, to land in the same neighborhood. It cannot be said, however, as a matter of law how large an area, in feet or blocks, constitutes a neighborhood, and no hard and fast rule can be laid down on the subject. In large cities 'neighborhood' is a relative term, and the field which a witness may take into consideration in forming an opinion of the selling price of land in the vicinity of a particular property, should not only be reasonably adjacent thereto, but it should be of the same general character as the immediate locality in which such property is situated. In sections of a city devoted to residences, or to retail trade, proximity to some desirable or undesirable point may affect values so greatly that one piece of land may be worth twice as much as another a hundred feet away. In determining the value of land

[6]This property sold for $875.00 per acre, but Mr. Larrison testified that he did not consider this sale, because he considered no sales before 1962, as they were too remote.

[7]It is interesting to note that, though entirely different sales were used in this case for comparison with the Roberts property, Pearce reached the same identical value figures reached in the first trial.

in such sections the court should be very strict in its requirements of proximity as well as of similarity."

It is obvious from what has been said, that we consider the proof offered as to both commercial value and value as a multi-family apartment to be completely inadequate to support the amount of the judgment.

It is asserted that the trial court erred in overruling the motions of appellant to quash the special jury panel selected to try this cause. It was first contended by the department that two jury commissioners did not have the qualifications prescribed by law since they were county officers, and accordingly, could not possess the same qualifications as petit jurors, a necessary requirement for jury commissioners under Ark. Stat. Ann. § 39-201 (1969 Supp.). Appellant's complaint is based on the fact that the two were Democratic Central Committeemen for Faulkner County. Appellant is in error. We have held that County Central Committeemen are not officers in any sense except to be answerable to mandamus proceedings. *Park* v. *Kincannon, Judge,* 214 Ark. 398, 216 S. W. 2d 376.

It is also contended that Act 568 of 1969 was applicable to this cause and that the jury should have been selected under the provisions of that act. Since any further trial would unquestionably come under the provisions of the act, there is no need to discuss the point further.

As pointed out at the outset, this is the second appeal of this case. This type of litigation is expensive, as well as time consuming, and we recognize that it may be difficult to locate many tracts of land that are really comparable. As earlier mentioned, the evidence offered relative to the multi-family unit use is stronger than at the first trial. Accordingly we have carefully examined the evidence and are of the view that it properly supports approximately 50% of the judgment entered. Hence, we think that an award of $57,000.00 is proper under the evidence, and that the judgment should be reduced from $113,300 to $57,000. See *Arkansas State Highway*

Comm. v. *Dupree,* 228 Ark. 1032, 311 S. W. 2d 791; *Arkansas State Highway Comm.* v. *Watkins,* 229 Ark. 27, 313 S. W. 2d 86.

The judgment is affirmed on the condition that remittitur is entered as indicated within seventeen calendar days; otherwise, the judgment will be reversed and the case remanded for a new trial.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. Once again I feel compelled to say, as I did in my concurring opinion on the first appeal, that the court is applying an improper standard in determining substantiality of expert opinion evidence on the market value of real estate. What I said in that opinion on this score I reiterate. Little involved on this appeal can be said to be controlled by the law of the case on the first appeal. The witness whose testimony was then treated did not testify at the second trial. Pearce used entirely different references to arrive at the opinion he expressed on this trial. The expert witnesses dutifully avoided consideration of sales which this court said were not comparable as a matter of law. One of these was on Highway 65, but this court said in the earlier opinion that the purchase was speculative. The others were eliminated because they were located in a small area that had already been developed to commercial use along another highway where traffic was nearly double that on Highway 65, upon which appellees' property is located.

A new approach to comparable sales was taken by Pearce and by Judge Roberts in the second trial. James Larrison, who testified at the second trial, did not testify at the first one. He did give regard to the inhibitions of the majority opinion on the first appeal. These witnesses endeavored to use other sales and to show in what respects the lands differed and the adjustments necessary to compensate for the differences. Unless the witnesses are permitted this latitude this case will never be terminated or the compensation due the property owner never determined unless he agrees to accept some arbitrary figure at which we may arrive with even less

substantial foundation than the testimony of any of the witnesses. The reason is that no witness has yet produced a valuation based upon a sale of lands actually comparable under the strict test of similarity being imposed by the majority.

It is strange to me that the majority can concede, as it does, that, strictly speaking, Judge Roberts is correct in his statement that, on the date of taking, this property was the *only* property in the city limits relative to size, topography, location and utilities that could be developed in the manner stated as its highest and best use, *i. e.*, commercial development along the highway and multifamily residential on the rear, and then apply such a strict rule in testing the basis of expert opinion evidence. The same strict test would totally eliminate from consideration sales of those tracts the majority finds *almost* in the same category. Those tracts were similar only in size and proximity in one case and proximity only in the other. Yet, for valuation purposes they might as well have been miles away.

The Berry to McCracken and Wilson sale involved property just across the highway from the subject property. Neither Pearce nor Larrison considered it because both considered the sale date of November 30, 1961, too remote. Is the majority saying this qualified expert is wrong as a matter of law? Time of sale is one of the important considerations in determining pertinence of sales date. See Annot. 118 A. L. R. 869, 887 (1939); 85 A. L. R. 2d 110, 149 (1962); 27 Am. Jur. 2d 331, Eminent Domain, § 429. Larrison testified that, while there is other land all along the highway, it would be difficult to develop because the terrain varies so sharply, and in addition it was not similarly situated as to availability of utilities. Utilities were admittedly not available to the Berry tract at the time of the sale. It consisted of 16 acres, not ten. Property south of the highway dropped off so sharply in elevation it was said to be difficult to develop. Every one of these dissimilarities would inevitably result in a much, much lower market value than that which would otherwise prevail.

I am astounded that, under the strict standards stated by the majority, it can say that the adjoining 10-acre tract is almost in the same category as the property involved. Perhaps this treatment arises from its considering the property as if it were "on Highway 65." The nearest any witness comes to placing this tract on this highway is the statement that it "corners" on the highway, which I submit may or may not be true when all the testimony and exhibits are considered. It fronts on a gravel street. It does not take an expert to know that, insofar as value for commercial development is concerned, it might as well be at least a mile away. Appellant's expert admitted the importance of highway frontage for commercial development. One of appellant's witnesses called this sale very comparable "to a degree." There is a conflict in the testimony as to whether that property has been zoned. There is at least some question as to whether true consideration for the sale is shown when a developer trades a house or other building for land. In other words, the builder might be willing to forego his profit (and the potential tax liability) in order to obtain land for which he might well be willing to pay an even higher cash price.

But, as I see it, these similarities and differences are matters that should be determined: first, by experts whose knowledge, training and experience qualify them to have opinions in such matters; second, by the trial judge who must exercise discretion in deciding the appropriate latitude to be allowed the experts in comparing sales under conditions prevailing in the vicinity of the property and the nature, characteristics and highest and best use of the property involved; and, third, by a jury properly selected and impaneled. This court should engage in weighing "comparability" by viewing similarities and dissimilarities and their effects only when there has been a clear abuse of the trial court's discretion.

In spite of the esteem in which I hold my brethren and the great respect I have for them and their many talents and great knowledge, I do not feel that any of us is as well positioned to make these determinations as are the experts who actually live in the real estate

market place, the trial judges who have the responsibility for determining the qualifications of the experts and the latitude which must be given them under prevailing market conditions in the particular locality or the jury, which is to judge weight and credibility. If this court progressively eliminates from consideration sales we decide are not comparable it will soon be demonstrated that there are no sales of lands comparable to appellees' under such strict standards.

I would refer the majority to a statement appropriate to this particular situation in 4 Nichols on Eminent Domain, Third Edition, 94, § 12.311[3], where it is said:

> It must be remembered, however, that the comparison is made with lands which are *similar* to the land taken. Of course, since, in fact, no two parcels are exactly alike, only such parcels may be compared where the dissimilarities are reduced to a minimum and allowance is made for such dissimilarities. It is, therefore, imperative to consider such differences as may exist in the physical and environmental conditions and a proper allowance made to cover any differential that may exist by virtue of the difference in the time of the sales. It is evident that there may be considerable difference in the size, shape, situation, and immediate surroundings of two estates, and perhaps in other respects, and yet the price which one brought may be of substantial assistance in determining the value of the other. There may be general considerations applicable to both alike which largely affect their value and render it proper that the price paid for one should be considered in arriving at the value of the other, nothwithstanding the differences between them.

No useful purpose would be served by my detailing each of the specific similarities and the various factors appellee and his witness enumerated. I think the majority, in declaring sales relied upon by appellee and his witnesses not comparable as a matter of law, has overlooked important evidence in the case, which at least

leaves a question of fact having a great bearing upon the proper latitude to be allowed expert witnesses in making comparisons. The highest and best use of the property is one of these factors. Some others of which there was at least substantial evidence are:

1. The ability of anyone traveling by automobile to reach any other place in the city within five minutes.

2. The proximity of commercial developments on the highway east of the property.

3. The availability of the property for 110-135 units for multifamily residential purposes.

4. The demand for 360 such units in Conway.

5. The unavailability of other tracts for this use, making this property unique because of zoning, availability of utilities, etc.

Because of these factors it was only natural that value witnesses consider properties that were bought and sold for development for multifamily residence use and for highway commercial use, making appropriate adjustments for dissimilarities. The necessity for making appropriate deductions because of certain dissimilarities in certain sales and appropriate additions because of other dissimilarities in others is so usual and obvious that I cannot see why it should prove confusing in this case. Nor can I understand where there is anything unusual about finding that availability of the back part of the property for multifamily residences added to, or even created a demand for, commercial sites on the highway frontage which would affect its value. It is an obvious fact that suburban and perimeter development property is being purchased and developed on this premise every day in almost every city in America. The desirability of this type of housing in a complex including small shopping centers has even presented a problem to those seeking to preserve downtown busi-

ness centers. We can't be blind to this established fact accompanying the urbanization of our society.

I will have to agree that the case must be reversed. The witness Larrison virtually admitted that, in his opinion, those sales along Highway 64 to which he gave great weight in evaluation of the Roberts highway frontage were almost exactly like the sales which the court held noncomparable as a matter of law on the first appeal. Under the law of the case, this deprives his testimony, as to that part of the land, of substantial support. Furthermore, it seems to me that the witnesses once again failed to satisfactorily *explain* the extent of the effect of various factors upon market value. When a witness says that by making various adjustments for factors which he enumerates, he arrives at a value of $156 per front foot, it is hard to comprehend how he can then arrive at a value of $110 per front foot, as did Pearce, on the property taken. Pearce also failed to explain how he came to the conclusion that the property was worth $148 per front foot, or 88% of the value of the sale by Rogers to Farmers Fire Insurance Company, except to say that it was based on adjustments for time, location, traffic, topography, physical characteristics, utilities, size and shape, highest and best use, access to the property and neighborhood and surrounding property. The fact finders had no way of knowing how much of this difference was attributable to time or any other one of the factors for which he made adjustments, or how he arrived at the adjustment for any one factor. Certainly, the expert witness did allocate some definite figure to each one of the factors and had some process of reasoning for his allocation. Why did he not come out with 87% or 89%, for instance? The same infirmities appear with reference to sales influencing Pearce's decision as to value of the remainder of the property. How did he adjust values, *e. g.*, from 54 cents per square foot to 14 cents per square foot, or $750 per unit to $350 per unit, or an average of 49 cents per square foot, or $800 per unit or $26,000 per acre to 14 cents per square foot or $350 per unit or $6,050 per acre? The only explanation I find is that the difference of $450 per

unit would "take care of the minuses" by allowing $49,500 (based on 110 units) for street and land work and earth work that would be required on the Roberts property. Yet he does not say how this relates to cost of the work or give any other reason for arriving at the figure of $450.

Larrison also said that his difference of $400 per unit would balance out the minuses by allowing $4,500 per acre for site preparation and service drive. Larrison also detailed the dissimilar factors connected with the commercial sales and said that some of these lands were better and some were worse than the Roberts land. He said, "All these percentage factors were added up and applied to the unit value paid for each of the comparable properties and then by multiplying percentage factors by the unit price paid for each of the sale properties, you come up with the adjusted value of the subject property by comparison." Yet he also failed to explain the percentage used with reference to any factor or to demonstrate how even one such calculation was made.

Judge Roberts testified that he used essentially the same sales as were used by his expert witnesses as the basis for his valuation of $129,750.

I have reservations about the offer of a remittitur. However extensively the record is examined, there just isn't any evidence showing a value of 50% of the judgment rendered, nor is there any attempt made by the majority to demonstrate how this figure was reached. Since appellees have an option in the matter, I do not see that they are harmed. Accordingly, I will merely refer to the reservations expressed in my separate opinion in *Arkansas State Highway Commission* v. *Carruthers,* 246 Ark. 1035, 441 S. W. 2d 84.

A. C. HAMILTON AND ROBERT W. MAXFIELD *v.* CHARLES HUCK AND LUTHER R. WADE

5-5450 464 S. W. 2d 68

Opinion delivered March 8, 1971

Givens & Capps, for appellants.

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

CARLETON HARRIS, Chief Justice. Appellant, Robert W. Maxfield, on September 17, 1969, at approximately 3:00 a.m., was operating a large tractor and trailer truck owned by appellant, A. C. Hamilton, the Hamilton vehicle traveling east on Interstate No. 40 near DeValls Bluff, Arkansas. Interstate No. 40 is a four-lane concrete highway, two lanes running east, and two lanes running west, the lanes being divided in this particular area by a three foot concrete dividing wall. The evidence reflects that Maxfield was traveling at a speed of approximately 65 miles per hour, in the left-hand east bound lane and passed a tractor trailer unit operated

by Ray DeVall who was traveling in the right-hand east bound lane. DeVall blinked his headlights as a matter of indicating to Maxfield that the latter could safely pull back into the right-hand lane in front of DeVall, and when this was done, the vehicle driven by appellant struck a truck which was likewise proceeding to the east. From the testimony:

"So, as I passed the second Roadway truck, he blinked his lights, and I give a signal, and I looked in my mirror to make sure that I was clear, and I was clear, and I came in, and, again, I touched my marker lights, and I could see straight ahead, and there was nothing in front of me nowhere that I could see, and all of a sudden, just out of nowhere, I can see an object approximately from here to the end of the Court Room wall, just about this distance before I could actually tell that there was an object, and me traveling between sixty and sixty-five miles per hour, it appears that this object is doing at least ten to fifteen miles an hour to me, and, so, from here to the Court Room wall at that speed, at sixty to sixty-five miles an hour, that would come at you pretty quick."

According to Maxfield, and also DeVall, the front truck, driven by Luther R. Wade, and owned by Charles Huck, appellees herein, was unlighted. When the collision occurred, Maxfield's truck, which had already been cut to the left in an effort to avoid the crash, struck the concrete dividing wall. Maxfield was injured, and the truck was badly damaged. Subsequently, Maxfield and Hamilton instituted suit for personal injuries and property damage respectively, Hamilton also suing for loss of profits occasioned by the inability to use the truck. On trial, the jury returned a verdict for appellees, and from the judgment so entered, appellants bring this appeal. For reversal, it is asserted that the verdict was contrary to the preponderance of the evidence; that appellees, through counsel, intentionally brought to the jury's attention the fact that repairs to the damaged vehicle had been paid for largely through insurance, and that the court erred in ruling that loss of profits of a commercial vehicle is not a recoverable element of damage in Arkansas.

We cannot, on appeal, decide this litigation on the question of whether the verdict was against the preponderance of the evidence. While the trial court had the authority to set aside the jury verdict for this reason,[1] we are only concerned with whether there was substantial evidence to support the verdict. In *Superior Forwarding Co.* v. *Sikes,* 233 Ark. 932, 349 S. W. 2d 818, this court said that we will affirm a jury verdict on appeal if there is any substantial evidence to support it, even though the verdict may appear to be against the preponderance of the evidence. Accordingly, while there was certainly evidence to support the view of appellants, we examine the case to determine if there was evidence to support the view of the jury. There is such evidence.

Trooper Mike Brandon, who investigated the accident, testified that the truck driven by Maxfield, after striking the Huck truck, moved on to the left and struck the median divider eighty-four feet east of the impact, then traveled three hundred and fifty-one feet up the left-hand lane along the divider until it came to a rest. In other words, the truck traveled 435 feet from the point of the collision. There was also evidence that Maxfield was driving with his lights on dim, but at any rate, we think a jury question was presented as to whether Maxfield was operating his vehicle at too great a speed under the circumstances, or whether he was keeping a proper lookout.

Nor do we find merit in the second contention. During cross-examination of Hamilton, counsel for appellees stated "I understand that the damages ran twelve thousand, seven hundred and ninety-four dollars and ninety-eight cents, according to a paper furnished me by your lawyer, that your insurance company paid for it". No objection of any nature was made. Subsequently, the record reflects the following:

"COUNSEL FOR APPELLEES:

Q. Did you pay that amount yourself?

[1]The record does not reveal that any such motion was made.

A. Yes, sir.

Q. No one paid that for you, that two thousand?

COUNSEL FOR APPELLANTS:

Your Honor, I am going to object under the Collateral Source Rule.

COUNSEL FOR APPELLEES:

He is giving us one figure here, and then another one. I don't care whether the insurance company paid it or not. I am curious as to why the figures are different.

THE WITNESS:

What figures are different?

JUDGE RHODES:

It would make no difference to who paid the bill. The gentleman would be entitled to recover if that much damage was done to his automobile.

COUNSEL FOR APPELLANTS:

No further questions."

While the objection may have been pertinent for the reason given, it certainly did not constitute an objection that the question was prejudicial because of the mentioning of insurance. We have held that the making of a specified objection has the effect of waiving all other objections. *Woods* v. *Pearce,* 230 Ark. 859, 327 S. W. 2d 377. There was no request for a mistrial, nor even a request that the jury be admonished, although the statement of the court, quoted above, is somewhat in the nature of an admonishment. It follows that there was no reversible error.

Since we have found no error up to this point, it becomes unnecessary to discuss whether the court erred in excluding proof of loss of profits. In upholding the judgment for appellees on the question of liability, questions relating to proper evidence in support of a recovery, become moot.

Affirmed.

AMA HOGUE *v.* WILLIAM F. HOGUE ET UX

5-5476 464 S. W. 2d 67

Opinion delivered March 8, 1971

Shaw & Shaw, for appellant.

Joe H. Hardegree, for appellees.

GEORGE ROSE SMITH, Justice. The issue here is the retaxing of costs. Upon the first appeal we modified the decree and remanded the cause for the entry of a decree consistent with the court's opinion. *Hogue* v. *Hogue,* 247 Ark. 914, 448 S. W. 2d 627. Our judgment and mandate directed that the cost of the appeal be divided equally between the two parties. The cost statement attached to the mandate recited total costs of $291.50. That total included a transcript or record fee of $71.50, as certified by the clerk of the trial court.

There was, however, no charge for the reporter's transcription of the testimony, because that item was not shown in the original record.

Upon receipt of the mandate the trial court entered a new decree conforming to this court's opinion and taxing equally the total costs of $291.50. The present appellees promptly filed a motion to set aside that decree and to permit the appellees to show their actual costs. At the ensuing hearing the appellees proved that they had paid $883 for the reporter's transcript of the testimony. The chancellor accordingly vacated his second decree and entered a third decree dividing equally between the parties the actual total costs of $1,174.50. This appeal is from that redetermination of the costs.

For the information of the bar we should state at the outset that it is not unusual for an appellate record to omit one or more items of costs, such as the reporter's fee. Such an omission is frequently carried forward in the statement of costs which the clerk of this court attaches to the mandate. Its correction is usually a ministerial matter involving merely a certification, by the clerk of the trial court, of the true amount of the costs. Upon that certification our clerk issues a new statement of costs, to replace the one that first accompanied the mandate.

Our procedure, though routine, has apparently not previously been described in an opinion, which doubtless explains why a different corrective process was followed in this instance. The chancellor, however, reached the right result; so we affirm his decision.

We do not agree with the appellant's insistence that the trial court was without jurisdiction to determine the correct amount of the costs. Upon the first appeal we exercised our judicial discretion, in an equity case, by deciding that the *liability* for the costs should be borne equally by the parties. Supreme Court Rule 24 (d). The determination of the exact *amount,* however, might properly be left to the trial court. See, *e. g., Lewis* v. *D. F. Jones Constr. Co.,* 194 Ark. 602, 108 S. W. 2d 1093

(1937). In fact, that procedure is often desirable and appropriate, for the trial court is in a better position than we are to hear evidence upon a disputed issue of fact. Here we find no reason to disturb the chancellor's conclusion, which was right.

Affirmed.

JONES, J., not participating.

HOYT BROWN *v.* DIAMOND G. RANCH, INC. ET AL

5-5498 464 S. W. 2d 77

Opinion delivered March 8, 1971

Garner & Parker, for appellant.

Jones, Gilbreath & Jones, for appellees.

GEORGE ROSE SMITH, Justice. This is an action for personal injuries brought by the appellant, Hoyt Brown, against the three appellees, Diamond G. Ranch, Inc., and its officers or agents, Mr. and Mrs. Austin Gatlin. The plaintiff alleged that he was hurt when his truck

struck a horse which the defendants had negligently allowed to run at large upon the public highway. Upon trial the jury returned a verdict in favor of the defendants.

Brown filed a motion for a new trial, asserting that Raymond Beshears, who served as foreman of the jury, had, on voir dire, wrongfully concealed his involvement in a similar situation in which the claimant had been represented by Brown's attorneys, the firm of Garner & Parker. After a hearing the trial judge denied the motion for a new trial, finding that "Mr. Beshears openly answered the questions propounded to him by the court, and he was not guilty of concealment."

While the jury was being empaneled two of the veniremen, Boone and Beshears, gave affirmative answers to the court's inquiries about the jurors' possible connection with similar incidents. After the court had explained the nature of the lawsuit being tried, the interrogation of the panel proceeded as follows:

The Court: First, let me ask you, have any of you ever owned horses, animals or stock which the law says must be enclosed . . .? Have you owned any stock that has gotten on the highway, and you've either been sued or claim for damages against you?

Ward Boone: I had some cattle get on the highway at one time but it was settled out of court. There was no damages paid either way.

The Court: How long ago was that, Mr. Boone?

Mr. Boone: About twelve years ago.

The Court: Did that happen in this area?

Mr. Boone: Yes, sir, just five miles west of here.

The Court: Were any personal injuries involved?

Mr. Boone: No, sir.

* * *

The Court: Do you feel that the fact that you had this experience, would that tend to influence you one way or another if accepted as a juror in this case?

Mr. Boone: No, sir, I don't think it would.

* * *

The Court: There is another gentleman, Mr. Raymond Beshears.

Mr. Beshears: I had the same experience as Mr. Boone except there wasn't any lawsuit.

The Court: There wasn't any lawsuit. Were there any personal injuries involved?

Mr. Beshears: No, sir.

The Court: How long ago, Mr. Beshears?

Mr. Beshears: A couple of years, I guess. Year and a half.

The Court: Do you feel that this experience would influence you if accepted as a juror in the case?

Mr. Beshears: No, sir.

At the hearing on the motion for a new trial it was shown that in 1967 Douglas Griffin, driving on the highway, ran into a pony owned by Beshears. Griffin's insurance company paid his property damage and turned the subrogation claim over to Garner & Parker. A lawyer who was then associated with the firm wrote to Beshears, asking him to get in touch with the firm about Griffin's claim for $319.15. Beshears turned the letter over to his own insurance company, which eventually settled the claim by the payment of $100. Beshears took no part in the negotiations and had nothing to do with the settlement. Quite the contrary, Beshears's insurer, in making

the settlement, refused to even ask Beshears for a release, because "he might later feel that we had misinformed him in some manner regarding his claim for damages to his animal."

The trial court, as we have said, expressly found that Beshears openly answered the questions on voir dire and was not guilty of concealment. Brown's attorney did not see fit to ask Beshears any additional questions about the earlier incident. There is no showing that Beshears remembered that the letter to him had been signed by Garner & Parker; in fact, Beshears was not called as a witness at the hearing upon the motion for a new trial. It does affirmatively appear that Beshears had no knowledge of the terms of the settlement that was eventually reached between the two insurance companies. Upon the record we find no abuse of discretion on the part of the trial judge in refusing to grant a new trial. *Oliver* v. *Paul N. Howard Co.,* 249 Ark. 427, 460 S. W. 2d 91.

Affirmed.

HERSCHEL EARP ET AL *v.* A. G. "HARRISON" EARP

5-5465 464 S. W. 2d 70

Opinion delivered March 8, 1971

Rhine & Rhine and *George Edward Thiel,* for appellants.

Kirsch, Cathey & Brown, for appellee.

LYLE BROWN, Justice. Appellee A. G. "Harrison" Earp claimed to be the son of M. C. "Harrison" Earp. The claim was denied by all other possible heirs of M. C. "Harrison" Earp, who died intestate. Appellee initiated this action to establish his heirship. The chancellor ruled in A. G.'s favor. The points for reversal will be listed as they are discussed.

M. C. "Harrison" Earp married Ida Smelser on July

4, 1919. At the time of that marriage he had seven children by a prior marriage, and Ida had five children born of her first marriage. The husband and wife lived together with their children until the fall of 1919 at which time they separated, and Ida filed for divorce. "Harrison" answered and cross-complained, alleging fraud on the part of Ida in that she was allegedly pregnant (at the time of marriage) by a man other than the defendant, "Harrison." A child was born to Ida on February 28, 1920, and the decree annulling the marriage was entered April 12, 1920. A. G. "Harrison" Earp, appellee, contends that he is the child born of the marriage between M. C. "Harrison" Earp and Ida Smelser Earp.

After the divorce from Ida, M. C. "Harrison" Earp married Bettie Earp who lived with him as his wife until his death in 1942. No children were born of this marriage. Bettie Earp was appointed administratrix of the estate of the intestate. When a petition to assign dower and homestead was filed, appellee intervened merely to note his claim as an heir at law of M. C. "Harrison" Earp. With respect to that intervention the probate court said:

> The court finds that it is not necessary to take any action on the intervention of A. G. Earp herein for the reason that said intervenor merely notes his claim that he is an heir at law of M. C. Earp, Deceased, and does not controvert the right of Mrs. Bettie Earp to homestead or dower as herein awarded.

No determination of heirship was ever made in the probate court proceedings.

Bettie Earp died on May 30, 1969. Her homestead and dower rights being thus extinguished, the estate of M. C. "Harrison" Earp passed to his heirs at law. A. G. "Harrison" Earp filed a complaint on August 13, 1969, against the children of M. C. "Harrison" Earp by his first marriage and their heirs. The complaint alleged that A. G. "Harrison" Earp was also an heir of

M. C. "Harrison" Earp and prayed a partition of the land in question. The chancellor found for appellee and granted him an undivided one-eighth interest in the lands. From the order of the chancellor, the heirs of M. C. "Harrison" Earp by his first marriage bring this appeal.

Appellants rely on three points for reversal. The first point is the contention that the lower court erred in making a finding of fact that A. G. "Harrison" Earp was the legitimate son and one of the heirs at law of M. C. "Harrison" Earp. It is clear that if A. G. "Harrison" Earp was in fact the child born to Ida Earp on February 28, 1920, before the marriage was dissolved by an annulment on April 20, 1920, then A. G. "Harrison" Earp is presumptively an heir of M. C. "Harrison" Earp and entitled to inherit along with the other children of the intestate. Ark. Stat. Ann. § 61-104 (1947), (since replaced by § 61-141) was in effect in 1942 when the lands passed to the heirs subject to the dower and homestead rights of the widow. It provided: "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate." In *Morrison, Admx.* v. *Nicks,* 211 Ark. 261, 200 S. W. 2d 100 (1947), this court said: "There is a presumption, said to be one of the strongest known to the law, that children born to a couple lawfully married are the children of the husband, and that this presumption continues until overcome by the clearest evidence that the husband was impotent or without access to his wife, and the controlling question is whether that proof was made." See also *Jacobs* v. *Jacobs, infra.*

The following witnesses testified that A. G. "Harrison" Earp was the child born on February 28, 1920, before the annulment of the marriage between M. C. "Harrison" Earp and Ida Earp: A. G. "Harrison" Earp, appellee; Mrs. Aubra Kappleman, half sister to the appellee; Mrs. Sybil Williams, cousin of appellee; Luther Smelser, half brother to appellee; and Ray Breckenridge, a neighbor of M. C. "Harrison" Earp when appellee was born. None of the appellants testified. The only evidence

presented by them to prove that appellee was not the child who was born on February 28, 1920, was an entry in a school record for the year 1936 when appellee was in the seventh grade, and appellee's application for a marriage license. The entry on the school record was made by someone other than appellee and indicated that appellee was born February 28, 1921. The application for the marriage license was dated March 13, 1944, and indicated that appellee was twenty-three years old at that time. The entries were made by someone other than appellee, except for his signature. (1944 less twenty-three is 1921. Appellee should have been twenty-four on March 13, 1944, according to his testimony.) It should be noted, however, that there is no place on the application for the date of birth of the appellee. The form merely asks for the age of the parties applying for the license, the purpose of the questions, no doubt, being to insure that they have reached the age of majority.

Appellants contend that the annulment decree which was offered into evidence was *res judicata* as to the question of the legitimacy, or putting it the way appellants expressed it, "This annulment decree was not plead nor was it argued as being *res judicata* against this appellee, but was plead and introduced in evidence to establish a finding of fact made by the lower court which should be binding on that court." Also, appellants say, "This finding of the lower court in 1920 removed this case from the application of Ark. Stat. § 61-104 *supra* and this appellee can claim no rights under that statute."

The case of *Shatford* v. *Shatford,* 214 Ark. 612, 217 S. W. 2d 917 (1949), answers the contention of appellants. In the *Shatford* case the husband was seeking an annulment from his wife due to fraud. He alleged that she was pregnant with child by another man. The chancellor granted the annulment, and the wife appealed. The appeallant contended that evidence by the husband and other witnesses as to the fact that he had never had sexual intercourse with the wife was inadmissible since it tended to bastardize the child born after the marriage. The *Shatford* court held that the testimony was admis-

sible in the annulment proceeding but would not be *res judicata* in a subsequent bastardy or heirship proceeding.

Appellants would cast the burden of proving legitimacy on appellee. That contention is answered in *Jacobs* v. *Jacobs,* 146 Ark. 45, 225 S. W. 22 (1920):

> The decided weight of authority is that every child born during wedlock is rightly presumed to be the offspring of the husband. The presumption must be adhered to for the protection of the rights of those who are attempted to be bastardized without any fault on their part, to preserve the peace of families and to promote the interest of society.

The presumption of legitimacy means that the parties contesting the legitimacy of a child must bear the burden of proof and must show by sufficient evidence that the husband was impotent or entirely absent at the period in which the child in the course of nature was begotten. *Kennedy* v. *State,* 117 Ark. 113, 173 S. W. 842 (1915).

Thus it would appear that the preponderance of the evidence is with the findings of the chancellor that appellee was the child born on February 28, 1920, and a lawful heir of the intestate, M. C. "Harrison" Earp. Appellants made no showing that M. C. "Harrison" Earp was impotent or without access to Ida. On the other hand, appellee made a showing by the testimony of several witnesses that the husband and wife slept together during the summer of 1919 after their marriage.

The second contention of appellants is that the lower court erred in failing to recognize the probate proceedings in connection with the administration of the M. C. "Harrison" Earp estate as being *res judicata* against A. G. "Harrison" Earp to any interest alleged by him. The simple answer to that contention is that A. G. "Harrison" Earp did all he could do to protect his interests in the estate; he intervened in the proceedings before the final decree which awarded homestead and

dower to the widow of the intestate, and he filed this action for partition within two and one-half months after the death of the widow. We have previously quoted that portion of the closing order which noted appellee's intervention.

The third and final point which appellants rely on is the contention that the statute of limitations had run on the appellee. Four dates are suggested as starting points for the statute to begin to run: April 12, 1920, the date of the decree of annulment; the date of appellee's twenty-first birthday; the date of the death of M. C. "Harrison" Earp, September 1, 1942; and January 4, 1944, the date the probate court fixed dower and homestead and divided the personal property. Obviously, the first two dates cannot be considered since M. C. "Harrison" Earp did not die until 1942. As to the second two dates, appellee did appear in the probate proceeding assigning dower and homestead to the widow for the purpose of noting the fact of his claim as an heir at law of the decedent. The probate court found it was unnecessary to determine his rights in that proceeding since the only issue was related to the dower and homestead claims of the widow. The widow's possession under dower and homestead rights was not adverse to the plaintiff or the other heirs. *Head et ux* v. *Farnum,* 244 Ark. 367, 425 S. W. 2d 303 (1968). The evidence shows that the widow retained possession of the land in question until her death.

Affirmed.

W. G. WOOLF ET AL *v.* D. WILLARD MADISON ET UX

5-5481 464 S. W. 2d 74

Opinion delivered March 8, 1971

Lee Ward, for appellants.

Gus R. Camp, for appellees.

LYLE BROWN, Justice. The appellants are the widow and nine of the ten children of Edgar Woolf, who died intestate in 1949. The appellees are the tenth child, Martha Madison, and her husband, Willard Madison. Appellants brought this action to cancel a deed to the Edgar Woolf homeplace wherein appellees were the grantees. Appellants asserted that one of the considerations for the deed was the agreement by appellees to care for the mother for the remainder of her life. Appellants contended the responsibility was violated. The chancellor held that appellants did not meet the burden of proof necessary to support their allegations. The appellants here contend that the findings of the chancellor "were against the clear preponderance of the evidence."

The Woolf homestead, the subject of this litigation, consisted of 131.5 acres in Clay County. It was not held

as an estate by the entirety. Shortly after the death of Edgar Woolf the widow and nine of the children deeded the lands to the tenth child, Willard Woolf. The deed recited a consideration of one dollar "and other good and valuable consideration." It reserved to the widow the main dwelling "for her sole use during the term of her natural life." On the same date Willard executed a note and mortgage in favor of the widow for $7,000, payable in annual installments of $500. In addition to the recited considerations there was an oral agreement between grantors and grantee that the latter would care for the mother during the remainder of her life.

Willard lived on the property and cared for his mother for about two years. He did not make any of the annual note payments. Willard wanted to leave the farm to attend college. With the consent of his mother he deeded the lands to a sister and her husband, Mr. and Mrs. Lloyd Kendrick. The Kendricks executed a note and mortgage to the mother for $10,000, payable in annual installments of $500. The use of the home by the mother was reserved in the deed. The Kendricks testified that they accepted the deed with the same verbal agreement to care for the mother.

The Kendricks decided, after three years, that the farming operation was not profitable. They arranged with appellees to take the land and assume the mortgage. That deed also reserved to the mother the exclusive use of the main house on the farm. Kendrick testified that he discussed with appellees the understanding among all the children that the grantees would be obligated to care for the mother.

In their answer, and in their brief, appellees contend there was no agreement on their part to care for the mother. Although the evidence does not reflect precisely the items of responsibilities contained in the obligations, we think the evidence is clear, cogent, and convincing that the ownership of the lands carried with it the condition that the owners did have limited obligations of care.

Willard Woolf was the grantee in the first deed we have described. He said one of the considerations for the deed, which he made with all the other children, was that he would care for the mother during her natural life. The second grantees were Mr. and Mrs. Lloyd Kendrick. Mrs. Kendrick testified that the care of her mother was very much a part of the consideration, excepting the payment for clothing and doctor bills. "And we were to get her to and from the doctor." The Kendricks testified that appellees agreed to the same arrangements. W. G. Woolf, another son, stated that appellees accepted the obligation to care for the mother. Of still greater significance on this point is the testimony of appellees. Martha Madison, one of the appellees, testified that she and her husband assumed substantially the same obligation toward the mother as did the Kendricks. Appellee Willard Madison testified that he made an agreement with Willard Woolf, ". . . the agreement we had we were to move out there in the house with her. She was going to buy her part of the groceries and we were to live there and see that she got to the doctor." (Mrs. Woolf, because of infirmities, did not attend court.)

The second pivotal question is whether appellees violated in substantial respect the obligations to the mother. We think those responsibilities were those described by the Kendricks and corroborated by appellee Martha Madison. The evidence preponderately shows that appellees abided by the agreement for some fifteen years and until Mrs. Woolf voluntarily left the home.

The Madisons, appellees, received their deed in May 1955 and shortly moved into the main house with the approval of the mother. At that time the mother was near sixty-five years of age and suffering from diabetes. That of course affected her diet. She administered her own insulin. From the outset and until Mrs. Woolf left the home in 1969 (near the age of eighty years) there is no question but that she received dutiful and kindly attention from appellee Martha Madison and her children. They took the mother to church regularly; they took her to the beauty shop weekly; she went with her daughter grocery shopping; she had her own television which the

family provided her; she had two rooms for her private use; she had access to a telephone; the daughters and appellee Martha saw that the mother's rooms were kept clean; and foods commensurate with her diet were supplied. Appellees' small son slept on a rug at his grandmother's bedside, which pleased her very much. The girls wrote letters, read to her, and ran errands for the grandmother.

According to appellees and two of their daughters, Mrs. Woolf became somewhat of a problem to the household. This appears to have set in about the time she passed her seventy-fifth year. She experienced two cataract operations, she became forgetful, and she gradually lost considerable strength. It was said that she became somewhat quarrelsome and exhibited an attitude of independence. Appellee Willard Madison said that on more than one occasion she would visit some of her other children and would leave after quarreling with them; and he said "any time she said anything to me it was criticism." Mrs. Madison said she avoided arguments with her mother by not contradicting her. One of the children testified that her grandmother "got a little childish," became more forgetful, and became a little more demanding; and that she developed a carelessness about her appearance and cleanliness. Another daughter testified that as her grandmother advanced in years she became more difficult to please; that she admonished the child about correcting her younger brother and sister; and that the grandmother became inquisitive about telephone calls received by other members of the family. Notwithstanding, there is no evidence that Mrs. Woolf's daughter, Martha, or the children treated Mrs. Woolf with anything but respect and understanding.

Appellee Willard Madison seems to have responded differently to the increasing idiosyncrasies of Mrs. Woolf. He said he moved his family into the main house at the suggestion of Willard Woolf, who felt that the Madisons could better "care for and look after Mrs. Woolf." Madison said his relations with Mrs. Woolf were very good for a number of years. His first displeasure with the Woolf family was that "they would come too often and

stay too long," Madison related. He denied emphatically that he set out to "freeze Mrs. Woolf out of the home." He admitted that he had not carried on any conversations with Mrs. Woolf for some few years "because any time she said anything to me it was some criticism. I didn't do something right." He also admitted that he had criticized Mrs. Woolf's demeanor—not to her—but to one or more of her children.

Several of Mrs. Woolf's children testified, in substance, that they noticed a strained relationship between Mrs. Woolf and appellee Madison; and that they were not on speaking terms. "If mama said something, he didn't like it and mama didn't like what he'd say every time." However, it can be said to the credit of appellee Madison that there is no specific evidence that he ever abused Mrs. Woolf, either physically or by spoken words. Mrs. Madison said she had never heard her husband use a profane word in the hearing of Mrs. Woolf.

When Mrs. Woolf left the home in 1969 she did not intimate that she had no intention of returning. She left the impression that she was going to visit her daughter, Ruth Kendrick. Mrs. Woolf asked Mrs. Madison to call Ruth to come after her. She took only some of her personal effects.

By virtue of the reservation of the homeplace in the deed, together with the oral agreement, Mrs. Woolf is entitled to live in the home with the Madisons, and if she returns, appellees are obligated to care for Mrs. Woolf and to see that she gets to the doctor. Appellees are not obligated to pay Mrs. Woolf's medical bills or to furnish her clothing.

Affirmed.

DAVID TURNER *v.* WILLIAM O. ROSEWARREN ET AL

5-5444 464 S. W. 2d 569

Opinion delivered March 8, 1971
[Rehearing denied April 12, 1971.]

Irwin, Streett & Branden, for appellant.

J. Marvin Holman and *William M. Stocks,* for appellees.

JOHN A. FOGLEMAN, Justice. This appeal comes from a judgment after a new trial of appellees' action to recover from appellant, Betty Rosewarren's host automobile driver, for personal injuries, following our reversal of the first judgment in *Turner* v. *Rosewarren,* 247 Ark. 1301, 440 S. W. 2d 769. We then reversed because the evidence was not sufficient to show wilful and wanton misconduct on the part of appellant. After the first judgment, Betty and appellant were married, the cause was remanded, new witnesses were discovered, Betty's impaired memory was improved and the cause again submitted to a jury which returned a verdict for a substantially larger amount than did the first jury. Appellant again urges that the evidence was insufficient to support a verdict finding him guilty of wilful and wanton misconduct. On this appeal he also asserts that the trial court erred in admitting the testimony of Helen Stewart, who testified at the first trial, and of Mrs. David Scott, who did not. We are unable to agree with appellant on either point.

No useful purpose would be served by reiterating evidence common to both trials. We will endeavor to give emphasis to testimony at the second trial not given in the first one. We find the additional evidence sufficient to leave the question of wilfulness and wantonness of appellant's conduct to the jury and its answer dependent almost entirely upon the credibility of witnesses.

Betty Rosewarren's recovery from traumatic amnesia commenced one or two years after the collision. It was not complete, either as to events recalled or clarity of recollection of those things she did remember. Facts she did recall were significant, however. She remembered that appellant David Turner was angry with her before

the collision, and had intentions of breaking off their relationship and recovering his class ring. Still, she could not remember his coming to her home, but could remember his driving down the road and her being frightened by the bright lights of a car coming up very close behind the Valiant automobile driven by Turner and in which she was riding. She remembered that David told her Kenny Elkins was driving that car. She then remembered seeing a speedometer reading "85 miles an hour" and turning to look at David, but couldn't recall whether she actually saw him. While she incorrectly described the shape of the speedometer she envisioned, she explained, after a recess, that she was confused and had incorrectly described the shape of the speedometer on her father's automobile instead of that which she recalled seeing in David's car. She admitted that she really could not say when she saw the 85-per-hour reading except that it was after a car approached from the rear of Turner's vehicle. After she looked toward David, all went black, she said, until suddenly a light in the window and across the windshield on her side struck her in the face. It seemed to her that Turner's car was sliding toward the lights. She remembered hearing screams which were her own and feeling as if there was nothing of her below the waist. She recalled asking for David, hearing Kenny Elkins' name, and later asking David while in the ambulance en route to the hospital why he was angry and why he wouldn't talk.

Betty also told the jury that David had driven past the place where the collision occurred many times over a period of more than one year immediately preceding this occasion. She said that, at the place of the occurrence, a driver comes upon a hill at the bottom of which there is a curve where the highway is rough and will "throw" a car which enters it. According to Mrs. Turner her fear of speed causes her to "freeze" or "clam up" until it is over. David had previously told her, she testified, that his Valiant was light and hard to handle at high speeds. She also revealed that her husband had a temper.

Other pertinent new testimony was that of Arkansas

State Police Trooper Eldon Brown and Mr. and Mrs. David Scott. Brown investigated the collision on the night it occurred. He arrived at the scene while Betty and David were still there. Brown could tell then that appellant had lost control of his 1962 Valiant while coming around the curve, crossed the center line and struck the 1961 station wagon driven by Mrs. Rosa Smith. Brown described the highway at the point as "wavy" pavement 20 feet wide, with a dip and a raised place in the curve. North of the curve there is a hill and a sign 1,000 feet north of the dip warning of the impending curve. Brown said that the "dip" and the "hump" will cause the right side of a vehicle rounding it to be thrown upward and the vehicle itself leftward. He located the point of impact south of the curve. He found the Turner and Smith vehicles at a distance of 283 feet from the dip. He had recorded this distance as 183 feet on his official report, but had discovered his 100-foot error while remeasuring the distance three weeks before the trial at the request of appellees' attorney. Brown could tell that the wheels of the Valiant had dropped off the pavement just south of the dip, after which the vehicle traveled about one-half the distance to the point of impact, came back on the highway, skidding sideways out of control across the center line, laying down 141 feet of skid marks, and then collided with the station wagon. Brown said that the damage to the Valiant was heavy and to the station wagon considerable.

David Scott lived in a house about 200 yards southwest of the point of the collision. He described the curve as a blind one on an 18-foot wide, low-type asphalt and rock highway without any shoulders whatever. He knew of a low spot in the approach to the curve from the north, which would cause a car passing over it to lurch. He heard the impact on the night of the wreck, went to the scene and then summoned the ambulance and state policeman. He observed skid marks of the Turner vehicle in the ditch west of the highway and then across the highway into the ditch on the east side where he found the vehicle at rest. The marks of only two wheels appeared in the ditch.

Mrs. David Scott heard a thump, then heard and saw the impact. She went immediately to the Turner car where she found Betty Rosewarren lying in the car on the right side. It was dark at the time, and she did not know David Turner. She saw a boy go around, get hold of the steering wheel and take something out of the car. There were only two people beside her at the scene when she got there—Betty Rosewarren and a boy. She testified that when she first saw the boy he was coming out of the car from the driver's side. She did not know him and was unable to identify him. She testified that this boy helped her open the door on Betty's side of the car and then squatted down beside Betty. While he was in that position, according to Mrs. Scott, he said "I was racing." Mrs. Scott saw another boy come up just a few seconds later, and other people came later. She said that a number of people were present when this boy made the remark about racing.

Helen Stewart again testified. She said that her sister-in-law, Rosa Smith, was following her to the Hallowe'en party at the Woodland Church. She estimated the distance to the church from the place where the wreck occurred as one-quarter of a mile. One proceeding north past the scene of the wreck, as she was, would make a left turn at the top of the hill north of the curve. Unlike her earlier testimony, she testified that as she was ascending the hill in her automobile, when she was close to her turn and had given her turn signal, she met "these fast *cars*"[1] going back and forth across the center line, causing her to pull onto the shoulder of the road until they had passed. She then said that the *car*[1] she met was moving so fast it was not holding the road, and was moving back and forth across the center line where the road was "curvy." The failure of this vehicle to remain on its proper side of the highway caused her to leave the highway to get out of its way. She recalled that two or three cars were following her at the time.

Mr. William Rosewarren, Betty's father and one of the appellees, testified this time that appellant's remark

[1]Emphasis supplied.

to him at the hospital was, "Mr. Rosewarren, I guess I'm not a very good driver. I was driving too fast. It's all my fault." He also described the highway at and near the place of the collision. He called it a wobbly, weaving, blacktopped, narrow road. He described the hump on the approach to the curve as one which caused a vehicle to "drop down and up." He also said that anyone who drove that road knew that 50 miles per hour was the maximum speed at which a vehicle could make the curve. He questioned the accuracy of the record as to his previous testimony about David's remark to him. He also claimed that, having never been in a courtroom before, he was in fear at the first trial.

Kenny Elkins was called as a witness by appellant. He said that he had known appellant in high school and Betty Rosewarren for six or seven years. He was stopped at an entrance to the highway when he saw them pass just before the collision. He pulled onto the highway directly behind them at a point about three miles from the place the wreck occurred. He said he was following them at a distance of six or seven car lengths and at a speed of 55 to 60 miles per hour with no vehicle intervening. He said that he did not see the wreck because the vehicles were out of his line of vision around a curve. Elkins said that they were meeting cars and that the third one, the vehicle immediately preceding that of Rosa Smith, never dimmed its bright lights. When he went around the curve the first thing he saw was the back end of David's car up in the air coming down. He stopped before he reached the actual point of impact. He saw no car on the shoulder, as he approached, and did not see a left turn blinker signal given by any car he met near the intersection with the road to Woodland Church. He denied ever trying to pass the Turner vehicle. He claimed to have been the first person to go to the scene, but having stopped in such a position that his vehicle blocked the highway, he went back to clear the highway. He said that he got David out of the car and at about the same time told Scott to call the police and the ambulance. He remembered seeing Mr. Scott's mother but did not see Mrs. David (Margaret) Scott at

the scene. He said it was he who squatted down beside Betty and talked to her.

Appellant contends that the testimony of Helen Stewart should have been excluded because she did not identify him as the driver of the vehicle whose actions she described. He also argues that Rosa Smith's testimony did not connect him with that vehicle. We agree that Mrs. Stewart did not identify the vehicle or the driver. Rosa Smith did not testify, but her testimony at the earlier trial was read. She said that, just as Mrs. Stewart turned on her blinker light before turning off the highway, she met a vehicle coming over the hill that almost struck the back end of the Baker vehicle just behind Mrs. Stewart and seemed to head directly toward her vehicle quite a ways back. She testified that the vehicle then seemed to swerve back on the right side of the road and straighten up, but then went off the shoulder of the road, then came back up on the road and skidded right in front of her. She said that the car that hit her was the only one going south at the time. This testimony of Rosa Smith tended to connect the Turner vehicle with the Stewart testimony sufficiently to prevent the failure to exclude it from constituting error.

Appellant's argument as to Mrs. Scott's testimony is based upon her inability to identify the driver of the Valiant or the one making the statement about racing, its contradiction by Elkins, and the failure of appellees to make Elkins a party defendant or to call him as a witness. We think that it would not be unreasonable to draw the inference that the person Mrs. Scott described was the driver of that vehicle, if her testimony was believed. Admittedly, this driver was David Turner. Appellant's arguments really attack the credibility of the witness and the weight to be given to her testimony, rather than its admissibility. Failure to exclude her testimony was not error.

The more difficult question is the sufficiency of the evidence to support the verdict. We have concluded, however, that fair-minded men might reasonably conclude

from the evidence that David Turner, in a display of temper, while driving at an extremely high speed, in order to frighten the passenger at whom his fit of anger was directed, entered into a curve well known by him to be unusually dangerous for high speed vehicles because of the "dip" "hump" and lack of shoulders, fully appreciating the fact that his conduct would probably result in injury, in utter disregard of the consequences. The jury might even have found that he was racing with, or trying to keep ahead of, Kenny Elkins. While we must necessarily resolve the question of sufficiency of the evidence to present the issue of wilful and wanton misconduct upon the facts and circumstances of the particular case, this case is closely analagous to the situation presented in *McCall* v. *Liberty,* (April 27, 1970), 453 S. W. 2d 24, where we found substantial evidentiary support. It is true that we have no evidence of drinking alcoholic beverages here. Either appellant's anger or his racing would be an equivalent circumstance to show an attitude of arrogant or heedless recklessness.

The serious questions raised here really relate to the credibility of the witnesses rather than to the substantiality of the evidence if the testimony is believed. We are unable to say that the testimony was so incredible that it must be held to be insubstantial. In this respect, we must leave evaluation of the credibility to the jury and not upset its findings unless we can say that there is no reasonable probability in favor of appellees' version, and then only after giving legitimate effect to the presumption favoring the jury findings. *McWilliams* v. *R. & T. Transport, Inc.,* 245 Ark. 882, 435 S. W. 2d 98. *Fidelity-Phenix Ins. Co.* v. *Lynch,* (June 8, 1970), 455 S. W. 2d 79. Whatever doubt may be cast upon the testimony of the appellees and their supporting witnesses was to be resolved by the jury and cannot be considered by us. *Arkansas Power & Light Co.* v. *Kennedy,* 189 Ark. 95, 70 S. W. 2d 506. We must give testimony credited and believed by the jury its highest probative value. *Kroger Grocery & Baking Co.* v. *Melton,* 193 Ark. 494, 102 S. W. 2d 859; *Arkansas Power & Light Co.* v. *Kennedy,* supra. We cannot disregard testimony believed by the fact finder, but are bound by it unless it is so

contrary to physical facts or laws, scientific knowledge, laws of mathematics, or daily experience of common life or is so visionary that we can say as a matter of law that it could not be credited by any reasonable person. *Standard Oil Co. of Louisiana* v. *Hodges,* 193 Ark. 899, 103 S. W. 2d 927; *Alldread* v. *Mills,* 211 Ark. 99, 199 S. W. 2d 571; *Lanier* v. *Trammell,* 207 Ark. 372, 180 S. W. 2d 818; *American Republic Life Ins. Co.* v. *Presson,* 216 Ark. 771, 227 S. W. 2d 969. See also *Corn* v. *Ark. Warehouse,* 243 Ark. 130, 419 S. W. 2d 316. Since we cannot say that the testimony in this case is so contradicted or so visionary, we must affirm the judgment.

ALICE CLAY WHARTON *v.* JAMES D. BRAY AND JANICE ROGERS BRAY

5-5389 464 S. W. 2d 554

Opinion delivered March 8, 1971

[Rehearing denied April 5, 1971.]

Moses, McClellan, Arnold, Owen & McDermott; By: *Charles W. Baker,* for appellant.

Virginia (Ginger) Atkinson, for appellees.

FRANK HOLT, Justice. This action, resulting from an automobile accident, was instituted by appellee Janice Bray to recover for personal injuries and property damages and by her husband, appellee James Bray, for loss of consortium. A jury awarded a total of $7,240.95 in damages. From a judgment on that verdict comes this appeal. We first consider appellant's contention that the trial court erred in refusing her requested instruction "concerning duty to avoid danger because said instruction accurately reflects the law which is applicable to the evidence in this case and no other instruction given by the court properly covers this area of the law."

Evidence adduced at trial established that sometime between 6 and 7 p.m. on a mid-November evening, appellant stopped her westbound jeep in the eastbound lane of Lawson Road in order to pick up her mail from a rural route mailbox. Appellee Janice Bray, traveling eastward at about 35 to 40 miles per hour, came upon the parked jeep, swerved to the left, but nonetheless collided with it damaging the right front fender region of each vehicle. Appellee also sustained injuries to the back of her neck. Both parties had their headlights on. Appellant testified that when she observed the approaching car, she began honking her horn to alert its driver. Appellant also stated that she was parked partially off the road; however, although the cars were removed from the road before the investigating officer arrived, the remaining debris indicated that her jeep may have been entirely on the pavement. Other testimony reflected that appellant's jeep was visible to an oncoming car for 800-900 feet, and that even if the jeep were entirely on the road, there remained approximately twelve feet of black-

top on which appellee Janice Bray could have bypassed it. Both parties lived in this vicinity and were familiar with this road.

Appellant's refused instruction, based upon *St. Louis & S. F. R. Co.* v. *Carr,* 94 Ark. 246, 126 S. W. 850 (1910), reads:

> Where a danger is probable or obvious, it is the duty of a person to exercise ordinary care to avoid injury even though the other party was negligent, and this duty to avoid the consequences of another's negligence arises whenever the circumstances are such that an ordinarily prudent person would apprehend their existence. The law requires the exercise of ordinary care to observe danger and avoid it.

For a reason not argued in the briefs, we hold that the trial court did not err in rejecting this particular instruction, even if it is a correct one. This is true because AMI 901 [B], which is applicable to the facts of this case, also accurately states the law and, therefore, preempts appellant's proffered instruction. This is in accordance with our Per Curiam Order of April 19, 1965 which requires the trial judge to give an applicable AMI or, in the event he finds that the AMI does not accurately express the law, to state his reasons for refusing it. The order also implicitly requires the parties to request an applicable AMI (modified if necessary) or, upon tendering a substitute instruction, to state into the record the reasons for which they believe that the AMI is inadequate or inaccurately states the law. In the case at bar, AMI 901 [B] was not requested by appellees, nor was any reason given for tendering the above quoted instruction in its place. The trial court, therefore, properly refused it. *Vangilder* v. *Faulk,* 244 Ark. 688, 426 S. W. 2d 821 (1968).

Among the other contentions for reversal we find merit only in appellant's assertion that the trial court erred in submitting to the jury improper verdict forms; in amending the judgment; and in entering a judgment awarding property damages to appellee James Bray.

In their complaint, appellees alleged individual claims for recovery. James Bray sought only personal damages in the sum of $10,000 for loss of consortium and medical expenses; Janice Bray, however, sought personal damages in the amount of $25,000 for bodily injuries and $500 for property damage to the car which she allegedly owned. Neither appellant nor appellees favored the trial court with verdict forms specifying the elements of recovery, although the appellees informed the court that a specific finding by the jury was desired as to the amount of property damages. The court then prepared and submitted the following to the jury:

> We, the jury, find for plaintiffs and assess their damages as follows:
>
> James Bray (Personal) $_____
> (Property) $_____
> Janice Bray $_____

The jury returned a verdict awarding $600 in personal damages and $1,640.95 in property damages to James Bray and $5,000 to Janice Bray. While reading the verdict, however, the trial court inadvertantly interchanged the personal and property damages awarded to James Bray. The jury was hurriedly discharged because of the late hour and the threat of a snowstorm. Upon a motion for a new trial, the court agreed that it had mistakenly submitted an improper verdict form since Janice Bray and not James Bray was seeking property damages. The error was further compounded since the jury awarded him $1,640.95 in property damages, whereas the proof supported a verdict in this regard for no more than $600.84. The trial court, stating it was "self-evident and crystal clear" that the jury intended the sum of $1,640.95 to be James Bray's personal damages for loss of consortium and $600 for property damages to the automobile, amended the judgment by a transposition of these awards to conform to that interpretation of the verdict.

Appellees argue here on appeal that this amended judgment is correct because it is immaterial which of

them, Janice Bray or James Bray, recovered the property damages since, according to the undisputed proof, they were both owners of the automobile. They then cite authority to the effect that (1) the trial court properly should amend a verdict where it incorrectly expressed the otherwise clear intent of the jury, and (2) the appellant is not in an attitude to complain where she has failed to register an objection to the form of the verdict before the jury was discharged.

While it may be immaterial as to which appellee ultimately receives the awarded property damages, it is not without significance that the jury received a verdict form which did not fully correspond to the pleadings and proof. This may have been the very factor triggering the glaring confusion which the final form of the verdict took. Despite the trial court's contrary observation, we do not find the intent of the jury to be clear. The amended judgment appears to have been based in some degree upon speculation as to what the jury would have done had it been afforded a proper verdict form. Even the trial court was aware of this by stating:

> It could very well be that the Court is not being legally realistic and objective in facing this alleged error. Too, it could very well be that this Court is too conscious of what, in its opinion, the jury intended to do and what it would have done had the verdict form been presented properly.

Furthermore, it cannot be said that appellant failed to timely object to the form of the verdict since the damages awarded to James Bray were admittedly misread by the trial court in a manner which, as indicated previously, made them seem more consistent with the proof.

The $600 awarded to Mr. Bray for loss of consortium is more than a mere nominal sum and, therefore, cannot be increased to an amount which either the trial court or appellees or both consider to be more in harmony with the proof. This item, therefore, must remain as the jury determined it to be. *Hales & Hunter Co.* v. *Wyatt,* 239 Ark. 19, 386 S. W. 2d 704 (1965); *Fulbright* v.

Phipps, 176 Ark. 356, 3 S. W. 2d 49 (1928). As to the $1,640.95 awarded to Mr. Bray for property damages, both parties seem to agree that the evidence does not support more than $600.84 damages to the automobile. There was undisputed evidence of co-ownership by the Brays. By Ark. Stat. Ann. § 27-1155 (Repl. 1962) the pleadings can be construed to conform to this proof of ownership and damages without any prejudice to appellant. Since the jury's award of property damages to Mr. Bray is supported only to the extent of $600.84, his judgment is modified and affirmed for that lesser amount. Obviously, the jury's award to Mrs. Bray did not include the element of property damages inasmuch as that item was specifically allocated by the jury to Mr. Bray. Therefore, her judgment for $5,000 is affirmed.

Substituted Opinion delivered March 8, 1971

HARVEY RAY JOHNSON *v.* STATE OF ARKANSAS

5570 464 S. W. 2d 611

Opinion delivered March 15, 1971

[redacted]

W. Q. Hall, for appellant.

Ray H. Thornton, Jr., Attorney General; *Mike Wilson,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Harvey Ray Johnson, appellant herein, was convicted of the crime of assault with intent to kill and, in accordance with the verdict of the jury, sentenced to ten years imprisonment. From such judgment, Johnson brings this appeal. Only one point is relied upon for reversal, *viz,* "The trial court erred in overruling the defendant's motion to require the prosecution to furnish him copies of the statements of the witnesses (the alleged victim of the assault)." Johnson was charged on July 9, 1970, and on July 16, entered a plea of not guilty. The case was set for trial on September 11. On September 10, counsel for appellant filed an affidavit and motion for production of statements of state witnesses. The affidavit set out that counsel had asked the prosecuting attorney for the names and statements of the witnesses, but had been advised that up until September 9 there were no such statements; that when they were acquired, copies would be furnished appellant's counsel. The affidavit further set forth that the prosecuting attorney had statements from Kermit Smith, the person who was allegedly assaulted, and other witnesses whose names were unknown to appellant or his attorney, and the motion prayed that the prosecuting attorney be directed to make available to appellant and his counsel any statements taken or to permit the making of photostatic copies. The motion was denied, but appellant admits that on that same date, his attorney was furnished with copies of the statements of all witnesses except Kermit Smith, the victim of the shooting.

We do not agree that error was committed. In the first place, there is nothing in the record to indicate that Smith ever made a statement of any nature to the

prosecuting attorney or investigating officers. Smith testified at the trial when the prosecuting attorney presented the state's case, and of course there was opportunity for defense counsel, on cross-examination, to interrogate Smith relative to whether any pre-trial statement had been made by him; this was not done, nor was it contended in the motion for new trial that appellant had discovered subsequent to the trial that Smith had made a statement.

In *Smith* v. *Urban,* 245 Ark. 781, 434 S. W. 2d 283, we held that whether or not a prosecuting attorney in a criminal case must disclose evidence in his possession favorable to the accused depends on many factors and a case by case judgment must be made. Under the circumstances of *Smith* v. *Urban supra,* we held that certain evidence should have been made available to Smith's counsel. However, the evidence referred to was very favorable to the accused, probably the most important evidence that could have been offered in his behalf. In the case before us, the testimony of Smith at the trial is abstracted, and we fail to see where any part of his evidence could be said to be favorable to Johnson. In fact, we would classify it as extremely unfavorable, and there is absolutely no showing that Smith had made any statement, either orally or in writing, contrary to the testimony given on the witness stand. In *Murchison* v. *State,* 249 Ark. 861, 462 S. W. 2d 853, we held that where a motion for a new trial is made on the basis that evidence was suppressed, the primary focus of the inquiry is to determine whether the defendant has been deprived of a fair trial by the unavailability to him of the particular testimony. Here, we do not know what alleged fact or facts supposedly favorable to the accused appellant was deprived of presenting to the jury, and from the record and briefs, it does not appear that he has any particular circumstances in mind.

We find no reversible error.

Affirmed.

JAMES E. BRADSHAW *v.* STATE OF ARKANSAS

5547 464 S. W. 2d 614

Opinion delivered March 15, 1971

David C. Shelton, for appellant.

Ray H. Thornton, Jr., Attorney General; *John D. Bridgeforth & Ken Stoll,* Asst. Attys. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In July of 1969 the appellant pleaded guilty to four charges of uttering forged checks and was sentenced to eight years imprisonment upon each charge, the sentences to run concurrently.

Thereafter he filed a petition for postconviction relief under Criminal Procedure Rule 1, asserting that his pleas of guilty were induced by coercion. This appeal is from the circuit court's denial of the petition, after an evidentiary hearing.

Bradshaw testified that while he was in jail awaiting trial he was beaten and his head was shaved, on orders given by the sheriff. That testimony was disputed by the State's witnesses, who stated that the heads of all the inmates of the jail were shaved as a measure necessary to combat an infestation of lice with which one prisoner was afflicted. According to those witnesses, the only force used was that necessary to overcome Bradshaw's resistance. The evidence is amply sufficient to support the trial court's finding of fact against the petitioner upon this point.

Bradshaw's pleas of guilty were the result of negotiations between his attorney and the prosecuting attorney's office. See *Cross* v. *State,* 248 Ark. 553, 452 S. W. 2d 854 (1970). The State first tried to persuade Bradshaw to accept a sentence of twenty years, but he refused. Eventually the parties agreed upon a recommended sentence of eight years, which the court imposed.

Bradshaw now contends that his pleas were coerced, because during the negotiations the deputy prosecuting attorney made the statement that he could obtain a sentence of 47 years under the habitual criminal statute. We find no proof of coercion. Bradshaw admittedly had four previous felony convictions; so under the habitual criminal act he could have been sentenced to as much as one and a half times the maximum penalty for each offense. Ark. Stat. Ann. § 43-2328 (Supp. 1969). Since the maximum sentence for uttering a forged check is ten years, Ark. Stat. Ann. § 41-1805 (Repl. 1964), Bradshaw could have received a sentence of fifteen years upon each charge, or a total of sixty years imprisonment. That a plea of guilty is induced by the possibility of the prisoner's receiving a more severe sentence does not establish coercion. *Brady* v. *United States,* 397 U. S. 742 (1970).

Moreover, it must be borne in mind that the parties were negotiating. Some reference to the possible minimum and maximum sentences is obviously pertinent, perhaps even essential, to the negotiating process; so it cannot reasonably be said that such a reference is coercive.

The appellant also complains that he was unable to make a bond in the amount set by the court, and consequently he was held in jail for nine months before he pleaded guilty and was sentenced. If the amount of the bond was unreasonable that issue could have been reviewed in this court. *Parnell* v. *State,* 206 Ark. 652, 176 S. W. 2d 902 (1944); *Ex parte Osborn,* 24 Ark. 185 (1866). Furthermore, there is no proof in the present record that the bond was fixed in an amount that was excessive in the circumstances.

Bradshaw also complains of the fact that the officers took $505 that he had when he was arrested and returned it to the persons who had been defrauded. Bradshaw testified, however, that he had defrauded the persons and wanted to give the money back to them; so he is not in a position to complain about his wishes having been carried out. We are not impressed by the implied suggestion that a thief has a constitutional right to use the stolen funds to make bail when he is charged with the offense.

No error appearing, the judgment is affirmed.

FOGLEMAN, J., not participating.

SHIRLEY BOATWRIGHT *v.* PULASKI COUNTY JUVENILE COURT

5-5500 464 S. W. 2d 600

Opinion delivered March 15, 1971

Monroe L. Bethea, for appellant.

Joe Purcell, Attorney General; *Milton Lueken,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Garry Wayne Morris, a/k/a Boatwright, was adjudged by the Pulaski County Juvenile Court to be a dependent and neglected child. Custody was removed from the mother (the father was deceased) and the boy was placed in the custody of Mr. Jim Fisher, operator of Shawnee Valley Boys Ranch,

Harrison, Arkansas. Three years later, when the mother had regained her health and was steadily working, she petitioned that the boy be returned to her custody. That petition was denied and on appeal to circuit court there was an affirmance. The mother, Shirley Boatwright, appeals, alleging the judgment to be contrary to the law and the evidence; that the court erred by admitting into evidence several notarized statements from employees of the boys school; and that the mother was not bound by any contractual arrangement between herself and the boys school to the effect that the child was to remain at the school until he finished the twelfth grade.

In 1966 Shirley Boatwright was approximately twenty-eight years of age, in poor health, and in dire financial circumstances. Life for her had been rugged. As a teenager she had served a time in the Arkansas Girls Training School. Following that episode she married; in fact she had five different husbands. To one or more of those marriages were born two children, and in 1966 the daughter was ten years of age and Garry was two years older. Shirley made arrangements with her parents to care for the daughter. Because the parents' home was not large enough to accommodate both children, and because Garry presented an unusual disciplinary problem, the mother agreed to a juvenile court order declaring the boy a ward of the court and with the understanding that he would be placed in the Shawnee Valley Boys Ranch.

In 1969 the mother was living in Alabama. She was regularly employed and earning some sixty dollars a week take-home pay. She had a three-bedroom apartment. She took the daughter to Alabama and placed her in school, where the child was reportedly making good grades. In that situation, and with her health regained, the mother petitioned the Pulaski County Juvenile Court to reinvest her with custody of the boy. The court adjudged that the boy remain in the present custody as a ward of the court.

We cannot agree with appellant that the judgment is contrary to the law and the evidence. In *Duncan* v. *Crowder,* 232 Ark. 628, 339 S. W. 2d 310 (1960), we said: "As in all child custody cases, the tender consideration we have for the future of the child involved causes us more concern than we experience in any other type of case. Of course it is a universal rule of law that the paramount consideration in awarding custody of minor children is the best interest and welfare of the child." With that rule of law as a guide we examine the evidence.

We do not dispute the assertion that the mother is not as unstable as she was when she relinquished custody of her son in 1966. But the paramount question is whether the son has shaken off his incorrigibility which just four years ago was so serious that neither the mother nor the boy's maternal grandparents could control him. On cross-examination the grandfather, who was called as a witness by the mother, stated the opinion that the interest of the boy would be better served if he were left at the boys ranch. Jim Fisher is the director of the boys ranch. He said Garry had made considerable improvement but that he is not yet ready to adjust to public school life because of personality traits. Fisher predicted that if the mother's petition for custody were granted, Garry would doubtless end up in a reform school. The trial judge was also probably impressed, as we are, with the fact that the mother has to work full time and therefore would not be able to give maximum attention to the child's problems. Then there was the testimony of Rev. Grover Bishop, pastor of the Fairview Baptist Church in Little Rock. At appellant's request he had helped get the boy admitted to the boys ranch. He had observed Garry "in the most recent months," and it was Rev. Bishop's opinion that Garry is not yet prepared to be released from the boys ranch. The testimony we have recited was not contradicted. The only substantial testimony offered by the mother was as to her belief that she is now able, physically, emotionally, and financially, to care for her son.

Appellant complains that the court considered, in violation of the hearsay rule, five notarized statements from teachers and custodians at the boys ranch. Those statements opposed Garry's release. After a careful search of the record we find no showing that the statements were in fact introduced as evidence. There was considerable discussion concerning those instruments. At one point the court said, "Very well, they appear to qualify." But before the court pursued the matter to a final determination on admissibility counsel for appellant interceded and asked for permission to further question the witness on the point of inadmissibility. That motion was granted. After further questioning of the witness through whom the instruments were sought to be introduced, the court said: "The documents will be *marked for identification* and submitted to the court and I will make my ruling as to the admissibility subsequently. Let them be marked for identification as State's Exhibit Two." (Emphasis ours.)

Other than allowing the instruments to be marked for identification we are unable to find any further reference thereto. At the close of appellant's evidence the respondent moved for judgment. The court responded by saying that he had "not read the reports *that have been admitted.*" We conclude that he was referring to the two written instruments which were admitted in evidence on behalf of the appellant. (The admissibility of those instruments is not attacked on appeal.) They consisted of a letter from the State of Alabama, department of pensions and security, and another letter from the department of pensions and security of Mobile County, Alabama.

It is to be noted that the court said a ruling would be subsequently made on the admissibility of the documents. In that situation, if the appellant desired to pursue the motion, she should have subsequently called the court's attention to the motion and sought a ruling. The failure to so act constituted a waiver. *Flake* v. *Thompson,* 249 Ark. 713, 460 S. W. 2d 789.

The next point made by appellant is that "any contractual arrangement between Mrs. Boatwright and Shawnee Valley Boys Ranch that Garry would remain there until he finished high school would be void as against public policy." Mr. Fisher testified that he wrote a letter to the juvenile court stating that Garry would be accepted on condition that he stay at the ranch until he finished high school. Appellant did not pursue her initial objection to the testimony. There is no intimation that the trial court took that statement into consideration in its decision. That condition was not incorporated into the juvenile court decree and properly so, even if appellant had given her consent. *Waldron* v. *Childers,* 104 Ark. 206, 148 S. W. 1030 (1912). For the reasons stated, we find the point to be without merit.

Affirmed.

ARKANSAS STATE HIGHWAY COMM'N *v.*
JEWELL THOMAS BANE

5-5435 464 S. W. 2d 603

Opinion delivered March 15, 1971

Thomas B. Keys, Philip N. Gowen, and *Hubert E. Graves,* for appellant.

Felver A. Rowell Jr., for appellee.

JOHN A. FOGLEMAN, Justice. This is a sequel to *Arkansas Highway Commission* v. *Bane,* 247 Ark. 143, 445 S. W. 2d 106. We reversed a judgment fixing the amount of the landowner's compensation for a right-of-way taking and remanded the case for a new trial. We reversed because we found that the testimony of the landowner did not afford substantial support for the jury verdict.

On retrial, the value testimony of two witnesses on behalf of appellee was stricken on motion of appellant, leaving the verdict on her behalf dependent entirely upon the testimony of Sammy Carl Plummer, the mayor of Plummerville. Appellant asks that we reverse this judgment because: (1) the trial court refused to strike

from Plummer's testimony $6,000 of his damages relating to one tract and $1,800 to the other tract remaining after the taking for the reason that his basis was what he would give for the lands; (2) he gave no substantial evidence to support his testimony

Plummer testified that a tract of 43.6 acres left south of Interstate Highway 40, after 18.4 acres were taken, was worth only $50 per acre after the taking. Appellant moved to strike $6,000 of the total damage figure because it contended that the witness based his valuation of the lands after the taking on what he would give for it instead of what it would bring on the market. The contention is based on Plummer's answer to a question on cross-examination, asking why he arrived at a difference of $150 between the overall value of $200 per acre he had placed on the tract before the taking and his valuation of this parcel after the taking. The interrogation which preceded the motion went as follows:

A. That's what I told Mr. Hayes when he asked me. He is one of your appraisers. He come to me on nearly all of these tracts and asked what I would give for them. I told him at the time—

Q. That's your appraisal of the after value—what you would give for it?

A. He asked what I would give for it.

While Plummer's answers may not have been fully responsive to the examiner's questions, they hardly establish the use of an improper basis for valuation by Plummer. He simply stated that one of appellant's appraisers had asked him what he would give for the tract and that he gave him the figure he had stated in his testimony. Plummer had lived in Plummerville for 64 years. He had been the county clerk for three years, had been in the tax assessor's office for four years, in the tax collector's office for two years, and had served on the county equalization board for six years. He had

been familiar with the tract for 20 or 30 years. He said that he was generally familiar with land values in and around Plummerville. He testified that after the taking this tract was completely isolated without any public vehicular access. The closest approach to it, without crossing lands of others, was one-quarter of a mile away, according to him. He stated that he figured no one would want the land isolated back over on top of a mountain. In his opinion the use of the land as a cattle operation had been ruined.

The motion to strike his testimony that an 18-acre tract left north of the highway was worth only $100 per acre after taking was based upon his saying that is what he would give for it in response to a cross-examination query if he had any reason for saying it was worth only that amount. Plummer had previously testified that there was not very much of it that anybody would want. The motion to strike this "after value" testimony was denied by the court with the comment that Mayor Plummer was a lay witness.

Appellant's motion went only to the striking of the values given by Plummer for the value of lands remaining after the taking. His testimony as to the value of the land before the taking would have been left intact. *Arkansas State Highway Commission* v. *Stallings,* 248 Ark. 1207, 455 S. W. 2d 874; *Arkansas State Highway Commission* v. *Phillips,* 247 Ark. 681, 447 S. W. 2d 148.

The witness was permitted to testify as a non-expert, who said that he knew the value of the land. He testified that he was generally familiar with the values of lands in the vicinity of Plummerville and that a lot of people sought his opinion on the subject. He lived within a quarter of a mile of the property. Such witnesses are permitted to express their opinions as to values. *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30; *Lazenby* v. *Arkansas State Highway Commission,* 231 Ark. 601, 331 S. W. 2d 705. Plummer's competency as a value witness was not questioned. Ap-

pellant had the burden of showing that there was no reasonable basis for his opinion. *Arkansas State Highway Commission* v. *Dean,* 247 Ark. 717, 447 S. W. 2d 334; *Arkansas State Highway Commission* v. *Clark,* 247 Ark. 165, 444 S. W. 2d 702.

We do not feel that appellant met its burden. The mere fact that the witness stated that the value ascribed to the remainder was what he would give for it is not sufficient to show that he would give more or less than market value or to render his testimony inadmissible. *Arkansas State Highway Commission* v. *Pruitt,* 249 Ark. 682, 460 S. W. 2d 316. If this were the sole basis for the testimony of the witness, or if he were clearly not a competent witness on land value, we might consider this answer in a different light. Since neither premise exists here, we find no error in the refusal of the circuit judge to strike his testimony.

Appellant argues that since Plummer based his opinion on a single sale of lands he had made earlier in the immediate vicinity and his experience as a public official, but did not know of or investigate other sales in the vicinity, it is clear that he had no knowledge of the market value of lands. Accordingly, says appellant, there was no substantial basis for his testimony and its motion to strike his value testimony for that reason should have been granted. Of course, his knowledge or lack of knowledge of sales of other lands was to be considered in evaluating his credibility and the weight to be given to his testimony, but would not render his testimony insubstantial as a matter of law. *Arkansas State Highway Commission* v. *Ormond,* 247 Ark. 867, 448 S. W. 2d 354. In order for us to hold otherwise, the matter elicited on cross-examination must have demonstrated that Plummer had no reasonable basis whatever for his opinion. *Arkansas State Highway Commission* v. *Carter,* 247 Ark. 272, 445 S. W. 2d 100. We cannot say that this was demonstrated.

The judgment is affirmed.

A. B. HERVEY, JR., COMM'R OF REVENUES, STATE OF ARKANSAS *v.* AMF BEAIRD, INC.

5-5504 464 S. W. 2d 557

Opinion delivered March 15, 1971

Lyle Williams, J. Victor Harvey, John F. Gautney, Walter Skelton and *Dewey Moore, Jr.,* for appellant.

Wright, Lindsey & Jennings, for appellee.

JOHN A. FOGLEMAN, Justice. The Commissioner of Revenues contends that the chancery court erroneously granted summary judgment in favor of appellee AMF Beaird, Inc., a Delaware corporation, whose principal office is in Louisiana, for recovery of income taxes paid the State of Arkansas by it for the years 1964, 1965 and 1966. In the judgment, granted on appellee's motion in a suit by it to recover these taxes, the chancellor made the following findings:

1. Plaintiff timely filed, on February 8, 1969, amended returns requesting refunds of income tax paid for the calendar years 1964, 1965, and 1966. Defendant denied the requested refunds, and plaintiff timely sought review of that denial in this Court.

2. Defendant has presented no evidence in opposition to the affidavit, depositions, and exhibit submitted by plaintiff in support of its motion and supplement to motion for summary judg-

ment, and there is, therefore, no genuine issue as to any material fact.

3. Defendant is prohibited by the terms of 15 U. S. C. A. § 381 from levying an income tax on plaintiff for the years 1964, 1965, and 1966.

Appellant urges three points for reversal. He contends that the court erred (1) in holding that appellant had presented no evidence in opposition to the affidavit, depositions and exhibits submitted by appellee in support of its motion for summary judgment; (2) in granting summary judgment in spite of the existence of genuine issues as to material facts; and (3) in holding that appellant is barred from levying an income tax on appellee for the years in question by United States Public Law 86-272, 73 Stat. 555, 15 U. S. C. A. § 381. As we view the matter, the issues raised by these points are so interdependent and intertwined that they cannot well be treated separately, so we will discuss them collectively. The real issue raised by the pleadings is whether appellee is relieved from the payment of income taxes for the years in question by the provisions of the federal law above mentioned. The act, insofar as pertinent, reads as follows:

> (a) No state, or political subdivision thereof, shall have power to impose, . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both of the following:
>
> > (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
> >
> > (2) the solicitation of orders by such person, or his representative, in such State in the name

of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to—

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

Appellee based its motion for summary judgment upon the pleadings, the depositions of Robert Carroll, Jr., Paul Downs and Clian Dearien and the affidavit of N. T. Adams. In response, appellant filed only a formal allegation that there was a genuine issue of material fact and a brief in which he argued that the business activities of appellee exceeded the mere solicitation of orders for sales of tangible property. Appellant relied upon disclosures in the depositions upon which appellee based its motion. These disclosures included the contracts between appellee and certain of those with whom it did business in Arkansas.

Carroll operates Carroll Building & Supply Company, a sole proprietorship in Murfreesboro, engaged in the building material and LP gas business. He sells LP storage tanks manufactured by Beaird. He makes payment for tanks sold each month either to its representative or directly to the company at its principal office in Louisiana. He never returned any equipment to Beaird unless it was damaged or defective. He said that AMF salesmen never did anything except take orders, check his inventory and accept payments. Carroll carried insurance on the equipment obtained from Beaird

while it was in his possession. He said that monthly sales were about equal to monthly orders. He stated, "As we sell a tank we pay for it." The contract between Carroll and Beaird, which could be terminated by either party upon 30 days' notice, contained the following pertinent provisions:

I. That First Party shall consign to Second Party Beaird Standard LP-Gas domestic systems at Second Party's business location in Murfreesboro, Arkansas, and Second Party shall receive and accept possession of said systems upon the terms and conditions hereinafter stated:

II. Shipments will be made by truck or rail at First Party's discretion, and all freight charged from First Party's plant to destination will be paid by First Party;

III. The prices at which Second Party shall buy said systems will be in accordance with a schedule to be furnished Second Party by First Party, and said prices will be subject to change by First Party at any time;

IV. Second Party agrees to accept billing for all systems remaining in their consigned stock over twelve months;

V. Second Party agrees that no consigned systems or other equipment will be used, sold or removed from its stock until cash payment for said systems or equipment has been made to First Party. Upon request of Second Party, giving serial number of systems sold, name and address of purchaser, First Party shall furnish State or local regulatory bodies and the customer the required data sheets. Second Party also agrees that parts will not be removed from systems in stock for any purpose without written approval from First Party.

Second Party agrees to store systems or other tank equipment in a manner which will hold them safe from fire, theft or other damages which may occur and to protect First Party against any liens, seizures, taxes, or other claims or privileges which might be made against said systems or First Party. Second Party, as consignee, especially assumes liability for and agrees to pay any state or local taxes levied on the consigned articles or their use or sale, or on the business growing out of the consignment of said systems;

VI. Second Party shall diligently promote the sale of First Party's systems and if, in the opinion of the First Party, any or all of said systems on hand at any time are slow of movement, then at the sole discretion of First Party, Second Party shall make disposition of said systems in accordance with written instructions directed to it by First Party. Any freight or hauling charge involved in such disposition shall be at the expense of First Party.

VII. During the terms of this contract Second Party agrees not to stock or sell LP-Gas systems manufactured by others than First Party.

Carroll stated that he used his own sales agreement forms, billed customers and extended credit at his own risk, without any dictation or suggestion or prices by Beaird, in spite of the contract provisions.

Downs operated Tobin Furniture & Butane Company, a corporation engaged in the LP gas and furniture business in DeQueen, under a contract similar to that with Carroll. Paragraph 4, however, in the Tobin contract, reads as follows:

IV. Second Party agrees to use systems shipped into consignment on a first-in first-out basis in order to avoid obsolete inventory, and fur-

> thermore, Second Party agrees to remit for all systems remaining in their consigned stock over twelve (12) months.

This contract also contained an additional provision reading as follows:

> If Second Party cancels the consignment agreement, he agrees to (a) either purchase the remainder of stock on hand at First Party's published list price as of date of cancellation, no cash discount, will be allowed; or (b) deliver the stock remaining in consignment to another consignment located as directed by First Party; or (c) return the stock remaining in consignment to the First Party's factory at Second Party's expense.

Downs followed practices similar to those of Carroll. He said that Beaird's salesman would come by, inventory his stock and collect for whatever merchandise he had sold.

Dearien operated Stone County Gas Company, a corporation in Mountain View, selling propane gas and appliances. The corporation acquired the business from O. H. Stevens, who was buying from Beaird. It continued the existing relationship with appellee. Stevens' contract with Beaird was virtually identical with that of Tobin. Dearien obtained tanks by placing an order, usually when Beaird's salesman called. He paid Beaird either at the end of a month or when the salesman came around and checked inventory. Otherwise, the method of operation was similar to those conducted with the other deponents. Dearien testified, "The property was on consignment and it was ours to handle any way we saw fit as long as we paid for it."

N. T. Adams was Beaird's sales representative at all times after June 1, 1951. He made monthly calls on Beaird's customers in Arkansas. He stated that his only duties in Arkansas were:

(a) To receive orders from the customer for transmittal to the home office in Shreveport, Louisiana, where the order is accepted or rejected.

(b) To check the customer's inventory of Beaird equipment.

He said that the customer paid Beaird each month for the merchandise sold by the customer during the preceding month. He added that Beaird did not intend to retain title to the equipment sold to its customers, took no action for this purpose, did not designate its customers as its agents and did not deal with them on that basis. He corroborated the deposing customers as to practices with reference to sales, credit extended, prices, etc.[1]

At the outset, we should say that we do not agree with the chancellor that the failure of appellant to offer evidence in opposition to the affidavit, depositions and exhibits submitted by appellee necessarily entitled the latter to summary judgment, or showed nonexistence of any genuine issue as to any material fact. See *Ashley* v. *Eisele,* 247 Ark. 281, 445 S. W. 2d 76. This is only the case when the moving party has clearly met its burden of demonstrating that there is no justiciable issue. The adverse party only has the burden of demonstrating the existence of such an issue when the moving party has made a prima facie showing of entitlement to the relief sought by it. See Ark. Stat. Ann. § 29-211 (e) (Supp. 1969); *Miskimins* v. *City National Bank of Fort Smith,* 248 Ark. 1194, 456 S. W. 2d 673. In determining whether the movant has made the requisite showing, all doubts are resolved against summary judgment, all presumptions and inferences must be resolved against the movant and, in a case in which fair-minded men may honestly differ about the conclusions to be drawn from the testimony, summary judgment must be denied. *Mason* v. *Funderburk,* 247 Ark. 521, 446 S. W. 2d 543. The evidence must be liberally construed in favor of the party opposing the motion. *Pickens-Bond Const. Co.* v.

[1]Plemmons Brothers Butane Company in Waldron had a similar arrangement with Beaird, but it is not now doing business.

North Little Rock Elec. Co., 249 Ark. 389, 459 S. W. 2d 549.

In order to determine the correctness of the chancery court's action, we must decide whether the facts shown in support of appellee's motion made a prima facie case for recovery of the taxes paid by it. We find that they do not. Appellee failed to bring itself within the statute upon which it relies because it did not show that the *only* business activity on its behalf in Arkansas was the solicitation of orders. The stated purpose of the act in question was to prohibit states from collecting income taxes permitted by *Northwestern States Portland Cement Co.* v. *Minnesota* and *Williams* v. *Stockham,* 358 U. S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, wherein it was held that mere solicitation of orders afforded sufficient "nexus" with the state in which they were solicited for such taxation. 2 U. S. Code Cong. & Adm. News 2548 et seq. (86th Cong., First Session, 1959). When we consider the purpose of the legislation and the language of the act, we cannot give the term "solicitation" the broad interpretation necessary to sustain this judgment. Other jurisdictions considering this section have held that "solicitation" is not to be given a broad construction. *Clairol, Inc.* v. *Kingsley,* 109 N. J. Super. 22, 262 A. 2d 213 (1970); *Cal-Roof Wholesale Co., Inc.* v. *State Tax Commission,* 242 Ore. 435, 410 P. 2d 233 (1966); *Herff-Jones Co.* v. *State Tax Commission,* 247 Ore. 404, 430 P 2d 998 (1967). The legislative history of the act clearly indicates that a narrow construction of the term "solicitation of orders" was intended by Congress. 2 U. S. Code Cong. & Adm. News 2548, et seq. (86th Cong., First Session, 1959).

The activities of appellee's representative in Arkansas go far beyond mere solicitation of orders for sales of appellee's products to be shipped into the state if the orders are approved. Proper performance of his duties requires him to make regular checks of customers' inventories of Beaird equipment. The record shows that Adams did so. This practice itself extends Beaird's activities beyond the scope of solicitation of orders. Even if it should be said that this activity helped to produce orders, it is

equally reasonable to conclude that Beaird's interest was in protecting its property rights in the items shipped to the various parties with whom it had contracts, to establish the basis for billing these parties and to determine whether conditions in any particular instances required invocation of rights reserved in the various contracts. If Beaird did not maintain this degree of control, then it would have had no means of determining whether or when it should bill a customer for a particular item or whether proper and timely remittances had been made by the customer.[2]

We would have no difficulty, however, in finding that appellee had failed to show, at least as a matter of law, that its activities were restricted to solicitation of orders for *sales* of tangible personal property. Appellant argues, with persuasive force, that the relationship between appellee and its "customers" is based upon a consignment arrangement, and that no sale is made by Beaird to them. Since the contracts might possibly be construed as being for conditional sales, in determining whether there was a sale or consignment we must look at the entire contract, as well as the actions of the parties thereunder. *Sternberg* v. *Snow King Baking Powder Co.,* 186 Ark. 1161, 57 S. W. 2d 1057; *American Snuff Co.* v. *Stuckey,* 197 Ark. 540, 123 S. W. 2d 1063. See also, *Ludvigh* v. *American Woolen Co.,* 231 U. S. 522, 34 S. Ct. 161, 58 L. Ed. 345 (1913); *Edgewood Shoe Factories* v. *Stewart,* 107 F. 2d 123 (5th Cir. 1939); *Liebowitz* v. *Voiello,* 107 F. 2d 914 (2nd Cir. 1939); *Reliance Shoe Co.* v. *Manly,* 25 F. 2d 381 (4th Cir. 1928).

Significant factors in evaluating such a transaction include:

1. Suggestion and contemplation of consignment in the memorandum of the agreement between the parties. [See *In re DIA Sales Corporation,* 339 F. 2d 175 (6th Cir. 1964).]

[2]We do not discuss the effect of "acceptance of payments" in Arkansas by appellee's representative because appellee asserted and appellant admitted in oral argument that this issue had not been raised in the trial court.

2. Lack of obligation on the part of the "consignee" to pay for unsold goods. [See *Ludvigh* v. *American Woolen Co.,* supra; *Fowler* v. *Pennsylvania Tire Company,* 326 F. 2d 526 (5th Cir. 1964); *In re DIA Sales Corporation,* supra.]

3. Obligation of the consignee to pay for goods when sold by him. [*Edgwood Shoe Factories* v. *Stewart,* supra.]

4. Prompt remittance to consignor for goods sold, whether for cash or credit. [See *Edgewood Shoe Factories* v. *Stewart,* supra.]

5. Visits to consignee to inquire into sales and urge prompt remittance of collections to consignor. [See *Ludvigh* v. *American Woolen Co.,* supra.]

6. Keeping by a representative of the consignor of an account or inventory of goods consigned and sold. [See *Ludvigh* v. *American Woolen Co.,* supra.]

7. Provision for return of merchandise upon termination of the agreement. [See *Ludvigh* v. *American Woolen Co.,* supra.]

In reviewing the contract and the actions of the parties here we note the following significant factors indicating that the arrangement was for consignment rather than sale:

1. The contracts use words consistent with consignment throughout,[3] *e.g.*:

a. First party shall *consign* to second party. . .

b. Second party agrees that no *consigned* systems will be used, sold or removed from its stocks. . .

c. Second party as *consignee,* especially as-

[3]It is notable that the words "sold" and "sale" are never used in connection with the transactions between Beaird and its "customers." They are only used in reference to transactions conducted by the "customers" in disposing of the goods.

sumes liability for and agrees to pay any state or local taxes levied on the *consigned* articles or their use and sale, or on the business growing out of *consignment* of said systems.

d. Second party agrees to use systems shipped into *consignment* on a first-in and first-out basis. . . and furthermore second party agrees to remit for all systems remaining in their *consigned* stock . . .

e. If Second party cancels the *consignment* agreement he agrees to (a) . . . or (b) deliver the stock remaining in *consignment* to another *consignment* . . . or (c) return the stock remaining in *consignment.*

2. The "customers" were only obligated to receive and accept *possession* of systems consigned upon the terms of the contract.

3. There is no obligation on the part of the "customer" to pay for consigned systems unless they remain in his consigned stock for more than 12 months, or unless they have been sold by him. He may, at his option *purchase* the remainder of stock on hand if he cancels the consignment agreement.

4. Parts cannot be removed from any system in stock without written approval of Beaird.

5. The "customer" is obligated to store the systems in a manner to hold them safe from fire, theft or other damages and to protect Beaird from liens or claims which may be asserted *against Beaird.*

6. If, in the opinion of Beaird, any of the systems are slow of movement, then at the *sole discretion of Beaird,* the "customer" shall make disposition of the systems in accordance with Beaird's written directions, with freight or hauling expense borne by Beaird.

7. The "customer" agrees not to stock or sell systems manufactured by others.

8. The "customer" agrees to "use" systems on a first-in, first-out basis to avoid obsolete inventory (in spite of the fact that he must pay for all systems remaining in the consigned stock over 12 months).

9. If the "customer" cancels the contract, he may either pay for the stock on hand, deliver the property remaining to another consignment at the direction of Beaird or return it to Beaird's factory at his own expense.

We do not intend to say that there are not other significant factors involved. It would not be unreasonable to infer from appellee's filing of tax returns and paying the taxes that it once thought that it was liable for them. Some of the actions of the parties are probably more consistent with a conditional sale than with consignment. We do mean to say that, at the very least, those factors pointed out suffice to raise a question of fact for the trial court's determination. Language from *In re Lexington Appliance Company, Inc.,* 202 F. Supp. 869 (D. C. Md. 1962) is appropriate here:

> A consignment is generally defined as a bailment for care or sale, where there is no obligation to purchase on the part of the consignee. The presence or lack of an obligation to purchase or pay for the goods on the part of the consignee is the most important factor in determining whether the agreement may be termed a consignment, because, if the alleged consignee is absolutely bound in all events to pay for the goods unsold, even though title is reserved in the alleged consignor, the transaction is a sale, or at least a conditional sale.

Here the "customers" were never *absolutely bound in all events* to purchase any item. The contracts could easily be terminated before liability accrued for a system in stock for more than 12 months.

Since we cannot say that appellee was entitled to judgment on the record before us, as a matter of law, the judgment is reversed and the cause remanded for further proceedings.

JONES, J., dissents.

MISSOURI PACIFIC RAILROAD CO. ET AL
v. JAMES E. ELLISON ET AL

5-5486 465 S. W. 2d 85

Opinion delivered March 15, 1971
[Rehearing denied April 26, 1971.]

W. J. Smith and *B. S. Clark,* for appellants.

Haskins & Larrison, Hardin & Rickard and *Wright, Lindsey & Jennings,* for appellees.

J. FRED JONES, Justice. This is an appeal by the Missouri Pacific Railroad Company from a judgment against it for personal injuries and property damages growing out of a train-truck collision at a railroad crossing in Benton, Arkansas.

On March 4, 1969, James E. Ellison, while in the course of his employment by East Texas Motor Freight Lines as a truck driver, drove an East Texas truck onto the Missouri Pacific Railroad Company's track at the Neeley crossing in Benton, and it was struck by an eastbound Missouri Pacific freight train. The train stopped after the collision and Woodrow Utley, a brakeman in the employ of Missouri Pacific, injured his leg in crossing a ditch after alighting from the train.

Ellison filed suit in the Saline County Circuit Court against Missouri Pacific and its engineer, Wilson, for personal injuries. He alleged negligence in failure to keep a proper lookout and in failure to give the statutory signals. East Texas intervened for damage to its truck, tractor and trailer, and Fireman's Fund Insurance Company intervened claiming statutory subrogation rights for the amount it had paid, and would be obligated to pay, to Ellison in workmen's compensation benefits.

Missouri Pacific answered by general denial and affirmatively alleged that the plaintiff's own negligence in failure to keep a proper lookout and in proceeding onto the tracks while blinded by the sun, was the sole and proximate cause of the collision. Missouri Pacific also counterclaimed against Ellison and East Texas for damages to its locomotive and for $1,633.85, representing the amount it had paid to its brakeman, Utley, in settlement of his claim against Missouri Pacific for personal injuries under the Federal Employers Liability Act. Missouri Pacific alleged that upon receipt of Utley's

demand, it advised East Texas that Utley's claim could be settled for the amount paid and that East Texas refused to recognize its responsibility to Utley, and refused to participate in the settlement; whereupon, Missouri Pacific consummated the settlement with Utley and took a release from him in favor of itself, Ellison and East Texas.

At the trial before a jury the trial court refused to submit the counterclaim for the amount paid to Utley to the jury and dismissed the counterclaim. The cause was submitted to the jury on interrogatories and the jury apportioned the negligence 60% to Missouri Pacific and 40% to Ellison. The jury found that Ellison sustained damages in the amount of $65,000, and that East Texas had sustained property damage in the amount of $3,300. Judgment was entered for Ellison in the amount of $39,000 and for East Texas in the amount of $1,980. On appeal to this court Missouri Pacific relies on the following points for reversal:

> "The defendants' motion for directed verdict should have been granted.
>
> The court erred in refusing to give defendants' requested instruction No. 'A.'
>
> The court erred in giving plaintiff's requested instruction No. 15.
>
> The court erred in dismissing defendant Missouri Pacific Railroad Company's counterclaim as to Woodrow Utley."

Under its first point, Missouri Pacific argues that a verdict should have been directed in its favor for the reason that Ellison based his entire case upon the alleged fact that he failed to see the train because he was blinded by the sun, and that he was, therefore, excused from his duty to keep an effective lookout, and since he heard no train coming he proceeded across the crossing. In support of this argument, Missouri Pacific

relies heavily on *Missouri Pacific R. R. Co.* v. *Binkley,* 208 Ark. 933, 188 S. W. 2d 291. There are considerable differences in the *Binkley* case and the case at bar. In the *Binkley* case Mr. Binkley was driving his automobile up a 38 foot wet "gumbo" incline to the railroad track. The wheels were spinning on the wet "gumbo." Mrs. Binkley saw the train coming and advised Mr. Binkley. He also saw the train when it was between 70 and 100 yards away from him. He explained in detail how he continued in his attempt to drive the automobile from the track after he saw the train coming. Mr. Binkley did not testify as to how long it took him to reach the point of impact from the road at the foot of the slick incline, but as to his vision being affected by the sun, his testimony related to the time he left the road onto the incline and not as he drove onto the track.

> ". . . you can see as far as you can see when you leave the road. But I looked down and couldn't see it because the sun was so bright. I glanced and took a look and it was bright and I didn't see a thing. Q. Did the engineer do everything possible, do you think? A. Yes, I do. He was just like I was, he gave me time; he thought I was going to get it out of the way and when he saw I wasn't he did everything possible."

The appellee's theory in the case of *Binkley* was that the collision was due to the negligence of Missouri Pacific in maintaining a slick and muddy approach to its crossing. It was the company's contention that Binkley was guilty of contributory negligence in failing to exercise caution necessary before driving onto the railroad track. Binkley met this contention in his brief as follows:

> " 'Appellant insists that the plaintiff should have seen the train before he reached the track, but anyone who has ever tried driving a car on a gumbo dump when it is wet and slick will understand that it takes all the attention and all the skill of a good driver to keep the car from skidding and going into

> the ditch, and that he has no time for looking for trains or anything else.' "

The primary difference, however, between *Binkley* and the case at bar, is set out in the *Binkley* opinion in the following sentence:

> "Here, appellee sued for property damage only, and any contributory negligence on his part would preclude recovery under the law at the time this action arose."

Furthermore, in the case at bar, the jury did not absolve Ellison of negligence. The jury found that he was negligent to the extent of 40% of the total negligence. The trial court properly overruled Missouri Pacific's motion for a directed verdict.

The trial court did not err in its refusal to give defendant's requested instruction No. A, which is AMI No. 1801 as modified. The trial court did give AMI No. 1801 as follows:

> "There was in force in the state of Arkansas at the time of the occurrence a statute which provided: A railroad is required to place on each locomotive a bell or whistle, and these shall be rung or whistled at a distance of at least a quarter mile from where the tracks cross any public street and shall be kept ringing or whistling until the locomotive has crossed the street.
>
> 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."

This instruction was given in the format of AMI No. 903, as evidenced by the last paragraph of the instruction. The instruction offered by Missouri Pacific would have modified AMI No. 1801 almost beyond recognition. Missouri Pacific's requested instruction No. A is as follows:

> "The purpose of giving these signals is to warn the traveler of the approach of the train. But, if the train is in plain view, or if its presence is otherwise discoverable by the exercise of ordinary care, then the giving of signals ceases to be a factor in the case.
>
> Therefore, if you have found from a preponderance of the evidence that the train in this case was in plain view or that its presence could have been otherwise discovered by the plaintiff, James Ellison, in the exercise of ordinary care, then you are instructed that the sounding of the whistle or bell on the locomotive ceases to be a factor to be considered in this case. (Then the failure to sound the whistle and bell by the trainmen should not be considered by you as evidence of negligence.)"

This instruction would have told the jury that if the presence of the train could have been discovered by Mr. Ellison in the exercise of ordinary care, that the sounding of the whistle or bell on the locomotive ceases to be a factor to be considered in the case; and that failure to sound the whistle or the bell should not be considered as evidence of negligence.

Missouri Pacific argues that the court's refusal to give the instruction took away from the jury its duty to consider the train was in plain view, and that the presence was otherwise discoverable because some witnesses testified that they heard the noise of the train from a distance as far as a quarter of a mile away. We are unable to follow Missouri Pacific's reasoning on this point. The refusal of the requested instruction did not take from the jury its duty to consider that the train was in plain view in the light of the other instructions given by the court, including AMI No. 1804; but, on the contrary, Missouri Pacific's instruction No. A, if given as tendered, would have in effect, removed from the jury's consideration as negligence, evidence of Missouri Pacific's failure to sound the whistle or bell as required by statute, even had the engineer observed the truck approaching the crossing with all obvious

intentions of driving across in front of the train. It would appear the the physical fact that one using the crossing would be looking into the setting sun on a clear day should make it even more necessary to sound the bell and whistle on a locomotive approaching the crossing from the west in the afternoon.

Missouri Pacific relies on the case of *Kansas City Southern Ry Co.* v. *Baker,* 233 Ark. 610, 346 S. W. 2d 215, but that case is distinguished from the case at bar by two sentences in the *Baker* opinion as follows:

> "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 *Baker* we quoted with approval from *Missouri Pacific R. R.* v. *Doyle,* 203 Ark. 1111, 160 S. W. 2d 856, as follows:

> " '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.' " (Emphasis added).

As we read the *Baker* case, it does not hold that "the giving of signals ceases to be a factor because the train was in plain view and easily discoverable" as argued by Missouri Pacific in the case at bar. As above stated, in the *Baker* case, Mrs. Baker *did see* the train and simply tried to outrun it. (Apparently because rain was falling).

The Missouri Pacific contends that the trial court erred in giving plaintiff's requested instruction No. 15, which is AMI No. 1802, as follows:

> "All persons operating trains upon any railroad in this state have the duty to keep a constant lookout for persons upon, near, or approaching the railroad track. A violation of this duty is negligence.

> This does not mean that each member of the train crew must keep a constant lookout, but it does mean that an efficient lookout must be kept by some member of the crew at all times."

This instruction, as given by the court, placed less duty on Missouri Pacific than would have its own requested instruction No. 3, which was refused by the court. Missouri Pacific's requested instruction No. 3 was AMI No. 1802 modified to include "property," as well as "persons" upon, near, or approaching the railroad track. Furthermore, plaintiff's instruction No. 15, as given by the court, was given in connection with plaintiff's instruction No. 20 (AMI No. 2104) which reads, in part, as follows:

> "If you should find that the defendants were not guilty of negligence, which was a proximate cause of the occurrence, then they are entitled to recover the full amount of any damages you may find they have sustained which were proximately caused by any negligence of James Ellison."

Missouri Pacific, in support of its assignment of error in giving plaintiff's instruction No. 15 (AMI No. 1802), argues that engineer Wilson testified that he did see Ellison's truck when the engine was about 1400 to 1500 feet from the crossing and the truck was about 200 or 250 feet from the crossing, and that the truck was driving 20 or 25 miles per hour. But engineer Wilson also testified, as pointed out by Missouri Pacific in its brief, that when the train was within 200 or 250 feet of the crossing and it appeared that Ellison was not going to stop, he yelled at fireman Armstrong, who was operating the engine, to put it into emergency.

Fireman Armstrong also testified that he was acting as engineer at the time of the collision and that as such he sat in the righthand side of the locomotive cab and that Ellison approached the crossing from Armstrong's left side. He testified that the windshield on the locomotive extends across the front of the cab to the door channels. He testified that there is glass in the front

doors of the cab on each side of the locomotive and that he was able to see out of both sides of the cab. He testified that the engine was about 1300 to 1400 feet from the crossing when the truck-trailer came into his view. He says that Ellison was approximately 200 feet from the crossing at the time he first saw him and was traveling about 25 miles per hour after coming into his view. He testified that the truck seemed to be continuing to slow down as if it was going to stop at the crossing. He says that Mr. Wilson and Mr. Utley, as well as himself, were observing the truck very closely, and that when the truck approached the crossing to within 20 or 25 feet it looked as if the truck was going to stop, but that it didn't and "I put the brake to emergency, and, of course, *Mr. Wilson and Mr. Utley* they had *called my attention* to go to emergency *because they realized it was possible he wouldn't stop,* but he just eased down to the west rail and completed his stop and a fouling the west rail." (Emphasis added).

It was brought out on cross-examination of Mr. Wilson as well as Mr. Armstrong that in prior depositions they had estimated that the truck was approximately 600 feet from the crossing when they first observed it. The train crew testified that the usual and statutory signals were given on approaching the Neeley crossing, but other witnesses, including Ellison, testified that they heard no bell or whistle signals; so, the jury might have reasonably concluded that neither Wilson nor Utley actually saw the truck until they shouted a warning to Armstrong, and that Armstrong did not see the truck until his attention was called to it, which was too late to avoid the collision. It is obvious that the estimates of distances by Wilson and Armstrong were not very accurate. Wilson was a party defendant and his testimony is not to be regarded as undisputed. *French* v. *Browning,* 187 Ark. 996, 63 S. W. 2d 647. In the light of all the evidence, as well as all the instructions both given and requested, we conclude that the trial court did not commit reversible error in giving the lookout instruction.

We are of the opinion that the trial court did not

commit reversible error in dismissing Missouri Pacific's counterclaim as to Woodrow Utley. As we view the record there was simply no causal relation between Mr. Utley's injury and the negligence of Mr. Ellison. Mr. Wilson testified that the engine traveled about 1900 feet after the collision and that the engine stopped within about 10 feet of the Edison Avenue, or Bauxite crossing, which was the next crossing from the Neeley Street crossing where the collision occurred. Mr. Utley testified that after the collision occurred and the train had stopped he obtained the flagging equipment, as it was his duty to protect the head of the train, and that he went back to the engine to get off. He says that the front of the engine had oil all over it and was bent up so he alighted from the rear end of the engine. He says that there was a filling station at the crossing where the engine stopped and he saw the filling station attendent standing outside the station. He says that there was a little ditch between the railroad track and the filling station and that,

> "I hopped over this ditch to get the attendent to call the ambulance and police and in doing this I pulled a ligament in the calf of my right leg. He said he would call the police and ambulance and I proceeded on to the front of the train with my flagging equipment to do my flagging duties."

As to Missouri Pacific's claim against East Texas for the amount it paid to Mr. Utley in settlement of his claim against the railroad, the record shows in-chambers proceedings as follows:

> "MR. CABE: At the conclusion of the evidence the intervenor East Texas Motor Freight moves for a directed verdict on the claim of the Missouri Pacific Railroad Company seeking to recover by way of contributions for monies paid to W. W. Utley, its brakeman for the reason that the injury sustained by Mr. Utley was not proximately caused by this collision. The chain of events had been efficiently broken and there is insufficient evidence from which a jury might find that East Texas Motor Freight

through its driver James Ellison was guilty of negligence which was a proximate cause of the injury and damages sustained by W. W. Utley.

MR. CLARK: Let the record show the Court has refused to give instructions on Mr. Utley's claim for damages on the basis that Mr. Utley had a cause of action against East Texas Motor Freight, and the action on the part of Missouri Pacific Railroad in making the settlement and including East Texas Motor Freight and James Ellison in the settlement was purely voluntary.

THE COURT: I am saying he could have a cause of action otherwise I confirm what Mr. Clark says.

MR. CABE: We object to any instructions or interrogatories regarding Mr. Utley.

THE COURT: Sustained.

MR. CLARK: Save our exceptions."

The railroad's claim for the amount it had paid its employee, Utley, was apparently made under the theory of contribution between joint tort-feasors, and although the manner in which the trial court refused to give an instruction on Utley's claim for damages is an awkward way of refusing to submit the Missouri Pacific's counterclaim on this item to the jury, we agree with the results. If there was error in the manner or reasoning of the court in reaching the results, we consider such error harmless in this case.

The fact that Utley might have had a cause of action against East Texas, and that the Missouri Pacific Railroad's settlement with Utley was purely voluntary, would not within itself justify withdrawing this part of the claim from consideration by the jury. Ark. Stat. Ann. §§ 34-1001—1009 (Repl. 1962). See also *Lacewell v. Griffin,* 214 Ark. 909, 219 S. W. 2d 227. But, proximate cause was properly defined in the instructions as, ". . . a cause which in a natural and continuous se-

quence, produces damage and without which the damage would not have occurred."

The proximate cause of Mr. Utley's injury was obviously his "hopping" across a small ditch to talk to a filling station attendant at a railroad crossing some 1900 feet from the point of collision; and when the engine, from which he alighted, was within 10 feet of the Bauxite crossing he was intending to protect, and did protect, as a flagman.

The judgment is affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result. I think there was error in giving the instruction submitting the issue of the railroad's failure to comply with the lookout statute, but I do not think appellants have any standing to raise the question.

In my opinion, the undisputed evidence eliminated the lookout question entirely. The train consisted of 89 cars and 4 diesel power units. It was equipped with air braking system. At least one-half to three-fourths of a second is required for one operating the engine to perceive danger and three-fourths to one second for reaction and movement to the emergency system. Six seconds would then elapse before the lead unit develops brake cylinder pressure. The air pressure is then propagated to the rear at the rate of approximately 930 feet per second. Six or seven additional seconds will elapse before the emergency application of the brakes is effective for the entire length of this train. At least 12 seconds will elapse before there is any retardation of the train. If the train were traveling at the rate of 50 miles per hour, as the engine crew estimated, it would move at least 800 feet before there is any perceptive slowing down of the train. In the opinion of appellant's road foreman of engines, from 3,000 to 3,300 feet would be a normal stopping distance for this train traveling slightly upgrade, as it was. When the train stopped, it

blocked the crossing. The front of the train stopped at a distance of not more than 1,900 feet (34 cars and 4 power units) beyond the crossing.

The engineer in charge of the train was acting as fireman and was seated on the left-hand side of the first power unit, as was the brakeman, who sat just to his rear. This was the side from which Ellison approached in his truck. The fireman, who was acting as engineer, was seated on the right-hand side. All had many years of experience in their respective jobs. Each had an unobstructed view. Engineer Wilson (the acting fireman) testified that he saw Ellison's truck approaching on Neely Street when the train was 1,400 to 1,500 feet from the crossing. The truck was then passing the Jones warehouse. Engineer Armstrong saw it when the train was 1,300 to 1,400 feet from the crossing. Brakeman Utley estimated the distance from the crossing at the time he saw the truck at 1,500 feet. Wilson and Utley estimated the truck's speed at 20 to 25 miles per hour when they first saw it. All the engine crew testified that the truck speed constantly decreased as it approached the crossing as if it would stop before reaching the tracks. Armstrong said that the truck was moving so slowly when it was 20 to 25 feet from the crossing, it appeared that it would stop at any point. As soon as he realized that it would not, he put the brake into emergency position at about the same time that Wilson and the brakeman called out to him to do so. He saw Ellison's truck ease down to the west rail of the track on which the train was traveling and stop with the front wheels on the rail. Wilson also said the truck finally stopped on this rail before it was struck by the train. Wilson said that the front of the train was 200 to 250 feet from the crossing when it became apparent that the truck would not be stopped.

Ellison's testimony does not really contradict that of the train crew in this regard. Ellison said that he approached the tracks, stopped, and seeing nothing eased across the switch tracks toward the track on which the train was traveling without seeing or hearing anything. He said that he was traveling pretty slow in low gear

and estimated his speed at 2 or 3 miles per hour. He confirmed the fact that, when he stopped, just the front of his truck was on the rail.

The testimony of witnesses called by appellees tends to corroborate the engine crew. Warren Long was on the loading dock at Masonite about 100 yards from the crossing. He first saw Ellison approaching the crossing when his truck was about even with the Jones mill at a distance he estimated at 50 yards from the switch tracks. It seemed to him that Ellison stopped at these tracks and then proceeded after which Long heard the impact. Barnie Jernigan was standing on the back porch at Arkansas Face Veneer, about 150 yards from the crossing. He saw the truck emerge from behind a building and proceed toward the crossing and then stop suddenly about the time of the impact. When he first saw them, the truck was a little over 200 feet and the train about 150 yards from the crossing. Scotty Smith was on the dock at Masonite, at a distance of 75 to 100 yards from the crossing. He saw the truck approach the crossing and saw the front end decline when the driver applied his air brakes. As Smith turned to resume his work the truck was near the spur track. He heard the impact almost immediately.

There was every indication to everyone who saw the truck that it would stop before proceeding onto the track ahead of the train. Under similar circumstances we have held that the testimony of the train crew cannot be disregarded and that the lookout issue should not be submitted to the jury as a possible proximate cause. *Chicago, R. I. & Pac. Rd. Co.* v. *Gipson,* 246 Ark. 296, 439 S. W. 2d 931; *St. Louis-San Francisco Railway Company* v. *Spencer,* 231 Ark. 221, 328 S. W. 2d 858; *St. Louis-San Francisco Ry. Co.* v. *Cole,* 181 Ark. 780, 27 S. W. 2d 992; *St. Louis-San Francisco Ry. Co.* v. *Thurman,* 213 Ark. 840, 213 S. W. 2d 362; *St. Louis-San Francisco Ry. Co.* v. *Williams,* 180 Ark. 413, 21 S. W. 2d 611; *Kansas City Southern Railway Company* v. *Shane,* 225 Ark. 80, 279 S. W. 2d 284.

Whatever may be said about the inaccuracy of the

train crew's original estimate of the distance of the truck from the crossing, it is obvious that it would have been impossible to have stopped the train before reaching the crossing after it became apparent that the truck would proceed onto the crossing rather than stop, as it gave every indication of doing. The truck's distance from the crossing was wholly immaterial and insignificant. Under similar circumstances, we have said that failure to keep a lookout could not have contributed to cause the collision. *Missouri Pac. Ry. Co.* v. *Yarbrough,* 229 Ark. 308, 315 S. W. 2d 897. Language used there is pertinent:

> Certainly if the trainmen saw the appellee with his truck standing still near the track they would not be required to anticipate that he was going to start the truck up and attempt to cross, when to do so would make a collision almost inevitable. In *Missouri Pacific R. R. Co.* v. *Doyle,* 203 Ark. 1111, 160 S. W. 2d 856, the court quoted from *Blytheville, L. & A. So. Ry. Co.* v. *Gessell,* 158 Ark. 569, 250 S. W. 881, as follows [203 Ark. 1111, 160 S. W. 2d 858]: " 'The operatives of trains have the right to assume that a traveler or a pedestrian approaching a railroad track will act in response to the dictates of ordinary prudence and the instinct of self-preservation and will, in fact, stop before placing himself in peril, and the duty of the railroad employees to take precautions begins only when it becomes apparent that the traveler at a crossing will not do so.' "

In spite of the absence of an issue under the lookout statute, there was a fact issue on the question of the giving of the statutory signals. Consequently, appellant was not entitled to a directed verdict. It is in no position to complain because, as pointed out in the majority opinion, appellant requested the same instruction as that given at appellees' request. A defendant cannot complain, on appeal, of the giving of an erroneous instruction at the request of a plaintiff when it is the same, in effect, as an instruction requested by defendant. *Dunnington* v. *Frick Co.,* 60 Ark. 250, 30 S. W. 212. Where the evidence is sufficient to support a ver-

dict upon one of several allegations of negligence so that there was no error in failure to direct a verdict for a defendant, the defendant is in no attitude to complain of an instruction submitting an issue of negligence not justified by the evidence, when he asked an instruction submitting the same issue. *L. J. Smith Const. Co.* v. *Tate,* 151 Ark. 278, 237 S. W. 83. An alleged error in giving an instruction on an issue not raised by the evidence is harmless where both sides request an instruction on that issue. *Keatts* v. *McAllister,* 222 Ark. 658, 262 S. W. 2d 136.

Chicago, R. I. & P. Ry. Co. v. *Smith,* 94 Ark. 524, 127 S. W. 715, is analogous. There the appellant contended that a pedestrian struck by its train was guilty of contributory negligence as a matter of law, so that an instruction submitting the question whether the pedestrian was guilty of negligence in failing to look, listen and discover the approach of the train was erroneous under the uncontroverted evidence. This court agreed but said:

> We think, however, that the defendant waived that particular error by requesting instruction containing the same error. By such action it invited the error. "Appellant cannot complain of an error in instructions asked by his opponent if the same error was repeated in instructions asked by himself." *Choctaw, O. & G. R. Co.* v. *Hickey,* 81 Ark. 579, 99 S. W. 839; *Railway Co.* v. *Dodd,* 59 Ark. 317, 27 S. W. 227; *St. L., I. M. & U. S. R. Co.* v. *Baker,* 67 Ark. 531, 55 S. W. 941; *L. R. & M. R. Co.* v. *Russell,* 88 Ark. 172, 113 S. W. 1021; *St. L., I. M. & S. R. Co.* v. *Carter,* 93 Ark. 589, 126 S. W. 99.

The case of *Missouri Pacific Railroad Company* v. *Yarbrough,* 229 Ark. 308, 315 S. W. 2d 897, might appear at first blush to be contra. Upon analysis, however, it appears that the trial judge had read all the requests for instructions by both parties and decided which would be given and which refused before the appellant had any opportunity to move for a directed verdict at the conclusion of all the evidence or to object to submission

of the issue of keeping a lookout, both of which appellant did. Furthermore, appellant's requested instruction no. 3, refused by the court, would have instructed the jury not to consider the allegation of failure to keep a lookout. The trial judge decided to and did give appellant's instruction request no. 19, dealing with the lookout question, instead of appellee's requested instruction on that point. Appellant *objected* to the giving of its own requested instruction on the point. Of course, under these circumstances, we found that appellant did have standing to raise the question. We have no such record here, so I would affirm the judgment.

FORD MOTOR COMPANY *v.* ROBERT L. REID ET UX

5-5287 465 S. W. 2d 80

Opinion delivered March 15, 1971
[Rehearing denied April 26, 1971.]

Wright, Lindsey & Jennings, for appellant.

Lightle & Tedder and *Sandy S. McMath,* for appellees.

CONLEY BYRD, Justice. Appellees Robert L. Reid and Billie Marie Reid, his wife, on April 26, 1967, purchased through W. H. Capps, d/b/a Capps Motor Company, a 1967 Lincoln Continental automobile manufactured by the appellant, Ford Motor Company. Approximately 1,800 miles later, on May 29, 1967, the automobile caught fire while parked in the garage attached to the Reid residence. Within ten minutes from the time the fire was first observed in the electrical harness under the right front seat of the automobile, it spread to and engulfed the residence in flames, resulting in total destruction of the automobile and the residence. The Reids brought this action against both W. H. Capps and Ford Motor Company alleging that the wiring under the front seat was defective in violation of the basic warranty on said automobile and that the damages sustained by them in the fire were proximately caused by the defect in the automobile. The first trial resulted in a directed verdict for Capps and a hung jury on the liability of Ford Motor Company. Upon retrial against Ford Motor Company, the jury returned a verdict for $89,279.00 for which judgment was entered. For reversal Ford Motor Company contends that the directed verdict in favor of Capps exonerated Ford Motor Company and that the court erred in giving its Instructions No. 6 and No. 7.

The testimony presented clearly made a fact issue as to whether there was a defect in the wiring harness that worked the solenoid for the reclining back of the right front seat and the motor which operated the head rest. The express warranty that came with the vehicle provided:

BASIC WARRANTY

"Ford Motor Company warrants to the owner each part of this vehicle to be free under normal use and service from defects in material and workmanship for a period of 24 months from the date of original retail delivery or first use, or until it has been driven for 24,000 miles, whichever comes first.

POWER TRAIN WARRANTY

"In addition, Ford Motor Company further warrants to the owner each part of the engine block, head, and all internal engine parts, water pump, intake manifold, transmission case and all internal transmission parts, torque converter, drive shaft, universal joints, rear axle and differential, and rear wheel bearings of this vehicle to be free under normal use and service from defects in material and workmanship for a period of five (5) years from the date of original retail delivery or first use, or until it has been driven for fifty thousand (50,000) miles, whichever comes first.

STEERING, SUSPENSION AND WHEEL WARRANTY

"In addition, Ford Motor Company further warrants to the owner each part of the suspension system, steering gear and linkage, power steering pump, road wheels, and front wheel bearings and seals of this vehicle to be free under normal use and service from defects in material and workmanship for a period of five (5) years from the date of original retail delivery or first use, or until it has been driven for fifty thousand (50,000) miles, whichever comes first.

"The further warranties do not include or apply to related items such as ignition, electrical, fuel, cooling, or brake systems, engine or transmission controls or linkages, steering column, clutch assembly, shock absorbers, or load leveling system.

GENERAL WARRANTY PROVISIONS

"It is a condition of all the warranties that the owner maintain this vehicle according to the maintenance schedule set forth in the Customer Maintenance Record in the Maintenance section of this Owner's Manual. It is also a condition of all the warranties that, every twelve months, the owner furnish an authorized Ford or Lincoln-Mercury dealer with evidence that these maintenance services have been performed and obtain the dealer's written certification that he has received such evidence.

"All the warranties shall be fulfilled by the Selling Dealer (or if the owner is traveling or has become a resident of a different locality, by any authorized Ford or Lincoln-Mercury dealer) replacing with a genuine new Ford or Ford Authorized Reconditioned part, or repairing at his place of business, free of charge including related labor, any such defective part.

"None of the warranties shall apply to (i) tires or tubes (adjustments for them being provided by their manufacturers), or (ii) normal maintenance services (such as engine tune-up, fuel system cleaning and wheel and brake adjustments), or (iii) normal replacement of service items (such as filters, spark plugs, ignition points, wiper blades and brake linings), or (iv) deterioration, due to normal use or exposure, of soft trim, appearance items, hoses, belts or moulded rubber or rubber-like items.

"The warranties herein shall not apply to any vehicle normally operated outside of the United States, Puerto Rico, or Canada, except a vehicle ordered through an Exchange or Ship's Store of the U. S. or Canadian Armed Services. A vehicle normally operated in a country other than the United States, Puerto Rico or Canada will be provided the dealer's warranty authorized for that country. If an owner is temporarily traveling in other countries,

his U. S., Puerto Rican, or Canadian license plates or Certificate of Registration will identify him as a visiting owner entitled to the privileges of the U. S., Puerto Rican, or Canadian warranty.

"The warranties herein are expressly IN LIEU OF any other express or implied warranty, including any implied WARRANTY OF MERCHANTABILITY or FITNESS, and of any other obligation on the part of the Company or the Selling Dealer."

The trial court instructed the jury with reference to their duties, the opening statements and arguments of counsel, credibility of witnesses, circumstantial evidence, burden of proof, expert witnesses and sudden emergency. Then the court gave the following:

INSTRUCTION No. 6

"Robert L. Reid and Billie Marie Reid claim damages from Ford Motor Company, and, therefore, have the burden of proving each of four essential propositions:

First, that they sustained damages;

Second, that there was a defect in the Lincoln automobile;

Third, that the defect existed at the time the automobile was delivered to the plaintiff;

Fourth, that the defeat in the automobile proximately caused their damages.

If Robert L. Reid and Billie Marie Reid failed to prove any one of these propositions, they would not be entitled to recover from defendants, Ford Motor Company."

INSTRUCTION No. 7

"You are instructed that Ford Motor Company, at

> the time of its sale of the Lincoln automobile involved in this cause of action to the plaintiffs, Robert L. Reid and Billie Marie Reid, warranted that the vehicle would be free, under normal use and service, from defects in material and workmanship for a period of twenty-four (24) months from the date of the original retail delivery or first use, or until it had been driven for 24,000 miles, whichever came first. If you find from a preponderance of the evidence that this warranty was breached by the defendant, Ford Motor Company, and that such breach of warranty resulted in damages to plaintiffs in this cause of action, you may then find for the plaintiffs in the amount of damages which you find they sustained by reason of the breach of warranty."

The other instructions dealt with proximate cause and damages.

Ford Motor Company's argument here on instruction No. 7 is as follows:

> "While the express warranty provides that it is expressly in lieu of any other express or implied warranty, including any implied warranty of merchantability or fitness, and exclusion or modification of warranties is permitted by statute (Ark. Stat. Ann. 85-2-316 [2]), and this case does not involve injuries to a person, this is not the point that we are here making.
>
> "In this facet of the case, the plaintiffs seek to use and rely upon an express warranty and part of that warranty spells out how it will be fulfilled. There is a contractual modification or limitation of remedy with respect to the express warranty and that is replacement of 'any such defective part'. At the most, this could not be more than the automobile which had cost $6,100.00.
>
> "Ark. Stat. Ann. 85-2—719 provides that an agreement may limit or alter the measure of damages and

may limit the buyer's remedies to repair and replacement of non-conforming goods or parts.

"If the plaintiffs are going to rely and seek recovery under an express warranty, they should not be permitted to select certain parts of the whole and reject other parts."

In its reply brief Ford Motor Company stated the matter in this language:

"Since appellant is not here claiming exclusion, modification or limitation of the implied warranty of merchantability, there need be no concern with whether negation of limitation is unreasonable or unconscionable. But if there is to be a claim that any contract or clause is unconscionable, the parties are to be afforded an opportunity to present evidence in connection with the making of a determination. Ark. Stat. Ann. 85-2-302 (2). As long as consequential damages from breach of implied warranties are neither limited nor excluded, it is submitted that a limitation in an additional or 'bonus' express warranty is not unconscionable. But, in any event, there has been no factual determination of unconscionability as a basis for departing from the express terms of the express warranty."

The pertinent portions of the Uniform Commercial Code provide:

Ark. Stat. Ann. § 85-2-714 (3). "In a proper case any incidental and consequential damages under the next section may also be recovered."

Ark. Stat. Ann. § 85-2-715. "(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty."

Ark. Stat. Ann. § 85-2-719. "(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article [chapter] and may limit or alter the measure of damages recoverable under this Article [chapter], as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."

Ark. Stat. Ann. § 85-2-316. "(1) Words or conduct

> relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article [chapter] on parol or extrinsic evidence (Section 2-202 [§ 85-2-202]) negation or limitation is inoperative to the extent that such construction is unreasonable."

When we read the second paragraph of the general warranty provisions under the guide lines of Ark. Stat. Ann. § 85-2-316 (1) that words "tending to negate or limit warranty" are to be construed whenever reasonable as consistent with each other but if the clauses are inconsistent then the words of disclaimer of express warranties must give way to the words creating the express warranty, we reach the conclusion that the mandatory language "all the warranties *shall* be fulfilled by the selling dealer. . ." is an instruction to the dealer and not a limitation on other remedies of the buyer. This construction is supported by Ark. Stat. Ann. § 85-2-719 (1) (b) which provides that "resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy."

There is no language anywhere in the warranty form "expressly" stating that the remedy of repair or replacement of defective parts is to be the exclusive remedy. The language in the fifth paragraph of the "General Warranty Provisions" goes only to "obligations" and "warranties," not to remedies. As Section 85-2-301 (Add. 1961), General Obligations of Parties, shows "The obligation of the seller is to transfer and deliver. . . . in accordance with the contract." Remedies are not "obligations," they are the rights arising from failure to perform obligations. This is further made clear by the provisions of Section 85-2-316 (4) cross referencing to contractual remedy section of the Code as governing those phases of the agreement. If the Ford Motor Company intended the repair remedy to be exclusive, as it now contends, it should have stated that intention in express language. Consequently it follows the Instruction § 7 was correct.

Ford Motor Company's complaint about Instruction No. 6 is that it did not limit liability to defects existing prior to the time the vehicle left Ford's control or to defects for which Ford had some manufacturing responsibility. This argument of course is premised upon the basis that Ford is not liable under the express warranty. As shown above, Ford is liable on its express warranty and it follows that this contention is without merit. By the very terms of the warranty it runs from the date of delivery to the purchaser.

It is also suggested that Instruction No. 6 is defective in that it did not limit the jury to a defective wiring condition in, under and about the front seat. We can find no prejudicial error here, because the pleadings and all of the proof had to do with a fire that started in the electrical wiring under the right front seat.

Ford also argues that the directed verdict in favor of Capps, the dealer, in the first trial also exonerated Ford. This argument, too, is premised upon the theory that Ford's liability could only be upon the basis of an implied warranty of fitness. As pointed out above, Ford's liability under the circumstances is that *under* its express warranty. That liability by its terms is independent of any liability of the dealer. It therefore follows that the exoneration of the dealer was in no way an adjudication of Ford's liability under its express warranty.

The appellees in their brief and the Amicus Curiae briefs have urged us to adopt the doctrine of strict liability as set out in Restatement of Torts 2d § 402A. Our disposition of this case under the Uniform Commercial Code makes it unnecessary to pass upon that argument.

Affirmed.

ARKANSAS STATE HIGHWAY COMM'N *v.*
W. F. LEMLEY ET AL

5-5384 464 S. W. 2d 605

Opinion delivered March 15, 1971

Thomas B. Keys and *James N. Dowell,* for appellant.

Gordon, Gordon & Eddy and *Williams & Gardner,* for appellee.

CONLEY BYRD, Justice. This eminent domain proceeding was before this court in *Arkansas State Highway Commission* v. *Lemley,* 247 Ark. 201, 444 S. W. 2d 692. On retrial the jury fixed just compensation at $12,000. For reversal, the Highway Commission relies upon the following points:

"1. The trial court erred in refusing to strike the before the taking value testimony and the resulting damage testimony of Mr. Roy Jackson on the basis that he gave no substantial evidence upon which to predicate his land values.

2. The trial court erred in refusing to strike the testimony of Mr. Jackson with reference to drainage damages that were not plead as special damages.

3. The trial court erred in refusing to strike that portion of Mr. Jackson's testimony as to the east 40 acres of land on the basis that this is a separate tract of land; that there was no taking from this portion of land; and that any impairment of access to a separate tract would not be compensable.

4. The trial court erred in allowing Judge Tom Scott to testify as to the cost of acquiring new access.

5. The trial court erred in refusing to strike Mr. C. V. Barnes' testimony with reference to damage based upon circuity of travel, a non compensable element.

6. The trial court erred in refusing to strike Mr. Barnes' testimony with respect to damages to the separate tract.

7. The trial court erred in refusing to strike Mr. Barnes' inconsistent and improper testimony relating to damages to the remaining land wherein he valued the land in the taking as a separate unit of value, damaging the remaining lands on a basis of their value to the whole.

8. The trial court erred in giving appellees requested instructions A and B.

9. The verdict is not supported by substantial evidence and is excessive."

Points No. 3, No. 6 and No. 8 were held adversely to appellant upon the first appeal and have become the law of the case.

Point No. 4, upon substantially similar testimony, was ruled adversely to appellant in *Arkansas State Highway Commission* v. *Darr,* 248 Ark. (May 18, 1970), 453 S. W. 2d 719.

Neither do we find merit in Point No. 2. Identical testimony about the drainage problem was elicited on the first trial—thus putting appellant upon notice of the nature of the claim. Furthermore, the drainage problem was restricted to acknowledged residual lands and was properly admitted as part of the claim for severance damages.

Mr. Roy Jackson testified that he and Lemley bought these lands in 1945. After qualifying as an owner and as an expert on land appraisals, Mr. Jackson valued the 120 acres of Section 33 at $3,200 before the taking and an after value of $1,500. He valued the 40 acre tract in Section 34 at $8,000 before and $3,000 after the taking. Because Jackson placed a before value of $200 per acre on the woodland and did not support this value by comparable sales of woodland, appellant now argues that his valuation is without substantial support. We find no merit in this contention. Jackson, among other things, compared the fertility of woodland areas with that of surrounding farm lands and testified about cost of clearing. No question is raised about his valuation of the open lands.

Mr. C. V. Barnes testified that before the taking the 120 acre tract abutted upon Highway No. 64, but after the taking, the property was left in two separate and distinct parcels of land. The owners can not cross the Interstate to reach the south 40 acres from the north 66 acres. The 66 acres left on the north side of the Interstate is four and a half miles farther from Morrilton than before the Interstate construction. It is also a mile and a half further from a paved road than before construction. Furthermore, there is no public access to the

north 66 acres since the taking. Based upon his experience and study of the market in the area, Mr. Barnes arrived at a before value of $30,000 for the 120 acre tract and an after value of $18,000.

On cross-examination Mr. Barnes stated that he did not place a separate value on the 40.8 acres south and west of the Interstate in arriving at his after value. He considered it one parcel before the taking and as one unit after the taking. Although the 40.8 acres still had access to Highway 64 and was severed from the north 66.48 acres by the Interstate, he did not analyze the south 40.8 acres by itself. On the whole remaining 107.28 acres he ascribed $170 per acre in round figures.

We agree with appellant that the trial court should have struck that portion of Barnes' testimony relating to the damage to the remaining lands. Ordinarily non-contiguous lands cannot be valued as a unit. The exception is upon a showing of a unity of use. See *Kansas City So. Ry. Co.* v. *Boles,* 88 Ark. 533, 115 S. W. 375 (1908). Barnes' testimony here demonstrated that the north 66.48 acres was left without public access and that even if such access were provided there would still be a considerable circuity of travel to get from the south 40.8 acres. In view of the fact that Barnes described the highest and best use of the lands before the taking as an owner occupied and operated agricultural unit and the fact that he described the south portion as a relatively small unit, we find nothing in his testimony by which one could say that the two parcels constituted a unit for valuation purposes after the taking. Furthermore, since the south 40.8 acres still has the same access that it had before, it certainly has not sustained any damage from lack of public access. Yet the method of averaging values used by Barnes would ascribe also damages to the south 40.8 acres for lack of public access.

The cardinal rule in eminent domain cases involving partial takings is the difference in values of lands before and after the taking. The per acre value of agricultural lands on either side of an Interstate may be and usually is as much after the taking as before the

taking. However, this does not mean that two separated parcels operated as a unit are worth as much per acre because of circuity of travel, access and location of improvements. This is particularly true of relatively small plots.

Appellant also argues that Barnes' testimony with reference to circuity of travel should have been stricken. We find no testimony of Barnes that ascribes damages to circuity of travel. All we can find is Barnes' statement that the north 66 acres after the taking is farther from the City of Morrilton and a paved road. These are matters that ordinarily affect value of lands and we hold that the trial court did not err in so ruling.

Reversed and remanded.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I would affirm this judgment. Roy Jackson testified that the difference in value amounted to $22,000. No infirmities are found in that testimony. It affords ample support to the jury verdict without regard to the Barnes testimony, as I will subsequently attempt to illustrate. Regardless of this, however, I submit that there was no reversible error in the trial court's refusal to strike Barnes' testimony as to severance damage. The reason given for reversal in the majority opinion is not the basis of appellant's argument, and does not seem to me to have support in the record. We have uniformly refused to reverse a trial court's action for a reason not argued by the appellant. *Cummings* v. *Boyles,* 242 Ark. 923, 415 S. W. 2d 571; *Fancher* v. *Baker,* 240 Ark. 288, 399 S. W. 2d 280, 16 A. L. R. 3d 1383. In such a situation we decide the appeal on the basis of objections argued here and consider all others waived. *Kane* v. *Carper-Dover Merchantile Co.,* 206 Ark. 674, 177 S. W. 2d 41. Errors relating to admission of evidence not argued on appeal are considered as waived. *Harris* v. *Edwards,* 129 Ark. 253, 195 S. W. 1064. We have also refused to consider, on appeal, any objection not specifically made in the

trial court. *Arkansas State Highway Commission* v. *Sadler,* 248 Ark. 887, 454 S. W. 2d 325; *Nelson* v. *Busby,* 246 Ark. 247, 437 S. W. 2d 799; *Judy* v. *McDaniel,* 247 Ark. 409, 445 S. W. 2d 722; *Sandidge* v. *Sandidge,* 212 Ark. 608, 206 S. W. 2d 755; *Wade* v. *Goza,* 78 Ark. 7, 96 S. W. 388. We have also said that a motion to strike part of the value testimony of a witness must sufficiently pinpoint the objectionable part for the trial court's action before error can be predicated upon denial of the motion. *Arkansas State Highway Commission* v. *Woody,* 248 Ark. 657, 453 S. W. 2d 45.

In order to demonstrate that there is no reversible error, it is necessary to view the Barnes testimony as a whole, not just an isolated part of it. *Arkansas State Highway Commission* v. *Pruitt,* 249 Ark. 682, 460 S. W. 2d 316. He stated that the 120-acre tract had 50 acres of woodland on the north end and 70 acres of open land on the south. The 120 acres fronted on U. S. Highway 64. He described the soil characteristics and topography of the tract. Its highest and best use, according to him, was for an owner-occupied and operated agricultural unit. He ascribed a value of $30,000 to the entire 120 acres. Barnes described the 12.72 acres taken as running diagonally through this tract, having a length of 1,830 feet and a width varying from 300 to 320 feet. He valued this tract at $3,800. The taking, according to him, severed a farm road running through the property and eliminated a protecting levee. The remaining 107.28 acres consisted of 40.8 acres, south and west, and 66.48, north and east, of Interstate Highway 40. These two tracts were effectively severed, said Barnes, to the extent that an additional 3,700 feet of turnrows on each side of the new highway would be necessary to cultivate the lands, which would also be left in irregular shapes and thus more difficult to cultivate. He considered the south residual a relatively small unit. According to him, the highest and best use after the taking was the same as before, except for diminished adaptability and the inaccessibility of that portion of the tract lying north of the new highway. He put a value of $18,200 on the remaining 107.28 acres, making a difference of

$11,800, which he said would include the value of the lands taken. In addition to the diminution of accessibility and adaptability of the remaining lands, and the reduction in productive acreage attributable to necessity for additional turnrows, Barnes said there would be an increased operating cost and a loss of unity of use of the property. He also pointed out the loss of the headquarters on the 120-acre tract, only a part of which was left on the 40-acre residual.

Barnes considered the damage to the separate 40-acre tract at $1,200 based upon a value of $150 per acre before the taking and $120 per acre thereafter. Thus, $5,000 of his total damages was arrived at without regard to the value of the remainder of 107.28 acres.

The only objection which is in any way related to this point for reversal is appellant's motion to strike, reported as follows:

> I would like to make a motion to strike that portion of this witness' testimony relating to damages to the remaining lands, the $80.00 per acre, and also the value of the lands in the taking, the $300.00 per acre, because the witness is valuing the land in the taking as a separate unit of value, whereas he is damaging the remaining lands on a basis of their value to the whole. This is inconsistent and improper, and his testimony in this regard should be stricken.

This motion accounts for the wording of appellant's point for reversal but hardly for its argument here. Appellant's entire argument on this point follows:

On cross-examination, Mr. Barnes testified as follows:

> Q. What per acre value after the taking did you place on the south 40 acres south of the Interstate—south and west of the Interstate?

A. I didn't place a separate value on the 40.8 acres south. I considered the 107 acres of the 120 acres all together as one parcel.

Q. As one parcel?

A. It was one parcel before the taking, so I considered it as one unit after the taking.

Q. Isn't this a completely separated and controlled access facility?

A. Yes, sir. It is one unit cut in two pieces.

Q. You didn't arrive at an after value per acre on the south 40 acres?

A. No, sir.

And later:

Q. You didn't ascribe any specific value to the 120 acres on a per acre basis?

A. On the whole 107.28 acres, I did.

Q. How much?

A. $170.00 in round figures.

Q. $170.00?

A. $18,200.00 which I ascribed to the land remaining in the 120 acre parcel figures approximately $170.00 per acre.

Q. Did you set $250.00 on the before value on the 120 acre tract?

A. That's right.

The fallacy of such a determination of value is pointed out in Nichols on Eminent Domain, Third

Edition, Section 17.1 (4) at page 106, 1969 Cumulative Supplement:

> "Similarly, where a parcel of land consists of segments which have different values, it is improper to average the values and apply such averages to the entire parcel. This is especially applicable in partial takings."

The majority opinion says that the testimony should have been stricken because Barnes valued the remainder as a unit. This is a complete departure from the reason assigned by appellant. Appellant has never made any such objection. Reversal for a reason not urged in either the trial court or in this court, is a novel procedure.

If we but look at the above testimony and argument, it should be obvious that appellant showed no ground for reversal for the reason assigned in its objection. There was absolutely no evidence that the two segments had different values, or that Barnes averaged the values and then applied the averages to the entire parcel. Of course, it was proper for the witness to state separately the value of the lands taken. *Arkansas State Highway Commission* v. *Stallings,* 248 Ark. 1207, 455 S. W. 2d 874; *Arkansas State Highway Commission* v. *McAlister,* 247 Ark. 757, 447 S. W. 2d 649; *Young* v. *Arkansas State Highway Commission,* 242 Ark. 812, 415 S. W. 2d 575. He was specifically asked to do so on cross-examination.

Assuming, however, that the motion was proper and that it should have been granted, this would not have resulted in striking all the testimony of this witness. As pointed out above, a substantial part of Barnes' testimony was admissible. Consequently, any error in this regard does not necessarily call for a reversal, since there was other substantial evidence as to severance damage to support the verdict and Barnes' testimony would have been properly considered, in any event, as to the 40-acre tract and as to the value of the part taken. See *Arkansas State Highway Commission* v. *McAlister,* supra; *Arkansas State Highway Commission* v. *Stallings,*

supra; *Arkansas State Highway Commission* v. *Ormond,* 247 Ark. 867, 448 S. W. 2d 354.

RALPH MAY *v.* ALTA INEZ MAY

5-5495 464 S. W. 2d 598

Opinion delivered March 15, 1971

Lester E. Dole and *Charles L. "Chuck" Honey,* for appellant.

No brief filed for appellee.

CONLEY BYRD, Justice. The trial court held void child custody provisions in a divorce decree obtained on March 14, 1967, by appellant Ralph May and awarded the custody of their three minor children to appellee Alta Inez May. For reversal appellant contends:

"1. That the divorce decree was a final adjudication and that the trial court erred in not requiring a showing of a change of circumstances and in not requiring appellee to go forward with the burden of proof.

2. That the court failed to take into consideration the best welfare of the children."

The record shows that on or about September 10, 1966, appellee Alta Inez May left her then husband, appellant Ralph May. Accompanying her were the children, her mother Bessie Colvert and her husband's cousin, John May, an ex-convict and parole violator, now her husband. Appellee moved to North Little Rock where she remained until February 25, 1967.

On September 14, 1966, appellant filed suit for divorce and caused a warning order to be issued upon his affidavit that he did not know the whereabouts of his wife. On November 18, 1966, he married his present wife, Nancy. On March 14, 1967, an uncontested divorce decree was entered. That decree, in awarding custody to appellant, recited a finding that the children were in his custody at that time.

At the hearing on October 21, 1969, appellant testified that when he filed the divorce suit on September 14, 1966, he knew his wife and children were in North Little Rock with Johnny May and that he had a copy of the divorce decree with him when he took the children from his wife in St. Joe, Louisiana, about March 10, 1967. At the hearing held on October 27, 1969, appellant testified that he got the children before he got the decree because he had enrolled his oldest child in school on March 6, 1967. At this time he also said it was about three weeks or a month before he picked up the children that he found out that his wife was in Little Rock.

We find no merit in appellant's contention that the Chancellor erred in failing to require appellee to show a change of circumstances. Appellant first testified that he knew his wife's whereabouts when he filed his divorce action, then later changed his story. The same is true with respect to custody of the children at the time the decree was rendered. Under these circumstances, the Chancellor could properly treat the decree as void in so far as it affected custody. See *Bauer* v. *Brown,* 129 Ark. 125, 194 S. W. 1025 (1917).

The testimony about the welfare of the children is conflicting. There is testimony that appellee engaged in a number of extra marital affairs, that she did not keep the children clean, and that she selfishly spent the family earnings on herself instead of food for the family. On the other hand the extra marital affairs were denied and proof was offered that appellee maintained a clean and comfortable home where the children would be kept. There was also testimony that appellant did not provide for his family while appellee was living with him.

Appellant's present wife has three minor children who live in their home and she was pregnant at the time of the hearing. There is also some testimony indicating that appellant is a cattle thief. While he denied the charge, he admitted that he was arrested and that after he agreed to return some cattle in his brother's pasture, the charges were dropped.

The chancellor saw the parties and their demeanor during the trial and upon the record before us, we are unwilling to hold that his findings are contrary to the weight of the evidence.

Affirmed.

JANAZEAN DAGGS *v.* GARRISON FURNITURE COMPANY ET AL

5-5506 464 S. W. 2d 593

Opinion delivered March 15, 1971

Sexton, Wiggins & Christian, for appellant.

Daily, West, Core & Coffman, for appellee.

CONLEY BYRD, Justice. The sole issue on this appeal is whether an unprovoked assault upon appellant Janazean Daggs arose out of and in the course of her employment with appellee Garrison Furniture Company. The law with reference thereto is set out in *Townsend Paneling* v. *Butler,* 247 Ark. (Dec. 15, 1969), as follows:

> " 'It is generally held that injuries resulting from an assault are compensable where the assault is causally related to the employment, but that such injuries are not compensable where the assault arises out of purely personal reasons.' Larson, Vol. 2, § 11.21, et seq.; *Johnson* v. *Dierks Lbr. and Coal Company,* 207 Ark. 527, 181 S. W. 2d 485 (1944)."

The proof is that appellant worked on the same floor as her assailant, Joy Stevens. Appellant had no social contact with Mrs. Stevens, had not talked to her and had not talked about her. On the day of the occurrence appellant had clocked into appellee's premises and was waiting for the bell to go to work. The work bell rang at 7:25 A.M. About 7:15 A.M. Mrs. Stevens came up to her, said, "I heard you were talking about me" and began striking appellant.

Joy Stevens admitted the striking. On direct examination she stated that her reason for striking appellant was not connected with her work for appellee. She just struck her for personal reasons not connected with her work. On cross-examination she admitted she had never talked to appellant and that she struck appellant because of something she heard from the other employees where she worked. When asked if it would have been the day before that she heard this something she replied, "It was just about every day." On redirect she testified that she

heard the rumors from her fellow employees and the rumors concerned Billy Lowe, a man who worked in her department. On recross she said her fellow employees would come by and whisper the rumors in her ear. On redirect she stated that the matter had gotten worse the day before because of something she heard after work.

Even if the assault be considered the result of horse play, there is evidence from which the Commission could have found that it was not work connected. Of course the Commission could also have inferred that the assault was related to a purely personal matter involving Billy Lowe.

Affirmed.

PAUL H. MILLER ET AL *v.* STATE OF ARKANSAS

5-5530 464 S. W. 2d 594

Opinion delivered March 15, 1971

Skillman & Furrow, Bruce Ivy, Donald A. Forest, James Robertson and *Jay F. Friedman,* for appellant.

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

CONLEY Byrd, Justice. Appellants Paul H. Miller, Raymond Rowell and Charles A. Barron along with

James E. Cox were found guilty of obtaining property by false pretence. For reversal appellants raise the issues hereinafter discussed.

Lena F. Martin, about 85 years old, was the widow of a Cross County bank officer at Wynne, Arkansas. When the bank's management observed some excessive checks on her account, the bank personnel were instructed to require identification of anyone presenting her checks and to ask the bearer what the check was for. Between November 21, 1968 and December 30, 1968, over $4,000 was withdrawn by checks made payable to appellants or Cox. In each instance the check was submitted for payment on the day it was dated, the bearer identified himself by driver's license or social security number and stated that the check was for roofing repairs to Mrs. Martin's home. The State's evidence shows that less than $100 worth of repairs were made to the home during that time.

POINT No. 1. The record shows that the trial date was set six months earlier and two days before the trial date, the parties announced ready for trial. On trial date appellants made motions to quash the information which the trial court denied. We can find no abuse of discretion by the trial court. See Ark. Stat. Ann. § 43-1206 (Repl. 1964), *Thurman* v. *State,* 211 Ark. 819, 204 S. W. 2d 155 (1947), and *Beckwith* v. *State,* 238 Ark. 196, 379 S. W. 2d 19 (1964).

POINT No. 2. The trial court did not abuse its discretion in refusing appellants' motions for a severance. See *Ballew* v. *State,* 246 Ark. (June 2, 1969), 441 S. W. 2d 453. Furthermore, since the trial court struck all portions of the confessions of Cox and Barron referring to the other defendants, no problem of confrontation arose contrary to the holding in *Bruton* v. *United States,* 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). See *Mosby* v. *State,* 246 Ark. 96°, 440 S. W. 2d 230.

POINT No. 3. We find no error in the admission

of the testimony of lay witnesses as to the mental capacity or competency of Mrs. Martin. See *Hill* v. *State,* 249 Ark. 42, 458 S. W. 2d 45. As we read the record each witness stated the facts upon which his observations and conclusions of Mrs. Martin's mental condition were made.

POINT No. 4. After Robert A. Smith, a builder with 15 years experience, testified that if any repairs had been made to Mrs. Martin's home during November and December 1968, they would have been discernible at the time he inspected the building, his testimony was competent to show the amount of repairs made. Appellants' argument that it would be impossible for any witness fifteen months after the repairs to give an opinion of the value of the repair work done, goes to the credibility of the testimony and not its admissibility.

POINT No. 5. Relying upon *Bruton* v. *United States, supra,* appellants contend that the trial court erred in admitting the confession of codefendant Cox into evidence. We disagree. The trial court deleted all portions of the confession having reference to appellants. This we understand to be permissible. See *Mosby* v. *State, supra.*

POINT No. 6. The information alleged that on the 26th day of November, $886.50 in money was obtained under false pretenses. At the trial it developed that the prosecuting attorney in drawing the information had transposed the figures and that the exact amount of the check was $686.50. The trial court did not err in amending the information because there was no material variance and no prejudice shown. See Ark. Stat. Ann. § 43-1012 (Repl. 1964).

POINT No. 7. Here appellants argue that the trial court erred in refusing their motion and request to instruct the jury that there was, as a matter of law, no conspiracy between appellants. The motion of appellants appears at page 279 of the record and is as follows:

"Mr. Skillman: Your honor, let me make it clear. By the term as used in the Information, the State is attempting to show that there was a collective action by these defendants on all of the sub-paragraphs thereto, with exception of sub-paragraph 4. Now, sub-paragraph 4 dealt with, or does deal with, as to Holmes, which is not involved in this particular instance today. I understand him not to be included. But that leaves 1, 2, 3, 5, 6 paragraphs of the Information wherein the State is alleging that the four defendants today jointly conspired by a common scheme and method and design. There is no evidence showing there was any common scheme, design, and plan. We say that each should be treated separate, distinct, and apart for this reason: if it is not, then Mr. Pearson can allege and claim that these four all got together and they did go at separate times to get these amounts of money, as they say, by false pretense. We say to that, there is no showing that they all benefitted in the fruits of this, or there was in fact a false pretense, and if the Court does find that there was no joint common scheme or plan, we are entitled to an instruction that the defendants, the charges against them, are to be treated as separate and distinct, even though they may be tried together, and it would prohibit the State from referring to such a common scheme, plan or design."

After listening to argument by appellants' counsel and counsel for the State, the trial court ruled:

"I am going to sustain the motion as to the conspiracy question, and neither defense nor the State can get involved, when it comes time to argue the case, in this particular aspect before the jury. The defendants are jointly charged here with obtaining money or property by false pretense from this lady. That means one verdict form as to each defendant will be submitted to the jury, and the jury will have to determine whether each defendant did or

> did not obtain money by false pretense. I am saying there will be one verdict form as to each defendant on charge of obtaining money by false pretense, whether contained in Count 1 or Count 6."

After this ruling, we find no further request on the issue either by oral motion or request for an instruction to the jury. Consequently we hold that appellants are not in a position to complain of the trial court's failure to so instruct the jury. See *Stockton* v. *State,* 239 Ark. 228, 388 S. W. 2d 382 (1965).

POINT No. 8. The trial court allowed the introduction into evidence of bail bonds and other judicial processes signed by appellants as handwriting samples to be used in identifying each appellant as one of the persons who endorsed and cashed the checks. This was not error. See *Lewis* v. *United States,* 382 Fed. 2d 817 (D. C. Cir. 1967).

POINT No. 9. Appellants requested the trial court to instruct the jury that the State's failure to call Mrs. Lena Martin would justify the inference that her testimoney would be contrary to the contentions of the State. Assuming that such an instruction would be proper in a case such as this, still the trial court did not err here. The record shows that Mrs. Martin, because of her age, had become so forgetful and senile that her relatives had moved her to their home in California to take care of her.

POINT No. 10. The trial court properly admitted the checks executed by Mrs. Martin to appellants into evidence. The identification of each appellant was made by a handwriting expert through comparison of the check endorsement signatures with the bail bonds and waivers of extradition signed by appellants.

POINT No. 11. On occasions the trial court examined the witnesses. Such examinations usually occurred after an objection was made and on those occasions the trial court would question the witnesses to

clarify their testimony before ruling on the objections. On one occasion, the trial court asked an out of state officer to identify one of the accused—apparently for the purpose of excusing the officer to return to his home. Under the circumstances we can find no abuse of discretion or prejudice to the appellants. See *Clubb* v. *State,* 230 Ark. 688, 326 S. W. 2d 816 (1959).

POINT No. 12. We can find nothing in the Prosecuting Attorney's reference to appellants as "con artists" that would call for a mistrial. The comment, while not recommended as good practice, was at most argumentative. Appellants asked for no other relief.

POINT No. 13. Appellants here contend that the trial court should have granted a mistrial when the Prosecuting Attorney, in his closing argument, referred to the confession of James E. Cox in reference to the appellants. Since we find nothing in the record to support this contention, we must hold it to be without merit.

Affirmed.

FOGLEMAN, J., not participating.

CARLTON J. CARNEY *v.* STATE OF ARKANSAS

5554 464 S. W. 2d 612

Opinion delivered March 15, 1971

Harold C. Rains Jr., for appellant.

Ray H. Thornton, Jr., Attorney General; *Garner L. Taylor, Jr.,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was charged in June 1966 with first degree murder. Thereupon, he and a codefendant were afforded the assistance of a court-appointed attorney. About five months later they entered a plea of guilty to the reduced charge of second degree murder, and each was sentenced to twenty-one years in the State Penitentiary. In March 1970 appellant filed this Rule 1 petition for post-conviction relief. Ark. Stat. Ann., Vol. 3A, 1969 Supp., p. 91. His present counsel was then appointed, and an evidentiary hearing was conducted after which the trial court, by written

findings of fact and conclusions of law, denied the petition. This appeal follows.

For reversal appellant first argues that he was not advised of his right to remain silent and did not have the benefit of counsel at the time of his alleged guilty plea. He therefore asserts that the trial court erred in failing to find that his constitutional rights were violated. Although the record adequately reflects that appellant was in fact given the Miranda warnings, we need not further consider this contention since it was not included in appellant's Rule 1 petition but, instead, raised here on appeal for the first time.

It is undisputed that appellant's court-appointed counsel represented appellant at his arraignment and when he later entered his plea of guilty. Appellant's claimed lack of representation appears to be founded upon his personal impression that unless he pleaded guilty, his court-appointed attorney would represent his codefendant exclusively. This was denied by the attorney who testified that he submitted a plea to the lesser degree because he thought it was "wise under the circumstances." There was evidence that appellant was fully advised of his rights by his counsel and the court. Appellant does not question the attorney's competency, and the record amply demonstrates that his approval of a guilty plea to a lesser charge was a matter of professional judgment based upon a thorough investigation of the facts, including the evidence accumulated by the prosecution and the probabilities of an unsuccessful trial of the case upon the original charge. An elderly person was murdered, and it appears that appellant was present as a participant with his codefendant when the alleged crime was committed. The crime was described as "gruesome" and committed with "brutality."

Appellant's court-appointed counsel is an experienced lawyer, having practiced for the past seventeen years. Upon appointment he learned that appellant had a history of some mental instability and treatment while living in Chicago. He promptly secured an order from the trial court committing appellant to the State Hos-

pital for a mental examination and advised the Hospital concerning the information he had about appellant. The Hospital, however, found appellant without psychosis. Further, he contacted appellant's relatives in Chicago numerous times and acquired data from a mental institution there for the trial court's consideration. Appellant's counsel secured two continuances to facilitate his duties and discharge his responsibilities. It appears that appellant was ably and diligently represented by his court-appointed counsel. In our view, the evidence supporting the court's findings on this issue is certainly sufficient.

In his next two points for reversal appellant contends that he did not in fact enter a plea of guilty or, alternatively, that if he did, it was a product of duress. He claims that his guilty plea was in contravention of Ark. Stat. Ann. § 43-1221 (Repl. 1964) in that it was submitted by the court-appointed attorney while he himself remained silent. However, witnesses who were present when the plea was entered testified that upon pleas of guilty it was the practice of the trial court to affirmatively determine from the defendant himself whether he desired to plead guilty and, also, if he understood the significance of such a plea, and that in the case at bar the appellant did, in accordance with that practice, confirm the plea submitted by his attorney. Appellant nevertheless maintains that in any event the plea was extracted as a result of harassment and numerous threats which, according to his testimony, were made by the police during his pretrial incarceration to the effect that he would be sentenced to death unless he pleaded guilty to a lesser offense. This complaint, which was never asserted prior to appellant's Rule 1 petition, is not corroborated and is, in fact, contradicted by other testimony that he was not abused or "mistreated in any manner." There was also evidence that the officers brought him clothing and attended to some of his other needs. We think there was sufficient evidence of a substantial nature to support the finding of the trial court that appellant's plea was properly entered.

Appellant lastly argues for reversal that because of his age at the time of the crime (16) and his history of mental instability, the common-law presumption of incapacity should apply. Again, this point is raised for the first time on appeal and cannot, therefore, be considered. However, we note that the appellant had attained the ninth grade and, as previously indicated, the State Hospital found him without psychosis.

In the case at bar, a full canvass of the record reveals no violations of appellant's constitutional rights.

Affirmed.

ST. PAUL INSURANCE COMPANY *v.* LIBERTY MUTUAL INSURANCE COMPANY AND JOE E. HERDISON

5-5480 464 S. W. 2d 566

Opinion delivered March 22, 1971

Daily, West, Core & Coffman, for appellants.

Shaw & Ledbetter and *Hardin, Jesson & Dawson,* for appellees.

CARLETON HARRIS, Chief Justice. This case involves the question of which insurance carrier, appellant, St. Paul Insurance Company, or appellee, Liberty Mutual Insurance Company, must ultimately pay workmen's compensation benefits which were awarded appellee claimant Joe E. Herdison. During the years 1968 and 1969, Herdison was employed by Hallett Construction Company, Liberty Mutual Insurance Company, (hereinafter called Liberty) being the compensation carrier through December 31, 1968. On January 1, 1969, St. Paul Insurance Company (hereinafter called St. Paul) became the insurance carrier for Hallett Construction Company. A claim was filed by Herdison, in which he alleged that he had sustained a back injury on November 26, 1968.[1] A hearing was held on August 27, 1969, and the referee ordered that St. Paul be made a party. Another hearing was held on November 4, 1969, at the conclusion of which the referee found that Herdison sustained an accidental injury on November 26, 1968, while Liberty was the insurance carrier, and sustained another accidental injury sometime in February 1969, at which time St. Paul was the insurance carrier; that both accidents contributed to Herdison's condition, and liability was equally apportioned between the two insurance carriers. St. Paul appealed to the full commission, and on March 16, 1970, that tribunal filed its opinion in which it adopted the findings and award of the referee. From this order, St. Paul appealed to the Sebastian County Circuit Court which affirmed the findings of the commission. From the Circuit Court judgment, appellant brings this appeal. For reversal, it is simply asserted that there is no substantial evidence to support the commission's findings, and that said findings do not support the award.

At the first hearing in August, 1969, the referee found that Herdison had suffered an accidental injury on November 26, 1968, at a time when Liberty was the insurance carrier, and that no time was lost in 1968,

[1]Herdison was not aware that his back was injured until his deteriorating condition forced him to see a doctor; originally, he complained only of pain in his feet and legs.

but on April 6, 1969, Herdison underwent an operation; that at this time St. Paul was the insurance carrier. The referee then directed that St. Paul be made a party as a respondent along with the employer and Liberty. Don Mitchell, called on behalf of Herdison, testified that he had instructed claimant to move a dozer in November, 1968, and knew that Herdison, while so engaged, had fallen and been taken to the hospital. There was no mention of any other accident or injury by Mitchell. Bill Logsdon, also called on behalf of Herdison, testified that when claimant was injured in November 1968, he (Logsdon) went to the hospital after the accident and brought Herdison back to Ft. Smith. Likewise, there was no mention of any other accident or injury by Logsdon. The record also reflects that Herdison reported no second accident or injury to his employer, nor to either of the doctors who treated him, and to whom he gave a history. The only evidence offered in support of two injuries came from Herdison himself. In a discovery deposition, Herdison testified that after the accidental injury on November 26, 1968, he returned to work the next day, and worked until he was operated on in April, 1969. He was then asked if during that period of time he received any other injuries. Herdison replied, "Well, at one time I noticed my back hurt me more. I was moving some—you know, my legs and things was bothering me more. I was moving some steel and of course, I was doing some lifting and I noticed it.**** It was my leg more or less, my back didn't hurt me so much it just—I don't know how to explain it, just my legs." The record then reflects the following:

"Q. Did you have any specific instance when you were lifting something that you felt—

A. Like I say, when I was lifting that steel that time why I noticed it was hurting me more. I was stiff, you know for awhile.

Q. Did you feel any popping in your back or anything like that?

A. No sir, I didn't, no."

When asked when this lifting took place, he answered "It happened somewhere in I'd say in about February". During counsel's summary of the evidence taken by deposition, we find the following:

"Q. Joe, as I understand your testimony then, sometime within say two weeks after this accident [the first accident on November 26] when you fell about ten feet you noticed that your left leg or right leg or right foot started going to sleep?

A. Yes sir.

Q. This would have been well before January 1st, wouldn't it?

A. Yes sir.

Q. That would also have been before you'd done any lifting?

A. Yes sir.

Q. And it just progressively got worse until finally you had to go to the doctor?

A. Yes sir."

Likewise, before the referee, Herdison testified that he moved some steel out of Durant, Oklahoma, and "I did quite a bit of lifting and seemed like it hurt me worse, you know. I got to hurting worse after that." He said that he did not recall the month in which this occurred, and would have to look in his log books to determine the month. The record then reflects, referring to his injury,

"A. Well, it was gradually getting worse, yes sir, up until I moved the steel and seemed like it hurt me worse after I did do the lifting.

Q. Well, after the steel incident would it be say

kind of a snow balling effect? Is that the way it affected you?

A. Well, I don't know whether that did it, or whether time. I just got worse, I know."

However, Herdison again testified that he was having pain and discomfort in January and February of 1969. From the record:

"Q. From the standpoint of the way or as we call it, the symptoms you had, did you have pain and discomfort and so forth in January and February of '69?

A. Yes sir, just shortly right after I had the accident why my foot and things started bothering me.

Q. As you continued to do the work in January and February would it be a fair statement that the day to day activities that you had seemed to make it worse?

A. Yes sir.

Q. Did it seem to aggravate it?

A. Yes sir, I got worse as every day went on."

It is apparent that constant complaint was made by Herdison relative to pain in his foot and legs within two weeks after the first accident, and as previously stated, this was the only injury mentioned to the doctors when they discovered that he actually had a back injury. The quoted testimony makes clear that he was getting worse sometime before the first of the year, and that he had extreme pain and discomfort in the early part of 1969 before the alleged second injury. As to this last, Herdison admitted that he did not know whether the steel lifting incident caused his condition to get worse, "or whether time". It is our opinion that, as a matter of law, the evidence is not substantial that Herdison

specifically received a second injury. Actually, the proof was barely enough to establish even that claimant *could* have sustained a second specific injury. In *Aluminum Co. of America* v. *Williams,* 232 Ark. 216, 335 S. W. 2d 315, this court quoted Larson as follows:

"In Larson's two-volume treatise on 'Workmen's Compensation Law', that writer states the holdings in Vol. 1 § 13.00: 'When the primary injury is shown to have arisen out of and in the course of employment every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own negligence or misconduct'. In 58 Am. Jur. p. 775, 'Workmen's Compensation' § 278, cases from various jurisdictions are cited to sustain the text: 'A subsequent incident, or injury, may be of such a character that its consequences are the natural result of the original injury and may thus warrant the granting of compensation therefor as a part of that injury'."

In accordance with what has been said, it is the order of this court that the judgment of the Sebastian County Circuit Court be, and hereby is, reversed with directions to remand the cause to the Workmen's Compensation Commission for an order consistent with this opinion.

CLETUS BYRD, LEONARD BRUMMETT, AND ANDREW HOGELAND *v.* SECURITY BANK

5-5453 464 S. W. 2d 578

Opinion delivered March 22, 1971

Rhine & Rhine, for appellants.

Douglas Bradley, for appellee.

CARLETON HARRIS, Chief Justice. This appeal is brought by three farmers, Cletus Byrd, Leonard Brummett, and Andrew Hogeland from adverse decrees[1] of the Clay County Chancery Court which found *inter alia,* that these appellants were indebted to appellee, Security Bank, in various amounts by virtue of promissory notes which they had executed to Parsons Gin Company and which Parsons had subsequently assigned to the appellee bank. Parsons' Gin Company was not incorporated and was only a name used by Jimmy Parsons, the owner. These notes were sued on by Security Bank in December, 1968, and Kennett Bank of Kennett, Missouri, intervened in each case alleging that it held notes from each of the appellants and also had liens superior to those of appellee, on the assets of these farmers.

From the evidence it would appear that sometime prior to the execution of the notes sued on, these farm-

[1]These suits were brought separately but were consolidated for trial.

ers had executed notes to Parsons Gin Company with financing statements as security. These notes were assigned by Parsons Gin Company to Security Bank, but the financing statements were retained by Parsons and filed in its name.

On or about January 26, 1968, the appellants each signed other notes to Parsons Gin Company, simply signing blank notes. Without appellants' knowledge or consent, Jimmy Parsons of Parsons Gin Company filled in the notes for varying amounts and on February 3, 1968, assigned them to Security Bank as consideration for the release of the prior notes and other notes which Parsons had previously assigned. Parsons once again kept the financing statements in the Gin Company's name.

The farmers then wished to borrow money from Kennett Bank, but after a lien search, that bank found the financing statements to Parsons and would not make the loans until these statements had been released. At Kennett Bank's request, Parsons released the financing statements in March of 1968. Kennett bank then filed financing statements from these farmers as security late in March of 1968 and made loans to the appellants as evidenced by notes signed by them on or about April 8, 1968.

On June 20, 1968, Security Bank discovered that Parsons had released the financing statements and to recover its former position, had Parsons assign these statements to it with the words "This statement replaces a prior one to secured party, released by error, when the secured party intended to merely subordinate the lien".

When the notes assigned to Security Bank became due, and after demand, were not paid, these suits were brought, Kennett Bank intervening shortly thereafter. The trial court found the lien of Kennett Bank to be superior to that of Security Bank, but that finding is not involved in this appeal. For reversal of the decree in favor of Security Bank, appellants contend that the lower court erred in finding that appellee, Security Bank, was a holder in "due course" and an "innocent

purchaser" of the notes and security transferred to the bank by "Parsons Gin Company".

It is argued that at the time appellee took the assignment of the second group of notes, no money was advanced by the bank to Parsons, and that appellee knew Jimmy Parsons was in financial straits, and should have known that he did not have sufficient money to advance the amounts mentioned in the notes, to the three appellants. The amounts of the notes were Byrd, $9,500, Brummett, $18,000, and Hogeland, $1,000. It is true, as previously stated, that no money was advanced to Parsons at that time, these notes being given in lieu of the original notes, and also being applied on other indebtedness due by Parsons.

Ark. Stat. Ann. § 85-3-302 (Add. 1961) defines a holder in due course as one who takes the instrument for value, and in good faith, and without notice that it is overdue or has been dishonored, or of any defense against, or claim to it, on the part of any persons.

We do not agree that appellee was not a holder in due course. The instrument was taken for value, and we need look no further than Ark. Stat. Ann. § 85-3-303 (b), where it is provided that the instrument is accepted for value when it is accepted in payment of, or in security, for an antecedent claim against any person whether or not the claim is due.

There is no evidence that the instrument was not taken in good faith. Let it be remembered that there is no proof, nor is it even suggested, that appellee knew that these notes had been blank when signed by appellants, and that the amounts had been filled in by Parsons. Also, the record reflects that transactions of this nature between the parties had been customary for a number of years, and all had worked out satisfactorily. There is no showing that at the time (February 3, 1968) the notes were taken, the bank officials had any reason to believe that Parsons had committed any fraud, or that he was in bad financial condition. Testimony on the part of the bank was that this fact did not come to its attention until June 20, when appellee dis-

covered that Parsons had released its security in March. Were it otherwise, while there might well be a duty on the officers of a bank to check or investigate prospective debtors of the bank as a matter of protecting that institution, we find nothing in the commercial code that compels such a duty on the part of the bank as a matter of protecting the prospective debtor.

Finally, in determining whether the bank was a holder in due course, the notes were not overdue, nor had they been dishonored. Nor is there evidence, as already stated, that the bank was aware of any defense on the part of any person. Appellants say that if the Security Bank had checked in the office of the Circuit Court Clerk, it would have found that the Kennett Bank had filed financing statements from appellants as security, said statements covering substantially the same property which had been covered in the financial statements securing appellee's indebtedness; that appellee would accordingly have been put on notice that "something was wrong". We disagree. The evidence reflects that appellee did not learn until June that Parsons had released the financing statements, and that Kennett had a lien on the properties. The Kennett financing statements were not filed until March 30, and it will be recalled that the Security financing statements had been filed in January. Appellee could not possibly have known about the latter filing unless it checked the clerk's records each day, week, or month to determine if the original financing statements were still in effect. Under the circumstances of this case, we cannot see where there was any duty on appellee to go over and check the records regularly to see if it still held effective security. There simply wasn't any reason for this to be done. Of course, this litigation could not have arisen except for appellants signing blank notes. The one fact that contributed most to the situation in which appellants now find themselves, is that they imprudently signed these blank instruments, and in doing so, failed to act as prudent persons.

It is also argued that James Parsons was operating under the assumed name of "Parsons Gin Company", and in doing so, was in violation of Ark. Stat. Ann.

§ 70-401-405 (Repl. 1957).[2] A penalty of a fine of not less than $25.00 nor more than $100.00 is provided for violation. We fail to grasp the significance of this argument, and consider it entirely irrelevant to the issue of whether the bank was a holder in due course. Whether Parsons properly complied with the aforementioned sections, which are entirely unrelated to the provisions of the Uniform Commercial Code, can have no effect on this litigation. If Parsons ignored or disobeyed the law, he is subject to a fine. Though the question of the liability of appellants cannot be affected by the failure of Parsons to file the required certificate, we do wonder how the bank could have learned that he had violated the law if he had not filed such a certificate.

Affirmed.

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[2]The statute, *inter alia,* provides that no person shall conduct or transact business under an assumed name unless such person shall file in the office of the county clerk a certificate setting forth the name under which the business is to be conducted, together with the true name of each person conducting or transacting said business.

CHARLES R. PARTLOW ET AL *v.*
LOUISE KEASLER ET AL

5-5524 464 S. W. 2d 589

Opinion delivered March 22, 1971

Penix & Penix and *Hartman Hotz,* for appellants.

Kirsch, Cathey, Brown & *Goodwin* and *John C. Gregg,* for appellees.

GEORGE ROSE SMITH, Justice. This suit for a declaratory judgment is essentially a test case to determine whether a majority of the owners of what is actually a private water main can sell it to the city of Center Hill, over the protest of a substantial minority of the owners. This appeal is from a declaratory judgment denying the majority's asserted power to sell the water main. We have no hesitancy in sustaining the circuit court's judgment.

In 1958 the owners of about 40 tracts of land lying along Highway 25, immediately west of the city of Paragould, signed a "Water Line Agreement" for the purpose of obtaining city water for themselves. They elected to call their project "Water Improvement District No. 25 West," but it is conceded that the organization is not an improvement district under the laws of Arkansas. To the contrary, the association is essentially a group of neighboring landowners who banded together to install a private water line for their own use.

The terms of the 1958 Water Line Agreement are of controlling importance. The landowners named five of their number to serve as the board of directors of what we will call the district. Each of the original signatory landowners contributed $500 for his principal dwelling house and $250 for each appurtenant tenant house or rental unit. The board of directors were given the authority to permit other landowners to tie onto the water line by paying the same fees. The landowners agreed that any sale of their property would carry the water rights and that the purchaser would be bound by the water line agreement.

Under the agreement the directors were required

to use the district's funds to install a private water line for a distance of 18,000 feet along the highway. The district would also install individual laterals to the north or south edge of the highway right-of-way, from which point all expense would be borne by the landowner. It was never intended that the district would actually supply any water. The water is furnished by Paragould Water Improvement District No. 3, apparently a true improvement district. Each landowner has his own water meter and is billed directly by the Paragould improvement district for his consumption of water.

The Water Line Agreement contains no provision for its amendment by the patrons of the water line. Nor does it contain any provision authorizing the board of directors or the members themselves to sell the assets of the district. In fact, the only clauses looking specifically to the future are the one permitting other landowners to join the venture and a sentence providing that vacancies on the board of directors will be filled by majority vote of the landowners.

The venture proved to be decidedly successful. By 1969 a total of 311 patrons were being served by the district's water line. Assets of the district included the water mains, a large storage tank, pumps, real estate, and more than $12,000 in cash.

After the district was formed in 1958, the city of Center Hill, astride the water line, was incorporated and had grown to a population of 1201 by 1970. The district's water line is used, pursuant to the original Water Line Agreement, by some residents of the city; it is also used by landowners living outside the city. In 1969 the city sought to create its own water distribution system. Application was made to a federal agency for a loan of $620,000, payable over a period of 40 years, to finance the project. The federal lending agency required as a condition to the loan that the city own its water mains, which meant that it would have to acquire the district's line. To that end the city offered to purchase all the assets of the district upon substantially the following terms:

The district would transfer practically all its assets, including at least $12,000 in cash, to the city, in return for $75,000 in second mortgage bonds to be issued by the city. Those bonds would bear no interest, would be subordinate to the federal agency's first mortgage for $620,000, and would be payable only from the city's water revenues. The city's proposal was submitted to the district's 311 landowners, of whom 185 voted for the sale to the city and 48 voted against it. The other 78 did not vote, but it had been explained that a failure to vote would be counted as a vote against the sale. Thus slightly less than 60% of the patrons of the district voted for the sale.

We do not stop to explore nice questions of whether the district constitutes an unincorporated association, a joint venture, a partnership, a private trust, or some other recognized legal entity. It is enough to point out that the district is not a public utility. It is simply a band of landowners who together own a private water line. Each landowner has made an investment in the district and is a proportionate owner of its assets. The Water Line Agreement contains no provision conferring upon a majority of the members the power to sell the district's assets. We liken the proposed sale to a situation in which a majority of a group of tenants in common might claim the right to sell the entire property at a price of their own choosing and in disregard of the protests of the minority members of the group.

Here the minority landowners in the district own a share in a venture that is fully paid for and that is successfully serving its intended purpose of providing the landowners with city water. If the city's offer should be enforced, those landowners would be compelled to exchange their valuable property rights for non-interest-bearing second mortgage bonds, seemingly due at least 40 years in the future and subject to being wiped out by a foreclosure of the first mortgage. Moreover, the protesting landowners would themselves have to participate in paying the water revenues which are the sole security for the bonds, so that they would in ef-

fect be required to take part in buying their own property from themselves. We think it plain that the city's proposal violates the constitutional prohibition against the taking of private property for public use without just compensation. Ark. Const., Art. 2, § 22 (1874). In the familiar words of Justice Holmes, speaking for the court: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393 (1922).

Affirmed.

LOYD HENRY BYRD ET AL *v.* STATE OF ARKANSAS

5567 464 S. W. 2d 565

Opinion delivered March 22, 1971

E. W. Brockman Jr. and *W. Harold Flowers,* for appellants.

Ray Thornton, Attorney General; *Garner L. Taylor Sr.,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. The appellants, Loyd Henry Byrd and Calvin Ford, were convicted of voluntary man-

slaughter. From that conviction they have here lodged a transcript. Appellants asked the trial court for an appeal and that prayer was denied. They did not thereafter apply to this court for an appeal, which procedure is authorized by Ark. Stat. Ann. § 43-2709. The same situation was present in *McKine* v. *State,* 242 Ark. 384, 413 S. W. 2d 860 (1967). We there held that the granting of an appeal in criminal cases in accordance with the statutory procedure is a prerequisite to our consideration of the case.

If we were to reach the case on its merits a majority of the court would affirm.

Dismissed.

ANNIAH BUSH *v.* STATE OF ARKANSAS

5573 464 S. W. 2d 792

Opinion delivered March 22, 1971

Leonard C. Smead, for appellant.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Anniah Bush contends that we should reverse his conviction of murder in the first degree in the perpetration of arson solely on the ground that the state did not prove his guilt beyond a reasonable doubt and to a moral certainty. He is mistaken as to the purpose and scope of appellate review of a criminal judgment. The point asserted here by appellant was resolved by the jury verdict, if it has substantial evidentiary support. *Pharr* v. *State,* 246 Ark. 424, 438 S. W. 2d 461. It does. The facts hereinafter recited state the evidence tending to sustain the conviction in the light in which we must view it—that most favorable to the state. *Cook* v. *State,* 248 Ark. 332, 451 S. W. 2d 473.

Bush, a male, lived with Perry Lee Holliway, a female, in a 3-room house in Hampton. One of her children, also an occupant of the house, was burned to death when their dwelling was consumed by flames during the early morning hours of February 8, 1970. Bush was tried upon a charge of murdering one Jessie L. Brown, who was sleeping in the house when it burned.

On Saturday night February 7, Anniah (alias Annine and Annias) Bush and his paramour went first to the home of a neighbor, Ruthie Mae Newton, where they drank some beer and whiskey. They left about 9:30 p.m.

and went to Jack Harris' place where they enjoyed drinking more intoxicants of some nature. They were taken to their home somewhere between 10:30 and 11:00 p.m. by the Holliway woman's stepmother. They immediately went to bed together in the front or center room, had intercourse and went to sleep. Not long thereafter Perry Lee Holliway's son, Leotis Galbert, a cousin whose name she could not remember, and Jessie Brown came in. Their banter awakened her, but apparently did not disturb appellant. The son and cousin went to bed in a back room. Perry Lee dozed off, but awakened to find Jessie Brown in bed with her and Bush. She then had intercourse with Brown, after which both went to sleep. Bush did not awaken until she bumped him in getting out of bed because of an asthma attack she was suffering.

When Bush saw Brown in the bed, he first asked, "What is that s__ o__ b__ doing in here?" drew an old unloaded pistol from a case under the bed and struck Brown a blow across the head sufficient to cause bleeding. According to the Holliway woman, Brown raised up when struck, then turned over, turned his face to the wall, and said nothing. Bush, she said, threw his weapon to the floor. She heard him say he would burn the s__ o__ b__ down, but never heard Bush say anything to Brown after his question. She then saw Bush get a plastic bottle and sprinkle gasoline about the floor in the room where they had been sleeping. At this time, the two were preparing to go to a neighboring unoccupied house to get water to alleviate the effects of her asthma attack. She went outside the house, from whence she tried to rush Bush. She said that he told her to shut up or he would kill her. She went back into the house to see what was detaining him. He advised that he was having trouble getting his shoes on his swollen feet. Before leaving the first time, she had put a "splinter" of wood from a woodpile in the room into the "tin heater" in the same room to keep the fire in it burning.

After a time, Bush came out, they walked to the vacant house, filled some cans they had brought with

water, and had a brief argument, after which, according to her, Bush threw her down and they engaged in intercourse. View of their house from this vacant building was almost completely obstructed by a high hedge. After about 10 minutes, but before consummation of coition, they saw flames at their home and jumped up and ran to the front of the house. The fire was then so widespread and intense that she was unable to remain close to the house even long enough to pull a screen from it in efforts to rescue her son, whose calls for help she heard as soon as she returned to the burning house.

City Marshal Cottrell heard the fire alarm at 4:00 a.m. and went to the scene. While the fire was still blazing high, he asked Bush what had happened. According to the marshal, Bush speculated that old electrical wiring had caught fire, because there had been trouble with a socket in the kitchen. He advised the officer that Jessie Brown, Leotis Galbert and Veotis Cross were in the house. The marshal testified that Bush said that when he left to get a bucket of water, Brown, while sitting on the side of the bed, asked him where he was going. Later, said the officer, Bush told him that Brown was lying on the bed asleep and just rolled over and grunted as Bush and Perry Lee Holliway departed on their mission to obtain water. Cottrell and another officer found a pistol in the ruins within a foot of the bed in the front room. They also found three bodies there. Bush testified that he did not know where the pistol was kept, and that he had thrown it into the yard at some time. Sergeant Peroni testified that Bush had told him the pistol was kept in a box under his bed.

Ruthie May Newton, the neighbor, whom Bush and the Holliway woman had visited recalled being awakened at 4:00 a.m. by Perry Lee Holliway's screams as the latter approached the burning house, followed by Bush carrying two cans of water. Mrs. Newton's husband asked appellant whether anyone was in the house, but got no reply until he repeated his in-

quiry. Bush then said that Streamline (Jessie Brown), "mother's boy" and another boy were in there. She saw Bush standing in the road in front of her house between his two cans of water, while attempts at rescue of those in the burning building were underway, but did not see him do anything to assist. She saw sparks from the electrical wires at the front of the house after her attention was directed to the fire.

Charles Taylor assisted in rescue efforts. He found the front door of the burning house open when he arrived. He could see the wood stove, but saw no fire in it. The fire was behind the stove in the corner next to the kitchen. The wall between the kitchen and the front room was burning. He saw electric wires flashing at the front of the house. He did not get close enough to smell gasoline. He judged that the fire came from the kitchen, because it was coming across the back of the front room. Doris Jean Galbert, the daughter of Perry Lee Holliway, saw gasoline in a plastic bottle beside the gas stove in the kitchen in her mother's house on February 7.

Anniah Bush denied any knowledge of the presence of anyone in the house except him and his paramour until she awakened him in getting out of bed because of her asthma attack. He then became aware of the presence of Jessie Brown, but claimed to have said nothing either to him or to the woman with whom he had gone to bed. He also denied having a pistol or striking Brown. He claims not to have been disturbed that another man was in bed with, and had intercourse with, the woman with whom he was living. He said that there was a fire in the stove and pine wood stacked all around the stove when the two of them went to the neighboring house for water. He generally corroborated the Holliway testimony about their activities thereafter except that he claimed to have made an attempt to enter the burning house. He denied setting the fire, making any threats to do so, or having any knowledge of the presence of gasoline inside the house. He admitted that he kept gasoline in a plastic milk jug

on a bench outside for the purpose of starting fires in the heater. No one saw appellant ignite the gasoline, nor did any who arrived at the scene after the fire started smell any gasoline.

Arson, like any other crime, may be proved by circumstantial evidence. *Carpenter* v. *State,* 204 Ark. 752, 164 S. W. 2d 993. When properly connected, it furnishes a substantial basis for a guilty verdict. *Ledford* v. *State,* 234 Ark. 226, 351 S. W. 2d 425. We find that it is sufficiently connected. Appellant's principal argument is that the evidence is not sufficient because, since no one saw Bush ignite the fire, it is just as plausible to believe that any one of the sleeping occupants left in the house might have lighted it, that a spark from the stove might have started it, or defective wiring might have caused it. It is true that the burden was on the state to prove that the burning of the building was the result of the wilful act of the accused. *Carpenter* v. *State,* supra. It is also true that we will reverse a conviction based upon circumstantial evidence alone, when the jury is left to speculation and conjecture to exclude every reasonable hypothesis other than the guilt of the accused. *Jones* v. *State,* 246 Ark. 1057, 441 S. W. 2d 458.

If the jury believed the testimony above set out, there was adequate evidence to show motive, threats, overt acts to carry out the threats, inadequate explanations of suspicious circumstances tending to show guilt, and unlikelihood of other possible causes of the conflagration, which serves to connect the circumstances and exclude any other reasonable hypothesis than the appellant's guilt. See *Carpenter* v. *State,* supra; *Ledford* v. *State,* supra.

The judgment is affirmed.

PATRICIA MANATT RAY *v.* SAM L. MANATT JR.

5-5502 465 S. W. 2d 111

Opinion delivered March 22, 1971
[Rehearing denied April 26, 1971.]

Kirsch, Cathey & Brown, for appellant.

Smith, Williams, Friday & Bowen, By: *William H. Sutton* and *Max C. Mehlburger,* for appellee.

J. FRED JONES, Justice. This is an appeal by Patricia Manatt, now Patricia Ray, from an adverse decree of the Western District of the Clay County Chancery Court in a child custody case between herself and her former husband, Sam L. Manatt, Jr. The given names of the parties are hereafter used for convenience.

Patricia and Sam obtained a divorce in Clay County in September, 1960. In contemplation of the divorce, an agreement was entered into, and signed by Patricia and Sam entitled: "Agreement as to Property and Marital Rights and Custody and Maintenance of

Children." This agreement was approved by the court and incorporated as a part of the divorce decree. It reads, in part, as follows:

> ". . . [S]ince it is desired by both parties to finally and for all time settle and determine and agree upon their individual property rights in all property owned and possessed by either separately, or both jointly, and to provide for the maintenance and welfare of their children:
>
> Therefore, in consideration of the premises, the mutual promises herein made, and the division of property hereinafter set forth, the parties covenant and agree as follows:
>
> 1. Patricia Manatt shall have principal custody of parties four (4), minor children: Sam R. Manatt, age 10 years, James D. Manatt, age 9 years, John D. Manatt, age 8 years, and Susan C. Manatt, age 5 years.
>
> 2. Sam L. Manatt, Jr. shall have custody of the four children for two (2) months during the Summer, school vacation period of each year, beginning with the year 1961. In addition, Sam L. Manatt, Jr. shall have custody of the children for at least one week, during Christmas, every alternate year; and, his custody of the children during the Christmas period shall commence with the year 1960.
>
> 3. Sam L. Manatt, Jr. agrees to pay to Patricia Manatt for the support and maintenance of said four children the sum of $400.00 per month, payable monthly, with payment to begin when a decree of divorce shall have been granted. Said payments shall continue so long as at least one child is living, but shall cease when the youngest child reaches 21 years of age or marries, whichever event occurs first."

After providing that 75 acres of land in Baxter

County together with a runabout boat with motor and trailer, household goods and a Pontiac automobile, should be the property of Patricia, the agreement provided as follows:

> "7. The terms of payment under a life insurance policy in the face amount of $35,000.00, now owned by Sam L. Manatt, Jr., shall be amended to provide that Patricia Manatt shall be the sole beneficiary thereunder. Said policy shall be kept in full force and effect now and at all future times by Sam L. Manatt, Jr. and he shall pay the annual premiums thereon."

The agreement then provided that Sam was to have city property in Corning, all of his stock in the Corning Bank; and all other property not specifically set aside, to go to Patricia. The agreement then provides:

> "11. In consideration of the foregoing covenants and agreements and the receipt of the properties described above, Patricia Manatt releases, relinquishes and waives all her rights to alimony, temporary and/or permanent, and it is agreed and understood that neither party shall have any right, title or interest in the property of the other, real or personal, now owned or hereafter acquired."

This agreement was incorporated as a part of the divorce decree and upon entry of the decree Patricia moved with the children to Colorado and Sam started making the $400 per month payments.

In June, 1961, the oldest child returned to Arkansas to spend the summer vacation with his father. With Patricia's consent he did not return to live with his mother in Colorado, but continued to live with his father. In June, 1962, the other two boys returned to Arkansas at the beginning of the summer vacaion and they too remained with their father, to which arrangement Patricia reluctantly agreed.

Patricia remarried a Mr. Ray in 1963 and the

youngest child, Susan, continued to live with her mother and Mr. Ray in Colorado, except for the summer vacations she spent with her father in Arkansas. At the end of summer vacation beginning in June, 1969, she too continued to live with her father and brothers in Arkansas and failed to return to live with her mother in Colorado.

When the two younger boys continued to live with their father in 1962, Patricia agreed to reduce the monthly payments for child support from $400 to $300 per month. In July, 1963, these payments were further reduced from $300 to $150 per month. Sam contends that this too was done by agreement between him and Patricia, and she contends that she made no such agreement. Nevertheless, payments were continued at $150 per month from 1963 until May, 1969, with the few exceptions when the payments were $175, the difference being attributable to additional expenses for orthodontic services for Susan.

On August 8, 1969, Sam filed his petition for a change in custody of Susan (later amended to include the other children) from Patricia to himself. Patricia filed a response in opposition to the change in custody and prayed judgment for $21,950 in delinquent child support payments. Sam countered by a petition for the cancellation of child support payments. After trial of the case in which both Sam and Patricia as well as the four children testified; the chancellor on May 6, 1970, entered a decree awarding custody of the four children to Sam with the same visitation rights in Patricia as had been awarded to Sam under the original divorce decree. The support money payments were discontinued from and after January 16, 1970.

As to the reduction of the amount for child support awarded in the original decree, the chancellor found that "the evidence does preponderate to the effect that they did agree to reduce them down .o the $150.00 a month." The chancellor found that Sam was indebted to Patricia at the rate of $150 per month for back child support from June, 1969, through

December, 1969, which, together with interest at 6%, amounted to $1,089.90, and a decree was awarded to Patricia for that amount. The chancellor also awarded to Patricia the sum of $286.67 for expenses in answering a discovery deposition and $573.34 expenses in attending court at the hearing on the petition. The court also ordered Sam to pay attorney's fee in the amount of $1,250.

As to the $35,000 insurance policy, referred to in the agreement and incorporated as a part of the original divorce decree, the chancellor found that Sam had kept the policy in force but had borrowed $5,300 on it, and after making provisions for Sam to continue the payment of premiums on the policy and providing for notice to Patricia when and as such payments are made, the chancellor denied Patricia's petition for an order directing Sam to discharge the loan which he had obtained on the security of the policy and to enjoin him from future borrowing thereon.

On appeal to this court Patricia relies on the following points for reversal:

> "The chancery court erred in modifying the 1960 decree by taking the custody of Susan Manatt from her mother and awarding custody to her father.
>
> The chancellor erred in canceling retroactively any support money payments ordered by the 1960 decree.
>
> > A. The chancery court was without jurisdiction to allow retroactive cancellation of support money obligations.
> >
> > B. The chancellor's ruling that there was any agreement between appellant and appellee to reduce the support money payments to $150.00 per month is erroneous and should be reversed.

Appellee's defense as to the five-year statute of limi-

tations is not applicable here by reason of payments made within five years of the bringing of appellee's suit.

Appellant is, in any event, entitled to recover the delinquent payments accruing within five years of February 3, 1970.

The chancery court erred in refusing to order appellee to discharge the loan which he had obtained without knowledge or consent of appellant against the insurance policy which appellant was the beneficiary under the divorce settlement and the divorce decree."

We cannot say that the chancellor erred in changing the custody of Susan from her mother to her father. We agree with the statement in appellant's brief that Patricia is shown to have been a dedicated and devoted mother making every effort to meet her daughter's special problem and, at the same time, permitting the daughter to maintain close relations with her father and his family. Patricia is not only shown to have been a devoted and dedicated mother to her 15 year old daughter, she is shown to have been a very wise, discerning and unselfish mother in so far as her relationship with her daughter is concerned; and it is unfortunate, for both her and the daughter, that she has had no assistance in causing Susan to fully appreciate just how unselfish her mother has been.

Both parents were bound to have recognized the probable result of split custody, and the record is clear that Patricia did recognize that she would eventually lose the custody of Susan to her father. There is no question that Patricia was more interested in the happiness of her young daughter than she was in her own. When the second two of the three boys failed to return to Colorado following their summer vacation with their father, Patricia reluctantly agreed that they could stay with their father and she testified that at that point she realized she would someday lose the actual custody of Susan. Perhaps at that point if

Patricia had demanded and received the continued payment of $400 for the support of Susan, she could have furnished Susan with some of the things Susan now seems to think she was denied. Instead of following such course at the risk of alienation between herself and Susan or between Susan and her father, she suggested that the payments be reduced to $300 per month and soon thereafter, whether by agreement or otherwise, she started accepting $150 per month without court order.

There is no hard evidence that Sam directly influenced Susan in desiring to leave the custody of her mother, but certainly there is no evidence that he said or did anything to influence her otherwise. As soon as he received Patricia's answer to his petition for change in custody, he gave it to Susan to read and interpret. Paragraph 2 of the response reads, in part, as follows:

> ". . . [I]n the event the said Susan C. Manatt desires and this court can ascertain that such desire is bona fide on her part to live with the defendant in Corning rather than in Colorado and in the event this court should determine such action would be in the best interest of the said Susan C. Manatt, this plaintiff does not, under such circumstances, desire to oppose a change of custody provided proper assurances are given that the said Susan C. Manatt may visit this plaintiff at her home in Colorado during the summer months when she is not in school and during Christmas vacation."

Susan testified that she concluded from reading the papers filed by her mother that her mother did not want her. There is no evidence that Sam did or said anything to change or redirect such conclusion.

The 19 year old son testified that while he lived with his mother and when he visited her in Colorado, he had to pay some of the expenses of his entertainment ("skiing and such as that") out of his own money his father had given him. He testified that his father also

gave him to read, the papers his mother had filed and he testified, in part, as follows:

"Q. Do you love your mother?

A. Yes, sir.

Q. Has she ever done anything to cause you not to love her?

A. In the past year I have got so I don't respect her so much. It made me mad when Daddy got the papers and I went back to school and me and Sam called her and she said it wasn't anything to do about keeping Susan, that she felt like she deserved more, like the bank stock and things like that."

This brings us to the appellant's second, third and fourth points having to do with the support payments, and these points have given us considerable difficulty; especially in the light of the interpretation the children seem to have placed on their mother's pleadings in this case.

The agreement as to the payment of support money which was incorporated into the divorce decree, appears to have been either carefully or carelessly drawn. The record does not indicate the value of the Baxter County property awarded to Patricia as compared to the value of the Corning property awarded to Sam. The value of the personal property awarded to Patricia is not set out but from its nature it could not have been a substantial amount. The number of shares of the bank stock awarded to Sam is not indicated but he testified that his share of the dividends (besides bonus of $5,000) in 1969 was around $14,000. The agreement entered into between the parties and incorporated into the divorce decree is entirely open to question as to the intent of the parties.

Under the agreement and the decree, the reason for entering into the agreement, as expressed, is "to finally

and for all time settle and determine and agree upon their individual property rights in all property owned and possessed by either separately, or both jointly, and to provide for the maintenance and welfare of their children." It was agreed and decreed that Patricia should have custody for 10 months and Sam should have custody for two months each year. Paragraph 3 of the agreement as carefully or carelessly drawn, makes no provision for suspension of payment while Sam has custody, but simply provides that Sam shall pay to Patricia for the support and maintenance of the four children $400 per month, payable monthly. The agreement then contains this unusual sentence. "Said payments shall continue so long as at least one child is living, but shall cease when the youngest child reaches 21 years of age or marries, whichever event occurs first." This provision reads more like a proviso in a will than in a child support agreement. In part consideration of this agreement Patricia not only relinquished and waived her right to alimony but it was agreed and understood that neither party should have any right, title or interest in the property of the other, real or personal, then owned or acquired in the future.

In 57 A.L.R. 2d, § 2, p. 1141, is found the following:

> "In determining the validity and effect, as between divorced spouses, of an agreement by which the former wife releases the former husband from his obligation under the provisions of the divorce decree to pay child support to her, the first question to be considered is whether the agreement meets the tests of validity applicable to all releases. In particular, the agreement must be supported by a valid consideration.
>
> There is ample authority in support of the proposition that as between the former spouses, such an agreement is valid and precludes the former wife from enforcing the child support provisions of the divorce decree, at least as long as the in-

terests of the child are not affected and only an obligation personal to the wife is involved."

In 57 A.L.R. 2d, § 3, p. 1141, is found the following:

> "As in the case of other releases, an agreement by which a divorced wife releases her former husband from obligations under the child support provisions of the divorce decree must ordinarily be supported by a valid consideration.
>
> * * *
>
> Such an agreement has been held supported by a valid consideration where * * * —the husband assumed the support of the children. Ostrain v. Posner (1926) 127 Misc 313, 215 NYS 259; Bassman v. Bassman (1953, sup) 123 NYS2d 751."

In the Illinois case of *Royster* v. *Royster,* 339 Ill. App. 250, 89 N.E. 2d 279, the wife was granted a divorce and support money by a decree entered on her counterclaim in 1935. In 1938 the parties agreed to a reduction in support payments, which was not approved by the court, and in 1947 the wife brought proceedings to recover the balance of support money. The Illinois Supreme Court held that the trial court had the power to approve or ratify the agreement; and in doing so it could take into consideration changed conditions, if any shown by record, in finances of parties, delay in attempting to enforce original decree, and the corresponding equities presented by record.

In the 1940 Colorado case of *Hill* v. *Hill,* 107 P. 2d 597, in approving a subsequent agreement between divorced parents for a reduction in child support, the Colorado Supreme Court said:

> "We know of no rule which precludes parties who are sui juris from entering into such a contract, and, while the court is not necessarily bound by the agreement, if its terms are fair and no fraud

attends its execution, it may be recognized by the court."

In the Illinois case of *Wolfe* v. *Wolfe,* 24 N.E. 2d 871, an agreement between divorced spouses reducing the support money for their minor child awarded by the divorce decree, was held to preclude the wife from enforcing the award by contempt proceedings against the husband. The court pointed out it would be unjust to hold the husband in contempt when the former wife had for five years, without protest, accepted the reduced amount, particularly where the child was cared for by and lived with the mother of the husband, during which time the grandmother contributed to its support. The wife in that case argued that no oral agreement to accept a reduced amount for the support of a minor child is valid unless it receives the sanction of the divorce court.

In the case at bar the chancellor apparently considered the provision for the $400 monthly payments as intended strictly for child support and maintenance and not as a part, or in consideration, of the property rights agreed upon. The provision that the payments would continue as long as at least one child is living, with the additional proviso that the payments would cease when the youngest child reaches 21 years of age or marries, would indicate that these monthly payments were intended as part consideration for an otherwise inequitable property settlement. Especially is this true when the youngest child then living was a girl who would attain her legal majority at 18 years of age. On the other hand, paragraph 3 plainly states that the agreement is to pay for the support and maintenance of said four children, and since the parties apparently so considered it, we cannot say that the chancellor erred in doing likewise.

In any event, the payments were to be made each month and Patricia first agreed that they should be reduced to $300 per month. The chancellor found, on conflicting evidence, that Patricia subsequently agreed that the payments should be reduced to $150 per month,

and we are unable to say that the chancellor's findings are against the preponderance of the evidence as we would be required to do in order to reverse on this point. The fact that Patricia drew monthly drafts on Sam in the amount of $150 for approximately seven years wihout complaint to the court lends some weight in favor of an agreement. This fact also lends weight to Patricia's sense of fairness toward Sam and concern for the mental or psychic welfare of the children. In such close matters as this we affirm the chancellor unless his decree is against the preponderance of the evidence. *Stephenson* v. *Stephenson,* 237 Ark. 724, 375 S.W. 2d 659.

As to appellant's fifth point, we are of the opinion the chancellor erred. The insurance policy is clearly personal property and was so regarded in the agreement and in the divorce decree. While the agreement only provided that Sam would keep the premiums paid and keep the policy in full force and effect with Patricia as the *sole* beneficiary; the findings of the chancellor in the original decree, as to the insurance policy, recite as follows:

> "In substance, said agreement provides that the plaintiff shall take . . . a certain life insurance policy . . ."

Under the original agreement, and under the original decree as we interpret them, it was never contemplated that Patricia would be awarded as a part of her property an insurance policy to be burdened with debt to the extent of its loan value. It appears that the intent of the parties, in connection with the insurance policy, was that in the event of Sam's death, Patricia would collect from the insurance company and not from Sam's estate. Sam's income for 1969 was between $30,000 and $50,000 and although the necessity for, and purpose of, Sam borrowing on the insurance policy does not appear in the record—we hold that Patricia is entitled to the policy as it was awarded to her—unencumbered by the loan to Sam.

The decree is reversed as to the insurance policy and this cause remanded to the chancery court for entry of an order directing Sam to pay the loan against the policy forthwith, and for an order restraining him from placing future encumbrances against the policy. In all other respects the decree is affirmed.

The appellant's attorneys have requested, and they are hereby awarded, a fee of $1,250 for their services to the appellant in connection with her appeal to this court.

Affirmed in part; reversed in part and remanded.

IDA CHLORINE HARALSON ET AL *v.*
ATLAS TRANSIT CO., INC.

5-5492 465 S. W. 2d 108

Opinion delivered March 22, 1971
[Rehearing denied April 26, 1971.]

Terral, Rawlings, Matthews & Purtle and *John W. Cole,* for appellants.

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

CONLEY BYRD, Justice. The trial court directed a verdict for the appellees in this action by appellants Ida Chlorine Haralson, Gene Haralson, and Arnold Johnson, administrator of the estate of Gladys Johnson, deceased, for injuries received in a car-truck collision with a truck and trailer owned by appellee Atlas Transit Co., Inc., and operated by appellee Buddy Reese.

For reversal appellants contend that there was ample evidence to show that the driver of the truck failed to keep a proper lookout; failed to keep his vehicle under control; was driving his vehicle at an excessive speed under the circumstances; and was driving his vehicle on the wrong side of the road.

Robert Faulk, the investigating State trooper, testified that the accident occurred on Highway 167 in Grant County at approximately 6:00 A.M. on January 6, 1970. It was snowing when he received word of the accident and because of the weather it took him forty-two minutes to drive the twenty-two miles from the Markham Street interchange on Interstate 30 to the scene of the accident. The road where the accident occurred was straight, with a curve commencing a short distance to the north. He found debris right around the center line and some gas spilled on the highway.

Buddy Reese testified that he was driving the truck and trailer. He saw the reflection of lights before he saw the car. When he first saw the car it was turned crossways in the road. He knew there was a side road ahead and it looked as though the car was coming out of the side road and making a left hand turn. When he first saw the car he applied his brakes but upon determining that his trailer was sliding a foot or two to the left, he let off his

brakes. His truck had fifteen forward gears and at the time he was traveling in 13th gear at a speed of 35 to 45 miles per hour. When he first saw the car it was 35 to 45 yards from the point of impact and he was also 35 to 45 yards from the point of impact. He placed his truck in its proper lane of travel with its right front off the pavement, on the right hand shoulder at the point of impact. He estimated the stopping distance of his truck, considering the road conditions and his speed, at 150 yards. Under normal conditions he estimated the truck's stopping distance at 35 to 45 yards at the speed he was traveling.

Herbert Slyby was parked on the road side, fixing the windshield wipers on his wife's car, and witnessed the collision. He said the car, driven by Mrs. Billy Wilson, went out of control and skidded around at least one and one-half times before it collided with the truck on the truck's side of the road. He would not attempt an estimate of the truck's speed but said that it did not appear to be coming fast.

Loretta Slyby testified that she watched the car slide around into the truck in just a split second. She could not tell the jury anything about speed and distances involved.

Billy Wilson, husband of the car's driver, testified that he talked to Buddy Reese at the hospital and that Reese said he thought the car pulled out from that side road and he could have avoided the collision if he had taken the ditch. He also testified that he was familiar with the type of truck involved and in 13th gear it would run 50 to 55 miles per hour. Its minimum speed in that gear would be 50 miles per hour.

Gene Haralson testified that Buddy Reese was at the hospital. When asked if Reese made a statement, Haralson answered:

> "He said he thought she had come out of that side road there by that ranch and he thought she had just lost control of it and would get back on

her side of the road. He said he could have avoided the accident. He said when he realized she had lost control of the car it was too late."

Haralson admitted that Tony and Billy Wilson were present when the statement was made.

Tony Wilson testified that he saw where the car was apparently hit first. He saw dirt, glass, mud and gasoline about twenty feet the other side of where the car came to rest.

Leslie Tannahill, a deputy sheriff, testified that when standing in the south bound lane where the curve begins one could see down the road 1416 feet.

We can find no substantial testimony in the record from which it can be inferred that the collision occurred in the north bound lane.

Without the testimony of Billy Wilson that the truck would have been going from 50 to 55 miles per hour in 13th gear, we would affirm the directed verdict. However, because we must view the testimony in the light most favorable to the party against whom a verdict is directed, we must consider his testimony without regard to its credibility. Viewed in this light, there is testimony from which the jury could find that Reese was driving the truck and trailer along a snow covered highway at a speed of 55 miles per hour; that prior to the collision Reese had seen the back ends of some cars sliding; that his visibility was 150 yards; that his stopping distance under the existing conditions at 35 to 45 miles per hour was 150 yards; and that he did not see the car with which he collided until it was 70 to 90 yards away from him and already out of control. When this evidence is added to the statement of Reese that he could have avoided the accident by taking the ditch, we cannot say that there is no substantial evidence to show that Reese was negligent in failing to keep a lookout and in driving at an excessive speed under the circumstances.

Appellees argue, however, that the cause of the collision was the fact that the car went out of control and not any alleged negligence of appellees. Here again, we must view the evidence and the inferences in the light most favorable to the parties against whom the verdict was directed.

In Prosser, Torts, 3rd ed., Ch. 7, § 41, p. 246, it is stated:

> "The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. Proof of what we call the relation of cause and effect, that of necessary antecedent and inevitable consequence, can be nothing more than 'the projection of our habit of expecting certain consequents to follow certain antecedents merely because we had observed these sequences on previous occasions.' If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists."

We are unwilling to say that jurors cannot conclude that there was a causal relation between the speed of the truck, and the driver's failure to see the car until it was 70 to 90 yards away and the collision with the disabled vehicle in which appellants were riding.

Reversed and remanded.

J. C. WARREN *v.* STATE OF ARKANSAS

5577 464 S. W. 2d 564

Opinion delivered March 22, 1971

Donald B. Kendall, for appellant.

Ray Thornton, Attorney General; *Milton Lueken,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant J. C. Warren was charged by information with burglary and grand larceny. The jury found him guilty on both counts as well as under the habitual criminal statute, Ark. Stat. Ann. § 43-2328 (Supp. 1969). For reversal of his 21 year sentence he relies upon the following points:

"1. Information charging the appellant with the crimes of burglary and grand larceny stated that the appellant stole $154.00. The State failed to prove that the appellant stole $154.00, and, therefore, the verdict was contrary to the law and the evidence.

2. The prosecutor, in his closing argument, held in his hand a hammer which he attempted to get

into evidence during the trial and argued to the jury that this hammer could have been used in the breaking and entering of the grocery store. Since this hammer had been excluded as admissible evidence during the trial, this argument was prejudicial to the appellant and, therefore, the verdict of the jury was contrary to the law."

The proof shows that an officer apprehended appellant as he was leaving the broken door of the Stack Mart Grocery owned by John Shasteen. Appellant went directly to an automobile and attempted to flee from the officers. After a high speed chase he was finally stoppped. In his back pocket was a hammer and on the car's floor board was a green money bag from Farmers and Merchants Bank containing $93.60. John Shasteen identified the money bag from the coins and some correspondence left therein.

The appellant, relying upon cases such as *Wilburn* v. *State,* 60 Ark. 141, 29 S. W. 149 (1895) and *Starchman* v. *State,* 62 Ark. 538, 36 S. W. 940 (1896) argues that since the information charged larceny of $154.00 and the proof showed only $93.60 taken, the evidence is insufficient to support the charge. We find no merit in the contention. Such a variance would have been reversible error before Initiated Act No. 3 of 1936. See *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304 (1943). However since that time a variance between the charge and the proof, which does not tend to prejudice the substantial rights of the defendant on the merits, has not been fatal. Ark. Stat. Ann. § 43-1012 (Repl. 1964).

Under Ark. Stat. Ann. § 41-3907 (Repl. 1964), larceny is a felony when the value of the property stolen exceeds $35.00. Thus when, as here, the money taken exceeds $35.00, we are at a loss to understand how appellant's rights were prejudiced because the proof showed that less money was taken than was charged.

Appellant's last point, relative to the hammer, was not brought forth in his motion for new trial. There-

fore, we do not reach this issue for the first time on appeal. *Yarbrough* v. *State,* 206 Ark. 549, 176 S. W. 2d 702 (1944).

Affirmed.

FRED T. HALLIMAN *v.*
CLAYBURN G. STILES, JR., ET UX

5-5478 464 S. W. 2d 573

Opinion delivered March 22, 1971

McMillan, McMillan & Turner, for appellants.

Seymour S. Rosenberg, Memphis and *Lookadoo, Gooch & Lookadoo,* for appellees.

FRANK HOLT, Justice. This is an action instituted by appellees for personal injuries allegedly received in an automobile accident. A default judgment was entered against appellant; and, from a denial of his motion to vacate that judgment, he brings this appeal.

Appellees stopped on an ice-covered bridge where an accident had previously occurred causing several other automobiles to block both lanes of passage. Appellant, driving behind, collided into the rear of appellees' car. The police who investigated the accident filed a report indicating that appellant was the holder of a Tennessee driver's license which gave his address as 405 Fonvill Avenue, Martin, Tennessee. About fifteen months later, appellees filed suit alleging that appellant was a resident of Tennessee and attempted to obtain service under the nonresident motorist statutes.

Summons was issued on the Secretary of State, and appellees' attorney mailed a registered letter containing a copy of the summons and complaint to appellant at the above Tennessee address. The letter was returned to the writer marked: "Forwarding Order Expired, Out of U.S.A." A letter containing the summons, which was mailed to appellant by the Secretary of State, was also returned similarly marked. Appellees' attorney then filed an affidavit stating compliance with the out-of-state service statute. A verified petition was filed by appellees seeking to take depositions of their doctors by interrogatories and alleging that "service cannot be had on the defendant, inasmuch as he is out of the continental United States." Appellant was thereafter determined to be in default; and, upon testimony of damages, the trial court rendered judgment totaling $58,383.89.

Several months later appellant learned of the judgment against him and filed a motion to set it aside in which he alleged that: The Tennessee address was not, and never had been, his last known address; at the time of the accident he was residing at 3322 North Kenmore, Chicago, Illinois, and had noted this same address in his Motor Vehicle Accident Report which was made the day following the accident; at the time suit was filed he was a missionary in New Guinea where he was at present; the judgment was void because he did not receive either of the letters mailed to the Tennessee address and did not, therefore, have notice of the suit or opportunity to appear and defend; and the judgment was also voidable because of fraud and unavoidable casualty. By verified amendment, he alleged a meritorious defense.

In support of his motion, appellant testified by deposition that: He had been a missionary in New Guinea for ten years; prior to this time he had lived in Chicago where he was pastor of a church; when he returned to the United States a friend in Tennessee had given him a car at which time he also obtained a driver's license from that state. He further stated that at the time of the accident he was on a year's sabbatical leave residing with his family at his Illinois address and had gone to Tennessee to visit his stepmother and some friends. His testimony also asserted that he gave his Illinois address to the police officer who had investigated the accident, to the local hospital which treated his children who were riding with him at the time of the accident, and to his insurance adjuster.

The trial court denied appellant's motion, and its order reads in part:

> The Court is of the opinion that in addition to showing the invalidity of the service, it is necessary for the defendant [appellant] to allege and prove a meritorious defense to this action.
>
> The defendant has sufficiently alleged, by verified

> complaint, a meritorious defense but the Court does not feel that the proof in this case is adequate to sustain this defense and therefore it is unnecessary for this Court to determine whether the service is valid upon the defendant or not and the defendant's Motion to Vacate Judgment should be denied.

For reversal appellant relies upon three contentions: (1) The service was insufficient; (2) the judgment was void under Ark. Stat. Ann. § 29-107 (Repl. 1962), a meritorious defense therefore not being required; and (3) the judgment was voidable under § 29-506 and should have been voided in that there was an allegation and prima facie showing of a meritorious defense. We agree with appellant that the proceedings were void ab initio and that a showing of a meritorious defense was therefore unnecessary.

Appellees insist, however, that our holding in *Haville* v. *Pearrow,* 233 Ark. 586, 346 S. W. 2d 204 (1961), is dispositive of the issues now before us. There the appellants sought to set aside a judgment *solely* on the basis of § 29-506 which provides for the vacating of a judgment after the expiration of the term in which it was rendered. We said:

> Under the view we take, it is not necessary that we discuss whether the service was valid, for under our holdings, irrespective of the validity of service, the judgment must be affirmed. We have many times held that before one can successfully set aside a judgment, he must show a meritorious defense. This is in accord with our statutes. Section 29-508 provides that proceedings to vacate judgments or orders under § 29-506 shall be by complaint, verified by affidavit, and shall set forth the judgment or order, grounds to vacate or modify same, and the defense to the action, if the party applying was a defendant. Section 29-509 provides that a judgment shall not be vacated on motion or complaint until it is adjudged that there is a valid defense to the action on which the judgment is rendered.

In the case at bar, however, appellant does not rely on § 29-506 only. He also affirmatively attacks the very validity of the judgment itself, alleging that it is void under § 29-107 for lack of notice. If service on appellant was, as he contends, improper, then the trial court was without personal jurisdiction over him and the proceedings were void. Any adjudication resulting therefrom would, of course, be without binding force or legal consequence. *Pennoyer* v. *Neff,* 95 U. S. 714 (1878); *Moore* v. *Watkins and Others,* 1 Ark. 268 (1838). The trial court therefore erred in holding that the absence of a meritorious defense renders a determination of the validity of the service unnecessary; rather it is the validity of the service and the jurisdiction which it thereby confers that affords legal vitality to the consideration of whether or not appellant presented a meritorious defense. See *Woolfolk* v. *Davis,* 225 Ark. 722, 285 S. W. 2d 321 (1955). Although we think that a prima facie showing of a meritorious defense was made in the case at bar, this showing was not necessary since, as shall be demonstrated, service over the appellant was not effectively acquired. The proceedings were conducted without proper notice to appellant; and the judgment, consequently, was void. *Beck* v. *Rhoads,* 235 Ark. 619, 361 S. W. 2d 545 (1962).

Our nonresident motorists statutes, based on the state's police power, are designed to furnish a convenient forum in which one who has been injured within this State through the negligence of an out-of-state motorist can enforce his civil remedies. They provide that operation of a motor vehicle by a nonresident on Arkansas highways is deemed equivalent to the appointment of the Secretary of State by such nonresident as being his agent upon whom may be served all lawful process in any action arising out of any accident in which he may be involved within the boundaries of this State. Section 27-342.1. Service of process on the Secretary of State is sufficient to acquire personal jurisdiction over the nonresident, "provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or his attorney to the defendant at his last

known address." Section 27-342.2. Proof of compliance with these statutes must also be demonstrated by appending to the writ of process and filing with the trial court the defendant's return receipt or an affidavit of the plaintiff or his attorney stating compliance. Section 27-342.2. We do not think that appellees adequately observed these provisions in the case before us.

Although *Alexander* v. *Bush,* 199 Ark. 562, 134 S. W. 2d 519 (1939) suggests that our nonresident motorist statutes require actual notice to the defendant, this is not always insisted upon. Jurisdiction can be acquired if the statutes are validly enacted and prescribe a constitutional mode of service, and if the plaintiff fully complies with their provisions. See Leflar, R. A., *American Conflicts Law,* § 21 (1968). See, also, *Bruce* v. *Paxton,* 31 F. R. D. 197 (E. D. Ark. 1962). But the substituted service and constructive notice which these statutes authorize are not intended to dilute a defendant's due process right to be heard. In *Mullane* v. *Central Hanover Bank & Tr. Co.,* 339 U. S. 306 (1950), the United States Supreme Court well expressed this point:

> This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. * * * [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

Where, as in the case at bar, personal jurisdiction over a defendant may be founded on something less than actual notice, statutory service requirements, which are implemented in derogation of common law rights, must be strictly construed and exactly complied with. *Jenkins* v. *Hill,* 240 Ark. 197, 398 S. W. 2d 679 (1966); *Kerr, Adm'r* v. *Greenstein,* 213 Ark. 447, 212 S. W. 2d 1 (1948); 61 C. J. S., Motor Vehicles, § 502 (1)(a).

In *Wuchter* v. *Pizzutti,* 276 U. S. 13 (1928), the

constitutionality of service requirements in nonresident motorist statutes was contested. The United States Supreme Court held such requirements to be constitutionally valid if they contain a provision making it *reasonably probable* that notice of the service on the Secretary of State will be communicated to the nonresident defendant who is sued. The Court also indicated that the burden is on the injured party to investigate into those facts which would normally reveal the address of the nonresident defendant. This is so, according to the Court, since ". . . it could hardly be fair or reasonable to require a nonresident individual owner of a motor vehicle who may use the state highways to make constant inquiry of the Secretary of State to learn whether he has been sued."

The requirement in our statute that notice be sent to the nonresident defendant at his "last known address" has been said to be indefinite. See Recent Decisions [*Kelso* v. *Bush,* 191 Ark. 1044, 89 S. W. 2d 594 (1935)], 34 Mich. L. Rev. 1227 (1936). Unless this is interpreted to mean that diligence is necessarily required in ascertaining such address, the statute does not prescribe a method of service reasonably calculated to give actual notice and, therefore, does not comport with the constitutional standards set out in *Wuchter* v. *Pizzutti, supra.* Other jurisdictions have already grappled with the problem of assigning an appropriate meaning to similar "last known address" provisions. See *State ex re. Cronkhite* v. *Belden,* 193 Wis. 145, 211 N. W. 916 (1927), *overruled, Sorenson* v. *Stowers,* 251 Wis. 398, 29 N. W. 2d 512 (1947); *Hartley* v. *Vitiello,* 113 Conn. 74, 154 A. 255 (1931). See, also, *Spears* v. *Ritchey,* 108 Ohio App. 358, 161 N. E. 2d 516 (1958); *Drinkard* v. *Eastern Airlines,* 290 S. W. 2d 175 (Mo. 1956). And, *cf. Nonresident Motorists Process Acts,* 33 F. R. D. 151 (1963). We think that the provision in our statute necessarily implies that a plaintiff must make a greater effort than was made in the case at bar to determine the nonresident defendant's last address in order to create a reasonable probability that he will receive actual notice of the suit.

In the case at bar, appellant testified by deposition that he gave his Illinois address to the investigating officer. According to the officer, he could not "state positively about this particular time, it is my custom and I usually verify the parties present address with the one shown on the driver's license by asking if that is still their present address." Appellant also testified that he gave his Illinois address to the local hospital where his children received treatment, and to his insurance adjuster. The record affirmatively reflects that appellant entered this address on his Arkansas Motor Vehicle Accident Report which was promptly made (one day after the accident) and filed with the Motor Vehicle Division of the Arkansas Revenue Department in compliance with our laws. See Ark. Stat. Ann. § 75-1418 et seq. (Repl. 1957). Further investigation certainly would have disclosed appellant's Illinois address.

We do not intend to enunciate a rule which would allow an evasive absentee defendant to deliberately frustrate the purpose of our nonresident motorist statutes. This is not the case here. We simply hold that in the circumstances before us, appellees did not demonstrate that sufficient inquiry was made in attempting to ascertain appellant's last known address and thereby deprived him of "reasonably probable" actual notice consistent with due process. The substitute service statute not having been sufficiently complied with, the default judgment is void. The order denying appellant's motion to vacate is reversed and the cause remanded for proceedings consistent with this opinion.

CITY OF WEST HELENA *v.*
RAPHAEL G. DAVIDSON ET UX

5-5493 464 S. W. 2d 581

Opinion delivered March 22, 1971

Garland Q. Ridenour, for appellant.

David Solomon, for appellees.

FRANK HOLT, Justice. Appellees petitioned the appellant's planning commission to rezone their lot from Residential (R-B) to Neighborhood Commercial (N-C). The commission refused to change the classification, and appellant's city council approved the commission's action. The appellees then proceeded in chancery

court. This appeal results from the chancellor's finding that the action of the city council was arbitrary, and from his order directing appellees' property to be changed to the requested "Neighborhood Commercial Zone." In its first two points for reversal, appellant asserts that the chancellor erred by substituting his judgment for that of the zoning authorities and that the chancellor's findings are contrary to the preponderence of the evidence. We do not agree.

The facts in the case appear to be undisputed with reference to the nature of the realty surrounding the subject property. This vacant lot is being purchased by the Davidsons, appellees, from appellee Katz with the intention of constructing a drug store thereon. It is located on the north side of Oakland Avenue (U. S. Highway No. 49), which is the main thoroughfare between Helena and West Helena and one of the most heavily traveled roads in the State, accommodating approximately 15,000 vehicles a day. The lot is situated about one block inside the east central corporate boundary of appellant city and the contiguous boundary of the western most portion of the City of Helena. The lot constitutes the far eastern parcel of a residential (R-B) district. Immediately adjoining it to the west is a church with a complex of buildings. Next are two vacant lots, then a 50-foot-wide street or avenue which is not open at the highway entrance. Then, continuing to the west on the north or same side of the highway (Oakland Avenue), are found residences in a different classification, Residential (R-A), leading up to an elementary school. Across the street from the church and a small portion of appellees' property is a residence; then, continuing on further west on this south side of the highway are two vacant lots, the Helena Country Club, and residences in R-A classification, except for a service station. This appears to accurately describe the type of property which is on both sides of the highway to the west of appellees' vacant lot.

Immediately to the east of appellees' property on the north side of the highway there is a bowling alley.

Adjacent to this commercial business is a high school and junior high school complex of the Consolidated Helena-West Helena School System. Next to the schools it appears that appellant recently rezoned some land to the east for commercial purposes to permit construction of a shopping center. Directly across the highway from appellees' property is located the Arkansas Power & Light Company's main office, storage and maintenance building, and east of this property there is a drive-in food and drink establishment. On the eastern line of this drive-in is found the corporate boundary of West Helena and Helena. Further eastward on both sides of the highway, there are various business establishments located on commercially zoned property extending for almost a mile into the City of Helena.

Appellee Mr. Davidson, a pharmacist, rents a building in Helena where he owns and operates a drug store about one block east of that city's corporate line, or approximately two blocks from the vacant lot he seeks to have rezoned in order to construct a drug store building thereon.

Appellant's witnesses, which included members of the city council and of the planning commission and four property owners, testified that the rezoning of appellees' property from Residential (R-B) to Neighborhood Commercial (N-C) would disturb the planning program and not be in the best interest of the City; that rezoning would depreciate or adversely affect the value of residential property to the west which is in the classification Residential (R-A); and that the church should not be considered a buffer zone between appellees' property and the area to the west. There was evidence that in the past several efforts to rezone this property were unsuccessful. Evidence was also adduced that the proposed rezoning would increase already existing traffic problems which, as one witness testified, was the basic reason the people in the area were objecting. It was admitted by appellant that the character of appellees' property is "low residential" which is described as suitable for

multi-dwelling houses, such as duplexes. One of appellant's witnesses testified that he would not build a home there. It appears that a multiple dwelling sould be restricted to a height of 35 feet, whereas a building zoned for Neighborhood Commercial (N-C) use could be no more than 26 feet in height. As previously indicated, it is admitted that the whole area east of appellees' property on both sides of Highway No. 49 consists of commercial establishments for a considerable distance.

The church, which is adjacent to appellees' property, found it necessary to purchase a part of appellees' property in order to provide a better driveway and access to the highway to accommodate its 350 members. The church now has an Education Building consisting of thirteen classrooms, three offices, two restrooms, an equipment room and a kitchen.

An expert city planner, associated with the University of Arkansas, who assisted appellant's planning commission and whose contract was completed in 1962, recommended that appellees' property be zoned Residential (R-B) and the property west of the church be classified as Residential (R-A). He testified that there appears to have been a number of changes since 1962 and that from his observation, the tract of property adjacent to the subject property appears to be commercial in nature. The church has been built since the completion of his contract in 1962 and the nearby school has grown. He stated that he did not consider the church as a buffer zone and that a residential classification, duplex type, is still appropriate for appellees' property and consistent with city planning. He finally stated that he did not have an opinion whether the subject property would be commercial in nature. He observed that Neighborhood Commercial is a very limited classification and is restricted to one-story buildings.

Among appellees' witnesses was a local licensed realtor and real estate broker who lives in West Helena and has had many years experience in his profession.

He was for several years a member and official of the City's Planning Commission, beginning in the early 1960's, and is familiar with appellees' property and the city's planning and zoning ordinances. It was his opinion that appellees' property was not suitable for residential uses, nor could ever be used for that purpose; that the highest and most compatible use of the property was for Neighborhood Commercial purposes for a retail store; that this type of use would not adversely affect or depreciate the value of property to the west; and that the residence diagonally across the highway from appellees' property is "sitting back" about 250—300 feet from the highway and is within 50—75 feet of the Arkansas Power & Light Company's property. According to him, it would not be spot zoning to permit the requested neighborhood commercial use. He also testified that the church, in addition to being a buffer zone, could be considered merely as "an extension of a commercial zone." Another well-known realtor and an expert who is experienced in zoning and planning programs was of the view that the property was definitely commercial in character inasmuch as it is located in and adjacent to an established commercial business area; that good planning required the use of this property for neighborhood commercial purposes; and that such usage would not depreciate the value of any residential property in the area. In his view, the proposed use of the property as a drug store would not increase the traffic hazard on this heavily traveled highway (15,000 vehicles per day). According to him, a Neighborhood Commercial (N-C) classification or a commercial use of a low character would conform to the highest compatible use of the subject property and would fit into the city's planning program. Also, the church is a perfect buffer between the residential district (R-A) and the subject property. Because of the proximity of the subject peoperty to the boundary line of Helena-West Helena, it was his opinion that good planning required zoning by area rather than by political boundaries and that the use of the property in both cities in proximity to appellees' property should be considered for zoning purposes.

In *City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883 (1925) we said:

> "*** any attempt on the part of the city council to restrict the growth of an established business district is arbitrary. When a business district has been rightly established, the rights of owners of property adjacent thereto cannot be restricted, so as to prevent them from using it as business property."

We think this language is applicable to the case at bar in view of the fact that appellees' property is practically surrounded by established commercial activities which border on both sides of a major highway having a traffic count of approximately 15,000 vehicles per day. Furthermore, appellees have specified the intended use of the property. cf. *City of Little Rock* v. *Parker, et al,* 241 Ark. 381, 407 S. W. 2d 921 (1966).

As stated previously, the facts are not disputed as to the present uses of the properties in the area. The dispute presented to the chancellor largely pivoted around the opinions of the witnesses representing opposing views as to the highest compatible use of the subject property. In such a situation we aptly said in *City of Helena* v. *Barrow,* 241 Ark. 654, 408 S. W. 2d 867 (1966):

> "In a case of this kind the chancellor should sustain the city's action unless he finds it to be arbitrary. No matter which way the chancellor decides the question, we reverse his decree only if we find it to be against the preponderance of the evidence."

In the case at bar, the chancellor heard the witnesses and evaluated their conflicting testimony and other evidence; we are unwilling to say that his findings are against the preponderance of the evidence. Nor do we find any merit in appellant's contention that the chancellor erred in considering evidence of commercial uses of nearby property within the corporate limits

of the adjacent City of Helena. Appellees' property is within one block of this bordering city, and certainly it must be said that the commercial use of other property situated within one block of their property would have an effect upon its highest compatible usage. In fact, appellant's expert, who by contract assisted in the planning program, testified that the planning project as to land use was conducted in conjunction with the planning commissions of both cities and that there is a very close correlation between land use planning and zoning ordinances.

The decree is affirmed.

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

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent because I think that the chancery court erred in holding that the action of the city authorities was arbitrary. I think the majority opinion is in error in ignoring decisions more recent than that on which it places its principal reliance—*City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883. In commenting on this case in *City of Little Rock* v. *Parker,* 241 Ark. 381, 407 S. W. 2d 921, we said:

> The statute in force at the time of *Pfeifer* was Act 6 of the Second Extraordinary Session of the General Assembly of 1924, and cities of the first class were authorized to establish zones limiting the character of buildings erected thereon. There were only three zoning classifications under that Act, one, that portion of the city where manufacturing establishments might be erected, two, those portions of the city where business other than manufacturing, might be carried on, and finally, those portions of the city set apart for residential purposes. Act 186 of the Acts of the General Assembly of 1957, Ark. Stat. Ann. § 19-2825 (Supp. 1965) is a comprehensive act authorizing cities of the first and second class to adopt and enforce plans "for the coordinated, adjusted and harmonious

development of the municipality and its environs." The purposes of the act are set out in Subsection a. as follows:

> "The plan or plans of the municipality shall be prepared in order to promote, in accordance with present and future needs, the safety, morals, order, convenience, prosperity and general welfare of the citizens; and may provide, among other things, for efficiency and economy in the process of development, for the appropriate and best use of land, for convenience of traffic and circulation of people and goods, for safety from fire and other dangers, for adequate light and air in the use and occupancy of buildings, for healthful and convenient distribution of population, for good civic design and arrangement, for adequate public utilities and facilities, and for wise and efficient expenditure of funds."

The Act itself consists of nine lengthy sections, including approximately forty sub-sections, and composing fourteen pages (Acts of Arkansas 1957), all dealing with the preparation of plans for the orderly growth of a city. * * * Section 8 provides that the provisions of the Act shall be construed liberally.

It is apparent that the passage of Act 186 of 1957, to some degree, necessarily modified our holding in *Pfeifer,* for a strict and literal interpretation of all the language in that case would certainly result in nullifying the effort by a city to coordinate development of lands, and, more than that, in effect, would nullify Act 186. The right and responsibility for classifying the various areas in the city are with the zoning authorities, and their decision will only be disturbed if it is shown that they acted arbitrarily.

In *City of Little Rock* v. *McKenzie,* 239 Ark. 9, 386 S. W. 2d 697, we stated that we must uphold the decision of the zoning authorities unless we can say

that it is arbitrary and capricious, i.e., without *any* reasonable foundation. A chancery court may declare a zoning ordinance void when, and only when, it can say that the action of the authority having power to zone, is clearly unreasonable, arbitrary and capriious or an abuse of discretion. *Economy Wholesale Co.* v. *Rodgers,* 232 Ark. 835, 340 S. W. 2d 583; *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321; *City of Little Rock* v. *Garner,* 235 Ark. 362, 360 S. W. 2d 116; *Olsen* v. *City of Little Rock,* 241 Ark. 155, 406 S. W. 2d 706; *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446; *City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883. In the sense used in these cases, we have said that "arbitrary" means "decisive but unreasoned," or "arising from unrestrained exercise of the will, caprice or personal preference, based on random or convenient selection or choice, rather than on reason or nature" and that "capricious" means "not guided by steady judgment or purpose." *City of North Little Rock* v. *Habrle,* 239 Ark. 1007, 395 S. W. 2d 751; *City of Little Rock* v. *Parker,* 241 Ark. 381, 407 S. W. 2d 921.

In *Marling* v. *City of Little Rock,* 245 Ark. 876, 435 S. W. 2d 94, we said:

> We perceive that the chancellor was impressed, as are we, with an abundance of evidence pertaining to the danger of spot zoning. That danger was emphasized where, as here, there is no existing barrier to prevent the spreading of rezoning into the exclusively residential area to the north. Those residents have a stake in this case and are entitled to consideration. Appellant's exercise of her rights of property must be recognized; however, we held in an early zoning case that her enjoyment of its use may be reasonably restrained so as not to cause injury to the property rights of her neighbors. See *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321 (1925). This is true even though, as was said in *Downs,* the best and most remunerative use of the two lots in question might be for quiet business.

In *Downs* v. *City of Little Rock,* 240 Ark. 623, 401 S. W. 2d 210, we said:

> The benefit to a few individuals cannot be allowed to override the best interests of the residents of the overall area. The Planning Commission has apparently spent long hours in rezoning property in the city of Little Rock with the view of establishing a long-range program, one that will best fit the needs of an expanding city in future years.
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> * * *
>
> Probably, it would be most difficult to determine petitions for rezoning in any of the old additions without encountering individual cases of hardship, but the line must be drawn at some point. If this property were rezoned, where would the rezoning end? If these two lots are to be placed in a different category than "B" Residential District, why should not the lot just north of Lot 12 be placed in the same category—and so on *ad infinitum*?

In *Tate* v. *City of Malvern,* 246 Ark. 316, 438 S. W. 2d 52, we said:

> * * * 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.

In the same case, in speaking of spot zoning, we said:

> 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 modi-

> fication 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.

In *City of Little Rock* v. *Gardner,* 239 Ark. 54, 386 S. W. 2d 923, we said:

> One of the main purposes of zoning and rezoning is to stabilize property values in a neighborhood, thus encouraging the most appropriate use of the land.

In *City of North Little Rock* v. *Habrle,* 239 Ark. 1007, 395 S. W. 2d 751, we said:

> It is undisputed that appellee bought her property after the area was zoned. No doubt it will be a financial disadvantage for appellee if she cannot operate a beauty shop on her lot, but we do not understand this is necessarily any indication the Zoning Authorities acted arbitrarily when they refused to let her do so. In the McKenzie case, supra, we indicated we were not insensitive to hardships which sometimes result in a case of this kind, but said: "Yet in every case such as this one a similar loss in property value must be suffered by one side or the other."

The Walter Morris home, valued at $75,000, and admittedly one of the finest in West Helena, is located immediately across the street. Numerous residences that are well maintained and exhibit pride of ownership are in the vicinity. A real estate man called to testify on behalf of appellees stated that changing the zoning of this property to neighborhood commercial could be spot zoning.

Raphael G. Davidson, one of the appellees, testified that traffic on the street, which is Highway 49, is high. He numbers his customers at between 100 and 150 and states that the hours his business would be open are 9:00 a.m. to 8:00 p.m. He was prompted to buy the

property because of its location, *knowing* the status of the zoning classification. He admits a traffic problem on Highway 49, but did not think that his business would have an effect upon it. At one time, he thought of the development of the property for residential purposes but abandoned the idea because his experience with rental property was not profitable, and he considered the expense great. He admitted he had not gone into any depth to determine these questions nor made a survey as to feasibility. He also considered the price of the property for development for residential purposes.

C. V. Barnes, a real estate consultant of Little Rock, called as an expert witness by the appellees, stated that spot zoning is poor practice. O. B. Porter, building official and plumbing inspector for West Helena for nine years, testified about building permits issued. One of them was for the construction of the A. E. Raff home built in 1965 in the vicinity. He admitted that there had been considerable enlargement to the school 300 or 400 yards north of the highway and isolated from the property in question. Porter testified that the present zoning ordinance of the City of West Helena was adopted November 22, 1966.

R. E. McLendon, an alderman for the past 11 years, was present at the City Council meeting the date that the Davidsons' petition for rezoning was heard. The recommendation of the Planning Commission to the City Council was that the zoning not be changed from the R-B Zone which permitted multiple dwelling. The vote of the Council rejecting the petition was unanimous. His reason for voting to reject was because the Planning Commission had studied the problems, and the city officials were trying to have an orderly growth of the city. He stated that since the adoption of the zoning ordinance only one piece of property had been rezoned to neighborhood commercial. That was the Gann property about three blocks away. It was a neighborhood grocery store at the time of the adoption of the ordinance, which made its use nonconforming. It was across the street

from a sawmill, and he could recall no opposition by the neighbors. This witness had operated the Pure Oil Station which was also a nonconforming use. It was his opinion that the rezoning of the property would increase the traffic.

James P. Baker, who had been a member of the first Planning Commission for several years, returned to it to serve as chairman in May 1958, and has served as such since that time. He said that in 1958 the city entered into a contract with the Planning Division of the University of Arkansas under the direction of Professor William S. Bonner. One of the purposes in the study conducted under that contract was to consider the future growth and development of the city so that it could be guided and directed in order not to victimize the city. The second phase of the contract with the University began about 1960, according to Baker, but in the meantime the Planning Commission had worked with the Research Planning Division of the Arkansas State Highway Department for a study of major streets and the future of both Helena and West Helena. He said that members of the Planning Commission actively engaged themselves in the planning. He felt that the zoning classification at the time the ordinance was adopted was sound and that it was in accordance with the master plan. He recalled six drafts of the zoning ordinance and that the real estate board was consulted. He referred to Highway 49 as a major artery between Helena and West Helena, carrying approximately 15,000 cars per day which he said affected the planning and zoning of any area. He stated that West Helena did not have very much property zoned neighborhood commercial, because there just wasn't any demand or need shown for additional neighborhood commercial property. Baker testified that the Planning Commission conducted public hearings on the Davidson application, which was presented by the attorney for appellees and then referred to the zoning committee, which made a study and recommendation to the Planning Commission. The Planning Commission then held a public hearing, adjourned the meeting for a 10-day period and dis-

cussed the matter again. The Planning Commission vote was unanimous. Baker said that a previous owner's request to rezone the property to commercial had been denied.

W. C. Dempsey, a member of the Planning Commission, considered the traffic problems in the area and considered that a business in that area would multiply the traffic. He also stated that there was a well-established residential area contiguous and adjacent to the property which he took into consideration. It was his opinion that the proposed zoning change would tend to reduce the value of the property in that area. He also felt that traffic to the business created some noise which would have a tendency to disturb worship services at the nearby Church of Christ. He could not see that rezoning this property would do anything other than decrease the value of the surrounding property, and tend to make a commercial district creep into the area. It was his opinion that the property was more desirable and adaptable for multifamily dwelling.

J. C. Nixon, another member of the Planning Commission, testified that the last request of the former owner for rezoning was denied on November 22, 1966. It was his recollection that the public hearing on the Davidson request was held on June 26, 1969. He explained the bowling alley as being in a location that the Planning Commission could not, under the law, deny a permit, that the Kream Freeze had been in its location for 20 years and that the Planning Commission had no control over the Arkansas Power and Light Company property. Robert W. Fey, another member of the West Helena Planning Commission, testified that once you establish the line between zones you have got to hold it and that changing this zoning would be the beginning of a hedging into the residential areas, a factor which he considered an important reason to vote to deny the request for rezoning. He too thought that the Davidson property was suitable for multiple houses.

Walter Morris testified that the principal reason for bringing the Morris property into the city limits was the desirability of the protection of a zoning ordinance, thinking that there would not be further encroachments in the residential area where their homes were constructed. Mrs. Lenora Hornor Morris protested because continued encroachments into the area would decrease the value of their property where she had maintained her home with the idea that the residential zoning would be maintained. William Bonner, a City Planner associated with the University of Arkansas since 1950, recommended the zoning of this tract of land and stated that if this property was used for commercial purposes then the only access would be from Andrews Street which would cause a traffic problem. He stated that the only thing the city could have done with reference to the zoning of the bowling alley was to make it a nonconforming use or to zone it as it was. It was his opinion that the proper use for the Davidson lot is residential, in view of the traffic and the neighborhood.

While it is true that we only determine the preponderance of the evidence, the question to which the determination must be related is whether or not the Planning Commission and the City Council acted arbitrarily and capriciously. It seems to me that this evidence shows anything except an arbitrary and capricious action, as we have defined it.

Of course, the courts cannot substitute their judgments for that of the Planning Commission and the City Council. *City of Little Rock* v. *McKenzie,* 239 Ark. 9, 386, S. W. 2d 697. I cannot help but believe that the learned chancellor fell into error in this respect. In his findings of fact, he stated that, in consideration of the testimony in trying to analyze the proof, he had taken into consideration his own opinions formed by a visit to the area during a month's sojourn in the city in the trial of other litigation and had viewed the premises and noted the activity of the bowling alley, the warehouse and office building of the Arkansas Power and Light Company and the

Dairy Queen in the immediate area as well as the commercial activity on the south side of the highway as it proceeds into the City of Helena. He stated that, in his opinion, the area is highly commercial regardless of how the defendant may zone the area. Of course, we are not able to evaluate what the chancellor saw in determining the preponderance of the evidence.

I would reverse the decree.

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

UNION PLANTERS NATIONAL BANK OF MEMPHIS, TENNESSEE *v.* CLEM MOORE & PAUL WILLMUTH, PARTNERS D/B/A GENERAL OIL & INVESTMENT COMPANY

5-5499 464 S. W. 2d 786

Opinion delivered March 29, 1971

Bennett & Purtle, for appellant.

Highsmith, Harkey & Walmsley, for appellees.

CARLETON HARRIS, Chief Justice. This appeal questions the correctness of the ruling by the Independence County Circuit Court that Auto-Kar Distributors, Inc. was doing business in Arkansas without having qualified, and that accordingly, its note and security instrument assigned to Union Planters National Bank of Memphis, appellant herein, could not be sued upon. N. S. Garrott, Jr. owned two corporations, the Garrott Corporation, and Auto-Kar Distributors, Inc. The former is an Arkansas Corporation and sold coin operated automatic car washers. The latter corporation was set up to market these coin operated car washers in Tennessee, Southern Kentucky and Northern Mississippi. Both companies sell a machine known as "Auto-Kar Washer". A contract was entered into in January, 1967, between Auto-Kar Distributors, Inc. and Clem Moore and Paul Willmuth, partners, D/B/A General Oil & Investment Company, for the sale of one of these car washers. This contract was subsequently assigned to appellant, which instituted suit when appellees ceased making their payments. Appellees defended upon the basis that Auto-Kar Distributors, though doing business in Arkansas, had not qualified to do so; that appellant was not authorized to do business in Arkansas, and it was prayed that the complaint be dismissed. After the taking of testimony, the court found that Auto-Kar Distributors, Inc. contracted to sell a car washer to appellees, which was to be erected at Batesville; that it further contracted to supervise the erection of the car washer through its engineer; that Auto-Kar Distributors, Inc. was a foreign corporation incorporated under the laws of the state of Tennessee and had not qualified to do business in Arkansas; still further, that the contract between the parties was first signed by the president of Auto-Kar Distributors, Inc. and then taken by its representative to appellees in Batesville where it was signed by a repre-

sentative of appellees; that the contract for the sale and erection of the automatic car washer was made in the state of Arkansas. Upon these findings, the complaint was dismissed, and from the judgment so entered, appellant brings this appeal. For reversal, it is asserted that the court erred in holding that Auto-Kar Distributors was doing business in Arkansas, appellant contending that the transaction was a single isolated sale which would not constitute doing business in this state, and it is further contended that the transaction was interstate in character and qualification to do business was not required of Auto-Kar Distributors.

Mr. Garrott, who lives in Memphis, testified that he became acquainted with appellees during a period of time when one of the Garrott Corporation salesmen sold units in Arkansas. He said that this corporation entered into a contract with appellees to sell them a complete car wash system, but that the sale was made on condition that it could be financed through the home company in Dallas. However, the parties were unsuccessful in obtaining financing in Dallas, and Garrott testified that it was decided that financing could probably be obtained through the Union Planters National Bank in Memphis through Auto-Kar Distributors. This last is the Tennessee corporation. The witness stated his company did banking business with this bank and the proposed transaction was discussed with bank officials; as a consequence, the bank agreed to handle the financing. Accordingly the first contract was cancelled and a new bill of sale was executed on January 16, 1967. Appellant bank has a required set of forms for use and this form, called "Security Agreement" was executed by Mr. Garrott as president of Auto-Kar Distributers and by Clem Moore for General Oil & Investment Company, the agreement being dated January 23, 1967. It actually is a contract for the sale of the washer, and was assigned by Auto-Kar Distributors to Union Planters National Bank on the same date. Under the provisions of the agreement, the seller retains security title to the goods. At this point, we have the first dispute in the testimony. Garrott testified that Moore had already signed the agreement at the time he (Garrott) signed it

in Memphis. Moore subsequently testified that Garrott had already signed it at the time he (Moore) signed it in Batesville. The president of Auto-Kar Distributors further testified, and this is not disputed, that the machine was shipped from Dallas, Texas, F. O. B. to Moore and Willmuth. Garrott testified that this was the only unit that Auto-Kar Distributors had sold in Arkansas. He also testified that there was nothing in the agreement that required his company to furnish any assistance in setting up the unit, but that when the machine was delivered at Batesville, the company sent a man over to supervise the installation of the machinery.

Mr. Willmuth and Mr. Moore testified that the agreement was signed by Moore in their office at Batesville, and that Garrott's signature was already affixed to the instrument when Moore signed it. Both stated that the agreement was brought to the General Oil & Investment Company's office by a Mr. Ross who was with Auto-Kar Distributors.[1] Moore (Clem) stated that the items comprising the car wash were shipped or brought into Arkansas, part coming from Dallas, another part, a hot water heater, coming from another source which he believed to be Tennessee. He testified that appellees also purchased a vacuum cleaner to use in cleaning the inside of the cars which was to be delivered at a date subsequent to the original delivery; this vacuum cleaner was delivered in Batesville by an employee of Auto-Kar. Moore also said that he paid $175.00 for the use of the engineer sent over by Auto-Kar for the purpose of supervising the erection of the unit.

Mr. Garrott again testified on rebuttal that the agreement was not signed when it was sent out by him. "It would have been the poorest business practice in any form ever conducted had I signed that before it was sent over there." He also denied that there was any vacuum cleaner involved in the transaction at all. Garrott said he had not agreed to furnish any engineer, and that he was denying he had said anything about sending an engineer. The bill of sale does provide for "supervision" for $175.00.

[1]Garrott had testified that the details of the transaction had been handled by Sam Moore and Carl Ross.

After a close study of the facts in this case, and the authorities cited, we agree with the trial court that the acts of Auto-Kar Distributors, Inc. constituted the doing of business in this state. Cases cited by appellant are distinguishable. *McHaney* v. *Lafayette South Side Bank and Trust Co.,* 185 Ark. 1022, 50 S. W. 2d 991, involved a foreign corporation, not authorized to do business in Arkansas which had executed a contract renewing a prior guaranty contract *entered into and to be performed in another state. Sillin* v. *Hessig-Ellis Drug Co.,* 181 Ark. 386, 26 S. W. 2d 122, held that a foreign corporation, without qualifying to do business in Arkansas, may take and foreclose a mortgage to collect its accounts *resulting from interstate sales.* In *Simmons-Burks Clothing Co.* v. *Linton,* 90 Ark. 73, 117 S. W. 775, the court held that prohibiting a foreign corporation from doing business in this state without qualifying to do so, does not prevent such a corporation from taking a note or mortgage to secure a past due debt *for goods sold in another state.* The case of *Goode* v. *Universal Plastics, Inc.,* 247 Ark. 442, 445 S. W. 2d 893, relied on by appellant, also involved a contract made in another state.

The facts in the case of *Hogan* v. *Intertype Corporation,* 136 Ark. 52, 206 S. W. 58, bear some similarity to the instant litigation. There, a salesman for appellee company, which had its main office in New York, called on the appellant in Arkansas and obtained a written contract for a typesetting machine. The machine was shipped from New Orleans to the appellant, and thereafter an agent of the company arrived in Arkansas and demonstrated to appellant the operation of the machine, whereupon appellant executed notes and mortgage. The chancellor ruled the transaction interstate business rather than business done in this state by a foreign corporation contrary to law. On appeal, we said:

"In the instant case, the property was not only retained by the seller after it reached Arkansas, but an agent of the seller was sent to the State for the purpose of demonstrating that the machine would do the work represented, in order to consummate the sale; and, after

making a satisfactory demonstration, the agent accepted in part payment therefor long time notes executed and payable at Huntington, Arkansas, and a mortgage on the machine to secure the notes, which was recorded in Greenwood, Arkansas. This constituted a business transaction in Arkansas by a foreign corporation contrary to the statute law."

This court reversed the decree and dismissed the case.

In the case now before us, title to the property was also retained by the seller after it reached Arkansas; there is substantial evidence that an agent, or employee, of the seller was sent to Batesville for the purpose of seeing that the car wash was properly constructed. There was substantial evidence that the contract was executed, and became effective, at Batesville. These facts are all in line with *Hogan.* In addition, there was also substantial evidence that a vacuum cleaner, necessary in the operation of the car wash, was brought to Batesville by an employee of Auto-Kar. We think these facts establish that Auto-Kar was doing business in Arkansas contrary to the statute.

Nor are we impressed by the argument that this was an interstate transaction. *Hogan* v. *Intertype Corporation supra,* points out that one test laid down by Arkansas cases differentiating an interstate transaction from an intrastate transaction is the ownership of the property after it arrives in this state. It has already been pointed out that title was retained by Auto-Kar. Actually, all of the facts heretofore mentioned support the view that this is an intrastate transaction. Let it be remembered that this is not the case of a resident of this state ordering goods from a foreign corporation, and the foreign corporation honoring that order by shipping the goods to the purchaser. To the contrary, the essential acts necessary to putting the car wash into operation were carried out in this state, *viz,* the contract was entered into in this state, the car wash was constructed in this state, and supervision for construction was furnished at the site.

Little need be said about the fact that the provisions of Ark. Stat. Ann. §§ 64-1201-02 (Repl. 1966) are also applicable to the assignees of such an unenforceable contract. In *Pacific National Bank* v. *Hernreich,* 240 Ark. 114, 398 S. W. 2d 221, this court flatly held that there can be no holder in due course of a negotiable instrument arising out of a transaction which was illegal because an unlicensed foreign corporation was without power to enter into an enforceable contract in Arkansas. In so holding, we said:

"It is settled law that assignees can receive no better rights than their assignors had. The strong language in the *Hogan* case is excellent—but it is dicta. Thus it is apparent that this is really the first time this court has had occasion to rule directly on the question presented.

To reverse this case and permit enforcement of the notes here sued on would in effect repeal our penal statute prohibiting unlicensed foreign corporations from doing business in this state."

We held that a transaction of this nature is not merely unenforceable but void *ab initio.*

Affirmed

FOGLEMAN, J., not participating.

JULIAN JAMES STORES, INC. *v.* BOB G. BENNETT

5-5509 465 S. W. 2d 94

Opinion delivered March 29, 1971
[Rehearing denied April 26, 1971.]

Douglas Bradley, for appellant.

Lee Ward, for appellee.

GEORGE ROSE SMITH, Justice. The appellee, a real estate broker brought this action to recover a $3,500 commission which he had assertedly earned by finding a purchaser for a 31-acre farm being offered for sale by the appellant, a family corporation owned by Julian James and his wife. This appeal is from a $3,500 verdict and

judgment for the plaintiff. For reversal it is contended that the plaintiff's proof was fatally deficient in four particulars.

We state the facts most favorably to the appellee, as is our rule. On a Wednesday morning, June 18, 1969, Bennett and Julian James happened to meet at the post office in Jonesboro. James orally employed Bennett to sell the farm for $33,000, with the down payment to be $15,000 and the balance to be paid in five years, at 7½% interest. In response to a question Bennett stated that he thought that Wallace Fowler would be interested in buying the property.

On Thursday and Friday Bennett discussed the farm with Fowler and showed it to him. Fowler was interested but wanted easier credit terms. On Friday Bennett talked again with James, who raised the price to $35,000 but reduced the. down payment to $7,500 and extended the period of credit to fifteen years. On Saturday morning Fowler agreed to the new terms. That afternoon Bennett telephoned James and reported that he had sold the land to Fowler upon James's exact terms. James replied: "That's great, Bob. . . . You've done a good job."

On Monday morning Bennett received this letter from James, dated the preceding Saturday:

> Since I talked to you today, I have discussed, in detail, the possibility of selling the acreage out by Craighead Forest, with the family, and several things have developed, that has caused us to not sell the property at this time.
>
> From all indications another deal for another piece of property is going to go thru, and if it does, we think it best to hold this acreage, for it might be best to sell it off in lots.
>
> Your interest in selling it and helping us is sincerely appreciated. If and when we decide to think of selling it, we will be glad to talk to you first.

When Bennett called James on Monday morning to express his surprise and disappointment at James's change of position, James said that his wife wouldn't let him sell the property. Despite James's written statement that he and his family had decided not to sell the property, on June 25—only two days later—James and his wife sent Bennett a letter offering him an exclusive listing to sell the property for $37,500. In that letter Mr. and Mrs. James stated that they would like to see Bennett's client (Fowler) get the property and explained that the new price was a compromise between what James had discussed with Bennett and what Mrs. James wanted for the property. Later on this action was filed, resulting in a verdict for Bennett for the full 10% commission.

The appellant corporation now relies upon four asserted deficiencies in Bennett's proof to justify its refusal to pay Bennett's commission. Not one of those grounds for refusal was asserted in James's about-face letter of Saturday, June 21. Consequently the appellant is confronted with the settled rule that a seller who has attempted to revoke his earlier acceptance of an offer obtained by the broker cannot ordinarily defeat the latter's claim to his commission upon a ground not originally stated as a basis for the revocation. This introductory statement to an A. L. R. annotation fits the case at bar so precisely that it is well worth quoting:

> For example, in a case where a landowner has listed property for sale with a broker, and the latter has procured an oral offer from a prospect so easily that the owner concludes he should have asked more for the property, for which reason he rejects the offer and gives the standard excuse that his wife will not let him sell, or he frankly states that he wants more money, a question arises as to whether he may later defend the broker's action for commissions or other compensation by asserting other matters not discussed when refusing the offer, such as [several illustrative excuses stated]. As will be seen in III, infra, as a general rule, none of these matters may be raised as a defense under such circumstances. [156 A. L. R. 602.]

The foregoing principle of waiver applies to the first three of the grounds now relied upon by the appellant for a reversal of the judgment. For that reason we need discuss those contentions only briefly.

First, it is argued, on the basis of dictum contained in a footnote in *Cherry* v. *Montgomery,* 242 Ark. 233, 412 S. W. 2d 845 (1967), that a broker does not earn his commission if the purchaser's oral offer is made to the broker rather than to the seller himself. That rule prevails in California, as an incident to the statute of frauds. *Mattingly* v. *Pennie,* 105 Cal. 514, 39 Pac. 200, 45 A. S. R. 87 (1895). The rule has never been followed in Arkansas, and, moreover, it does not apply even in California when, as in the case at bar, the seller waives the rule by preventing the broker from bringing the parties face to face. *Martin* v. *Culver Enterprises,* 49 Cal. Rptr. 149 (Cal. App., 1966).

Secondly, it is contended that Bennett did not prove Julian James's authority to act for the family corporation. Bennett showed, however, without contradiction, that James and his wife owned 494 of the corporation's 500 outstanding shares of stock and that James was the president of the company. To allow such a one-man corporation to avoid its owner's contract would be a fraud. *Security Bank & Tr. Co.* v. *Warren Light & Water Co.,* 170 Ark. 50, 278 S. W. 643 (1925). Furthermore, here the corporation perforce relies upon James's letter of June 21, revoking the contract, but that letter was signed by James as an individual. Finally, the principle of waiver, already mentioned, obviously applies here, for if Mr. and Mrs. James had been sincere about wanting to sell the property upon the terms accepted by Fowler, they could readily have supplied the necessary corporate resolution.

Thirdly, it is argued that the appellant never agreed to an offer of $1,000 earnest money that accompanied a written acceptance signed by Fowler on Monday, June 23. A complete answer to that contention is that James's terms of sale made no mention whatever of any earnest money. A seller certainly cannot complain of a provi-

sion in the buyer's acceptance more generous to the seller than what the latter had demanded.

Finally, the appellant, again citing *Cherry, supra,* argues that Bennett did not prove that the purchaser, Fowler, was financially able to make the purchase. We do not imply that the doctrine of waiver applies to this contention, for some authorities recognize an exception to that doctrine when the seller's belated objection is based upon a matter that the broker could not have cured even if the objection had been brought to his attention. 156 A. L. R. 604. But here, unlike the fact situation in *Cherry* v. *Montgomery,* the uncontradicted proof is that Fowler, the buyer, was financially able to make the purchase. Fowler testified that he was in the retail furniture business, that he owned a farm, and that he was interested in other businesses, which he named. He stated positively that he had been financially able to go through with the contract. On cross examination he said that he had the funds to make the $7,500 down payment, without having to borrow any money. It will also be remembered that on June 25 Mr. and Mrs. James stated in their letter to Bennett that they hoped that Fowler would be the purchaser of the property at the increased price of $37,500. Thus there was an abundance of substantial evidence to support the jury's verdict upon this issue.

Affirmed.

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

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent because I think the court has capriciously pierced the corporate veil in holding that the evidence showed that Julian James had the authority to employ a real estate agent to sell corporate assets. I humbly submit that the case cited constitutes no authority for the majority's position. In that case (*Security Bank & Trust Co.* v. *Warren Light & Water Co.,* 170 Ark. 50, 278 S. W. 643), the evidence showed that one individual, S. R. Morgan, controlled and directed the affairs of the corporation, and the officers of the corporation obeyed

his orders. Morgan handled the funds and *completely dominated* the firm. Bonds of the company and a mortgage securing them were the subject of the litigation. They were signed and impressed with the corporate seal by the president and secretary of the corporation, pursuant to resolution of the directors, and put into Morgan's hands. Morgan negotiated a loan and pledged the bonds, representing that they were valid, binding obligations, notwithstanding the fact that they had not been authorized by the Arkansas Corporation Commission or countersigned by the trustee. Then, without recording the mortgage, the corporation sold its corporate property to Morgan & Co., which was actually S. R. Morgan. The court treated the corporation as a partnership and properly said that Morgan and his associates were clearly estopped by Morgan's representations to deny liability on the notes or to repudiate the mortgage. None of the essential facts is present here. There is nothing to show that Julian James dominated the corporation or controlled or directed its affairs, or even his wife, who was the other substantial stockholder. As a matter of fact, the record clearly discloses that Mrs. James had a voice in the affairs of the corporation and used it. The fact that she was willing to authorize a sale at a substantially higher price does not mean that she was willing to, or did, authorize one at the lower price, or the employment of an agent to sell at that price.

Apparently, the majority is treating the husband and wife as an entity, but this fiction was substantially weakened by the Married Women's Acts early in the century. I have reason to entertain serious doubt that it will be revived beyond the reach of this opinion.

I do not see how the letter of a corporate officer as an individual, undoing an unauthorized act, could possibly constitute either evidence of his authority or ratification of his acts by the corporation. Nor do I find any act whatever on the part of the corporation or Mrs. James to justify the application of the principle of waiver—the voluntary relinquishment of a known right. It is obvious that Mrs. James did not want to sell the property on the terms accepted by Fowler and made herself an obstacle to any corporate resolution to that effect.

James was president and his wife secretary of the corporation. James' authority was governed by Ark. Stat. Ann. § 64-310 (Repl. 1966). It was not shown that there was any corporate by-law or resolution authorizing him to sell the corporate real estate or to employ an agent to do so. The identity of the directors is not disclosed. They have very heavy responsibilities to minority as well as majority stockholders. It is not shown that the directors even knew of the action of James, unless he and his wife are directors. If so, at least one director did not approve. Thus, cases such as *Bodcaw Oil Company, Inc.* v. *Atlantic Refining Company,* 217 Ark. 50, 228 S. W. 2d 626, cannot apply, for there was neither evidence of acquiescence in this transaction nor in similar actions without prior authority. Furthermore, no question of implied authority was submitted to the jury.

The issue as to James' authority was clearly raised by the motion for a directed verdict. The court instructed the jury, over appellant's objection, that James, as president and majority stockholder, had legal authority to bind the corporation. Neither the circuit judge, appellee's counsel nor the majority has come up with any authority for this statement. I submit that the giving of the instruction and the denial of a directed verdict were error. I would reverse the judgment and remand for a new trial. Perhaps appellee can more fully develop the cause to justify a finding of agency.

SOLOMON FELDMAN, JR. *v.* ARKANSAS STATE BOARD OF LAW EXAMINERS

5-5545 464 S. W. 2d 789

Opinion delivered March 29, 1971

Solomon Feldman, pro se.

Jack Barron, for appellee.

LYLE BROWN, Justice. Solomon Feldman, Jr., appellant, made application to the Arkansas State Board of Examiners, appellee, to write the examination scheduled for March 1971. The application was denied. Appellant contends that the action of the board violates constitutionally secured rights; that such action is in conflict with a rule of this court governing admission to the bar; and that the petitioner was not informed of the rule change which would cut off his right to take the examination.

Appellant is a 1965 graduate of the Arkansas Law School. The night school graduated its last class in 1967 and thereafter ceased to operate. In 1968 the board of examiners took cognizance of the fact that an unusual number of the graduates of the school had lately failed the examinations. On July 27, 1968, the board of examiners terminated its approval of the school. That action was pursuant to our Rule XII, which says that a candidate for the bar must be a graduate of a law school approved by the American Bar Association or by the State Board of Law Examiners. (The night school was not on the approved list of the American Bar.) In order not to abruptly withdraw the right of the night school graduates to take the examination, the board made the termination of the school effective after the July 1970 examination. Consequently the graduates were allowed four more opportunities to take the examination, they being given twice a year.

Appellant has twice written the examination and failed—July 1969 and March 1970. He did not offer himself for examination in July 1970. The following month he made application to write the examination to be given in March 1971, and the denial of that application is the basis of this litigation. It should be noted that five years elapsed between appellant's graduation and the cutoff date. During that period the examination was given ten times.

Appellant contends that the rule as applied to grad-

uates of Arkansas Law School is unconstitutionally retrospective and violates the equal protection clauses of the Federal and State Constitutions. "Previous to the ruling of the Board, the petitioner had the right to take the examination again. That was a vested right which was divested upon the application of the present rule." Also, petitioner says: "The law as applied by the State Board discriminates against those persons acquiring a degree from the old Arkansas Law School, while it does not work against any other candidate for admission to the bar."

If the action of the board in removing Arkansas Law School from the approved list was not "invidiously discriminatory," and if the action had a "rational connection" with the fitness of a certain class of persons to practice law, then the board did not offend against the due process or equal protection clause of the Fourteenth Amendment. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957). The same authority recognizes the power of the states to set high standards of qualifications for the practice of law, just so long as they do not contravene the recited nondiscriminatory and rational connection rules above stated.

We think the action of the board conformed to the principles recited in *Schware.* The board decided that the academic standards of the school had so declined that an unusual number of the graduates were failing bar examinations; consequently it was thought to be to the best interest of the public and the profession that the school be removed from the approved list. In order to avoid hardship which might appear to be discriminatory, the removal of the school was set up to a future date which would give any graduate who had not taken or passed the bar examination a period of two years (four examination dates) in which to write the examination. It will be remembered that the appellant graduated in 1965; thus a period of five years lapsed before the cutoff date. It would not be illogical to conclude that a 1965 graduate who did not pass the examination in the five year period would not have retained the scholastic attributes needed to succeed in the profession.

Appellant classifies the 1968 action of the board as retrospective. He says he had a vested right to take the examination and that the board's ruling divested him of that right which he acquired at the time of his graduation. As we have previously pointed out, the board's action was made to work prospectively. Appellant was given four more opportunities to write the examination. He exercised that privilege on two occasions but for reasons unexplained he did not present himself for examination on either of the other two dates. The authority of the board to approve schools necessarily carried with it the power to revoke approval. When such revocation carries with it a proviso which reasonably protects students who entered the school at the time it was on the approved list, the action of the board has been upheld. *Blodgett, State's Attorney ex rel Bazil* v. *Boardman,* 18 A. 2d 370 (Conn. 1941).

Appellant contends that the rule which eliminated Arkansas Law School from the approved list is contrary to our rules promulgated by constitutional authority. Amend. 28, Ark. Constitution. He points out that this court has made the rule that an applicant has the right to take the bar examination a total of four times and after that only by special permission. Appellant argues that "The State Board of Law Examiners now say that any applicant formerly from the old Arkansas Law School cannot take the examination after July 1970." Appellant overlooks the fact that the right to take an examination is vested only in those who are graduates of a law school approved by the board or by the American Bar Association.

We come to the last point advanced by appellant. He says he was never informed of the new rule regarding the eligibility of Arkansas Law School graduates to take the examination. Here is the rule adopted in July 1968: "A discussion was had concerning the termination of the approval of Arkansas Law School. It was duly moved by Mr. Leflar and seconded by Mr. Hyatt that the approval of the Arkansas Law School terminate with the July 1970 examination." The motion, which was unanimously passed, is the only action taken by the

board with reference to the termination of approval of the school or the right of the school's graduates to write the examination. Clearly, of course, the purpose of the rule was to terminate the right, on the cutoff date, of a night school graduate to thereafter write the examination.

Appellant was his only witness before the board. He testified that the secretary gave him two information sheets concerning bar rules; that he had a conversation with Herman Hamilton when the latter was chairman of the board; that he conversed with Ray Thornton when he was board chairman; that he talked with board member Steele Hays; that he had several conversations with the secretary of the board; and that Mr. Hamilton expressed the opinion that he was not cut off from taking the examination. Appellant testified that at no time was he advised of the 1968 rule and he insisted that had he been so advised he would have taken the July 1970 examination. His evidence of the recited contacts was not contradicted. Our problem stems from the fact that we cannot tell from the record when those contacts were made (if in fact some or all of them were made). The point is, if this applicant made timely contact with one or more officers of the board and discussed with them (as he says he did) the subject of his writing the examination, he was entitled to be informed of the deadline imposed by the rule for his taking the examination. Unfortunately, the 1968 rule was never published. The last rules governing admission to the bar were published in 1963. The only archive in which the cutoff rule is to be found is in the minutes of the bar examining committee. (The responsibility for publishing the rules rests with this court; had we timely met that obligation the problem might not now be before us.)

We could say that the burden of establishing the dates of his contacts was on appellant, and affirm. However, since the committee is a creature of this court we prefer to avoid such a minor technicality and give the applicant the benefit of every doubt, just so our action does not offend basic law.

Upon request being made by appellant the board shall set a hearing date, at which the single issue of lack of notice will be explored.

Reversed.

FOGLEMAN, J., not participating.

ARKANSAS STATE HIGHWAY COMM'N *v.*
HANSEL HIGHFILL ET UX

5-5496 464 S. W. 2d 784

Opinion delivered March 29, 1971

Thomas B. Keys and *Hubert E. Graves,* for appellant.

J. Marvin Holman, for appellees.

JOHN A. FOGLEMAN, Justice. On the first appeal in this case, we found that there was error in the circuit court's failure to strike the landowner's value testimony in this eminent domain proceeding. We are not confronted with that problem on this second appeal because the trial court instructed the jury not to consider such testimony by Highfill on the retrial. The sole point for reversal is that there is no *substantial competent* evidence to support the verdict. We might well dispose of this case upon the basis that no objection was made to the value testimony of either of the two other witnesses called by appellees, and no motion was made to strike the testimony of either. The question of competency, if any actually exists, was waived by appellant. *Koelsch* v. *Arkansas State Highway Commission,* 223 Ark. 529, 267 S. W. 2d 4; *Sneed* v. *Reynolds,* 166 Ark. 581, 266 S. W. 686.

The real basis of appellant's argument here is that the witnesses based their opinions upon noncomparable sales. One of them, Hobart Yarborough, was unable to find sales of comparable land in the immediate vicinity, so he relied upon three sales of land some distance away. One of these was 2½ miles southeast of Clarksville, while the Highfill land was 13 miles west. Another was two miles up Spadra Creek and lay adjacent to the city limits. It was not demonstrated that there were any other dissimilarities in the two tracts. The witness stated that he had used this sale and another from Hardgraves to Morgan in testifying in this and other cases pertaining to creek bottom lands. The third sale was not considered by him when he made his first appraisal, *i. e.,* before the first trial in this case. Appellant also argues that Yarborough's professed lack of knowledge about other purported sales about which he was quizzed on cross-examination and his failure to consider other sales as comparable show that his testimony could not be substantial.

Separation of two tracts by distance where they are otherwise similar is not sufficient to show that the sale of one is not evidence of value of the other, where it cannot be said as a matter of law that they are in different localities. *St. Louis I. M. & S. Ry. Co.* v. *Maxfield,* 94 Ark. 135, 126 S. W. 83, 26 L. R. A. (n. s.) 1111. See also, *Arkansas State Highway Commission* v. *Ormond,* 247 Ark. 867, 448 S. W. 2d 354; *Arkansas State Highway Commission* v. *Clark,* 247 Ark. 165, 444 S. W. 2d 702. If the sales relied upon by appellees' witnesses were not comparable as a matter of law, it was incumbent upon appellant to call that fact to the attention of the trial court. *Baker* v. *City of Little Rock,* 247 Ark. 518, 446 S. W. 2d 253. This it did not do. On the basis of disclosures made with reference to the respective tracts we are unable to say that they are not comparable as a matter of law. Consequently, the weight to be given Yarborough's testimony was for the jury. *Arkansas State Highway Commission* v. *McAlister,* 247 Ark. 757, 447 S. W. 2d 649.

While appellant insists that Yarborough admitted that he did not consider the third sale (from Bailey Barns to Charles Larrison), we construe the witness' testimony to be that he did not consider it when he made his first appraisal, but did consider it as a basis for his testimony at the second trial. The knowledge (or lack of knowledge) of the witness as to other sales, if indeed appellees' data about them was correct, would only bear upon the weight to be given to his testimony. *Arkansas State Highway Commission* v. *Shields,* 249 Ark. 710, 460 S. W. 2d 746; *Arkansas State Highway Commission* v. *Ormond,* 247 Ark. 867, 448 S. W. 2d 354. We cannot say that it had no substance.

Virtually the same argument is made about the testimony of Harold Lewis, the other value witness called by appellees. One sale which Lewis used in his evaluation of the Highfill property was 12 miles northeast of Clarksville, another was 18 miles from the Highfill land, and he also referred to two of the sales used by Yarborough. He denied that other lands about which he

was asked on cross-examination were comparable to that of the Highfills.

We are simply unable to say that appellant has demonstrated that the verdict had no substantial evidentiary support.

The judgment is affirmed.

CITY OF FORT SMITH, ARKANSAS *v.* CHARLEY FRANCE ET AL

5-5452 465 S. W. 2d 315

Opinion delivered March 29, 1971
[Rehearing denied May 3, 1971.]

Shaw, Jones & Shaw, for appellant.

Floyd Rogers and *David O. Partain,* for appellees.

J. FRED JONES, Justice. This is an appeal by the City of Fort Smith from an adverse decree of the Crawford County Chancery Court in an action brought by the city to quiet its title to part of a 40 acre tract of land in Crawford County. Charley France was the pri-

mary defendant in the trial court. He had conveyed small parcels of the land in controversy to the other appellee-defendants and they all claim title by adverse possession. The chancellor confirmed title in Charley France and his wife and in their grantees. On appeal to this court the city relies on the following points for reversal:

> "The trial court erred in finding that appellees had acquired title by adverse possession.
>
> The trial court erred in overruling appellant's motion objecting to entry of judgment and for a new trial."

Without benefit of abstract of any of the exhibits, the facts of record appear as follows: On May 18, 1935, the City of Fort Smith purchased from Andrew France and Lula France, his wife, several tracts of land in Crawford County in connection with the creation of Lake Fort Smith and Shepherd Spring Lake as a source of water supply for the city. The city acquired, by purchase and by eminent domain, some 10,000 acres for the entire project, but that portion of the land in controversy lies along Clear Creek between the two lakes and is described in the warranty deed of conveyance as follows:

> "The Fractional Southwest Quarter of the Northwest Quarter of Sec. 30, Twp. 12 N., R. 29 W., except that part of said tract lying West of a bluff crossing said tract in a Northeasterly and Southwesterly direction."

While not germane to the issue here, but to emphasize the vagueness of description, this deed also conveyed the fractional west half of the southwest quarter of the same section with certain exceptions; one of which is as follows:

> "Beginning at the Southeast corner of Southwest Quarter of Southwest Quarter of Sec. 30, Twp. 12 N., R. 29 W., thence West to Frog Bayou (Clear

> Creek) thence along said stream in a Northerly direction *to a certain slough, thence along said slough crossing another slough and cornering at a certain Box Elder Tree, thence in an easterly direction passing a certain Elm Tree to East line of said SW¼ of SW¼,* thence south to place of beginning, containing 20 acres, more or less." (Emphasis added).

The deed also contains language as follows:

> "And because there are indefinite descriptions in our chain of title we hereby grant and quit claim to the City of Fort Smith, its successors and assigns, but without warranty of any kind all our right, title and interest in and to the following: * * * all that part of Southwest Quarter of Northwest Quarter * * * lying East of a bluff which crosses said Southwest Quarter of Northwest Quarter * * * in a Northeasterly and Southwesterly direction."

After the City of Fort Smith purchased the property in 1935, it caused to be erected, through a W.P.A. project, a fence more or less parallel with the bluff referred to in its deed. The face of the bluff apparently deviates to some extent from vertical inaccessible rock cliffs to steep areas where a person or an animal could go up or down but a vehicle of conveyance could not. Apparently an old road at one time ran along the foot of the bluff. The bluff did not run in a straight line; it jutted out at some places more than at others, but it was apparently well defined across the 40 acre tract here involved. The fence erected by the W.P.A. for the City of Fort Smith was erected in more or less a straight line east of the bluff and averaging about 150 feet from the face of the bluff.

On April 2, 1956, Lula France, as an unmarried person, conveyed by warranty deed to Charley France and Nellie France, his wife, land described as follows:

> "All that part of the Southwest Quarter of the Northwest Quarter of Section 30, Township 12 North of Range 29 West, which lies East of the

Shepherd Springs Road as now located over and across said forty and North of that part of said forty owned by the City of Fort Smith, Arkansas and that part of the said forty owned by Joe C. Bennet and others. Said deed to Joe C. Bennet as described in records office of the Recorder of Crawford County in deed record Book 178 at page 52. This deed conveys to the Grantee all interest in the above described land not already owned by her."

In 1966 Charley France and wife conveyed by warranty deeds to Smith and to Morris two small plots 50 by 100 feet in dimension and apparently lying within the area between the fence and the bluff claimed by the city. About this same time Charley France bulldozed a road from the top of one end of the bluff down into the old road near the foot of the bluff, whereupon the City of Fort Smith filed a suit in ejectment but dismissed it without prejudice and brought the present action to quiet its title. Charley France, Smith and Morris pleaded adverse possession for more than seven years. The chancellor found in favor of France, Smith and Morris and decreed title in them by adverse possession. The chancellor who heard the testimony, made his findings of fact and conclusions of law but died before the decree was actually entered thereon. The city's motion for a rehearing was denied and the decree was entered by the newly elected chancellor on the findings and conclusions of the chancellor who heard the case.

THE APPELLEES' EVIDENCE

Logan France, a brother of the appellee, Charley France, testified that he actually made the deal for the sale of the land from his parents to the City of Fort Smith and that his father and mother sold approximately 100 acres of land to the city out of the 160 acre tract they owned. He says that at the time of the sale the City of Fort Smith simply wanted 100 acres of the bottom land, and that in 1936 the city established its fence on what was supposed to be its west boundary line. He testified that none of the land was ever

surveyed prior to the erection of the fence and that his mother and father, while living in a house on top of the bluff, continued to use the property between the bluff and the fence for cow and calf lots and to impound their other livestock. He testified that his brother, Charley, lived on the same property with his mother and father and that after his father's death in 1952, Charley continued to use the property in the same manner as used by his father and mother and had continued to so use it until the present time. He testified that when the fence was built, the city fenced in the county road which was rerouted along the top of the bluff, and that his father connected fences across the old county road for the city, and so he could have fences connected from the bluff to the city fence on the south end and also on the north end of the property involved. He testified that some bulldozing was done by Charley on a road under the bluff about seven or eight years ago. He testified that Charley lives approximately 300 feet from the north line of the property in question; that his brother, Charley, used the property even before his father passed away in 1952, and that he has continued to use it for livestock pens ever since. He testified that his mother lived in a little house by the side of Charley's house on the top of the bluff, and that there was a trail leading down from Charley's house to the property between the bluff and the fence where the livestock was kept. He testified that the trail had been in use for more than 40 years, and that he traveled it in going to school when he was a child. He testified that a part of the property in question was planted in corn in 1935 and that the city built the fence diagonally through the field where the corn was planted.

Mr. W. F. Wright testified that he had lived in the area of this property for 62 years; that he farms, raises chickens and cattle, and does some veterinary type work at times. He testified that about in 1960 he was requested to administer a milk fever shot to one of Charley France's milk cows and that he did so. He testified that the cow was penned in a lot between the bluff near Charley's house and the city reservoir fence, and he believes Charley had some other livestock in the lot. He

testified that he was familiar with the area between the bluff and the city fence and that it has been in constant use by Charley France and his family through the years.

On cross-examination this witness testified that he had rented land for a period of five or six years from the city for cow pastures inside the fence, but not between the fence and the bluff. He testified that he knew there had been some bulldozing work done on the property in the past years; that his nephew, Lee Wright, did some dozing work for Charley France on the property several years ago.

Mr. Burton Vaught testified that he lives in Mountainburg, is 49 years of age, grows broilers and is president of the school-board in Mountainburg. He testified that he is well acquainted with the property involved, and that the fence built by the city runs 100 to 150 feet from the bluff, depending on the way the bluff "winds down through there." He testified that Charley France kept livestock in a lot below his house between the bluff and the fence; that he kept milk cows in the lot; that Charley had a mule in the lot at one time; that he purchased a horse from Charley in 1960 or 1961, maybe 1959, and that the horse was in the lot between the bluff and the fence. He testified that the lot was enclosed by fences across each end of the strip between the bluff and the fence the city built. This witness testified that he purchased the horse for the purpose of skidding logs; that his brother purchased all of the timber on the reservoir area from the City of Fort Smith, and that he did the logging of the timber his brother had purchased. He testified that the city caretaker for the reservoir property showed him the property lines where he was to cut timber. He says that the fence along the lake under the hill was pointed out to him as the property line; that he was told he could cut anything inside the fence for that belonged to the city, but that he was to cut nothing outside the fence.

On cross-examination this witness testified that he was fairly familiar with all the 10,500 acres the city owns around the lakes and that at one time all the city

land was either fenced or had posts around it. He testified that the caretaker told him that,

> "Anything inside that fence was city property. * * * said just cut inside the fence—its all city property. I said—'is there any danger getting on anybody elses up there?' And he said, 'Not so long as you stay under the fence.' "

One of the appellees, Charley France, testified that he lives on the bluff overlooking the property involved; that there is a road as well as a footpath, or trail, from where he lives down through the property. He testified that the property was deeded to him by his mother in April, 1956. He testified that his father and mother kept cattle, horses, goats and hogs on the property involved, and that he had continued to maintain the corral, or lot fences, as his father and mother had done; and had continued to keep his mules, calves and hogs enclosed on the property. He testified that he had a Mr. Lee Wright do some bulldozing on the property several years ago, and that he would estimate that it was about 12 or 15 years ago. He testified that the road came up from around the end of the bluff and extended through the distance of the 40 acre tract. He testified that he had this entire road worked with a bulldozer by Mr. Wright; that Mr. Wright "just brought the bulldozer down the hill and through the land to the end and fixed the road better than it was." He testified that after Mr. Wright did the bulldozing work he had the road worked with a bulldozer two other times; once by Bobby Joe Centers and once by Buck Fath. He testified that after the bulldozing work was done he planted some crops on one end of the area, and that he has used the property constantly since his mother deeded it to him.

On cross-examination Charley France testified that Bobby Centers worked the road about three years ago. He testified that his mother and father put fences in from the bluff to the fence built by the W.P.A. on each end of the land involved; that he continued to maintain the fences and use the property between the bluff and the W.P.A. fence. He testified that in maintaining the

road Mr. Centers may have pushed out big rocks and some trees with the bulldozer and that Mr. Wright, some 12 or 14 years ago, did the same with his bulldozer. He says that the road has remained open and passable ever since Mr. Wright did the bulldozing work some 12 or 14 years ago. He testified that he does not know whether his father and mother had permission from the city to use the land or not, but that they continued to use it after they sold the land to the city.

Mr. Claude Morris testified that he purchased a team of mules from Charley France; that he is familiar with the property involved and that when he purchased the mules, Mr. France had them, as well as other livestock, enclosed on the area involved. He testified that he had bought a lot from Charley in the area and had a well drilled on it. On cross-examination he testified that he had known Charley all of his life and had spent 29 days in the penitentiary with Charley for cattle rustling.

THE CITY'S EVIDENCE

Dominic Leraris, a civil engineer, testified that he surveyed the land involved at the request of the city in 1967; that he was first on the land June 27, 1967, and that a bulldozer was working a road on the land when he was there.

Mr. Roy E. McCann, Jr., a commercial photographer, identified a number of pictures he took of the area and both he and Mr. Leraris testified that in walking over the property they encountered no fences connecting the city fence line with the bluff.

Mr. Bob Sult testified that he had been superintendent of the reservoir for the City of Fort Smith and had been in almost daily contact with the area involved since December, 1962. He testified that when he first assumed supervision of the reservoir area, it was his understanding that the property involved between the bluff and the fence line belonged to the city. He testified that it was in the Spring of 1965 when he first learned that Charley France was claiming adverse to the

city. He says that on that occasion Charley advised him that he was going to cut a road down under the bluff and he advised Charley it was city property. He says Charley responded that if anyone stopped him it would be the sheriff (this was denied by Charley who testified that he and Sult did not get along and that Sult does not advise him on anything). Sult testified that he is pretty sure it was in 1965 when Mr. Centers was on the property with a bulldozer. He says that he had a work crew place barricades across the road but they were removed. He says that they then drilled holes across the road and set steel pipes in concrete and that the pipes were removed before the concrete set up. He testified that he did not know whether Charley France moved the barricades or not, but he does know Charley had him arrested for blocking a public road.

Mr. Sult testified that he noticed an old fence running out from the bluff but that he does not believe it connects with the city fence. He testified that when he first went up into the area in 1962, Mr. Cole (a former superintendent) went with him and that Mr. Cole pointed out to him that the land between the fence and the bluff belonged to the city. This witness testified that up until this present lawsuit was started, no cattle were on the property involved during the time he had been superintendent in so far as he knows. Mr. Sult testified that Lake Fort Smith had a fence all the way around it when it was first built and that Lake Fort Smith takes in the property in question. He testified that the fence has fallen in bad repair and that he attempts to keep all the old roads leading into the area blocked and the cattle run out of the area.

Mr. John Luce testified that he had worked for the City of Fort Smith for a period of 41 years; that he was familiar with the area when Lake Fort Smith and Lake Shepherd Springs were formed, and remembers when the property in question was acquired. He testified that it was his understanding that the city was to get all of the 40 acre tract involved in this case east of the bluff. He testified that it had been his impression that the city owned this property to the bluff until the

dispute arose a few years ago with Mr. Charley France, and that he first learned of the adverse claim about 1966. He testified that it was his impression all along, as superintendent of the property involved, that the city owned and controlled the land between the bluff and the fence line. He testified that the land along the very foot of the bluff was pretty rugged; that in many instances the fences were erected along the boundary lines of the city acquisition, but that in most instances the city was not particularly interested in property boundary lines and placed its fences in the most convenient location to keep cattle and livestock out of the water supply. He testified that he first learned of the adverse claim of Charley France when the obstructions he had placed in the old Shepherd Springs Road were removed and he sent some men to the area to replace the obstructions. He testified that there was no roadway from the top of the bluff to the old road where he erected the barricades until Charley France had a roadway cut around the bluff. He testified that this was done in 1965 or 1966 (he thinks it was 1966), and that when steel pipes were put in the road they were removed. He testified that livestock should not have been permitted to run on the city property between the bluff and the fence, and that there was not supposed to be any livestock in that area. He testified that there was a caretaker already hired when he became superintendent in 1945, and that he employed two caretakers in succession. He testified that as far as he knows the caretakers knew where the city boundary lines were; that some of the fence posts burned out, and the fences fell into disrepair over the years for lack of money or personnel to replace or repair them. He testified that the area surrounding the lakes was open range area when the lakes were impounded, and that the main object of fences was to keep cattle out.

On cross-examination this witness testified that he was not superintendent at the time the fence was built; that he simply knows that a fence was built and that he surmises that the fence was to keep the cattle out of the water. He testified that he did not know how long the old road had been between the bluff and the fence. He stated an opinion that livestock could get down

from the bluff but that a wagon or automobile could not. He testified that from 1935 when the city acquired the property, until 1965 or 1966 when he saw a bulldozer on the property, that the city had caretakers in the area and that they attempted to keep cattle out of the area. He testified that he did not know that cattle were running in this area from 1935 until 1965.

Charley France on recall identified the deed from his mother to himself and wife and testified that the description contained in the deed was intended to describe all of the property owned by her in the 40 acre tract.

The discovery deposition of Mrs. Helen Sax was submitted in evidence and she testified that her husband, who is incapacitated, was the first caretaker of the reservoir area. She testified that the W.P.A. built the fence soon after the property was acquired by the city, and that there was no fence built from the bluff to the W.P.A. constructed fence.

On cross-examination Mrs. Sax testified that it had been 30 years, or a little better, since she had been to the property. She testified that the fence went around the city property and that was the purpose of the fence. She testified that it was too difficult to build a fence up against the bluff and that the property between the bluff and where the fence was built belonged to the city and was not fenced in. She testified that Charley France stole some cattle and accused her husband of stealing them.

OPINION

In 1937 Mr. and Mrs. Andrew France conveyed two small tracts by warranty deeds to H. N. Pollock and to Dr. J. S. Gregg. The descriptions in both of these deeds are by metes and bounds beginning at the northwest corner of the "Elsenrath tract" and running to "bottom of bluff joining Fort Smith Lake property, thence South along bottom of bluff. . ." In October, 1949, Mr. and Mrs. France conveyed by warranty deed to John B. Dahin

et al, a tract of land in this same 40 acre tract described, in part, as follows:

> "Starting at the North East corner of the forty for a place of beginning, thence South to bottom of bluff and then following said bottom of bluff line in a Southwesterly direction 215 yards to hollow branch this line being the dividing line between the A. J. France and the Ft. Smith lake property."

There is no evidence in the record that the city ever had its lands surveyed, or ever marked its boundary lines, prior to the institution of this litigation. It is obvious from the descriptions in the 1937 deeds to Pollock and Dr. Gregg that Andrew and Lula France recognized the "bottom of the bluff" as the division line between the property they retained and the property they sold to the city. Andrew died in 1952 and there is considerable evidence that Charley continued to use the land for livestock pens and corrals from 1952 until this suit was instigated. Mr. Sult and Mr. Luce testified that no one was supposed to keep cattle or livestock on the city land between the bluff and the fence, and that the caretakers attempted to keep cattle out of the area. Charley France testified that the words "west of the bluff" as described in the deed to the city, could be construed to mean anywhere between the vertical rock cliffs shown in some of the photo exhibits and the creek at the foot of the hill. In other words, it is his contention that the "bluff" is not a vertical wall across the 40 acre tract, but in some places is a steep hill rather than a sheer wall; and that the terms "west of the bluff" and "bottom of the bluff" as used in the deeds, are ambiguous terms in defining the land boundary line.

In any event, we conclude that the chancellor's findings are not against the preponderance of the evidence that Charley France and his grantees held and used the property openly, notoriously and adversely to the city for more than the statutory period of seven years. Ark. Stat. Ann. § 37-101 (Repl. 1962); *Montgomery* v. *Wallace,* 216 Ark. 525, 226 S. W. 2d 551.

We find no merit in the city's second point. It appears that the case was fully developed before Chancellor Dunn, prior to his death, as evidenced by his findings of fact and conclusions of law. Chancellor Kimbrough had authority to enter the decree and we find no abuse of his discretion in doing so and in his refusal to reopen the case for a new trial. *Hyder* v. *Newcomb,* 234 Ark. 486, 352 S. W. 2d 826.

The decree is affirmed.

FOGLEMAN, J., concurs.

HARRIS, C. J., dissents.

JOHN A. FOGLEMAN, Justice, concurring. I would affirm the decree, because I do not feel that appellant has met its burden on appeal.

In cases where location of a boundary line, with overtones of adverse possession, is involved, we have held that the question is determined upon a preponderance of the evidence and that we must affirm a chancellor's decree unless his holding is clearly against the preponderance of the evidence. *Kieffer* v. *Williams,* 240 Ark. 514, 400 S. W. 2d 485. This is simply an application of the long-standing rule that this court will not, on appellate trial de novo, reverse a chancery court decree making findings of disputed questions of fact on conflicting evidence unless they are clearly against the preponderance of the evidence. *Hunter* v. *Dixon,* 241 Ark. 725, 410 S. W. 2d 389. It is incumbent upon an appellant to establish that such findings are erroneous. *City of Little Rock* v. *Sunray DX Oil Company,* 244 Ark. 528, 425 S. W. 2d 722.

In cases where testimony concerning descriptions, lines, boundaries, corners, location of buildings, physical evidence of points, areas, focal points, etc. is indefinite, we defer largely to the chancellor's conclusions regarding matters ambiguous in print. *Hopkins* v. *Williams,* 215 Ark. 151, 219 S. W. 2d 620. When we cannot be assured that all pertinent evidence considered by the

chancellor is before us, in boundary cases, we must affirm his decree. *Johnson* v. *Smith,* 215 Ark. 247, 219 S. W. 2d 926.

I am simply unable to say, upon the abstracts of the record before us, that the chancellor's holding is erroneous or clearly against the preponderance of the evidence. I am compelled to defer to the chancellor's conclusion under the circumstances. I cannot follow the critical testimony on the points involved, partly because I have no assurance that all pertinent evidence before the chancellor is available to us. In order to follow the testimony with any degree of understanding it would be necessary that each of us have available an abstract or reproduction of many of the exhibits to which the witnesses, the attorneys and the chancellor referred. This is the reason that our Rule 9 (d) requires an abstract of the record of such material parts of the pleadings, proceedings, facts, *documents and other matters* in the record as are necessary to an understanding of all questions presented to this court. See Rule 9, Supreme Court Rules, 3 A, Ark. Stat. Ann. (Supp. 1969). Compliance with that rule specifically requires:

> Whenever a map, plat, photograph, or other exhibit must be examined for a clear understanding of the testimony, the appellant shall reproduce such exhibit by photography or other process and attach such reproduction to the copies of the abstract filed in this court and served upon the opposing counsel, unless this requirement is shown to be impracticable and is waived by the court upon motion.

It was not shown that it was impracticable to reproduce the exhibits in this case, and the requirement was not waived by this court. It seems that reproduction of at least one important exhibit, a plat referred to in oral argument, would have presented no difficulty.

We have affirmed decrees previously upon the basis of my concurrence. In *Smock* v. *Corpier,* 226 Ark. 701, 292 S. W. 2d 260, we said:

> In reply to the appellee's criticism of the abstract the appellant insists that it is unnecessary to abstract the testimony in a chancery case, for the reason that this court tries the case *de novo.* The appellant is mistaken in her understanding of our practice. The case is tried *de novo,* it is true, but the trial is upon the evidence as abstracted by the parties and not upon the original record. We have repeatedly required compliance with Rule 9 in equity cases. *Davis* v. *Spann,* 92 Ark. 213, 122 S. W. 495; *Norden* v. *DeVore,* 207 Ark. 1105, 184 S. W. 2d 585; *Reep* v. *Reep,* 219 Ark. 270, 241 S. W. 2d 262.

It is with extreme reluctance that this court considers affirmance of a decree pursuant to Rule 9 (e). It is, and will be increasingly, appropriate that we so act more frequently in view of the case load of this court. My brother Jones has done an excellent and thoroughly painstaking job of analysis of the testimony of the witnesses. I submit that it could not have been done without his reviewing the full transcript of the testimony. I doubt that any other member of the court has the understanding of this testimony to be gleaned from such a tedious and time-consuming perusal. I am aided to some extent by the product of his labors, but I am still unable to exercise any independent judgment as to where the preponderance of the evidence lies on the sharply disputed fact questions involved. I can only concur in the affirmance of the decree.

CARLETON HARRIS, Chief Justice, dissenting. From the standpoint of proof, I consider this case to be very close, but I do not think that appellees sustained their view. Not only that, but in my opinion the equities are entirely with the City of Fort Smith. Admittedly, the city purchased the property in 1935 from the parents of appellee, Charlie France. Now, France, and others to whom the parents had subsequently conveyed part of the land (after conveying it to appellant) are claiming this same land by adverse possession. I think the evidence indicates that the possession of appellees commenced with permission by the city, and I cannot agree

with the majority that appellees have established actual, open, notorious, peaceful, continuous, hostile, and exclusive possession for more than seven years. Of course, there must also be the intent to hold adversely and against the rights of the true owner.

This land is an absolute necessity to the City of Fort Smith in protecting its water supply (Lake Fort Smith) and having purchased the land, it is hardly fair that the city be required to again acquire the same land through eminent domain proceedings.

I respectfully dissent.

VIRGIL BROOKS ET UX *v.* C. S. JOHNSON ET UX

5-5491 465 S. W. 2d 103

Opinion delivered March 29, 1971
[Rehearing denied April 26, 1971.]

Ben E. Rice and *U. A. Gentry,* for appellants

Howell, Price, Howell & Barron, for appellee.

CONLEY BYRD, Justice. Appellants Virgil and Marcell Brooks, husband and wife, appeal from a decree finding that appellees C. S. and Annie Johnson, husband and wife, are the owners of and entitled to the possession of a 16 foot disputed strip of ground. For reversal appellants contend that the trial court erred in finding the Johnsons are the owners of the property in controversy for the following reasons:

> "1. The deed which was the basis of plaintiff's ownership of the property was never introduced into the record.
>
> "2. Assuming that the deed purporting to convey the property to the plaintiffs was sufficiently identified and made a part of the record, said deed is void for indefiniteness and conveys nothing.
>
> "3. Assuming further that the deed was made a part of the record and should be considered, the plaintiffs had the burden of deraigning title from the sovereign and the mere introduction of a deed conveying the property to appellees even though the description was sufficient, did not constitute a deraignment of title.
>
> "4. The Court erred in refusing to confirm and quiet the defendant's title, it being undisputed that the defendant had had the actual, open, continuous and adverse possession of the property for a period of 20 years or more."

The Johnsons instituted this action in the trial court alleging that they "are now, and for a long time hitherto have been the owners of that certain piece or parcel of land situated, lying, and being in the county of Pulaski, State of Arkansas, and described as follows:

> "Fifty-eight and four-fifths (58 4/5) acres, more or

less, lying in the Northeast quarter (NE 1/4) of Section 33, Township Three (3), Range Ten (10) West, said 58 4/5 acres, more or less, running North and South the entire length of said Northeast quarter of Section 33 and lying immediately East of the Thirty-three and one-third (33 1/3) acres deeded to Matilda Johnson."

Pursuant to a motion to make the complaint more definite and certain, the Johnsons filed a response setting out a corrected property description according to a survey made by L. M. Harp on June 4, 1969.

Appellants' answer and counter-claim, as abstracted by them, is as follows:

"ANSWER

"They deny, both generally and specifically, each and every allegation contained in plaintiffs' complaint and amendments thereto except as hereinafter pleaded and admitted; that plaintiffs do not have title to an accurately described piece of property and their rights in and to the property occupied by defendant and intervenor [Mrs. Brooks] are inferior to the rights of defendant and intervenor in and to the property so occupied and possessed by defendant and intervenor.

"COUNTERCLAIM

"The defendant and intervenor allege that they are the record owners of and reside on the following described property situated in Pulaski County, Arkansas:

'A part of the East One Half (E 1/2) of the Northeast One Fourth (1/4) of Section Thirty Three (33), Township Three (3) North, Range Ten (10) West of the Fifth Principal Meridian, and more particularly described as follows: Beginning at the Northeast corner of said subdivision, thence West Sixteen (16) chains and

seventy eight (78) links, thence South Forty (40) chains and Thirty Two (32) links to Quarter Section line, thence East Three (3) chains and Twenty Eight (28) links, thence North Ten (10) chains, thence East Thirteen (13) chains and Fifty (50) links to the East line of said subdivision, thence North to point of beginning, less and except Four (4) acres, more or less, on the North side thereof, used as a cemetery, containing Fifty Four and 15/100 (54.15) acres.'

"That in addition to owning the foregoing property defendant and intervenor are the owners of an additional strip of land 16 feet wide running along the entire Western edge of the aforementioned property; that their ownership thereof arises out of their continuous possession of said property since June 22nd, 1948, in an actual, notorious, hostile, and exclusive manner with the intent to hold adversely to the claims of all other persons; that the plaintiffs have had notice of the aforementioned adverse possession since June 22nd, 1948; that said lands have been fenced and closed to a point of intersection with a creek traversing the property owned by defendant and intervenor; that said boundary fence to the point of intersection with said creek has constituted the boundary between the property owned by defendant and intervenor and plaintiffs since June 22nd, 1948, and even prior thereto, and plaintiffs have acquiesced thereto. Defendant and intervenor pray the plaintiffs' complaint and amendment thereto be dismissed; that title to the 16 foot strip of land along the western boundary of land owned by defendant and intervenor be quieted against the claims of the plaintiffs. Filed May 28th, 1970."

Appellee Callie S. Johnson testified that both his and the Brooks property were at one time owned by his grandfather. He inherited the land in 1929. According to him, during the free stock range era, approximately 1914 or 15, his father and a predecessor of Mr. Brooks each fenced one side of a lane for their cattle's use to

go to a free range in a big bottom north behind their property. The lane was on their common boundry, and each owner fenced 16 1/2 feet inside his property. Over the years the fence set back on appellant's property had fallen down and been destroyed. However, Brooks' predecessors in title recognized the true boundary as the boundary between the two properties. When Brooks bought the property in '47 or '48, Johnson informed him that Mr. Thompson, Brooks' immediate predecessor, had inadvertently built a henhouse over on Johnson's property. He said that Brooks at that time offered to move it and that he suggested Brooks could leave it if he would not build any more encroachments. A short time later the henhouse was torn down. Johnson said the present controversy occurred about four years ago when he talked to Brooks about building a common boundary fence on the true line. At that time Brooks wanted to join in building a common boundary fence but wanted to put it along the old fence.

Appellee Annie Johnson testified that the day Brooks bought the property from Thompson, she pointed out to Brooks the location of the true boundary line and advised him that the fence was not the line. She also recalled the incident referred to by her husband about the removal of the building and testified that the building was removed about a week later but she did not know who removed it.

Claude Stanfill testified that he bought the property now owned by Brooks in 1932, and owned it for 12 years. He traded it to Mr. Thompson. During the time of his ownership he was aware of the true boundary between his property and the Johnsons. During that time he used the strip of land belonging to Johnson under an agreement with Johnson and when he sold the land to Thompson he informed Thompson that the 16 feet was being used with Johnson's permission.

Appellant Brooks, on the other hand, testified that he purchased the property in 1948, and that when he began work on the barn he recalled Mrs. Johnson telling him that the fence was 16 feet over on her side of the

boundary. He said that he then informed her that he bought the property with the fence as the line and would not discuss it further. From the time of his purchase up until the trial he had pastured the area up to the fence and had regularly repaired the fence. His first discussion with Mr. Johnson occurred approximately 4 or 5 years ago when Mr. Johnson wished to move the fence over 16 feet. Brooks says that he did tear down the henhouse but only because it was unsightly. He denied Johnson's conversation about the house. Brooks said Johnson acquiesced in his use of the fence as a boundary until about 4 years ago. At that time Johnson wanted to sell him the strip of property and he told Johnson that he did not feel he should buy his own property. Johnson then wanted to build a partnership fence and his answer was that he would meet him half way—*i. e.,* he would back over one foot and build a fence but he would not build a partnership fence on the alleged line that Johnson had chosen. Admittedly thereafter Johnson attempted to have a survey made and Brooks caused Johnson to be arrested for trespassing. The boundary as surveyed both by his and Johnson's surveyors would come within 10 feet of Brooks' house. Brooks maintains that he has always mowed up to the fence line under a claim of right. On cross-examination Brooks testified that his deed introduced into evidence outlined the boundaries of his property.

George West testified that he surveyed the lands for Brooks and that his survey showed the line between the Johnson property and the Brooks property and also the fence line in dispute.

L. M. Hays surveyed the property for the Johnsons. In arriving at the description of the Johnson property he used Johnson's abstract of title, Brooks' deed and a copy of a recorded survey made by Francis H. Conway under date of Aug. 7, 1901. In making his survey, Hays found wire embedded in the trees along the true boundary line between the two properties.

We find no merit in appellant's first three points. Each point is premised on the proposition that the

Johnson failed to deraign that title necessary to support an action in ejectment. While it is true that the action as originally filed was in effect an action in ejectment, any lack of equity jurisdiction was cured by appellant's counterclaim.

Johnson, without objection, was permitted to testify from his own knowledge that his grandfather at one time owned both the lands now owned by him and by Brooks. He also testified with reference to the different persons who had held both tracts under the common owner. While such testimony may have been subject to the best evidence rule, in the absence of such objection, it certainly deraigns the title of both parties from a common source.

Furthermore Johnson testified that the persons under whom Brooks holds his title had recognized his title to the true line. This testimony was substantiated by Claude Stanfill who stated that he was a predecessor in title of Brooks and that he got the permission of Johnson before he tied his pasture fence to the fence in question.

The general rule is that a party in an ejectment suit or an action to quiet title must recover upon the strength of his own title. However, we pointed out in *Collins* v. *Heitman,* 225 Ark. 666, 284 S. W. 2d 628 (1955), where the parties trace their title to a common source, the one must prevail who has the superior equity. In this case it appears that the superior equity or *prima facie* title stands in Johnson. See *Weaver* v. *Rush,* 62 Ark. 51, 34 S. W. 256 (1896); *McCoy* v. *Anderson,* 137 Ark. 45, 207 S. W. 213 (1910); and 5 ALR 3d 375, § 7.

The evidence with respect to the appellants' adverse possession is conflicting. The Johnsons testified that Brooks recognized their title and agreed to remove the henhouse at the time Brooks purchased the property in 1948. Brooks, on the other hand, denies that he recognized the Johnsons' title and claims that at that time he asserted his ownership to the fence.

In *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444 (1906), we stated the applicable rule in this language:

> ". . . If one before the statutory period has run, and before he has acquired title by adverse possession, acknowledges or recognizes the title of the owner, such recognition will show that his possession is not adverse, and the statute of limitations will not commence to run against the owner until the adverse claimant repudiates the title of the owner. . . ."

In *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830 (1918), we pointed out that where the entry is permissive the adverse possession statute will not begin to run against the owner until an adverse holding is declared and such notice is brought to the knowledge of the owner.

Whether Brooks recognized the Johnsons' title as the latter testified or whether he asserted his ownership to the fence at the time of his purchase as he testified were issues of credibility. From this record, we cannot say that the Chancellor's finding in favor of appellees is contrary to a preponderance of the evidence.

Affirmed.

BURNISS SHAW WILSON ET AL *v.*
J. F. McDANIEL ET AL

5-5479 465 S. W. 2d 100

Opinion delivered March 29, 1971
[Rehearing denied April 26, 1971.]

Tompkins, McKenzie & McRae, for appellants.

McKay, Chandler & Choate, for appellees.

FRANK HOLT, Justice. Appellants instituted suit to establish their claimed interest in, and for partition of, the 40-acre tract of land here in issue. The present appeal is a sequel to *Wilson* v. *McDaniel,* 247 Ark. 1036, 449 S. W. 2d 944, wherein the pertinent facts of this extended litigation are comprehensively detailed. There we reversed a summary judgment for appellees because several material issues of fact were unresolved. The case was remanded, and a trial on the merits resulted in a decree once again favorable to appellees. Hence this appeal.

The land in issue is part of a 240-acre tract owned by H. U. Hancock when he died intestate in 1905. Surviving him were his wife, Eunice, two sons, two daughters, and the five children of a predeceased daughter, Palestine Scott, as his heirs. The two sons, the two daughters, and two of the five Scott children (Henry and B. C.) conveyed to Eunice whatever interests they had in 80 acres which included the 40 acres now in litigation. The deed was dated November 18, 1905, but not recorded until 1930. Eunice died in 1907 and, by a will probated in 1908, devised "all of [her] property" (without enumerating or in any way specifying what constituted that property) to J. H. Hancock, one of her sons, for life and then to his daughters, Myrtle and Bertha, to share and share alike and, at their deaths, to their children. Her will predated by several months the 1905 deed to her.

By an exchange of instruments in 1913 Bertha (who is still alive and without issue) received whatever interests J. H. and Myrtle had in the contested 40-acre

tract which she conveyed the same year to A. S. Frazier through whom appellees now claim title by mesne conveyances. Appellees' predecessors in title entered into possession of the lands in 1913, and appellees and predecessors have held possession and paid all taxes since that time. Myrtle died in 1965, and her two daughters and a son and his wife, appellants herein, now claim an undivided 22/50 interest in fee in the 40 acres, exclusive of a 3/35 interest never conveyed to Eunice since three of the Scott children did not sign the deed. Also claimed is an undivided 22/50 interest as remaindermen of Bertha's life interest. (As previously indicated, she had conveyed her interest in 1913 to appellees' predecessors in title.)

The chancellor found that the 1905 deed purportedly conveying 22/25 interests in the lands to Eunice was not delivered during her lifetime and, therefore, was ineffective. He also found that appellees' predecessor in title, J. R. McDaniel, took possession of this 40 acres in 1913 and that he and his successors in title have had continuous possession with payment of taxes on the land from 1913 to date. Appellants' complaint was dismissed for want of equity, and title was quieted and confirmed in appellees. For reversal, appellants assert two contentions: (1) The chancellor's finding that the dead was not delivered is against the preponderance of the evidence; and (2) the statute of limitations in adverse possession does not run against remaindermen until the death of the life tenant.

Appellants argue that a presumption of delivery exists since the deed, duly executed and acknowledged, was properly recorded, and also since it was in the possession of Myrtle, a successor to the grantee's title. *Smith* v. *Scarbrough,* 61 Ark. 104, 32 S. W. 382 (1895). They further assert that this presumption of delivery of the deed is buttressed by other facts such as: The tax records reflect that the 1906 taxes on the purportedly conveyed 80 acres (which included this 40 acres) were assessed to and paid by Eunice; she continued to live on this land with her grandchildren, Myrtle and Bertha, until her death in 1907; her son, J. H. Hancock and his

two children, Myrtle and Bertha, continued to live on the land until approximately 1913; the taxes for 1907 through 1911 were assessed to and paid by J. H. Hancock; the 1912 taxes were paid in 1913 by Bertha and her husband; a suit for partition instituted in 1908 by the heirs of H. U. Hancock did not include contestation of those 80 acres, but was restricted to the remaining 160 acres of H. U.'s original 240-acre tract; the exchange of deeds in 1913 between Myrtle and Bertha dividing the lands and Bertha's conveyance of her interest in 1913 to her uncle, A. S. Frazier, who in the same year conveyed his interest to appellees' predecessor in title; in an action brought in 1914 by the five Scott children involving this property, J. H. Hancock and Bertha claimed title under the 1905 will and deed, which were exhibits in that litigation; and Bertha, in the present action, testified to some of the occurrences which she could recall surrounding the execution of the deed.

While the recording of a duly executed and acknowledged deed, as well as its being found in the possession of the grantee (in 1958), will raise a presumption of delivery, the other factors enumerated by appellants do not conclusively establish that presumption. The taxes may well have been assessed to Eunice simply because she, thinking the 80 acres were hers irrespective of delivery of the deed, requested that they be charged to her. A partition suit need not involve all lands in which ownership is claimed. Furthermore, proof that the heirs simply considered Eunice to be the owner of those 80 acres does not establish delivery of the deed. Similarly, the fact that J. H. Hancock and Bertha made prior claim under the deed or that Bertha could recall and testify to its execution does not conclusively amount to proof of its delivery.

Upon first appeal of this case, we enumerated certain factors which raised the possibility or factual issue that the children and grandchildren of Eunice individually agreed to convey their interests to her; that such agreement was conditioned upon the premise that everyone would join in executing the deed; and that since this did not occur, the deed was not delivered. *Wilson* v.

McDaniel, supra. This position certainly appears to be supported by the fact that the grantors are designated in the deed as "The heirs and legatees of H. U. Hancock now deceased."

In our former opinion we reviewed the litigation instituted in 1914 by the five Scott children, including the two who signed the 1905 deed, against J. H. Hancock, Myrtle Hancock, Bertha Hancock Bethany and her husband. In that action they asserted that Eunice Hancock owned no interest in this 40 acres (and also other lands) except dower and homestead, or a life estate which expired at her death. These five heirs asserted that the defendants were denying the plaintiffs' title and interest in the lands. The three defendants answered and admitted that three of the five Scott children held a 3/5 of a 1/5 interest, however, that the two[1] who signed the 1905 deed had no interest. The deed was thus put in issue. In a substituted complaint these five Scott children again alleged that Eunice Hancock, their grandmother, had only a life estate in the lands and, therefore, could not convey the lands by her will. In a 1916 decree the trial court agreed with the plaintiffs, the Scott children, and held all five of them to be owners of an undivided 1/5 interest in the lands.

After reciting these proceedings in *Wilson* v. *McDaniel, supra,* we said:

> "* * * The basis of the rendition of this judgment is not set out in the judgment, but it is at once evident that the court did not, at least as far as B. C. and H. F. Scott were concerned, consider the deed to Eunice Hancock to be valid. Another inference can also be drawn from the deed itself. One of the grantors mentioned in the deed is W. A. Scott—but W. A. Scott did not sign the instrument. The acknowledgments also show that some signed on one date, and others on a subsequent date. These circumstances, together with the fact that the deed was not recorded until 22 years after the death of Eunice, somewhat raise an inference that the deed

[1]B. C. and H. F. (Henry)

> was not delivered during the lifetime of Eunice Hancock; that is, these circumstances raise the possibility that the children and grandchildren of Eunice, individually agreed to convey their interest to her, but such agreement was conditioned upon the premise that everyone would join in executing the deed; since this did not happen the deed was never delivered."

We then indicated that a delivery is incomplete where made by some of the parties to a deed which shows on its face that it was intended to be jointly executed so that all should be bound by its covenants. *Consolidation Coal Co.* v. *Yonts,* 25 F. 2d 404 (6th Cir. 1928). See also Annot., 140 A. L. R. 265 (1942); 26 C. J. S., Deeds, § 49.

This rule of law is now the law of the case and is certainly sufficient to rebut the presumption of delivery; and, when applied to the facts of the case at bar, we think this rule controls the issue of delivery. We therefore cannot say that the chancellor's finding that the 1905 deed was not delivered is against the preponderance of the evidence. It follows that appellants were not remaindermen to a life estate in the lands here in issue; consequently, their second point for reversal—*i. e.,* as remaindermen they are not barred by limitations—need not be discussed.

Affirmed.

PAUL A. TEAGUE ET AL *v.* HOME MORTGAGE & INVESTMENT CO.

5-5497 465 S. W. 2d 312

Opinion delivered April 5, 1971

Dan McCraw, for appellants.

Wood, Smith & Schnipper, for appellee.

CARLETON HARRIS, Chief Justice. The question in this litigation is whether the Chancery Court of Garland County erred in quashing service of process. The O. R. C. Co., Inc.,[1] a Texas corporation, hereafter called O. R. C., was not authorized to do business in Arkansas, but operated a shopping center in Hot Springs. In July of 1963, O. R. C., according to a complaint subsequently filed against Home Mortgage & Investment Co., appellee herein, which company owned stock in O. R. C. (the

[1]Ordway Rutherford Company.

two companies subsequently merging),[2] was in the process of constructing a building, and during said construction removed and excavated considerable dirt from and around a building belonging to Paul A. Teague and wife, appellants herein. The complaint asserts that O. R. C. changed the drainage system located beneath its construction and beneath appellants' building, reducing the size of the opening in the southerly end of the system and thus causing the system to become inadequate to carry off water which might enter the drainage system during heavy rainfall. Such rainfall occurred during July and appellants contended that the basement of their building was flooded and damaged by the water, recovery of damages being sought in the amount of $20,000. Appellee appeared specially by a motion to quash service of process, asserting that it was a corporation organized and existing under the laws of the State of Texas, and that it was not then and never had been registered or authorized to do business in the state of Arkansas, and had never done any business or performed any character of work or service in this state. It was asserted that the service obtained on appellee under the provisions of Ark. Stat. Ann. § 27-340 (Repl. 1962), was insufficient to bring appellee within the jurisdiction of the Arkansas court, and it was prayed that service of process be quashed. On hearing, the chancellor on exchange held, "The sole act of ownership of Arkansas property does not require a nonresident corporation to qualify to do business in Arkansas, and, from the face of the pleadings, this is not involved". The motion to quash was sustained. From the order so entered, appellants bring this appeal.

In chronological order, we list the facts which we deem pertinent to a decision in this litigation.

The cause of action as alleged by the plaintiff occurred and arose in approximately July of 1963, at a time when there was an abnormally heavy railfall in Garland County, Arkansas.

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[2]Home Mortgage & Investment Co. owned all of the stock at the time of the merger, but it is not clear for how long this had been true.

At that time, O. R. C. and Home Mortgage & Investment Co. were separate and distinct Texas corporations. In November of 1963, approximately four months after the alleged tort, O. R. C., by warranty deed and assignment lease, conveyed all of its interest in any property or lands located in Garland County, or in the state of Arkansas, to parties not presently involved in this litigation, Melvin W. Jackson and B. H. Castle.

On February 7, 1964, O. R. C. merged into Home Mortgage & Investment Co., appellee herein, pursuant to the laws of the state of Texas. Home Mortgate & Investment Co. acquired no assets whatsoever of O. R. C. as a result of the merger.

Home Mortgage & Investment Co. was the sole stockholder of O. R. C. at the time of the merger; the record does not reflect whether it was the sole stockholder in July of 1963, or only a stockholder.

On April 6, 1964, O. R. C. filed its statement of intent to dissolve the corporation upon the written consent of its stockholder, Home Mortgage & Investment Co., and on April 30, 1964, the Secretary of State of the State of Texas issued his Certificate of Dissolution.

Appellants instituted suit against Home Mortgage and Investment Co. on May 20, 1966, service being had on the Arkansas Secretary of State on May 23, 1966.

The contention of appellants is quite simple, it being their view that the legal entity known as "O. R. C. Co., Inc.", and the legal entity known as "Home Mortgage & Investment Co." are one and the same by virtue of the admitted merger.

Corporate existence is governed by the law of the state in which it (the corporation) is domiciled. In Leflar's American Conflicts Law, Chapter 26, "Corporations", we find "A corporation must under standard legal theory exist by the law of the place of its creation ordinarily referred to as its domicile, if it exists at all, and its legal capacity also is governed by that law".

Both appellee and O. R. C. were Texas Corporations and accordingly the merger of the two, and the dissolution of O. R. C., are governed by Texas law.

V. A. T. S. Bus. Corp. A.,[3] art. 5.06, provides in sub-section (1) that the several corporations parties to the plan of merger shall be a single corporation, which shall be that corporation designated in the merger plan as the surviving corporation. Sub-sections 3, 4, and 5 read as follows:

"(3) Such surviving or new corporation shall have all the rights, privileges, immunities, and powers and shall be subject to all the duties and liabilities of a corporation organized under this Act.

(4) Such surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities, and franchises, as well of a public as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal, and mixed, and all debts due on whatever account, including subscriptions to shares, and all other choses in action, and all and every other interest, of or belonging to or due to each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in such single corporation without further act or deed.

(5) Such surviving or new corporation shall thenceforth be responsible and liable for all liabilities and obligations of each of the corporations so merged or consolidated; and any claim existing or action or proceeding pending by or against any of such corporations may be prosecuted as if such merger or consolidation had not taken place, or such surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporations shall be impaired by such merger or consolidation."

As we read this statute, Home Mortgage & Invest-

[3]Vernon's Annotated Texas Statutes Business Corporation Act.

ment Co., upon merger with O. R. C., became entitled to all rights, privileges, choses in action, etc., of O. R. C., and on the other hand, following the merger, became responsible and liable for any claim existing or proceeding pending against O. R. C.[4] Let us look at the matter in this light. Suppose appellants had had their place of business in Mineral Wells, Texas, adjacent to a building being constructed by O. R. C., and the alleged damage had taken place there instead of Hot Springs, Arkansas. It seems clear under the Texas law herein cited, that appellants could have properly instituted their action against appellee corporation. If Texas law provides that the surviving corporation shall be responsible and liable for the obligations or claims of each of the corporations merged, the fact that this alleged tort occurred in Arkansas, would be of no moment. It appears clear that the term "thenceforth" in Sub-section (5) means that the surviving corporation shall be responsible for the obligations, including obligations prior to the merger, from the date of the merger.

The Texas Act is almost identical with the provisions of Smith-Hurd Ill. Ann. St. ch. 32, § 157.69. In the case of *Wanless* v. *Peabody Coal Co.,* 13 N. E. 2d 996, a coal company was engaged in digging and removing coal from under the premises of Wanless, this operation occurring from June 22, 1926, until May 1, 1928. At that time, six Illinois corporations, all coal companies, including the one already mentioned, merged, and continued operations in the same manner. Wanless instituted suit against the merged corporation, contend-

[4]It will also be noted in Sub-section (5) that the statute permits the prosecution of a claim against O. R. C., in complete disregard of the merger. This is made even more clear in Art. 7.12 where it is provided *inter alia* that the dissolution of a corporation by the issuance of a certificate of dissolution by the Secretary of State "shall not take away or impair any remedy available to or against such corporation, its officers, directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within three years after the date of such dissolution." It would thus appear, that since appellants instituted their action within three years of the date of dissolution, the suit could have been brought against O. R. C.

ing that his land had been damaged. Of course, there was a question whether the damage was caused by the original coal company doing the digging, or whether the damage was occasioned by the acts of the corporation which came into being by the merger of the several coal companies. In passing on this question, the court said:

"A statute in force in this state at the time of the merger or consolidation of these corporations provided: That all rights of creditors shall be preserved unimpaired, and all liabilities and duties of the respective corporations shall attach to such single corporation and may be enforced against it to the same extent as if such liabilities and duties had been incurred and contracted by it, and that any action pending against one of the corporations, merged or consolidated, may be prosecuted to judgment as if consolidation had not taken place, or the merged or consolidated corporation may be substituted in its place. Smith-Hurd Ill. Stats. c. 32, § 157.69; Callaghan's Ill. St. Ann. chap. 32, par. 71. Under the provisions of this statute, plaintiff could recover against Peabody Coal Company any damages sustained by reason of the negligent act of either of the respective merging corporations within the five years previous thereto."

As previously stated, the Texas statute and Illinois statute are substantially the same, and the quoted case is cited in an annotation to V. A. T. S., Section 5.06. It thus appears that Home Mortgage & Investment Co. is subject to suit for claims against O. R. C.

The validity of Section 27-340 (Act 347 of 1947) relating to service on nonresidents not qualified to do business under the laws of this state, but who nonetheless do transact business in the state, was upheld by this court in *Chapman Chemical Co.* v. *Taylor et al,* 215 Ark. 630, 222 S. W. 2d 820.

From what has been said, it appears that appellee corporation is as much amenable to service from the Arkansas Secretary of State as O. R. C.

Whether the Texas courts would enforce a judgment

obtained in Arkansas on the basis of this service is another question but it would certainly seem, under Texas law, that a judgment would be enforced as quickly against the appellee corporation as against O. R. C., and a refusal to do so would be based simply on the fact that no personal service was obtained, and this would be equally true of a judgment against either corporation.

From what has been said, it is apparent that we are of the view that the order of the Garland Chancery Court should be, and hereby is, reversed, and the cause is remanded to that court with directions to further proceed in a manner not inconsistent with this opinion.

It is so ordered.

MARGARET JOAN QUALLS *v.* DALE LAVON QUALLS

5-5519 465 S. W. 2d 110

Opinion delivered April 5, 1971

Warner, Warner, Ragon & Smith; By: *Wayne Harris,* for appellant.

Wiggins & Christian, for appellee.

GEORGE ROSE SMITH, Justice. The only remaining contested issue in this divorce case is the custody of the couple's son, Boytt Dale Qualls, who will be ten years

old on April 18, 1971. The mother appeals from a final decree vesting custody of the child in the father.

Most of the testimony in the trial court was directed to the parties' respective grounds for divorce rather than to the issue of child custody. Qualls, who admitted that he is of a jealous nature, accused his wife of associating with other men and of not properly looking after the child. Mrs. Qualls denied those accusations and attributed the failure of the marriage to her husband's extreme jealousy and to his repeated threats of violence toward her and others. None of that testimony sheds much light upon the question of custody, except as it may have assisted the chancellor in deciding which parent was worthy of belief.

Mrs. Qualls testified that after the divorce she intended to live with her parents. Since Mrs. Qualls is employed during the day, the child would actually be in the care of his grandparents a good part of the time. The record tells us almost nothing about those grandparents or about their home.

Qualls testified, without contradiction, that during the marriage his wife often went to work before the child got up in the morning, so that Qualls himself provided the child with breakfast and took him to school. Qualls works about 40 hours a week, but his hours are irregular in that he may work for 15 hours in succession and then be at home for some time before he is called back to work. When Qualls is at work he arranges for the child to be cared for by Qualls's sister-in-law, who has two young children of her own and who testified in the case.

For reversal the appellant relies principally upon the law's inclination to favor the mother in custody cases involving very young children. That principle, however, loses some of its force as the child grows older and is not so strong in the case of a ten-year-old boy as it would have been much earlier in the child's life. Moreover, the trial judge saw fit to award custody to the father in spite of the rule in question. We view this

case much as we did the situation in *Wilson* v. *Wilson,* 228 Ark. 789, 310 S. W. 2d 500 (1958), where we said: "We know of no type of case wherein the personal observations of the court mean more than in a child custody case. The trial judge had an opportunity that we do not have, *i. e.,* to observe these litigants and determine from their manner, as well as their testimony, their apparent interest and affection, or lack of affection for the child. Under our oft repeated rule that we will not disturb the findings of the chancellor unless they are clearly against the preponderance of the evidence, we affirm this temporary order." We are of a similar opinion in the case at bar.

Affirmed.

JEAN McNICHOL *v.* RONALD W. McNICHOL

5-5514 465 S. W. 2d 98

Opinion delivered April 5, 1971

Eugene Mazzanti and *Griffin Smith,* for appellant.

Hall, Tucker & Lovell, for appellee.

LYLE BROWN, Justice. This is an unusual child support case. The parties, divorced in 1965, had three minor children. Kenneth, age fourteen years at the time, was retarded. The father was directed to pay $400 a month child support. In 1967 the mother asked that the father take custody of the retarded son. That was done and the child support payment was reduced to $200 a month. In 1970 the mother asked that Kenneth be placed in a school in Louisiana for retarded children and that the father be directed to pay the cost amounting to $300 a month. The chancellor denied the request and the mother appeals, contending that the trial court's denial of her petition was contrary to a preponderance of the evidence.

Appellant Jean McNichol testified that she resides in Whittier, California, where she is a public health nurse. She stated that Kenneth had an I. Q. of sixty-seven which indicated to her that the boy was trainable for some type of employment. On her trip back to Arkansas for the hearing Jean McNichol went to the Easter seal day care center where Kenneth is enrolled. She said she found Kenneth in "a sheltered workshop not learning a trade, doing work there in a simple setting, stuffing envelopes and putting little nuts and bolts and things" together. She found nothing which in her opinion would lead to job placement for Kenneth. She introduced a brochure published by Evergreen Presbyterian School in Louisiana. The brochure described substantial facilities for the training of retarded children. The school had been recommended by a former pastor of the family. The total maintenance costs were estimated to be $300 monthly.

Elizabeth McNichol Worsley testified on behalf of her mother. She has a college degree in sociology and resides in San Antonio, Texas. She had lived in the home with Kenneth until she went away to college. From that experience and from her training in sociology she believed that Kenneth had considerably more potential than the training that the Easter seal school afforded him. She visited the school on the day before the trial. She said Kenneth's supervisor had the boy putting nuts and bolts together and pasting labels on magazines.

Don Wilkerson was called by the mother as an adverse witness. He is a vocational counselor and was Kenneth's supervisor at the rehabilitation center in Conway. It was his opinion that Kenneth made some progress at Conway but that the staff there "had exhausted every means to get him suitably trained and placed." Mr. Wilkerson said he had no idea as to when the boy would be capable of entering competitive labor, if ever.

Dr. McNichol testified in his own behalf and rather extensively. He is a medical school graduate and specializes in psychiatry. He holds the position of clinical director in charge of the alcoholic rehabilitation service under the State program. His credentials in the field of mental health are quite impressive. He related that when he took custody of Kenneth in 1967 the boy was placed in the Benton unit of the State Hospital and shortly was placed in the rehabilitation service at the same unit. (Kenneth had been a patient in the California State Hospital.) Dr. McNichol was working at the Benton unit. Kenneth remained there from September 1967 until January 1968, and was then transferred to Children's Colony at Conway for further evaluation and training. When the boy was terminated at Conway, the father succeeded in placing him in training with the Easter seal service in Little Rock, as an out-patient. Dr. McNichol obtained lodging for his son at a boarding house specializing in housing mentally retarded men and boys. It is operated by an experienced psychiatric technician. The housing was recommended to Dr. McNichol by the rehabilitation service. It is walking distance of the Easter seal day care center. Kenneth regularly attends a nearby church. The father pays all expenses except spending money, which Kenneth earns by part-time work at the day care center.

It was Dr. McNichol's opinion that it would serve no useful purpose to send Kenneth to Evergreen School, considering his low potential rating. He said Kenneth is making as much progress in his present situation as could be made at any institution. He said the norm of the average boy in Kenneth's condition is sixty-seven

per cent and that Kenneth's capacity is only seventeen per cent of the norm. He thought it would be upsetting to Kenneth to remove him from his present surroundings in Little Rock, where he has made friends and found a limited outlet for recreation. The witness conceded that if he were ordered to place the boy in Evergreen he could afford it financially. However, the doctor is afflicted with multiple sclerosis. The ailment has increased to the point where he cannot get up and down stairs without the use of a wheelchair. He walks with the aid of two canes. Therefore, he reasoned that his ability to earn could well be seriously affected at any time.

We conclude from the chancellor's remarks at the close of the evidence that he was more impressed by the professional evidence given by Don Wilkerson and Dr. McNichol. That testimony warranted the conclusion that Kenneth's chances for improvement were negligible and that to disburb the boy in his present situation would cause a serious setback. The chancellor expressed admiration for the mother in her desire to move Kenneth to what she considered to be a better environment, but said her sincere hopes were not enough to justify a change. If the boy were sent to the school near Minden, Louisiana, he would be far removed from both his parents. Presently the father is only a thirty minute drive away from Kenneth. They correspond and the father occasionally pays Kenneth a visit and keeps in touch with the boy's supervisors, with whom the father is personally acquainted. We are unable to say that the findings of the chancellor are against the preponderance of the evidence.

Affirmed.

ROSE CITY PROPERTY OWNERS' ASSOCIATION *v.* MATTHEWS COMPANY, SOUTHWEST REALTY CO., INC. AND DELTA LAWN BUILDERS, INC.

5-5523 465 S. W. 2d 118

Opinion delivered April 5, 1971

Herndon & Patterson, for appellant.

Stubblefield & Matthews, for appellees.

JOHN A. FOGLEMAN, Justice. Appellant filed a suit for injunction seeking to restrain appellees from constructing allegedly substandard homes in the Delta Lawn Subdivision in violation of an amendment made on March 30, 1970, to a bill of assurance dated January 12, 1970. There was an alternative prayer for damages of $750,000. Appellant states that an amendment to a plat of the subdivision and the bill of assurance pertaining thereto are exhibited with the complaint.

Appellees, by answer, generally denied the allegations of the complaint and the standing of appellant to sue. Appellees directed a request for admissions and an interrogatory to appellant, attaching a plat and bill of assurance filed on January 12, 1970. Appellant answered.

Appellees moved for summary judgment on the pleadings, exhibits and admissions filed. The chancery court decree granting the motion recited that it was based upon the pleadings and exhibits thereto, the motion for summary judgment and response, appellees'

request for admissions with its exhibits and appellant's answer to this request.

Appellant's points for reversal are that genuine issues of material facts existed and that appellees were estopped to deny an implied dedication of ownership to appellant's members or easement in the entire subdivision by plats, replats and additional plats to the subdivision.

As appellees point out, the question for decision is wholly dependent upon the plats, documents and admissions contained in the record before the chancellor. None of these, not even the bills of assurance upon which appellant's action is apparently based, is abstracted. It is always with extreme reluctance that we affirm a case for noncompliance with the abstracting requirements clearly set out in Rule 9. In this case we have no choice in the matter, because the issues and appellant's arguments thereon are wholly incomprehensible without abstracts of these important parts of the record.

The decree is affirmed.

J. B. WILSON *v.* JOAN RODGERS ET AL

5-5415 468 S. W. 2d 739

Opinion delivered April 5, 1971
[Rehearing granted June 21, 1971.]

Milton G. Robinson, for appellant.

John W. Moncrief, for appellees.

J. FRED JONES, Justice. This is an appeal by J. B. Wilson from an adverse decree of the Arkansas County Chancery Court, Northern Division, in a case wherein J. B. contended that he is the owner of a one-half undivided interest in certain real property in Arkansas County, the legal title of which was held in the name of his brother, George, who is now deceased.

Until George Wilson's death, he and J. B. were partners in livestock and farming operations on the land involved in this case. The litigation arose when the widow and heirs of George Wilson filed a petition in chancery for the appointment of a receiver and for an accounting of the partnership assets, consisting primarily of cattle and hogs. They also alleged that J. B. was slandering George's title to the land, consisting of some 670 acres, by claiming that he owned an interest in the land. J. B. Wilson filed a general denial and alleged rightful possession and control of the partnership assets. He filed a cross-complaint against the widow, Mrs. Kathryn Wilson, as well as against Joan Rodgers, Nancy Tullos, and Kalynn Harris, the three married daughters and surviving heirs of George Wilson, in which he alleged that the lands were partnership assets; that the legal titles to such lands as were held in the name of George Wilson were held in trust for the partnership; that he, J. B. Wilson, owned a one-half undivided equitable interest in the lands and he prayed for a decree to that effect. The chancellor confirmed title to the lands in the estate of George Wilson subject to

the rights of dower and to outstanding mortgages and deeds of trust. On appeal to this court J. B. relies on the following points for reversal:

> "The findings and decree of the lower court are not supported by the evidence.
>
> It was error to refuse to strike the answer to defendant's counterclaim, which answer was not timely filed; and refuse to grant counterclaimant a judgment in accordance with the prayers of the counterclaim.
>
> The lower court erred in ruling that the Dead Mans Statute applied and in not permitting appellant to testify about conversations and transactions between him and his deceased brother, because the controversy over the land did not involve the deceased partner's estate.
>
> It was error to permit appellees' witnesses to testify about self-serving declarations made by the deceased partner."

J. B. Wilson alleges a constructive trust in the lands as distinguished from an express trust. He contends that all the property was purchased with partnership funds, and that a constructive, or resulting trust, was created by operation of law. The burden of impressing a constructive trust on the real property in this case rested on the appellant, J. B. Wilson, and he attempted to do so by parol evidence.

Of course, a constructive trust may be proved by parol, but parol evidence for that purpose is received with great caution, and the courts uniformly require the evidence to establish such trusts to be clear and satisfactory. Sometimes it is expressed that the "evidence offered for this purpose must be of so positive a character as to leave no doubt of the fact," and sometimes it is expressed as requiring the evidence to be "full, clear and convincing," and sometimes expressed as requiring it to be "clearly established." *Crittenden* v. *Woodruff,*

11 Ark. 82; *Trapnall* v. *Brown,* 19 Ark. 39; *Johnson* v. *Richardson,* 44 Ark. 365; *Richardson* v. *Taylor,* 45 Ark. 472; *Robinson* v. *Robinson,* 45 Ark. 481; *Crow* v. *Watkins,* 48 Ark. 169, 2 S. W. 659; *Camden* v. *Bennett,* 64 Ark. 155, 41 S. W. 854; *Tillar* v. *Henry,* 75 Ark. 446, 88 S. W. 573; 1 Perry on Trusts, § 137; *Broderick & Calvert* v. *Flannigan,* 176 Ark. 1203, 6 S. W. 2d 8; *Spencer* v. *Johnson,* 178 Ark. 1200, 13 S. W. 2d 585.

In *Tillar* v. *Henry,* supra, we said:

> "Titles to real estate cannot be overturned by a bare preponderance of oral testimony seeking to establish a trust in opposition to written instruments. The conservatism of the courts has prevented the tenure of realty being based on such shifting sands."

And again in *Nelson* v. *Wood,* 199 Ark. 1019, 137 S. W. 2d 929, we said:

> "The general rule, as well as the established rule in this state, seems to be well settled that in order for one to establish by parol either a resulting or constructive trust, the evidence must be 'full, clear and convincing,' 'full, clear and conclusive,' 'of so positive a character as to leave no doubt of the fact,' and 'of such clearness and certainty of purpose as to leave no well founded doubt upon the subject.' These requirements run through a long line of cases from this court."

This same rule was more recently applied in the case of *Darsow* v. *Landreth,* 236 Ark. 189, 365 S. W. 2d 136. So, measuring the evidence in the case at bar by the above rules of law, we now consider the evidence in this case.

The real property involved consists of five separate tracts purchased from different individuals. Deeds to three of the tracts are in the record and the deeds to two of the tracts are not in the record. The record consists of five volumes totaling 1,189 pages. Much of the evidence is directed to the admitted partnership assets

consisting of personal property, and the evidence directed toward impressing a trust on the real property falls short of being so clear, convincing and satisfactory that we would be justified in overruling the decree of the chancellor, who saw and heard the witnesses as they testified.

The undisputed evidence is clear that George and J. B. Wilson were near the same age, and had held themselves out as business partners all of their adult lives. After their father died intestate when they were quite young, they continued to operate an oil business left to them by their father. When George married, he brought his wife to the family home and J. B. continued to live with George and his wife until he also married. After losing the oil business and their home, through mortgage foreclosure during the depression years, George and J. B. remained closely associated with each other and got into the business of farming and raising livestock under the partnership title "Wilson Brothers," and this relationship continued until George's death on July 1, 1967.

All of the deeds of conveyance to the lands here involved were made to George Wilson and to his heirs and assigns forever, and the record is completely void of any competent evidence as to why this was done. It would be next to impossible, and of little value, to analyze the separate testimony of the many witnesses who testified, but the record is clear that most everyone considered the Wilson brothers as a partnership; and most everyone assumed that the partnership included the joint ownership of the land. A number of witnesses called by J. B. testified that George always referred to "us," "our," "Jay and I," and "mine and Jay's," when discussing the farm and its operation. In the sale of some of the land with conveyance to George, the grantors testified that they made the deal with J. B. One of the grantors testified that he dealt with J. B. and sold the land to the Wilson Brothers. The deed, however, was made to George, his heirs and assigns, and there is no evidence as to why this was done. Several witnesses testified as to business they conducted with the Wilson

Brothers. Those witnesses called by J. B. testified that they dealt directly with J. B. in such matters as clearing land, sinking a well, arranging to rent land, baling hay, purchasing and selling livestock and feed, and in doing dragline work on the farm. Some of these witnesses testified that when they attempted to do business with George, he would delay final decision until he could talk with J. B.

The witnesses who were called by Mrs. George Wilson and the heirs, testified that they transacted all their business with George and that George did business with them without having to consult with J. B. One or two of these witnesses testified that George referred to the land as belonging to him and had stated that he intended it should go to his wife and children at his death. The overall testimony of all the witnesses leaves the preponderance of the circumstantial evidence fairly even on both sides.

The evidence is clear that George Wilson assessed the real property taxes for a number of years in the name of Wilson Brothers. On the income tax returns the profits from the farm were divided equally between George and J. B. Loans from the Production Credit Association were made to George and J. B. jointly until some individual judgments were obtained against them and the procedure was changed, at the insistence of the association. The amounts of the judgments against George were less than those against J. B., so they borrowed money and paid off the judgments against George and the P. C. A. loans thereafter were made to George or in his name. All of this evidence definitely established a partnership relation between George and J. B. in the operation of the farm as the Wilson Brothers farm or ranch.

In spite of the voluminous record in this case, the record is vague or silent as to the two most important aspects of the case. It is vague as to the bank accounts and it is silent as to why the deeds were made to George, his heirs and assigns. J. B. testified that the bank accounts were joint accounts or Wilson Brothers

partnership accounts and that both he and George collected money from the farm operations and deposited all they made into the partnership accounts. He testified that they each drew money from the accounts by check when and as they needed it. J. B.'s primary contention is that the lands were purchased by the Wilson Brothers and paid for out of their joint funds.

Numerous canceled checks were offered in evidence. A number of them dated in the 1950's were signed "Wilson Brothers by J. B." Some were signed "Wilson Brothers by George," some were signed "J. B. & George Wilson," some were signed "George and J. B. Wilson by George," and some were signed "George and J. B. Wilson by J. B." Some of the checks were signed "George Wilson by J. B.," but most of the checks introduced by the appellees were dated in the 1960's and were simply signed "George Wilson." None of the checks indicate how the accounts were actually carried at the banks and no bank officer testified as to how the accounts were actually carried or what arrangements were made between the banks and the Wilsons in connection with the accounts. Richard Trice testified that he worked in the First National Bank in Stuttgart back in the '20's and had known the Wilsons since 1926. He testified that they did business at the bank as "Wilson Brothers" while he worked there. A number of duplicate bank deposit slips were introduced into evidence by the appellees. They were dated from 1957 through 1967; some of them were made out to George Wilson and some were made out to Nancy Wilson. From the documentary exhibits it is impossible to tell whether the bank accounts were joint, or partnership accounts, or whether they were the individual or personal accounts of George or J. B. with checking authority granted to the other. No bank official testified on this point. J. B. also introduced a few deposit slips made out to him.

Mr. J. B. Wilson testified that after it was agreed that the P. C. A. loan would be made in George Wilson's name rather than the partnership, the business was carried on as before. In this connection he was asked the following questions and made the following answers:

"Q. What about the bank accounts, were they still carried as Wilson Brothers?

A. No, sir, we carried the bank account in Nancy Tullos' name.

Q. In what bank?

A. In the First National Bank at DeWitt and finally George put an account up here in this bank, once in the Farmers and Merchants and once in the Peoples, in fact he had an account in Peoples when he passed away.

Q. Did you ever have any in the DeWitt Bank and Trust Company?

A. He could have, yes sir, before that but it was before that time.

Q. Mr. Wilson, did you continue to write checks on that bank account?

A. Yes, sir.

Q. Did you write them yourself and sign them?

A. Yes, sir. I put George Wilson by J. B. Wilson.

Q. And did they go through?

A. Yes, sir.

Q. Now did, was there any other provision made for your cashing checks after that change was made?

A. No, sir, George would just give me a book full of signed checks so anything I needed or that come up I could write one."

Mr. J. B. Wilson testified that he deposited all monies that he made individually, as well as what he

collected from the partnership business, into the partnership account.

"Q. You mean that you deposited to the credit of Wilson Brothers all the money that you made individually?

A. Either to Wilson Brothers or Nancy Wilson's account or George Wilson's account at the Peoples National Bank because we carried that account in his name. And I have slips for some of the deposits I made, not every one of them because I didn't keep every deposit slip."

In rebuttal J. B. testified that he wrote some checks on the George Wilson account after George's death, but that the account was not in George Wilson's name. He testified that the account was in Nancy Wilson's name and that he had authority to write checks on it. He testified that the money in the account was not any more George's money than it was his; that one-half of the account belonged to him, and that he deposited money to the account.

"THE COURT: Why was that account in Nancy Wilson's name?

A. George put it in there back when he lived in DeWitt.

THE COURT: Why?

A. I couldn't tell you that.

THE COURT: Well you were his partner weren't you?

A. Yes, sir, he just said let's carry one account in Nancy's name and I said all right so we can both write checks on it and it was back when her name was Nancy Wilson, she hadn't even married.

THE COURT: Was there any judgment against you or George at that time?

A. There was against me and at one time there were some against George but I think there was some judgments that we have paid up but that could have been the reason that he did that. Then is when he started getting the account in this bank too with just George Wilson on it.

* * *

THE COURT: I understood you to testify those checks were George Wilson by you.

A. I signed his name, that's the way we always signed it, George Wilson by me but it come out of Nancy's account. We didn't put Nancy's name, we put George Wilson by J. B. Wilson, and it come out of her account.

THE COURT: And the bank let you do that?

A. That's what they did. That's how they are signed and they come out of Nancy's account."

Mrs. Lillian Young, an abstractor, testified that about a year, or two years, before George Wilson died, J. B. Wilson came to her office and asked her to prepare a deed for his brother, George Wilson, and his wife, to sign conveying J. B. a one-half interest in the land held in the name of George Wilson. She testified that a few days later J. B. Wilson asked her if she had prepared the deed and she told him that she had not. On this point Mrs. Young testified as follows:

"A. I called Mr. George Wilson and asked him to come to my office and he did and I told him that his brother had told me to prepare a deed from Mr. George Wilson and his wife to Mr. J. B. Wilson, and he said, 'No, you don't prepare that deed.'

Q. Did he say whether or not J. B. Wilson had any interest in the property or whether he was the owner of it or just tell you not to prepare any such deed?

A. He told me not to prepare the deed, that was his property and it was to go to his wife and girls when he was no longer living."

She testified that she had prepared mortgages and deeds for the Wilson Brothers but that she always looked to George Wilson because that was the one with whom she dealt.

"A. George Wilson paid me. He gave me the money.

Q. You can have these trusts but did Wilson Brothers pay you for drawing the deeds and abstract work?

A. These checks may have been given to me that way but I always looked to George Wilson because that was the one with whom I dealt."

The probative value of this testimony was diminished to some extent on cross-examination when Mrs. Young testified that she addressed her bills for service in care of J. B. Wilson, and when she identified three checks signed "Wilson Brothers by J. B. W." and made payable to her for abstract work and taxes. Mrs. Young explained that it was always hard for her to get in touch with Mr. George Wilson as he was always out in the country, but "as to Mr. J. B. Wilson, I could find him most any time around on the streets."

The appellant J. B. Wilson's witnesses testified that George had indicated all along that he and J. B. owned the land together as partners. J. B. testified that the land was bought and paid for with partnership funds. The appellees' witnesses testified that George had indicated all along that the land belonged to him individually. The solemn deeds of record sustain the appellees' con-

tention and although there is ample evidence that J. B. was a full partner in the livestock and farming operations, we are left to surmise and conjecture as to why the legal title to the real property rested in George Wilson, his heirs and assigns. George Wilson was in bad health for a considerable period of time before his death, the real property was heavily mortgaged without assistance or objections by J. B. The record only contains circumstantial evidence that perhaps the deeds should have been made to George and J. B. as joint tenants when the property was purchased but this was not done. There is no evidence at all of why the deeds were made to George, his heirs and assigns when the property was purchased, and there is no clear and convincing evidence of why this court should do so now. We find no merit to the appellant's other assignment or errors, so the decree is affirmed.

Affirmed.

BYRD J., concurs.

BROWN and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I am as yet unable to understand how the majority can find evidence to overcome appellant's contention that the real estate involved was partnership property or how the trial court could find that J. B. Wilson and George Wilson constituted a farming partnership which stopped short of ownership of the real estate. The evidence that Wilson Bros. owned the land seems stronger to me than that relied upon to show a farming partnership. I think that a partial explanation lies in failure to apply law relating to partnerships rather than to constructive or resulting trusts. Appellant has never sought to impress either upon the conveyances. He has simply sought to establish a trust under partnership law.

The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. Ark. Stat. Ann. § 65-107 (4) (Repl. 1966);

Brandenburg v. *Brandenburg,* 234 Ark. 1117, 356 S. W. 2d 625; *Zajac* v. *Harris,* 241 Ark. 737, 410 S. W. 2d 593. Clear and convincing evidence is not required to prove a partnership. Its existence need be proved only by a preponderance of the evidence. *Brandenburg* v. *Brandenburg,* supra.

We have held that provisions of the Uniform Partnership Act [Ark. Stat. Ann. § 65-101, et seq. (Repl. 1966)] are applicable to partnerships entered into prior to its passage and which had acquired real estate prior to its adoption. *Zach* v. *Schulman,* 213 Ark. 122, 210 S. W. 2d 124, 2 A. L. R. 2d 1078.

Pertinent provisions other than the one cited hereinabove include the following:

> 1. Unless the contrary intention appears, property acquired with partnership funds is partnership property. Ark. Stat. Ann. § 65-108 (2) (Repl. 1966).
>
> 2. Every partner is an agent of the partnership for the purpose of its business and his acts for apparently carrying on the business of the partnership bind it. Ark. Stat. Ann. § 65-109 (1) Repl. 1966).
>
> 3. A partner's interest in partnership property is as a tenant in partnership. Ark. Stat. Ann. § 65-125 (1) (Repl. 1966).

Until adoption of the Uniform Partnership Act in 1941, the title to real property could not be held in the name of the partnership. *Percifull* v. *Platt,* 36 Ark. 456; *Spaulding Mfg. Co.* v. *Godbold,* 92 Ark. 63, 121 S. W 1063, 29 L. R. A. (n.s.) 282, 135 Am. St. Rep. 168, 19 Ann. Cas. 947. The act recognizes, however, that title to partnership real property may be held in the name of one of the partners, but that this partner may not effectively convey title to the property unless the grantee in the conveyance is a holder for value without knowledge or the conveyance is one for apparently carrying on the business of the partnership. Ark. Stat. Ann. § 65-

110 (3) and (4) (Repl. 1966). When the legal title is vested in the name of one of the partners, he becomes, in equity, a trustee for the other partners to the extent of their interest. *Spaulding Mfg. Co.* v. *Godbold,* supra.

Real estate purchased for partnership purposes, paid for with partnership funds and held and used for partnership purposes, is treated as partnership property regardless of how or by what agency it is bought or in whose name the title is held, and the holder of the legal title is a trustee for the partnership. *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. 2d 282. When land is purchased for use in carrying on the partnership business with partnership funds and there is no agreement or design that it be held for the partners' separate use, it will be treated in equity as vested in them in their firm capacity, whether the title is in all, or less than all the partners. *Lewis* v. *Buford,* 93 Ark. 57, 124 S. W. 244.

Proceeding upon these well established principles, we should turn aside from attempts to measure the evidence by the clear and convincing yardstick and abandon efforts to decide whether there was a constructive or resulting trust to answer the following pertinent inquiries:

1. Did J. B. Wilson receive a share of the profits of the business of Wilson Bros., consisting of him and George Wilson?

2. Is there any evidence that he received these profits as compensation for services as distinguished from his share as a partner?

3. Does the evidence that a partnership existed preponderate?

4. Were the lands in question purchased with partnership funds?

5. If so, is there a preponderance of the evidence to show an intention that the lands not be held as partnership property?

6. Does the evidence show that the property was used for partnership purposes?

I humbly submit that questions 1, 3, 4, and 6 must be answered in the affirmative and questions 2 and 5 in the negative. This being so, the decree should be reversed for a decree declaring that George Wilson held the lands as trustee for the partnership of Wilson Bros. Time and space limitations do not permit adequate elaboration upon the great volume of evidence in the record. The testimony of J. B. Wilson, even as limited by the trial judge, clearly established a case for relief. But a decree in his favor does not hinge upon J. B.'s credibility. His testimony is corroborated in most instances where documentary evidence is available and by disinterested witnesses who would have no motive for misrepresentation.

The chancellor found, and the majority proceeds upon the assumption, that there was a partnership consisting of J. B. and George Wilson engaged in livestock and farming operations upon the lands involved. In any view of the case we must start upon the well substantiated premise stated in the majority opinion that these two brothers had held themselves out all their adult lives, and were universally regarded, as partners d/b/a "Wilson Bros."

J. B. was 21 months older than his brother. They first operated a petroleum business left them by their father. J. B. told of their acquisition of the various tracts making up the farm near 3-Way Store known as Wilson Bros. ranch. The acquisitions commenced about 1940 and extended into the early 1950's. One of the tracts purchased was the Lane tract, on which a Federal Land Bank mortgage was assumed. Payments were made through a National Farm Loan Association. Wilson's testimony about payments by him to this association was corroborated by the secretary of that association, who said that the loan was assumed by George and J. B., but carried in the name of George. He recalled that a payment was made by J. B. in cash, and

a receipt issued to him on May 29, 1947. This witness also identified a 1945 receipt for a payment by Wilson Bros. J. B. said he borrowed money from Prislovsky to pay off this debt and later borrowed from Prudential Life Ins. Co. to pay. He produced a check to Prislovsky from Wilson Bros. which he said was for interest on this loan. J. B. also said that he borrowed money from Dr. J. B. Strait to pay for the Keaton land. He produced two Wilson Bros. checks signed by him for payments on this loan. He said that Wilson Bros. then obtained a loan from Prudential Ins. Co. to pay off the debts to Prislovsky and Strait. While these mortgages were signed by George and his wife only, J. B.'s testimony that this insurance company required that J. B. sign the note is corroborated by a letter from the company and does not seem to be questioned.

J. B. says that a loan made by John Hancock Life Insurance Company was obtained to pay the Prudential indebtedness, to pay Wortman for land clearing and to pay other debts. He was not asked to sign either the mortgage or the note. He admitted that money was borrowed by George on more than one occasion from Mrs. Kennedy, but stated that he went and got the money on one occasion and that all the proceeds of these loans were placed in a bank account in the name of Nancy Tullos, one of George's daughters, and that he and George wrote the checks on this account for partnership purposes. After PCA loans were obtained in George's name rather than in the name of Wilson Bros., the proceeds, according to J. B., were deposited in the bank, either in the name of Nancy Tullos or George Wilson. He said that he then signed checks "George Wilson, by J. B. Wilson." He also said that George would give him a book of signed checks, and exhibited eight that he had when George died. He exhibited some deposit slips for deposits made by him to this bank account.

J. B. also exhibited checks for payment of taxes on the farm, which he said came from partnership funds. Two of them were signed J. B. and George Wilson, and two were signed Wilson Bros. by J. B. Wilson. Tax assessment records clearly show that the lands were as-

sessed in the name of Wilson Bros. for many years prior to George's death. Not one of these tracts was assessed in the name of George Wilson, although a lot owned by him was so assessed. The tax assessor testified that the assessments for the years 1963 through 1967 were made by George Wilson. After his death the assessment was changed to show the name of the owner as Kathryn Wilson at the suggestion of her attorney. In 1960 only is there any indication that George Wilson paid these taxes. J. B. exhibited other checks written on Wilson Bros. for lands purchased. One of them was for the Cox land in 1952, later sold. He also exhibited a check to Harry Harper signed Wilson Bros. by J. B. Wilson, which he testified was to retire a loan which enabled them to construct a building at the 3-Way Store. He exhibited a deposit slip to the account of Wilson Bros. identifying a check of H. W. Harper, which he said represented the loan proceeds. Many other such Wilson Bros. checks were exhibited.

J. B. testified that neither he nor George ever performed any work in any capacity for anyone other than Wilson Bros. This testimony is not substantially contradicted. He stated that they never had an accounting but used money from the business as they needed it. Although there is abundant evidence of use of parts of the lands by J. B. Wilson, there is never any indication that he paid any rent or that he was expected to pay any. The only business telephone listing was in the name of Wilson Bros. Ranch.

J. B. testified that the first land purchase made by either was in 1937. The land was deeded by Kentucky Home Life Insurance Company to J. B. Wilson. J. B. said that it belonged to him and George and that they sold it for $6,000 and put the money in the Wilson Bros. bank account. J. B. is corroborated about many of the land purchases. Floyd McPherson said that negotiations for purchase of 192 acres from him in 1946 were opened and the deal made by J. B. Wilson. $1,000 of the $5,000 purchase price was paid in cash by J. B., $500 was credited for a bull traded by J. B. and $3,500 was paid by Roy McCollum. McPherson said that the

contract to sell was to Wilson Bros., and his recollection was that the deed was made to Wilson Bros. Esker McPherson said that J. B. approached him and wanted him to buy some land and hold it for J. B. Later J. B. and George returned and said that Roy McCollum would finance them to buy a one-third interest in the Montgomery estate. After the purchase, they brought a deed to McCollum for McPherson to sign.

The Lane property was bought from Mrs. Paul Gourley. Her letter offering the land to George and J. B. in April 1944 was exhibited. The offer was accepted by a letter over George's signature. It recited that the terms were acceptable to "J. B. and myself" and that "we" are accepting them. It also recited that "we" will pay for it.

Strong corroboration of J. B. Wilson came from Warren Bass, a certified public accountant, called as a witness by appellees. He prepared income tax returns for George Wilson for several years. He did not consider that a partnership existed, and did not prepare a partnership return. At George's request, he prepared returns showing all income shared with J. B., "because he needed to help his brother anyway." All the income and expenses from the farming operations and cattle operations were consolidated, then divided in halves with one-half allocated to each brother. Bass said George told him that he was giving his brother one-half. George Wilson did tell him that the cattle and personal property belonged to the two and that all the income was paid to them as Wilson Bros. When Bass prepared the portion of the return for George relating to social security self-employment tax, he listed George Wilson's farm income as coming from "farm partnerships." A breakdown of the income and expenses on the worksheets for these returns revealed that in 1966 George Wilson received $132.32 in interest from a bank as his only income from any source other than the partnership. Expenses for acquiring cotton acreage bought are included. Taxes in the amount of $793.23 were included as was interest amounting to $5,007.78. George Wilson claimed no separate income from the land, and no

rental charge was made to Wilson Bros. or to J. B. Wilson.

Arthur Thomas bought the Madden place from them. He dealt with George, but said that George told him that the land was owned by Wilson Bros. Judge Fred Wilcox bought land from them, which was part of the Cox place. At closing, Judge Wilcox asked if J. B. and his wife shouldn't sign the deed. He was assured by George and an abstractor that the title was in George. Wilcox said that Wilson Bros. had paid him by check for work done on the farm.

Various witnesses testified about land clearing for Wilson Bros. on their farm near 3-Way Store. They testified about having dealt with both George and J. B. with reference to the clearing, and some of them recite payments made by Wilson Bros. checks or checks signed by J. B. and George Wilson. Some of the payments were made by cash, and some by farm machinery apparently owned by Wilson Bros. One of these witnesses, William Wortman, admitted receiving four checks for clearing land signed by George Wilson only and payable to him as administrator of his father's estate. This was in 1965 when J. B. Wilson says that the bank account was carried in George's name, well after the change in the PCA loans.

Mrs. Lillian Young said that she had closed loans for Wilson Bros. and prepared deeds for them. Although she first stated that she always dealt with George, her statement for abstract work in 1953 was rendered to Wilson Bros. and addressed to them in care of J. B. She received at least three checks for work done for Wilson Bros. on the account of Wilson Bros. signed by J. B. W. She explained that it was hard for her to contact George, but she could always find J. B. The abstract work was done on land, and she was told to send her statements to Wilson Bros.

Marion McDonald leased the Montgomery and Keaton lands from Wilson Bros. in 1947 and 1948. He dealt with J. B. principally, although he did talk to

George. The contract required him to put down a new well which would become the property of Wilson Bros. at the end of three years. He grew rice crops on the land. The landowner's share of the crop proceeds was paid to Wilson Bros. McDonald sold the pump and power unit on the well to Wilson Bros. at the end of the three-year term for 16 head of cattle and $800. Later McDonald installed a new pump when J. B. told him something was wrong. He billed J. B., who paid him. George Wilson always referred to the lands as belonging to Wilson Bros. in discussions with McDonald.

Albert Higgins and William J. Brown told about negotiations with George Wilson for renting lands and for proposed fish farming operations. Both said George Wilson stated that the land belonged to him and J. B.

Wilson Bros. paid one-half of the bills for fertilizing and putting chemicals on crops of tenants on the land. There is evidence that payments for the landlord's share from cotton and cottonseed sold at the gin were made to Wilson Bros. It was Howard Ives' recollection that both J. B. and George signed the lease when he rented the farm for two years. It was shown that the PCA in Stuttgart financed the operations of Wilson Bros. beginning in 1954. The first loan application was signed by both J. B. and George. It was for acreage in rice, beans, oats and lespedeza. The ownership of one of the tracts of land on which the crops were to be produced was shown to be in J. B. and George Wilson. The 1955 application was for crop production on lands farmed in cotton, milo, oats, rye grass pasture and pasture crops. One of the tracts was again shown under the ownership of J. B. and George Wilson. The change in the name to whom the loan was granted was made in 1962 because of judgments against J. B., but George kept on mortgaging the same property as security.

The PCA held an insurance policy issued by American Livestock and Insurance Company, dated July 22, 1967, insuring J. B. and George Wilson, d/b/a Wilson Bros. The indebtedness existing at the time of George Wilson's death was paid by credit life insurance, apparently from this policy. The policy was offered by

PCA but not required. Premiums were charged to the borrower. The brothers had carried credit life as early as 1955. The policy could not have been issued on J. B. when the loan was made to George only, according to the PCA officials.

George Wilson's son-in-law said that a check he gave in payment for cattle bought from George was made to Wilson Bros., and delivered to George, who endorsed it and used it to pay off a PCA loan. He said that he got free rent on his bean crop by working on the farm for George and J. B. He testified that he helped them put in the cotton crop, and they let him put in another bean crop the next year. He later professed that his reference to J. B. in this testimony was an oversight on his part.

One of the appellees, Joan Rodgers, a daughter of George, testified that she would say offhand that her father engaged in no business other than the farm and 3-Way Grocery and the cattle business. George's widow testified about income from sale of Christmas cards and a flower shop and from her own employment. She definitely stated that her earnings were applied to the needs of her children, herself, her home and the payment of bills such as doctor's bills, all of which were beneficial to her husband. The only suggestion that George Wilson had separate assets to apply to the purchase of lands is in her testimony that a lot given her by her mother was mortgaged to Mrs. Kennedy for a payment on the farm. She said that "we" later paid the mortgage and sold the lot. The proceeds of the sale of the lot were used for the George Wilson family. She testified that her husband became a veterinarian and worked for others with cattle before he and his brother acquired their herd. This is the only way in which she fixes the time, and is the only indication that George Wilson ever engaged in any business activity or employment separately from J. B. Wilson.

There is other testimony and other corroboration of J. B. Wilson. That recited is illustrative. I submit that the evidence is more than sufficient to establish J. B. Wilson's interest in the lands known as the Wilson

Bros. Ranch held in the name of George Wilson. This is without the testimony of J. B. Wilson excluded by the court under the dead man's statute. This may have been error. The personal representative of George Wilson's estate was a party to J. B.'s counterclaim or cross-complaint only as a volunteer. It is not seriously contended that the land is needed for any purpose in connection with the administration of the estate. Wilson concedes that he is estopped to assert any claim against creditors of the George Wilson estate because of the long number of years that he permitted the title to be held in George's name. He admits that the partnership is liable for the payment of mortgage indebtedness on the land. Even if the administrator is properly a nominal party, the dead man's statute has no application to litigation which is basically between J. B. Wilson and the heirs of the estate.

This is also without regard to appellant's serious contention that the answer to J. B. Wilson's counterclaim or cross-complaint should have been stricken, because it was filed more than 20 days after service of the counterclaim. See *Utley* v. *Heckinger,* 235 Ark. 780, 362 S. W. 2d 13.

I respectfully dissent.

I am authorized to state that Mr. Justice Brown joins in this opinion.

Opinion on rehearing delivered June 21, 1971

PER CURIAM

On petition for rehearing appellant asks us to consider the following, among other things:

1. Appellees commenced this action in the trial court claiming ownership of five tracts of land, alleging that all tracts were conveyed to George Wilson, but introduced deeds conveying only three of the tracts and rested without producing any other evidence. Appellant contends that appellees' proof failed as to the other two tracts. He further relies on possession of these tracts by J. B. Wilson and uncontradicted testimony by the grantor, who conveyed one of these tracts, that the deed was made to Wilson Brothers.

2. There is uncontradicted evidence that partnership funds were used to pay at least a part of the purchase price of all the lands involved.

3. There is no evidence to show that any of the tracts of land involved was paid for with any money except that belonging to a partnership of Wilson Brothers.

4. Evidence tending to show that deposits were made in bank accounts in the name of Wilson Brothers and checks were drawn on the account of Wilson Brothers was undisputed, and evidence that proceeds of operations conducted by J. B. Wilson were deposited to bank accounts of Wilson Brothers or to accounts in the name of George Wilson and, perhaps, in the name of his daughter, was not contradicted.

5. Evidence supporting appellant's contention includes applications for crop production loans by George Wilson in which the land ownership was stated to be by Wilson Brothers, and tax assessments of the lands by George Wilson in the name of Wilson Brothers.

Upon original submission, the court was sharply divided upon the question whether a preponderance of the evidence supported the chancellor's finding that J. B. Wilson had no interest in the lands involved. The chancellor properly found that all farming operations were by a partnership consisting of J. B. and George Wilson.

The majority then sustained the chancellor's finding but found these deficiencies in the evidence:

1. Deeds to only three of the five tracts involved were ever introduced in evidence, all of which named George Wilson as grantee. The identity of the grantor in the other two deeds was never disclosed. In spite of the fact that there was some evidence that some payments on the purchase price of some of the lands and some evidence that the grantors were dealing, or thought that they were dealing with Wilson Brothers, or J. B. and George Wilson, the record was silent as to the reason the title to the land was taken in George Wilson.

2. The overall testimony of all the witnesses left the circumstantial evidence as to the ownership so evenly balanced that it could not be said that a preponderance lay either way.

3. The evidence as to the names in which the bank accounts were carried, the source of the funds deposited, the identity of those authorized to draw checks on the account, the arrangements between the depositor or depositors and the banks was vague. No explanation was made or offered as to the failure of either party to produce bank records or bank statements or the testimony of bank officers or employees, other than one whose testimony related to transactions which took place many years ago. It was not possible to determine, with any degree of certainty, whether the pertinent bank accounts were joint accounts, partnership accounts or individual accounts of one or the other of the brothers, with checking authority to the other.

The affirmance of the chancellor's decree as to the ownership of the lands was based upon the want of evidence as to the reason the deeds introduced were made to George Wilson. We have considered this case, both on original submission and on petition for rehearing over a longer period of time than we usually devote to a single case, and are still divided and uncertain as to the

correct result, because of the deficiencies in the evidence pointed out. We are not able to say with any degree of certainty which party is to blame for not producing evidence covering these deficiencies. This determination does not rest solely upon placing the burden of proof in the case, because the evidence may be readily available to one party and not available to the other at all.

The general rule in equity cases is that, with all the record fully developed, we should finally decide the case here instead of remanding it to the chancery court for a new trial. *Narisi* v. *Narisi,* 233 Ark. 525, 345 S. W. 2d 620. The general rule we follow in this respect is proper and should be observed in all save the most exceptional cases. Yet there are exceptions. This court has the power, in furtherance of justice, to remand any case in equity for further proceedings. *Carmack* v. *Lovett,* 44 Ark. 180. We have done this when the chancery court had based its decision on an erroneous theory. *Long* v. *Charles T. Abeles & Co.,* 77 Ark. 156, 93 S. W. 67. We also did so when we found that the chancery court had erroneously decided a case upon an issue of law, leaving issues of fact undecided. *Fordyce* v. *Vickers,* 99 Ark. 500, 138 S. W. 1010.

When we can plainly see what the rights and equities of the parties are, we will not remand a chancery cause. *Pickett* v. *Ferguson,* 45 Ark. 177, 55 Am. St. R. 545. On the other hand, when it is clear that the cause was tried in the chancery court upon an erroneous theory, and we are unable to determine from the evidence before us the decree that should have been rendered, we will, in furtherance of justice, remand the cause to be reopened, to permit further proof so the case may be determined upon the proper principles. *Long* v. *Charles T. Abeles,* supra (on rehearing). In *Fordyce* v. *Vickers,* supra, we said:

> But where the chancellor has decided a case upon an issue involving virtually a question of law, in which we find that he was in error, and leaves undecided other issues in the case involving questions of fact, which he is probably better able to pass upon by

> reason of his greater familiarity with the circumstances and conditions surrounding said issues, this court in its discretion may remand the case for his decision upon said issues of fact. Under the circumstances of this case, we deem it wise to remand the cause for a determination by the chancellor of the matters relative to the improvements, taxes, and rents.

In *Gaither* v. *Gage,* 82 Ark. 51, 100 S. W. 80, we remanded a case for further proceedings where it was apparent that the case was tried upon an erroneous theory in the chancery court.

We analyzed previous holdings in *Wilborn* v. *Elston,* 209 Ark. 670, 191 S. W. 2d 961, saying:

> We try chancery cases de novo, and the usual practice on appeal is to end the controversy here by final judgment, or by direction to the trial court to enter a final decree. There are, however, exceptions to this practice, and it rests in the discretion of this court to determine whether, upon reversal of a cause, the same should be opened for a new trial. If the cause is heard and determined by the chancellor on an erroneous theory, or if it is not sufficiently developed in the trial court, this court may remand for further hearing on the whole case, or on certain issues. [Citing cases.] This practice was followed in the instant case on the former appeal, where the cause was heard by the chancellor on what we determined to be an erroneous theory, and the testimony on what we conceived to be the pertinent issues did not appear to us to have been fully developed.

Even when all the parties tried a case upon an erroneous theory and the chancery court decided the case upon that theory, we have exercised our discretion to remand such a case so that pertinent facts, not fully developed, might be ascertained. *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S. W. 2d 728.

In *Carlile* v. *Corrigan,* 83 Ark. 136, 103 S. W. 620, on reconsideration, we found the question, whether a preponderance of the evidence sustained a conclusion reached in the original opinion finding error but granting judgment here, not free from doubt, and, since it appeared that the evidence on that point had not been fully developed, we remanded to permit further testimony.

When the appellee tried a case upon the theory that a partnership was at will and the court accepted that theory, but we found that the partnership was one for a period of at least three years unless dissolved for sufficient cause, we gave leave to the parties to take further testimony on the existence of cause for dissolution. *Tankersley* v. *Norton,* 142 Ark. 339, 218 S. W. 660.

In our latest exercise of this discretion, we remanded a case in which we affirmed the chancellor as to the termination of a trust in order to permit the trustees to render an accounting to determine whether they were to be reimbursed for a financial loss. *Arnett* v. *Lillard,* 247 Ark. 931, 448 S. W. 2d 626. There we said:

> We agree with the chancellor that the trust may be terminated as of the date appellee pays the government mortgage. However, appellants should be afforded the opportunity to present a fair accounting of their tenure under the trust and they should be reimbursed in the event they have to that date suffered an unavoidable loss. No such contention was made at the trial level and a loss in actuality may not exist; however, it would be putting form above equity to permit an early and unexpected prepayment to burden appellants with a financial loss and to the benefit of appellee. We are clothed with discretion to order a case reopened in exceptional circumstances for additional proof if that is necessary to achieve equity. See *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S. W. 2d 728 (1949).

Appellant filed an answer to appellee's original complaint, in which he alleged that he was not wrong-

fully interfering with appellee's use and control of the land involved here, because it was a partnership asset of which he was properly in control and in which he had a partnership interest. He filed a cross-complaint against the appellee widow and heirs in which he alleged that all assets and property held in the name of George Wilson, with minor exceptions, were owned by a partnership consisting of George Wilson and J. B. Wilson, that the legal title was held by George Wilson in trust for the partnership and the partners, that land held in the name of George Wilson was purchased with partnership money, and that the farms involved were operated by the partnership. He further alleged that any attempt to base title to any such lands held in the name of George Wilson would constitute a fraud, actual or constructive, which should impress a trust upon the property in his favor. He asked that title to a one-half interest be vested in him, subject to mortgages and to claims of creditors against the estate of George Wilson.

A reading of the chancellor's opinion discloses that the question of title to the real estate must have ultimately been treated as if the determination of the case turned upon the existence of a trust ex maleficio or resulting trust. Every authority cited in this opinion has to do with an alleged trust, either constructive or resulting. None relates to the situation where partnership funds were used in paying the purchase price. At first blush one of them, *Randolph* v. *Randolph,* 216 Ark. 193, 224 S. W. 2d 809, might appear to be such a case, but it is not. The only reference to partnership is the contention of one brother, who joined with other siblings in the conveyance of land to another brother, that there was an agreement between him and the grantee to form a partnership for the purpose of acquiring title to the land from their cotenants and to pay for it from the proceeds of timber to be sold off the land. Even so, he did not contend that title was to be held by the partnership. He contended that the grantee agreed to convey an undivided one-half interest in the land to him. The question involved there had to do with the existence of an enforceable oral contract to convey or of a resulting trust. There was no evidence of the use of any

partnership funds or of the existence of any partnership assets.

We certainly agree that neither a constructive nor resulting trust was established by the evidence. Inasmuch as the authorities upon which the chancellor rested his finding were based upon this decision, we cannot be certain that there was a clear-cut decision on the partnership theory.

In *Harbour* v. *Harbour,* 207 Ark. 551, 181 S. W. 2d 805, where a resulting trust was alleged, the chancery court rendered a decree in favor of a wife on the basis that the lands deeded to the husband were paid for from a joint bank account. This court found the decree on that theory erroneous, but sustained the wife's contention that she had an equitable interest by reason of a resulting trust, and remanded the case to permit the wife to show the exact amount of her funds which were used in the purchase of the land.

A case quite similar to this is *Kook* v. *American Sur. Co. of New York,* 88 N. J. Super. 43, 210 A. 2d 633, 18 A. L. R. 3d 784 (1965). There in a suit on an insurance policy, the court found that there was coverage under the policy if property held in the names of the plaintiffs was the property of a partnership consisting of the plaintiffs. The court remanded the case for the taking of further proof on the subject. That court was not satisfied with the existing proof on the subject because the terms of neither the partnership agreement nor real estate purchase agreement were disclosed. No books, records, settlements, documents, income tax returns or other evidence corroborative of an interested partner was introduced. Because the court entertained substantial doubt as to whether the partnership issues were adequately understood or canvassed at the trial level, the court, in the interest of justice, remanded the case for additional proof. Obviously, there was more proof to support appellant's partnership theory in this case than there was in that.

Because of our uncertainity as to the preponderance

of the evidence, as to the theory upon which the case was decided, as to the rights and equities of the parties under the evidence before us, which seems not to have been fully developed, and in the furtherance of justice, we feel that this case should be remanded to the chancery court. There the parties shall be permitted to offer further evidence to show:

1. How the record title to the lands was held, and the identity of the grantee in any unrecorded deeds conveying the property.

2. The reasons for taking the title in the names of the grantees of all conveyances of lands alleged to be partnership property, rather than in the names of the two alleged partners.

3. The names in which bank accounts were held, the source of funds deposited thereto, the person authorized to draw checks on each such account, the arrangements between the depositors and the banks, and the disposition of the funds deposited.

4. The source of the funds used to pay the purchase price of any of the lands in which the grantee in the deeds when purchased was George Wilson.

5. Any accountings between the partners and withdrawal of partnership funds by the individual partners for their own account.

IRMAGARD K. CORBIN *v.* SPECIAL SCHOOL DISTRICT OF FORT SMITH

5-5537 465 S. W. 2d 342

Opinion delivered April 5, 1971

Warren & Bullion, for appellant.

Pearce, Robinson & McCord, for appellee.

J. FRED JONES, Justice. Mrs. Irmagard K. Corbin taught school in the Special School District of Fort Smith under a contract running from August, 1969, to May 29, 1970. On June 1, 1970, she was advised by the school board that she would not be employed for the ensuing school year. Mrs. Corbin filed a complaint in the Sebastian County Circuit Court for a declaratory judgment holding the district subject to, and in violation of, the provisions of the Administrative Procedure Act (Ark. Stat. Ann. §§ 5-701—5-714 [Supp. 1969]) She contended that the regulations promulgated by the board under which her contract was not renewed were void, and that she is still an employee of the district under her teacher's contract. She sought judgment for salary allegedly due her and for an order reinstating her as a teacher in the Fort Smith Special School District.

The school board demurred to the complaint, the demurrer was sustained by the trial court and the complaint dismissed. On her appeal to this court Mrs. Corbin relies on the following points for reversal:

> "The Arkansas Administrative Procedures Act applies to the adoption of regulations by School Districts.
>
> The Board has no authority to adopt the regulation disqualifying plaintiff from teaching.
>
> A School Board may not terminate a teacher arbitrarily."

In January, 1970, the board of directors of the district adopted a resolution which reads as follows:

> "The spouse of the superintendent, the assistant superintendent, and the director of finance and business affairs shall not be employed by the Fort Smith Schools in any capacity."

Mrs. Corbin is the wife of Chris D. Corbin, the superintendent of schools in Fort Smith. Mrs. Corbin taught in the Fort Smith Schools from September, 1963,

through May, 1966. She took a leave of absence; obtained a master's degree, and was re-employed as an elementary teacher by the Fort Smith School District under a written contract for the school year 1969-70. The contract was for the period from August 25, 1969, to May 29, 1970, at a total salary of $8,132, to be paid in monthly installments. The contract provided for termination by either party "pursuant to the Continuing Contract Law (Ark. Stat. Ann. § 80-1304 [Supp. 1969])."

On June 1, 1970, the Fort Smith School Board notified Mrs. Corbin of its intent not to re-employ her in a letter reading as follows:

> "In conformity with the Arkansas continuing contract law, I am notifying you that on May 11 the Fort Smith School Board voted not to renew your contract for the school year 1970-71.
>
> The Board stated as a reason for not renewing the contract that it would be against School Board policy. The policy referred to was presented and voted on at the January 26, 1970, meeting of the Board and is as follows:
>
> 'The spouse of the superintendent, the assistant superintendent, and the director of finance and business affairs shall not be employed by the Fort Smith Schools in any capacity.' "

In her complaint Mrs. Corbin attacks the resolution of the board on the grounds that it was not adopted in the manner as required by the provisions of the Arkansas Administrative Procedure Act (Ark. Stat. Ann. §§ 5-701—5-714 [Supp. 1969]). The demurrer filed by the school board alleges that the complaint does not state facts sufficient to constitute a cause of action.

It appears conceded by the parties that the Administrative Procedure Act (Act 434 of 1967; Ark. Stat. Ann. §§ 5-701—5-714 [Supp. 1969]) applies only to *state*

agencies. So, the question presented under the appellant's first point is whether the Special School District of Fort Smith is an "agency" within the meaning of the Act. We agree with the trial court that it is not. "Agency," as defined in § 1 (a) of Act 434 and as digested in § 5-701 (a), is as follows:

> " 'Agency' means each board, commission, department, officer, or other authority of the *government of the State of Arkansas,* whether or not within or subject to review by another agency, except the General Assembly, the courts, and the Governor. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Provided, the word 'agency' as used in this Act shall not include the Arkansas Public Service Commission, the Arkansas Commerce Commission, the Arkansas Pollution Control Commission, the Contractors Licensing Board, the State Health Board and the Arkansas Workmen's Compensation Commission, it being hereby determined by the General Assembly that the existing laws governing such agencies provide adequate administrative procedures for said agencies." (Emphasis supplied).

It is obvious that the primary purpose of Act 434 of 1967 was to consolidate and recodify the provisions of Act 183 of 1953 and Act 103 of 1963, because § 16 of Act 434 of 1967 provides as follows:

> "All acts or parts of acts in conflict with this Act are hereby repealed, but such repeal shall not affect proceedings pending on the effective date of this Act. Without limiting the generality of the foregoing, the following acts are expressly repealed.
>
> (1) Act 103 of 1963, codified as Sections 5-701 through 5-725 of the Arkansas Statutes Annotated;
>
> (2) Act 183 of 1953, codified as Sections 5-501 through 5-505 of the Arkansas Statutes Annotated."

Act 183 of 1953 was entitled an Act to "provide

for the filing and publication of regulations of agencies, departments and branches of state government; to provide for the effect on failure to comply with the Act; to declare the inapplication of the Act; to provide an effective date; and for other purposes." This Act simply provided that:

> "All agencies, departments or branches of the State government now or hereafter authorized to promulgate regulations under authority of law shall perform the following Acts before such regulation or regulations become effective:
>
> 1. File certified copies of such regulation or regulations with the following:
>
> (a) The Governor of the State of Arkansas.
> (b) The Secretary of State of the State of Arkansas.
> (c) The Recorder of each County in Arkansas."

This 1953 Act then required each agency, department or branch of state government to keep on file for public inspection during regular business hours any regulations promulgated. It also provided that the Act would not apply to any agency, department or branch of the State government which would be excluded from its operation by authority of the Constitution of Arkansas or amendments thereto.

The other repealed Act, 103 of 1963, was entitled an Act to "establish uniform administrative procedures for occupational and professional licensing boards and commissions; to prescribe a uniform procedure for taking appeals from such boards and commissions; and for other purposes." Section 1 of this Act provided as follows:

> "For the purpose of this Act the term 'board' shall mean and include the following:
>
> Abstractors' Board of Examiners,
> Arkansas State Board of Architects,
> Arkansas Athletic Commission * * *."

Then follow 26 other designated boards and commissions, none of which included the board of directors of local school districts. Section 1 of this Act did end, however, with the following two paragraphs:

> "Any other state board, commission or agency hereafter created with authority to exercise control over the licensing of any occupation or profession, unless it is expressly excepted in whole or in part from the provisions of this Act.
>
> Provided that all licensing boards in existence on the effective date of this Act and not specifically enumerated herein shall be exempt from the provisions of this Act."

While Act 103 of 1963 defined the designated boards and commissions under the term "board," Act 434 of 1967 uses the term "agency" to mean each board, commission, department, officer or other authority of the *government of the State of Arkansas,* whether or not within or subject to review by another agency, except the General Assembly, the courts, and the Governor.

We are of the opinion, and so hold, that the Uniform Administrative Procedure Act applies only to state agencies; that local school districts are political subdivisions of the state and are not state agencies within the meaning of the Act. *(Muse* v. *Prescott School District,* 233 Ark. 789, 349 S. W. 2d 329).

As to appellant's second point, we do not share the appellant's interpretation of the effect the regulation adopted by the board had on Mrs. Corbin's qualifications for teaching. All the resolution amounted to, as we interpret it, was an agreement between the members of the board, and announcement in the form of the resolution, that the board would not employ the spouse of a superintendent, assistant superintendent or the director of finance and business affairs. This resolution had nothing whatever to do with Mrs. Corbin's qualifications to teach; it had no more effect on Mrs. Corbin's qualifications to teach than it did on Mr.

Corbin's qualifications to serve as a school superintendent. By the board's compliance with its resolution, the only effect it had on the Corbins was to prevent both of them being employed in the Fort Smith Special School District at the same time, with one of them being employed as superintendent, with the attending superintending control over the other.

The appellant argues that the legislature has delegated no such broad powers to boards of directors of school districts that would enable such boards to set standards of qualification of teachers inconsistent with that fixed by the legislature. We agree with the appellant in this argument, but that is not the case before us. As already stated, the resolution complained of did not go to the qualifications of the teacher at all—it went to the district board's discretion in the employment of teachers and other necessary employees as authorized in § 80-509 (d) (Supp. 1969), and in doing all things necessary and lawful for the conduct of an efficient free public school or schools in the district as authorized by subsection (m) of the same section.

In *Pugsley* v. *Sellmeyer,* 158 Ark. 247, 250 S. W. 538, the board of directors of a school district had adopted, and required the enforcement of, a set of rules, one of which forbade the use of paint or cosmetics by female students. An 18 year old female student appeared in school wearing "talcum powder" on her face and she was denied admittance until she complied with the rules. While the rules were suspended by the board during the pendency of the appeal, in upholding the authority of the board in making such rules, this court at page 252 of the Arkansas Report said:

> "The question therefore is not whether we approve this rule as one we would have made as directors of the district, nor are we required to find whether it was essential to the maintenance of discipline. On the contrary, we must uphold the rule, unless we find that the directors have clearly abused their discretion, and that the rule is not one reasonably calculated to effect the purpose intended, that is,

of promoting discipline in the school, and we do not so find."

We see no reason why the same reasoning should not apply in the case at bar. We are of the opinion, and so hold, that the board had the authority to adopt and enforce the resolution as incidental to its unquestioned and specifically delegated authority to hire teachers and "do all things necessary and lawful for the conduct of an efficient free public school . . . in the district."

In *Safferstone* v. *Tucker,* 235 Ark. 70, 357 S. W. 2d 3, this court said:

> "The law involved appears to be well settled. In this State a broad discretion is vested in the board of directors of each school district in the matter of directing the operation of the schools and a chancery court has no power to interfere with such boards in the exercise of that discretion unless there is a clear abuse of it and the burden is upon those charging such an abuse to prove it by clear and convincing evidence."

And in *White* v. *Jenkins,* 213 Ark. 119, 209 S. W. 2d 457, we said:

> "It is well settled that courts may not intervene to control matters in the discretion of administrative bodies such as school boards, in the absence of a showing of an abuse of such discretion. Necessarily, some latitude in the exercise of this discretion must be given to these boards. They represent the people of the locality affected and naturally are closer to the problems to be solved than any court or other agency could be."

The board having the authority to exercise its discretion, the question then, is whether the action taken by the board in the case at bar was arbitrary, unreasonable, capricious, wrongful, discriminating or oppressive. We cannot say from the record before us

that it was. The board of directors was elected by the people of the district and was charged with the responsibility of hiring superintendents, teachers and other necessary employees, and in doing all things necessary and lawful for the conduct of an efficient free public school in the district.

What effect the employment of the spouse of a superintendent who would work under his supervision would have on the morale and efficiency of other teachers, and the efficient conduct of a free public school the board was required to maintain, we do not know; nor are we required to ascertain. We find no evidence in the record that the board abused its discretion, and we hold that the trial court was correct in refusing to interfere with the exercise of the discretion of the board in matters confided to its judgment.

As to appellant's third point, the language of the statute as well as that of the contract is plain. Ark. Stat. Ann. § 80-1304 (b) (Supp. 1969) provides as follows:

> "Every teacher in the State shall be employed by written contract. In districts which include cities of 10,000 or more population, according to the last Federal census, school boards may elect the superintendent for a period not to exceed 3 years. In other school districts employing a superintendent, school boards may elect the superintendent for a period of not to exceed 2 years. All other teachers and personnel of school districts shall be employed by written contract annually.
>
> * * *
>
> Every contract of employment hereafter made between a teacher and a board of school directors shall be renewed in writing on the same terms and for the same salary, unless increased or decreased by law, for the school year next succeeding the date of termination fixed therein, which renewal may be made by indorsement on the existing con-

tract instrument; *unless during the period of such contract or within ten (10) days after the termination of said school term, the teacher shall be notified by the school board in writing delivered in person or mailed to him or her at last and usual known address by registered mail that such contract will not be renewed for such succeeding year,* or unless the teacher during the period of the contract or within ten (10) days after close of school shall deliver or mail by registered mail to such board his or her written resignation as such teacher, or unless such contract is superseded by another contract between the parties. Provided that no contract for the succeeding school year shall be entered into between the school board and any person prior to the beginning of the second semester of the current school year. If a teacher quits or refuses to teach in accordance with his or her contract without just cause, he or she is hereby prohibited from teaching elsewhere during the time for which he or she had been employed. Provided, that nothing herein shall prohibit any school board from entering into a two [2] year or three [3] year contract as authorized in the first paragraph of this subsection." 'Emphasis supplied).

The contract between Mrs. Corbin and the district provides as follows:

"TIME: The time period covered by this contract is: 9 Months of school; 182 Days of school; 9+ Calendar months; From August 25, 1969, to May 29, 1970.

* * *

TERMINATION: By either party pursuant to the continuing contract law (80-1304)."

Mrs. Corbin's contract expired by its terms on May 29, 1970. It could have been automatically renewed by endorsement for an additional term, had not Mrs. Corbin or the district given notice to the other during the

term of the contract, or within 10 days after its termination, that the contract would not be renewed for the ensuing year. The board of directors of the district did notify Mrs. Corbin on June 1, 1970, (within 10 days after the termination of her contract) that the contract would not be renewed.

We are of the opinion that Mrs. Corbin's rights in this case are governed by her contract and the statutory law relating thereto, and not on "an expectancy of continued employment" by the Fort Smith Special School District while her husband is superintendent of schools in that district.

The judgment is affirmed.

D. C. MOORE, JR., ADM'R *v.* LARRY HANSEN, ET UX

5-5393 465 S. W. 2d 684

Opinion delivered April 5, 1971
[Rehearing denied May 10, 1971.]

Douglas Bradley, for appellant.

W. B. Howard & Jack Segars, for appellees.

CONLEY BYRD, Justice. Cleta Moore, wife of D. C. Moore, deceased, and appellee Betty Hansen, wife of appellee Larry Hansen, jointly purchased some beauty shop

equipment for the purpose of operating a beauty shop. D. C. Moore arranged for a loan for the two wives at the Citizens Bank of Jonesboro. Larry Hansen and D. C. Moore signed the note as accommodation makers for their wives. D. C. Moore requested a credit life insurance policy in the amount of the indebtedness. The premium therefor was included in the note on which the wives were primarily liable. After two installments were made, D. C. Moore was killed in an auto collision. After some litigation, the credit life insurance company paid the bank the policy amount, which after payment of counsel fees left a balance due on the note of $359.49. Cleta Moore paid this amount to the bank, received the note and assigned it to appellant. Appellant brought this action against Larry Hansen and Betty Hansen to recover one half of the balance due on the note before the insurance proceeds were applied. The trial court, upon stipulated facts, denied appellant any right of subrogation to the $5,132.48 paid by the insurance proceeds but did award him a judgment for one half of the $359.49 paid by Mrs. Cleta Moore. The latter portion of the judgment has been satisfied.

For reversal appellant contends that D. C. Moore was an accommodation maker and that appellant as Moore's administrator is entitled to recover from the Hansens one half of the proceeds of the credit life insurance policy that were paid on the debt. A further contention is that he is entitled to recover under Ark. Stat. Ann. § 66-3204(2) (Repl. 1966). We find both contentions without merit.

Appellant cannot recover as an accommodation maker unless he is subrogated to the rights of the creditor. The cases dealing with the issue make a distinction where the credit life insurance premiums are paid by the decedent and where the premiums are paid by another. See *Miller* v. *Potter,* 210 N. C. 268, 186 S. E. 350 (1936) and *Hatley* v. *Johnson,* 265 N. C. 73, 143 S. E. 2d 260 (1965). We think the distinction is valid. Neither appellant nor his decedent has paid anything and before he can become subrogated to the rights of the bank as a

creditor he must have paid the debt, *Haley* v. *Brewer,* 220 Ark. 637, 249 S. W. 2d 128 (1952). It was stipulated that "D. C. Moore, Sr. and Larry Hansen were accommodation endorsers on the said note, receiving no direct benefits therefrom."

When it is considered that the credit life insurance policy here involved stood only as additional security for the loan, it becomes even more logical and practical that appellant should not be subrogated to the rights of the creditor—*i. e.,* the debt in effect was paid by security that the principal obligors had already paid for.

It is true that Ark. Stat. Ann. § 66-3204(2) permits a recovery by a decedent's estate of proceeds of life insurance paid to an unauthorized party in violation of Ark. Stat. Ann. § 66-3204. Here, however, there was no violation of the statute which provides:

> "(1) Any individual of competent legal capacity may procure or effect an insurance contract upon his own life or body for the benefit of any person. But no person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under such contract are payable to the individual insured or his personal representatives, or to a person having, at the time when such contract was made, an insurable interest in the individual insured.
>
> * * *
>
> "(3) 'Insurable interest' with reference to personal insurance includes only interests as follows: . . .
>
> "(b) In the case of other persons, a lawful and substantial economic interest in having the life, health, or bodily safety of the individual insured continue, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the individual insured."

Obviously the bank as creditor had an insurable interest. Furthermore the decedent himself asked for the insurance.

Appellees contend that the appeal should be dismissed because appellant accepted the benefits of the judgment entered. We disagree but because of the holding above the issue becomes moot.

Affirmed.

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

JOHN A. FOGLEMAN, Justice, dissenting. I cannot agree with the majority that the decision of this case hinges upon the question of the identity of the payor of premiums for the credit life insurance on D. C. Moore's life. Certainly the Citizens Bank of Jonesboro had an insurable interest in the life of Mr. Moore since he was a surety of the principal obligors and in the event of their default he would have been liable, but this is not to say that, since the bank had an insurable interest, the principal obligors also had an insurable interest. If the principals on the note, Mrs. D. C. Moore and Mrs. Larry Hansen, had taken out the insurance on Mr. Moore's life it would have been void because it would have been considered a wager-contract. *McRae* v. *Warmack,* 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (n.s.) 949;[1] *Langford* v. *National Life & Accident Insurance Company,* 116 Ark. 527, 173 S. W. 414, 17A Ann. Cas. 1081; *United Assurance Association* v. *Frederick,* 130 Ark. 12, 195 S. W. 691. It is true that a person has an insurable interest in his own life and can insure his life and assign the proceeds to one not having an insurable interest *where there is no prior agreement* between the insured and the beneficiary that the beneficiary will pay the premiums. *Langford* v. *National Life & Accident Insurance Company,* supra; *United Assurance Association* v. *Frederick,* supra. In the present case there was

[1]The case of *National Life & Acc. Ins. Co.* v. *Davis,* 179 Ark. 621, 17 S. W. 2d 312, held that an uncle does have an insurable interest in the life of a nephew overruling *McRae* v. *Warmack,* supra, to that effect, but not otherwise.

a prior agreement that the principals, Mrs. Moore and Mrs. Hansen, would pay the premium since it was included in the note they signed at the bank.

Of course, Larry Hansen's liability for payments was as surety and co-obligor with Moore. He never paid a cent on the debt or the premiums, yet he is unjustly enriched. If the credit life insurance on D. C. Moore insured the *debt* to the bank, subrogation would appear to be questionable, but Ark. Stat. Ann. § 66-3804 (1) (Repl. 1966) states:

> "Credit life insurance" means insurance on the life of a debtor pursuant to or in connection with a specific loan or other credit transaction.

While there are no Arkansas cases involving credit life insurance on a surety's life there is a Georgia case in point, *Betts* v. *Brown,* 219 Ga. 782, 136 S. E. 2d 365 (1965). The Georgia statute defined credit life insurance in the identical language used in the Arkansas statute. Ga. 1, 1960, pp. 289, 743; Code Ann. § 56-3302 (1). The decision held that this provision makes it clear that it is the life of the debtor, not the debt itself, which is insured. The *Betts* case held that the comakers of a note to the bank held the position of principal and surety, and when the credit life insurance proceeds from the death of the surety paid the debt the widow of the surety was subrogated to the rights of the bank. In the case of *Kincaid* v. *Alderson,* 209 Tenn. 597, 354 S. W. 2d 775 (Tenn. 1962), the court found a relationship of surety and principal between an original mortgagor and an assuming mortgagor. The mortgaged property was a mobile home, and the note was for five years. The mortgage included premiums for a life insurance policy on the original mortgagor's life, and the policy was issued to the mortgagee. After the mortgage was assumed the original mortgagor died, and the insurance company paid the balance due. In discussing subrogation of the rights to the surety the decision stated:

> When thus a surety by his death through a valid life insurance policy on his life has discharged

> the obligation, this does not discharge the obligation of the Kincaids who are primarily liable. It would be exactly the same situation as if a surety on an obligation for any reason decided to pay off the obligation. This would not release the principal debtor from his obligation, but it would then be transferred to the surety who had discharged the obligation to release himself as surety. Thus by the death of Alderson and his life insurance paying this debt it would merely transfer the debt of the principal obligator to the surety rather than to the creditor. When the debt is thus paid the surety subrogated to the rights of the creditor.

Also in the case relied upon by the majority, *Hatley* v. *Johnson,* 265 N. C. 73, 143 S. E. 2d 260 (1965), it refers to both of the above cases of *Kincaid* and *Betts* with apparent approval and allowed the wife of a surety to recover when the credit life insurance proceeds were used to pay a mortgagee after the surety died. The decision also pointed out that in 1953 the statute G. S. § 58-195.2 was enacted which states:

> Credit life insurance is declared to be insurance upon the life of a debtor who may be indebted to any person, firm, or corporation extending credit to said debtor.

The decision also pointed out that *Miller* v. *Potter,* 210 N. C. 268, 186 S. E. 350 (1936), decided by a divided court, denied subrogation to a surety because the mortgagee purchased the insurance on the life of the original mortgagor for the debt. Since the passing of the statute cited above it would appear that it is no longer possible in North Carolina to insure the debt. The effect of the decision is that if such payment were allowed to cancel the primary debtor's obligation, then he would in effect be made a beneficiary although he has no insurable interest in the life of the insured.

The majority decision has made Mrs. Larry Hansen and Larry Hansen beneficiaries under the policy, because the premium was added to the principal debt, al-

though she had no insurable interest, and since this is a case of first impression in Arkansas I cannot help but feel that we have disregarded the statute defining "Credit life insurance" as well as the guiding decisions of our sister states that are directly in point. Nothing in this record indicates anything other than Moore's requirement that the principal debtors protect his estate from liability as an accommodation endorser. Nothing indicates that he made, or intended to make, either Mrs. Hansen or her husband a beneficiary of the policy. Only the bank and his estate were beneficiaries, as was clearly indicated in the policy. His estate was secondary beneficiary because the bank could never have retained the excess of any proceeds of insurance over the debt to it.

I do not understand how it could possibly be said that the principal debtor has any economic interest in the continued life of an accommodation endorser. A co-surety, such as Hansen, could not have an insurable interest in excess of the amount he could require his co-surety to contribute if they were called upon to pay the debt. Appellant did not seek to recover this one-half from Hansen.

I would reverse the decree.

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

SOUTH ARKANSAS OIL COMPANY *v.* DAVID LIVINGSTON ET AL

5-5520 465 S. W. 2d 119

Opinion delivered April 5, 1971

Wright, Lindsey & Jennings, for appellant.

William H. Drew and *Brown, Compton, Prewett & Dickens,* for appellees.

CONLEY BYRD, Justice. The jury found that both appellants South Arkansas Oil Company and Wheeling Pipe Line, Inc., were guilty of negligence and that such negligence on the part of each was a proximate cause of the fire that damaged appellee David Livingston's building and contents. The jury apportioned the damages 75% to South Arkansas and 25% to Wheeling. For reversal of the verdict in the amount of $66,494.08, appellant South Arkansas contends there was no evidence to show that it was guilty of negligence, or that any action on its part was a proximate cause of any damages sustained and that the trial court erred in refusing its requested instruction (AMI 503) on intervening proximate cause. Wheeling does not allege error in the judgment but as

a precaution to protect itself in event of reversal has filed a notice of appeal.

The record shows that South Arkansas is a gasoline marketing company and as such owns a service station in Lake Village adjacent to Livingston's Sport Center. The station is operated by Odell Rice on a commission basis. Mr. Wadsworth, South Arkansas's president did not know the exact gallonage of the station's storage tanks. His method of ordering gas was to check the reports sent in by Mr. Rice and to order gas approximately every two weeks according to the amount the reports showed had been sold. On those occasions when the pumps would run out of gas Mr. Wadsworth would cause gas to be shipped by the most convenient transport, either his own or that of Wheeling. On October 8, 1969, he says Mr. Rice reported that he was out of premium gas and on the same day he called Wheeling and ordered 5,500 gallons of premium and 3,000 gallons of regular.

In accordance with Mr. Wadsworth's order, Wheeling's driver T. B. Ray on October 9, 1969, delivered the 5,500 gallons of premium gas and the 3,000 gallons of regular. He testified that he pumped the 5,500 gallons of premium gas into the premium tank, disconnected therefrom and started pumping into the regular tank. Before he left to get a cup of coffee, Mr. Rice told him he had run the premium tank over. He estimates that ten or twelves minutes after he started pumping the regular he shut down to go get a cup of coffee Just as he ordered the cup of coffee, some one said they saw smoke and he ran to move the truck without drinking the coffee. According to him not more than fifteen or twenty minutes expired from the time he quit pumping the premium gas until the fire occurred.

David Livingston testified that there had been other occasions when spillage had occurred at the storage tanks and that he had discussed the matter with Mr. Wadsworth—[Wadsworth denies any such conversations.]

Odell Rice testified that the tanks had been over-

flowed before and that on the day in question he saw the gas overflowing from the premium tanks. When he first saw the fire it was in the area where the gasoline had been spilled.

George Carlton, the volunteer fire chief testified that the difficulty in extinguishing the fire was the amount of fuel in the gravel around the base of the tanks in back of the building. He says that in cleaning up the little spots of fire on the gravel, the gas would be re-ignited by the sparks caused by knocking one rock against another.

It seems to be conceded that the premium storage tank when completely empty would hold only 5,425 gallons of gasoline and that 93 gallons would still be left in the tank when the station pumps stopped pumping.

When the proof is considered in the light most favorable to the jury verdict, as we are required by law to do, we hold that there is substantial evidence both of negligence and proximate cause to support the verdict. As pointed out in *Gibson Oil Company* v. *Sherry,* 172 Ark. 947, 291 S. W. 66 (1927), gasoline is a highly dangerous substance. In *Tri County Gas & Appliance* v. *Charton,* 229 Ark. 989, 320 S. W. 2d 103 (1959), we stated the causal connection rule in this language:

> "In actions for damages on account of negligence plaintiff is bound to prove not only the negligence, but that it was the cause of the damage. This causal connection must be proved by evidence, as a fact, and not be left to mere speculation and conjecture. *The rule does not require, however, that there must be direct proof of the fact itself. This would often be impossible. It will be sufficient if the facts proved are of such a nature, and are so connected and related to each other that the conclusion therefrom may be fairly inferred.*"

South Arkansas's assertion that the trial court erred in not giving its requested instruction on intervening cause is not supported by the record. The record before

us is completely silent as to the proffer of such an instruction. In the absence of such showing, we are not in a position to hold that the trial court erred.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION
v. MYRTIS B. POLK ET AL

5-5541 465 S. W. 2d 671

Opinion delivered April 5, 1971
[Rehearing denied May 10, 1971.]

Thomas B. Keys and *Kenneth R. Brock,* for appellant.

David Soloman and *Jimason J. Daggett,* for appellees.

CONLEY BYRD, Justice. Appellant Arkansas State Highway Commission by this appeal again argues that the sum of the various interests in the property merely make up the fair market value of the whole property and that the sum of the parts cannot exceed the value of the whole. We held contrary to appellant on this issue in *Arkansas State Highway Commission* v. *Fox,* 230 Ark. 287, 322 S. W. 2d 81 (1959). We find that the record here supports our former decision from which we refuse to recede.

Our Constitution Art. II § 22 provides:

> "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

The record shows that Myrtis B. Polk and Carolyn Polk Holcomb owned 83 acres at the time the declaration of taking was filed on February 28, 1969, subject to an agricultural lease in favor of H. F. Lynn that would expire on December 31, 1971. The witnesses in appraising the landowners' interest in the land considered its highest and best use to be for rural residential purposes and gave its before and after value for that use. Mr. Lynn, the tenant, on the other hand arrived at his damages based upon an agricultural use. While he acknowledged that his lease covered the whole tract he stated without hesitation that he only messed with the 43 cultivated acres.

When we remember that the interests of both the landlord and lessee constitute private property and that each is entitled to compensation for the property taken for a public use, the invalidity of appellant's whole unit theory can readily be demonstrated. The price a willing buyer and a willing seller arrive at for residential development ordinarily contemplates an orderly development of the tract because there is usually a time difference or lag between the beginning and final development of an 83 acre tract. In arriving at the purchase price or the market price for that purpose, the use of

the premises for agricultural purposes is at most only incidental to the market price. See *Arkansas State Highway Commission* v. *Griffin,* 241 Ark. 1033, 411 S. W. 2d 495 (1957), where we held it was improper to value lands on behalf of the landowner both for commercial purposes and residential purposes. The highest and best use of the premises on behalf of the lessee, however, is for agricultural purposes but since his lease may or may not affect the market price of the landowner, it follows that if both the landowner and the lessee are to receive just compensation the private property of each must be valued on the basis of each respective ownership even though it may amount to more than the landowner could recover in the absence of a lease. For instance in the present case part of the lessee's damages was amortization of lime applied, an item that would have no practical effect upon the value of the lands for residential purposes.

Appellant in pursuit of its whole unit rule objective, offered its instruction No. 5 defining just compensation in terms of all of the defendants. The trial court modified the instruction by adding the italicized word "Landowners." As given the instruction read:

> "Just compensation to the Defendant *Landowners* in this case is the difference in the fair market value of the land immediately before the taking on February 28, 1969, and the fair market value of the land immediately after the taking; assuming that the highway is completed and permanently in place.
>
> "The term 'fair market value,' as used in these instructions, means the price the land would bring on the market in a transaction between a buyer and seller with knowledge of all the uses and purposes to which the land is adopted after they have had a reasonable time for negotiations, and the seller was willing but not forced to sell, and the buyer was willing, but not forced to buy."

The objection at the trial was that the instruction allowed an overlap or double payment where a lease was

involved. Appellant now argues that the instruction was erroneous because it did not require the jury, when assessing the landowners' damages, to take into consideration that the property was encumbered by a lease. We find no merit in this contention for either of two reasons: (1) it is raised for the first time on appeal and (2) the burden was on appellant to request an instruction on that issue if it desired that it be submitted to the jury.

Instruction No. 7 given by the court defined the damages which the lessee Mr. Lynn would be entitled to recover. The objection at that time, besides the whole unit rule, was that it was not supported by the evidence. On appeal the argument is that the instruction does correctly state the measure of damages for a leasehold interest in a partial taking. We do not consider the argument now made since it is raised for the first time on appeal. Not having presented the issue now argued to us to the trial court, appellant is not now in a position to claim that the trial court committed error.

Affirmed.

CANTRELL REALTY COMPANY *v.* ELBERT W. LISEMBY AND BETTY SUE LISEMBY

5-5510 465 S. W. 2d 121

Opinion delivered April 5, 1971

Bridges, Young, Matthews & Davis, for appellant.

John W. Elrod, for appellees.

FRANK HOLT, Justice. This action was brought by appellant to recover a real estate brokerage commission from appellees. After presentation of oral and documentary evidence by both parties, the trial court, sitting as a jury, found that appellant was not entitled to a commission. From the judgment of the court dismissing the complaint, appellant brings this appeal.

On April 10, 1969, appellees entered into a written "exclusive listing" contract with appellant. Under the terms of this contract, appellant was to have the exclusive right from April 10, 1969, through September 10, 1969, to sell appellees' house. If the house were sold within that period, whether by appellant or by any other party including appellees, appellant would be entitled, under the contract, to a broker's commission of 6% of the gross amount of the sale price. Since appellees insisted upon a net receipt of no less than $14,000, it was agreed that appellant should set the selling price at $15,000 in order to accommodate its commission and still allow appellees their desired return. The contract further provided that appellant would also be entitled to a commission if the house were sold after the 150-day listing period as a result of information given by or obtained through appellant.

Sometime in July 1969, Malon D. Harris contacted appellant as a prospective purchaser, and appellant en-

deavored to sell him appellees' house. Harris declined to purchase the house, and no other buyer was obtained by appellant during the listing period. Appellees advised appellant on September 8, 1969, that they did not intend to renew the listing contract and, on September 26, 1969, transferred the listed property to Harris for $14,000. Upon learning of this sale, appellant demanded its commission. Appellees' refusal to pay resulted in the present litigation.

In its first point for reversal, appellant contends that the trial court erred by not finding that appellees effectively sold their house during the listing period, thereby incurring liability for the commission. In accordance with our well established rule, on appeal we review the evidence in the light most favorable to appellees to ascertain if there is any substantial evidence to support the finding of the trial court, and, if so, then we must affirm. *Pearrow* v. *Huntsman,* 248 Ark. 1146, 455 S. W. 2d 128 (1970); *Zullo* v. *Alcoatings, Inc.,* 237 Ark. 511, 374 S. W. 2d 188 (1964). There is testimony that Harris first approached appellees about purchasing their house without any knowledge of the listing with appellant; appellees then referred Harris to appellant and advised him he would have to buy the house through appellant. On a later occasion, Harris asked appellees if he could buy the house for $14,000. Appellee Elbert Lisemby testified: "I told him I could not sell it to him for any price as long as [appellant] had it." Lisemby acknowledged that he told Harris he would sell him the house for $14,000 if appellant did not sell it.

Appellant now argues that this was an agreement which constituted a binding condition contract. However, according to Harris, this conversation was not understood to be a binding agreement. He stated that appellee Lisemby "said he couldn't hold it for me, but, of course, if [appellant] hadn't sold it before they were out of it that he would sell it to me." Likewise, Lisemby did not consider this as a binding contract. He testified that he was uncertain as of September 10, 1969 (the date of expiration of the listing contract) whether Harris would buy the house. It was not until September 26,

1969, that Lisemby knew for certain that Harris could or would buy his house because it was only then that Harris was able to make the $500 down payment. According to Lisemby and Harris, there was no enforceable agreement until that date. We cannot say there was no substantial evidence to support the finding that this asserted agreement was not intended as a binding sales contract.

Next it is asserted for reversal that appellees' conduct during the listing period was intended to, and did, improperly deprive appellant of the sale to Harris. Appellant contends there is evidence that appellees and Harris secretly negotiated with a federal loan agency during the listing period to secure financing; that when Lisemby did not renew the listing he made misleading statements to the effect that he had decided to retain the property and rent it; and that the transfer of the property after the listing period constituted a breach of the listing contract. But, once again there is substantial evidence controverting these contentions. Appellee Lisemby testified that he wanted appellant to sell the property and did not discourage anyone from buying it; that he never suggested to Harris that by waiting he could beat appellant out of its commission; that although he had told Harris, whom he had sent to appellant, that he would sell to him for $14,000, he would not do so until appellant had his full time; that Harris indicated that he was unable to finance the house at $15,000; and that they agreed to sell the house to Harris only after he was convinced that Harris would not buy it at $15,000. Although other evidence may be construed to indicate that appellees did not act in good faith toward appellant, nonetheless, when we view the evidence in the light most favorable to the appellees, we cannot say there is no substantial evidence to support an opposite conclusion by the trial court.

In its third and final point for reversal, appellant argues that the sale to Harris, even assuming it occurred after the listing period, resulted from the efforts of appellant during the listing period. Appellant points out that "there was substantial proof during the trial that the sale made to Harris was the product of [appellant's]

advertisements and efforts." Even though this proof does exist, it is not controlling here on appeal. As previously indicated, on appeal we must affirm if there is any substantial evidence to support the findings of the trial court, although there is also substantial evidence to the contrary.

The president of appellant company, Jerry Cantrell, testified that: He ran ads concerning the property in a local newspaper; he placed a "for sale" sign in appellees' yard; he had met with Harris on three occasions in an effort to sell him the house, but that Harris stated that he had decided not to buy the house and preferred to rent; Harris had referred to the ads when he contacted him; he had suggested methods of financing to Harris when he said that he was unable to "raise the money;" and after that, appellant did not consider Harris "a good prospect." Harris testified that he first learned of the house being for sale from appellee Elbert Lisemby, an acquaintance, who told him that he would have to buy from Cantrell; that he only met twice with Cantrell and that the other contacts were by telephone; that he did not mention any ad to Cantrell; and that he did not buy the house as a result of any efforts of appellant. The testimony is conflicting and reconciling conflicts in the testimony and weighing the evidence are within the exclusive province of the trial court. We cannot say there is no substantial evidence that the sale was made independent of appellant's efforts.

Affirmed.

BYRD, J., dissents.

M. L. SIGMON FOREST PRODUCTS, INC. *v.*
HAROLD E. SCROGGINS, SR.

5-5527 465 S. W. 2d 673

Opinion delivered April 12, 1971
[Rehearing denied May 10, 1971.]

Catlett & Henderson, for appellant.

Clifton Bond, for appellee and cross-appellant.

CARLETON HARRIS, Chief Justice. This is the second appeal of this case. In *M. L. Sigmon Forest Products, Inc.* v. *Harold E. Scroggins, Sr.,* 247 Ark. 493, 446 S. W. 2d 198, this court reversed the decree of the Drew County

Chancery Court and remanded this cause for further proof on two points, first, a determination of how long the appellant had been, and would be, kept from possession of the premises sought in the action and secondly to permit appellee to offer competent evidence of his reasons for withholding possession of the lands in controversy from appellant. The parties had entered into a lease agreement on January 18, 1967, which *inter alia,* provided:

"Lessor hereby leases and lets to Lessee for a term of two (2) years commencing on the 18th day of January, 1967, the following described lands lying and situated in Drew County, Arkansas, to wit: [description of lands follows]"

On December 13, 1968, appellant notified Scroggins that it would expect to take full possession of the farm on the expiration date. Whereupon Scroggins filed suit in the Chancery Court of Drew County alleging that he was a tenant for years under the lease agreement and was entitled to six months' written notice of termination, with such notice to end with the rental period of 1971. He further asserted that he had done substantial work in preparing the lands for the 1969 crop year, and that he had more than six months prior to the termination date in the lease, attempted to ascertain from appellant whether the lease would be continued or terminated, but without success. It was asserted that the annual rental value of the farm was $30,000 and that appellant should be enjoined from taking possession or from interfering with appellee's possession. Sigmon agreed that the rental value for one year's rental was $30,000. The chancellor decided the issues on the basis of a motion for summary judgment, responses, affidavits, and exhibits to the affidavits; but we reversed, remanded the case stating:

"There is, however, one fact definitely left for determination. Section 50-509 provides that one who willfully holds over, thus preventing possession to the person entitled thereto, shall pay the person so kept out of

possession double the yearly rent of the lands detained *for all the time he shall keep the person entitled thereto out of possession.* This record does not reflect for how long the appellant has been, or will be, kept from possession, and this fact will have to be determined at another hearing. Also, while there is nothing in the record before us which reflects that appellee acted in good faith in not surrendering the premises, inasmuch as the case is being remanded anyway, we think it proper to permit Scroggins to offer competent evidence of his reasons for withholding possession. In *Lessor-Goldman Cotton Company* v. *Fletcher,* 153 Ark. 17, 239 S. W. 742, this court pointed out that, under the statute:

> '* * * to entitle the landlord or lessor to double rents after the termination of the lease term, the holding over by the tenant must be done wilfully. The statute is highly penal, must be strictly construed, and cannot be extended by intendment beyond its express terms. A holding over by the tenant under the *bona fide* belief that he has the right to do so, even though he were mistaken, is not a wilful or contumacious holding under the statute, where the undisputed facts show, as they do here, that there were reasonable grounds for such belief.' "

On remand, the court conducted a hearing as a matter of determining these two matters, and at the conclusion of the hearing, made the following findings:

"1. Scroggins retained possession of the land in issue to November 17, 1969.

2. The 'yearly rent' of the land in issue for 1969 is $30,000.00.

3. Scroggins 'acted in good faith (under the facts and circumstances in this action)' in not surrendering the possession of the land in issue to Sigmon and is not subject to the penalty of double rents as authorized by Section 50-509 supra.

4. Sigmon should have a judgment against Scroggins for $30,000.00, less $26,249.44 previously paid, or a sum of $3,750.56, with interest and all costs of this action for which execution or garnishment may issue.

The rice and bean crop was stored and sold to certain graineries and certain amounts are paid by said graineries to Sigmon and Scroggins at intervals. This to state the full purchase price of the crops had not been paid by the graineries to Sigmon and Scroggins on the date this action was heard. Sigmon should file or cause to be filed with the Clerk of this Court a statement of further advances made by the graineries to it since this trial of this action, and if such advances have been received by Sigmon the same should be credited to the judgment granted in Part 4 hereof."

From the judgment so entered, appellant brings this appeal, contending that the court erred in holding that Scroggins acted in good faith in not surrendering the lands leased and was therefore not subject to double rental under the provisions under Ark. Stat. Ann. § 50-509 (1947). Appellee cross-appeals, contending that the trial court erred in not granting Scroggins judgment against appellant for one-half of the cost of seed, fertilizer, and herbicides used in the growing of the 1969 rice crop and one-fourth of the cost of fertilizer and herbicides used in growing the 1969 soybean crop in the sum of $7,227.01. We first discuss the direct appeal.

In *Lesser-Goldman Cotton Company* v. *Fletcher supra,* we held, as pointed out on the first appeal of this case, that the landlord or lessor is only entitled to double rents when the holding over by the tenant is wilfully done, and in the case before us, the trial court found that the holding over was not "wilful". In giving his reasons, the chancellor said that the relationship between the parties appeared to have been satisfactory for more than 25 years,[1] and "because of this long tenure, development and improvement of the farm by Scroggins there had been created a feeling of possession and maybe some degree of proprietary claim by Scroggins in the

[1]Appellee's father had farmed the lands previous to any lease to Scroggins.

land"; further, that Sigmon had knowledge of the work being done by Scroggins in preparing the land for the crop year but did not warn appellee that the lands would not be rented to him in 1969. Further from the chancellor's opinion:

"Scroggins testified that it would have been inconvenient for him to remove from the lands, that he would have suffered the loss of the preparatory work done on the land for the 1969 crop (neither of which are legal causes to withhold possession of the land), that he knew the lease in issue had a termination date but that he was entitled to remain in possession until he had received a six months notice of the termination of the lease or to quit possession."

Saying that he really thought he had the legal right to retain possession of the premises unless he had received a six months' notice to vacate does not establish the *bona fide* belief referred to by the law. Such *bona fide* belief might well arise where several heirs were contending to be owners of land—or where there was a will contest to determine whether one party had been legally devised some realty—or where there was a boundary line dispute. But, of course, there are no circumstances of this nature presented in the instant litigation.

We do not agree that the reasons enumerated justified Scroggins in holding over, and we have reached the conclusion that the holding over by appellee, under the law, was entirely "wilful". Scroggins testified that he talked with Glenn Cooper, president of appellant company, in June or July of 1968, with reference to whether he would be allowed to farm the lands past January 17, 1969. While it is asserted in appellee's brief that Scroggins was told by Cooper "that he thought it would be all right for Scroggins to farm the lands for another year", the record lacks quite a bit of supporting this interpretation. The first time that Scroggins was interrogated, and by his own attorney, relative to what was discussed in regard to the leased lands, Scroggins replied: "Not much of anything, I just asked him if he was going to let me farm on and *he said that he would let me know. That was all that was ever said* [emphasis

supplied]" When he was next asked by his attorney what he had been told, appellee stated: "He said that he would let me know—at that time he said that it was all right." This was the first mention of any inference that it "would be all right". Following this answer, the court asked "what was that? Did he say that, or, did he think that?" Appellee's attorney then asked "What did Mr. Cooper say?" Scroggins replied as at the outset "He didn't say anything, really. He said that he would let me know." Subsequently, appellee stated that he assumed that he would have the lands for another year "when he told me that everything was O.K.". It somewhat appears that the alleged statement by Cooper "at that time he said it was alright" was an afterthought.

It is also argued that Scroggins began preparing the lands for another crop year in October of 1968 and that Sigmon had knowledge of this fact but did not warn Scroggins not to incur the expense necessary in such preparation. It is likely that Sigmon did know of the preparation, but there is no proof that this was true. Though Cooper testified in the case, he was never questioned along this line and the testimony of Scroggins certainly did not establish this knowledge on the part of appellant. When asked if Sigmon Farms knew if he was preparing the lands for the next crop year, Scroggins said "I assume that they did. They were around all the time—some of them". It developed that by "they" he meant a Mr. Hobbs, whom Scroggins identified as follows. "I guess that he is right-hand man for Cooper, I don't know." When asked if Hobbs saw him preparing the land, he said that he guessed that he did. Be that as it may, there was no legal obligation on the part of appellant to tell Scroggins anything at all concerning renewal of the lease until 30 days before the expiration date. Scroggins testified that he had been renting the land since 1955, some years without a written lease; that he first had a ten year lease, but then entered into the two year lease in January, 1967. This fact, in itself, should have served as a notice to appellee that he could not depend upon prior practices, and of course, the testimony, earlier quoted, that Cooper would let him know about the lease of the land for 1969 like-

wise should have served as a warning not to incur expense until definite arrangements had been made. The evidence also reflects that Scroggins locked the gates to keep appellant off the farm.

His determination to maintain possession is further shown by the fact that he ignored the finding of the chancery court which was filed on February 18, 1969. The chancellor had held that a three day notice must be served on Scroggins (in compliance with Ark. Stat. Ann. § 34-1503 [Repl. 1962]) before appellant would be entitled to the land, and this notice was served on March 5, notifying Scroggins to give up the premises. Scroggins refused to do so and the next day appellant commenced an action in unlawful detainer in circuit court praying for possession of the land in issue and seeking double the annual rental value of the lands for the time Sigmon was kept out of possession; also for any sums for which Sigmon might be held liable for the reason of its breach of its rental contract with James E. Henly to whom Sigmon had leased the lands for a period of three years to commence on January 18, 1969. A writ of possession was issued by the clerk but Scroggins filed a bond to retain possession, and continued to hold on until November. The Supreme Court opinion was issued on November 4, 1969, and Scroggins delivered possession of the land on Noevember 17, 1969. The circuit court action was thereupon dismissed on December 4, 1969. In other words, appellant was prevented from using its lands for the entire crop year of 1969.

Though not argued by appellee, nor mentioned by the trial court, top, side, or bottom, in either the first case to reach this court, or on the present appeal resulting from the remand, it has been suggested by a member of this court that the case should be affirmed for the reason that equity will not lend its aid to the enforcement of penalties. See *Cooley & Cooley* v. *Lovewell,* 95 Ark. 567, 130 S. W. 574; *Hendrix* v. *Black,* 132 Ark. 473, 201 S. W. 283. We do not agree with this view. Brushing aside the fact that this defense is not argued by appellee, nor relied upon by the court in reaching its determination, there are more cogent reasons why such

a defense is not applicable. In the first place, this was not an action instituted by appellant in the chancery court wherein it sought double damages; to the contrary, *chancery jurisdiction was invoked by appellee,* and as stated in our first opinion, in answering, it was necessary under the provisions of Ark. Stat. Ann. § 27-1121 (Repl. 1962), that appellant file any counterclaim that it might have, or be thereafter barred.[2] In *Augusta Cooperage Co.* v. *Bloch,* 153 Ark. 133, 239 S. W. 760, Bloch instituted an action against the company in the circuit court to recover damages, including treble damages, for the wrongful cutting and removing of timber. The appellant moved to transfer the case to chancery court, asserting that the deed under which it claimed should be reformed. The case was transferred, the court deciding the litigation in favor of Bloch, however denying treble damages. The company appealed from an adverse ruling on reformation of the deed. On the question of treble damages, this court said:

"The trial court found that the trespass was wilful, but refused to award treble damages, citing *Cooley* v. *Lovell,* 95 Ark. 567; *Hendricks* v. *Black,* 132 Ark. 473. These were cases originating in courts of chancery to enforce penalties, and we held that 'courts of equity will not aid in the enforcement of penalties.' But, where one goes into a court of law to recover treble damages awarded by the statute (§ 10320, C. & M.) and the defendant in the action asks and succeeds in having the cause transferred to equity, the chancery court, having acquired jurisdiction and having determined on trial of the issues that the plaintiff is entitled to treble damages under the statute, may follow the law and award such damages without sending the cause back to the law court.[3]"

[2]The only complaint instituted by appellant was filed in the Drew County Circuit Court, but was dismissed after appellee surrendered the premises.

[3]The case was affirmed, the court finding that there actually had not been a wilful trespass, stating:

Even though the trial court gave erroneous reasons for its findings and decree, nevertheless, we find that the amount of the decree based on the stumpage value of the timber was justified by a preponderance of the evidence in the record."

In *United States* v. *Flint Lumber Co.,* 87 Ark. 80, 112 S. W. 217 (1908), suit was instituted in the Yell Chancery Court against the Flint Lumber Company to wind up the company's affairs on account of its insolvency, and a receiver was appointed. Thereafter, appellant was allowed to intervene, the intervention alleging that the property in question was vacant land of the United States and subject to homestead entry at the land office of the United States at Dardanelle; that one George Gamey, at the instance of appellee, and with the intent of defrauding the United States out of the pine timber growing on the lands, violated the laws regulating homestead entries and cut and removed 350,000 feet of pine logs. The court rendered a decree in favor of intervener but awarded only the measure of damages provided for cutting of timber by inadvertence or mistake (the value of the timber when first taken or "logs in the tree" value), rather than making an award under the provisions of the law relating to a wilful trespass (trespasser being liable for the full value of the property without deduction of labor or expense). The intervener appealed on this one point only and in reversing the trial court, this court, in an opinion by Mr. Justice Hart, stated:

"The amount of the liability in this case depends upon the fact of whether or not George Gamey and the Flint Lumber Company were wilful trespassers acting in bad faith and for that reason ought to suffer some punishment for their depredation."

The court held that the evidence showed appellee to be a trespasser, that the penalty should have been invoked, and reversed the chancellor.

It thus appears that there is a difference in the rule relating to the award of damages for wilful trespass (in chancery court) where the owner of the land instigates the action, and where the tenant or trespasser institutes the action. In *Augusta Cooperage Co.* v. *Bloch supra,* the case was transferred to the chancery court on the application of the alleged trespasser, and we said the

penalty was entirely proper. Of course, in *United States v. Flint Lumber Co. supra,* the benefit of the penalty was given to the intervener, who had not orginally filed the suit, but who had a definite interest in the outcome of the litigation.

We can see no legal difference where a person against whom a penalty is sought moves to transfer the case to equity (as in *Bloch)* and where a prospective defendant files the suit originally in chancery.

There is yet another reason why such a defense would have no merit in the present instance. Paragraph four of this opinion, quoting from the opinion in the first appeal of this case, makes it clear that the case was remanded for the purpose of determining how long appellant was kept out of possession of the premises, and whether Scroggins acted in good faith, in order *to determine whether appellant was entitled to double damages, and in what amount.* That opinion became the law of the case and is now controlling on this appeal. In *Farmers Cooperative Assn.* v. *Phillips,* 243 Ark. 809, 422 S. W. 2d 418 (1968), we said:

"There are two answers to this contention. First, our prior opinion became the law of the case and is controlling upon this appeal even though we should now think it to have been erroneous (which we do not imply)."

Numerous cases could be cited to the same effect.

On cross-appeal, it is urged that the court erred in not allowing Scroggins judgment against Sigmon for one-half of the cost of seed, fertilizer and herbicides used in the growing of the 1969 rice crop and one-fourth of the cost of fertilizer and herbicides used in growing the 1969 soybean crop, the amount sought being $7,-227.01. Actually, even if we agreed with appellee, it appears that the amount would be incorrect since appellee's accountant, H. W. Wall, admitted that in reaching this figure, he had charged Sigmon with one-half of the expense of the bean crop, where he should have charged

only one-fourth. Also, it appears that certain items were included in this sum which were not the responsibility of Sigmon under the terms of the lease. Be that as it may, appellee is not entitled to reimbursement, *for his 1969 operation was not under the lease but rather came about as a matter of his holding over.* The lease was not in effect because it had expired on January 18, 1969. The sharing of the cost of making the crop, as heretofore set out, was based on a provision in the lease. Since the lease was not applicable to the 1969 crop, its provisions cannot be relied upon.

To summarize, we find that the holding over was wilful, and appellant was entitled to double damages for the time that Scroggins held over and kept possession from appellant. This simply means that Sigmon is entitled to rent for 1969 in the amount of $30,000 (for which judgment was given by the trial court), plus a penalty of $25,000, this last figure being reached on the basis of the fact that Sigmon was denied possession for a period of ten months. This makes a total due from Scroggins to Sigmon of $55,000, less amounts already paid.

The decree on direct appeal is reversed and the cause remanded with directions to the chancellor to enter an additional judgment for M. L. Sigmon Forest Products, Inc. against Harold E. Scroggins, Sr. for the sum of $25,000 representing double damages; on cross-appeal the decree is affirmed.

It is so ordered.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I have suggested, and insist, that the chancellor's decree should be affirmed because equity does not lend its aid to the enforcement of penalties. There can be no doubt that the "double damage" statute invoked provides for a penalty. *Lesser-Goldman Cotton Co.* v. *Fletcher,* 153 Ark. 17, 239 S. W. 742; *Weeks* v. *McClanahan,* 227 Ark. 495, 300 S. W. 2d 6.

Even though this case is basically an action at law without any elements of equity jurisdiction and probably should have been tried in the circuit court, this court determines an appeal, as if the case were in chancery, when the parties have so treated it. *Ware* v. *White,* 81 Ark. 220, 108 S. W. 831. See also *Gray* v. *Malone,* 142 Ark. 609, 219 S. W. 742. The parties here treated the case as if it were in equity. No effort was made to transfer it to law. Trial here in an equity case is de novo, on which a decree will be affirmed if it appears to be correct upon the record as a whole, even though the chancellor may have given the wrong reason for his conclusion. *Morgan* v. *Downs,* 245 Ark. 328, 432 S. W. 2d 454. See also *Reamey* v. *Watt,* 240 Ark. 893, 403 S. W. 2d 102; *Downtowner* v. *Commonwealth Sec.,* 243 Ark. 122, 419 S. W. 2d 126; *Langley* v. *Reames,* 210 Ark. 624, 197 S. W. 2d 291. This is consistent with the general rule that the appellate court looks to the correctness of the judgment, whatever may have been the trial court's reason for granting it. *Southern Farm Bureau Casualty Ins. Co.* v. *Reed,* 231 Ark. 759, 332 S. W. 2d 615. The failure of appellee to argue the point or cite authority on it is immaterial. *Miller* v. *Dyer,* 243 Ark. 981, 423 S. W. 2d 275.

Even if appellee had failed to file any brief whatever, this would not have warranted automatic relief to appellant. The burden is always on the appellant to demonstrate error in the decree. *Poindexter* v. *Cole,* 239 Ark. 471, 389 S. W. 2d 869. If he does not do so we affirm on trial de novo even though the reasons for the chancellor's decree are unsound, if upon the whole record a correct result has been reached. *Culberhouse* v. *Hawthorne,* 107 Ark. 462, 156 S. W. 421.

I really feel that the chancellor's findings in this case, where only slight excuse for holding over was given, are an expression of equity's abhorrence for penalties, without direct statement of the maxim, if indeed the court's reliance thereon is of any significance.

We are not able to say exactly what issues were presented to the chancery court. Appellant unquestion-

ably asked double damages as a counterclaim in its answer. Appellant's motion for summary judgment was filed simultaneously with its answer. Appellee's response to this motion alleged that there was a genuine issue as to material fact, that appellant was not entitled to judgment as a matter of law and that appellee was entitled to prevail in the case. No other pleading controverting the counterclaim was then due and none has ever been filed. The motion for summary judgment was taken under submission for later action by the chancellor 17 days after it was filed. Appellee did file a $60,000 bond to retain possession and an answer to appellant's complaint in an unlawful detainer action instituted by appellant in the Circuit Court of Drew County after the filing of the findings of the chancellor on appellant's motion for summary judgment but before entry of the court's decree. In appellee's answer in the later action, he alleged that appellant was not entitled to damages equal to double the rental value of the lands under Ark. Stat. Ann. § 50-509 (1947), but was entitled to recover only the share crop rents upon said lands due or to become due from appellee to appellant. This action was dismissed on motion of appellant on December 4, 1969. The order of dismissal discharged the surety on appellant's unlawful detainer bond. That record was specifically made a part of the record in this case.

While we know the reasons given by the chancellor for refusing to enforce the penalty, we do not know, and cannot know, what arguments were advanced by appellee in the chancery court. Where the court proceeded to a hearing upon appellant's counterclaim without any attempt being made to require a reply thereto, the failure to require the reply was a waiver thereof. *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244, on rehearing. No default was sought, so all questions raised by the counterclaim were at issue (if indeed it is necessary to plead equity's abhorrence for penalties). *Pembroke* v. *Logan,* 71 Ark. 364, 74 S. W. 297; *Hill* v. *Imboden,* 146 Ark. 99, 225 S. W. 330.

Relief in equity should be granted as warranted by the facts, not on a request for that relief where there is

no prayer and the relief is apparent from the facts alleged or where the prayer for relief is general. See *Sannoner* v. *Jacobson & Co.,* 47 Ark. 31, 14 S. W. 458, *Cook* v. *Bronaugh,* 13 Ark. 183; *Kelly's Heirs* v. *McGuire,* 15 Ark. 555; *Ross* v. *Davis,* 17 Ark. 113; *Shields* v. *Trammell,* 19 Ark. 51; *Rogers* v. *Brooks,* 30 Ark. 612; *Morgan* v. *Scott-Mayer Comm. Co.,* 185 Ark. 637, 48 S. W. 2d 838; *Grytbak* v. *Grytbak* (on rehearing), 216 Ark. 674, 227 S. W. 2d 633; *Smith* v. *Smith,* 219 Ark. 304, 241 S. W. 2d 113; *Taylor* v. *Taylor,* 224 Ark. 328, 273 S. W. 2d 22.

I do consider the cases of *Cooley* v. *Lovewell,* 95 Ark. 567, 130 S. W. 574, and *Hendrix* v. *Black,* 132 Ark. 473, 201 S. W. 283, to be applicable and the authorities on chancery enforcement of penalties cited in the majority opinion inapplicable. I suggest that the parties moving for summary judgment against the sheriff under Chapter 94, Kirby's Digest [Ark. Stat. Ann. § 29-209 et seq. (Repl. 1962)] in *Cooley* had no choice of forum, since the decree under which they claimed was rendered in the chancery court and the officer acted under the processes of that court.

Language from *Augusta Cooperage Company* v. *Bloch,* 153 Ark. 133, 239 S. W. 760, relied upon by the majority is dictum. Furthermore, we clearly held that the defendant's responsive pleading entitled him to a transfer to equity, a situation quite different from that prevailing here. The plaintiff there could not have prevented the transfer or obtained a retransfer. In *Dickson* v. *Love,* 149 Ark. 669, 233 S. W. 800, not cited by the majority, we found a liability for treble damages for a part of the period for which the plaintiff had sought to recover, but the removal of the action to chancery was based upon defendant's prayer for the equitable remedy of specific performance, which the court granted.

I do not take the decision in *United States* v. *Flint Lumber Co.,* 87 Ark. 80, 112 S. W. 217, to be authoritative here. There was no question of a statutory penalty involved there, nor do I see the damages as punitive

damages, as that term is usually employed. All that we did in that case was to apply the common law distinction between the measure of damages for an unintentional trespass and that for a wilful trespass. In the former case the measure is the value of the property in its converted state at the time of trial, less labor expended by the trespasser. In the latter, it is the value of the property at the time of trial in its converted form without deduction for the trespasser's labor and expense in the enhancement of its value. See *Eaton* v. *Langley,* 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474; *Woodenware Co.* v. *United States,* 106 U. S. 432, 1 S. Ct. 398, 27 L. Ed. 230; *Hudson* v. *Burton,* 158 Ark. 619, 250 S. W. 898. I also suggest that the intervener in *Flint* may well have been restricted to the chancery forum. The pleading was filed in an insolvency proceeding in which a receiver had been appointed. By it the United States sought to recover tort damages. It is generally held that consent of the appointing court is essential to the prosecution of a suit against the receiver in another court, in the absence of waiver. See 75 C. J. S. 1004, et seq., Receivers § 333; *Walker* v. *Taylor,* 185 Ark. 980, 50 S. W. 2d 590; *Ratcliff* v. *Adler,* 71 Ark. 269, 72 S. W. 896.

Appellant has not been imprisoned in the equity court, and the compulsory counterclaim act did not hold it there. It has not at any time sought a transfer of the case to the circuit court, even after filing its unlawful detainer suit or after our remand. This omission was pointed out by the chancellor in his findings on appellant's motion for summary judgment prior to the first appeal, when he said:

> The reason the issue is considered is because the action sounds in Forcible Entry and Detainer, Section 34-1501, et seq of the Statutes of Arkansas, and Courts of Chancery are without jurisdiction of said actions, see *McPherson* v. *Hicks* 338 S. W. (2) 201 (p. 203), 232 Ark. 427. * * * despite the fact that the action sounds in Forcible Entry and Detainer, Sigmon does not raise the issue of Jurisdiction and does not plead for possession of the land in issue.

On the first appeal, the chancellor's decree was rendered upon appellant's motion for summary judgment, which was denied. The issues had not even been made on the counterclaim for double damages, as appellee had not filed any responsive pleading.

If appellant desired to avoid application of the principles of equity in this litigation, he was free at any time to move to transfer the case to the circuit court. Appellee's complaint did not state a cause of action in equity. See *Gray* v. *Malone,* 142 Ark. 609, 219 S. W. 742; *Fletcher* v. *Pfeifer,* 103 Ark. 318, 146 S. W. 864; *Comer* v. *Woods,* 210 Ark. 351, 195 S. W. 2d 542.

When a complaint fails to state an equitable cause of action, or the admitted facts show that the plaintiff had no such cause of action, the cause should be transferred to the circuit court upon motion to transfer by the defendant. Ark. Stat. Ann. §§ 27-208 (Repl. 1962), 22-405 (Repl. 1962); *Rowe* v. *Allison,* 87 Ark. 206, 112 S. W. 395. See also Ark. Stat. Ann. § 27-210 (Repl. 1962).

The compulsory counterclaim statute did not affect appellant's right to a transfer in any way. See *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. 2d 826. The motion might have been made before or after the filing of the answer and counterclaim. *Ponder* v. *Jefferson, Standard Life Ins. Co.,* 194 Ark. 829, 109 S. W. 2d 946. The entertainment of such a motion when made after trial without objection, after submission of the case, and after pronouncement but before entry of a decree, is a matter of discretion with the trial court. *Arkansas Const. Co.* v. *Pidgeon-Thomas Iron Co.,* 172 Ark. 721, 291 S. W. 57. If the grounds for transfer did not adequately appear upon the face of the pleadings, then appellant could have presented proof to show that the issues were purely legal ones. *Haggart* v. *Ranney,* 73 Ark. 344, 84 S. W. 703. Appellant might even have made such a motion after remand. *American Surety Co.* v. *Vann,* 135 Ark. 291, 205 S. W. 646. Not having moved to transfer the case, appellant waived its right to do so by going to trial and is in no position to complain when the case is tried as an ordinary action in chancery and equitable principles and

procedures are applied and equitable remedies granted. Ark. Stat. Ann. § 27-211 (Repl. 1962); *Hemphill* v. *Lewis,* 174 Ark. 224, 294 S. W. 1010; *Sledge-Norfleet Co.* v. *Matkins,* 154 Ark. 509, 243 S. W. 289; *Organ* v. *Memphis & L. R. R. Co.,* 51 Ark. 235, 11 S. W. 96. See also *Childs* v. *Magnolia Petroleum Co.,* 191 Ark. 83, 83 S. W. 2d 547; *Gray* v. *Malone,* 142 Ark. 609, 219 S. W. 742; *Sessoms* v. *Ballard,* 160 Ark. 146, 254 S. W. 446; *Catchings* v. *Harcrow,* 49 Ark. 20, 3 S. W. 884; *Pratt* v. *Frazer,* 95 Ark. 405, 129 S. W. 1088. Relief from penalties is peculiarly in the field of equity and, were it not for statute, relief might, under proper circumstances, even be granted after judgment at law. *Nevada County* v. *Hicks,* 38 Ark. 557; Ark. Stat. Ann. § 50-510 (1947).

The majority seeks to apply the law of the case as a bar to affirmance. I submit that this harsh but necessary rule should have no application here. I repeat that the issues had not been made by pleadings at the time of the chancery court's decision on the motion for summary judgment before us on the first appeal. We then decided that the chancellor correctly held that six months' notice of termination was not required, but erred in holding that a three-day notice under Ark. Stat. Ann. § 34-1503 (Repl. 1962) was necessary. We only speculated that notice given by appellant by letter to appellee was a predicate for a claim for double damages under Ark. Stat. Ann. § 50-509 (1947). We said:

> There is, however, one fact definitely left for determination. Section 50-509 provides that one who willfully holds over, thus preventing possession to the person entitled thereto, shall pay the person so kept out of possession double the yearly rent of the lands detained *for all the time he shall keep the person entitled thereto out of possession.* This record does not reflect for how long the appellant has been, or will be, kept from possession, and this fact will have to be determined at another hearing. Also, while there is nothing in the record before us which reflects that appellee acted in good faith in not surrendering the premises, inasmuch as the case is being remanded anyway, we think it proper to permit

Scroggins to offer competent evidence of his reasons for withholding possession. In *Lesser-Goldman Cotton Company* v. *Fletcher,* 153 Ark. 17, 239 S. W. 742, this court pointed out that, under the statute:

> "* * * to entitle the landlord or lessor to double rents after the termination of the lease term, the holding over by the tenant must be done willfully. The statute is highly penal, must be strictly construed, and cannot be extended by intendment beyond its express terms. A holding over by the tenant under the *bona fide* belief that he has the right to do so, even though he were mistaken, is not a willful or contumacious holding under the statute where the undisputed facts show, as they do here, that there were reasonable grounds for such belief."

The decree is reversed and the cause is remanded for the determination of the two issues mentioned.

Our mandate directed that the cause be remanded to the chancery court "for further proceedings to be therein had *according to the principles of equity* and not inconsistent with the opinion herein delivered." (Emphasis mine.)

As mentioned in the opinion on the earlier appeal, there was a cross-appeal then by appellee. Since we reversed on the direct appeal, we said no more about the cross-appeal. In it appellee asserted that the chancellor erred in disposing of the litigation on motion for summary judgment because there were several issues of fact upon which testimony should have been heard. In his response to appellant, appellee stated in his brief:

> In addition, the lower court correctly noted that Arkansas Statute Section 50-509 has no application to this case. *Lesser-Goldman Cotton Co.* v. *Fletcher,* 153 Ark. 17, 239 S. W. 742. The appellee is holding possession of the lands in question under a claim of right arising under a written lease, and the proper action on the part of appellant to regain

possession of these lands and to determine the rights of the parties is an action of unlawful detainer. Only the circuit court has jurisdiction of such an action and not the chancery court.

In its answer filed in this cause the appellant does not ask to be granted possession of the lands, but only to dissolve the restraining order and for double damages. The only remedy which the appellee had was a petition for a restraining order in the chancery court to enjoin the appellant from interfering with the appellee's right to possession of the demised lands.

On March 11, 1969, the appellant did file an unlawful detainer action in the circuit court of Drew County, Arkansas, cause No. 2151, and this case is now pending in the Circuit Court of Drew County, Arkansas.

In an unlawful detainer action the measure of damages is the reasonable rental value of the lands detained, in the case of farm lands, and for injuries caused by their detention.

On June 17, 1969, the appellant gave appellee the required six months notice to vacate the lands in question and on July 10, 1969, appellee gave written notice to appellant that he would vacate the said lands on January 18, 1970, and deliver possession to appellant.

Arkansas Statute Section 50-509 has no application to the case now before this court and appellant is not entitled to double damages.

It seems to me that there was and is an issue not decided on the former appeal which leaves the present question open for our present consideration. The former opinion has become binding as the law of the case only to the extent that the *questions* there involved were *decided. Baker* v. *State,* 201 Ark. 652, 147 S. W. 2d 17. 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; *Fentress* 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. *Osceola 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 a different instruction touching upon the issue, as then presented, 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 *Morgan Engineering Co.* v. *Cache R. Drain. Dist.,* 169 Ark. 473, 275 S. W. 741, 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 had 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 also said that a remand for further proceedings in accordance with the opinion was in effect a remand for a new trial on the issues that might be presented, and contemplated that proof might be introduced on those issues.

I would affirm on appeal and cross-appeal.

ARKLA CHEMICAL CORPORATION *v.* HARRIET L. PALMER, Ex'x

5-5532 465 S. W. 2d 335

Opinion delivered April 12, 1971

Douglas Bradley, for appellant.

Tiner & Henry, for appellee.

GEORGE ROSE SMITH, Justice. This appeal is from the probate court's denial of a claim filed by the appellant, Arkla Chemical Corporation, against the estate of Harry C. Palmer, Jr., deceased. The principal contested issue in the probate court was whether Arkla's claim, which arose from the sale of fertilizer, was (*a*) against Palmer's estate or (*b*) against Palmer Aero Service, Inc., a domestic corporation in which Palmer and his family owned all the stock. The probate judge, in denying the claim, held that Arkla, after Palmer's death, had elected to do

business with the corporation and accordingly had no claim against the decedent's estate. The correctness of that holding is the pivotal issue on appeal.

The facts, as reflected by a voluminous record containing much testimony and many exhibits, must be stated in some detail.

Palmer, during his lifetime, was the owner of an agricultural flying service, which sold seed and fertilizer and dispersed those commodities from airplanes. In 1962 Palmer organized the corporation, Palmer Aero Service, Inc. On the date of Palmer's accidental death in a plane accident, May 28, 1968, the corporation's outstanding 33 shares of stock were owned in the ratio of 30 by Palmer and one each by his former wife (the appellee) and their two children. (The Palmers had been divorced in February of 1968.)

It is shown without dispute that during Palmer's lifetime he was not careful to keep his own affairs separate from those of the corporation. In January of 1968, about four months before Palmer's death, he applied to Arkla for the privilege of purchasing fertilizer on credit. That application was made in the name of the corporation and was accompanied by a corporate financial statement listing assets such as airplanes, trucks, and real estate, that were actually owned by Palmer or by Palmer and his wife. At the same time Palmer executed Arkla's standard form of guaranty, by which he individually guaranteed payment of the account. Counsel for Arkla correctly states in his brief that at the outset it made little difference to Arkla whether the business was corporate or individual, since Arkla had the personal guaranty.

Arkla approved the application for credit and began selling chemical fertilizers to Palmer or to the corporation—a point unquestionably open to some doubt. During the months preceding Palmer's death Arkla's monthly statements were paid with sufficient promptness to enable the purchaser to take the 2% discount allowed for payments within 30 days.

Palmer was killed on May 28, 1968. Representatives of Arkla learned of the accident within a few hours. In a conversation some two weeks later between Arkla's salesman and Mrs. Palmer, who had been named as executrix of the will, it was stated by Mrs. Palmer that she intended to continue to operate the business in the same way as it had been run in the past. On September 5, 1968, Mrs. Palmer as executrix filed a petition in the probate court reciting that Palmer had been the majority stockholder in the corporation and asking for authority "to exercise the controlling interest in Palmer Aero Service, Inc., and to continue the business of said corporation." On the same day the probate court entered an order granting the petition and directing the executrix to exercise the controlling interest in Palmer Aero Service, Inc., and to continue the business of the corporation.

On the date of Palmer's death the business owed Arkla $22,971.86 for fertilizer bought on credit. Arkla's witnesses candidly admitted that the account was promptly paid by the company, in time to obtain the 2% discount. During June, July, and August the company continued to buy from Arkla. Those sales totaled $34,674.16. The company made payments amounting, according to Arkla's witness, to $33,354.76—a figure that includes the $22,971.86 owed at Palmer's death. Most of the checks for those payments are in the record. They were drawn on the corporate bank account, were signed by Mrs. Palmer in the corporate name, and usually contained notations showing that the discount for prompt payment was being taken.

Despite those prompt payments, the business was evidently losing money. (In fact, a trial balance later filed by the executrix showed an operating loss of $57,144.81 for the year 1968, most of which seems to have accumulated after Palmer's death.) On October 7, 1968, Arkla's attorney verified and filed Arkla's claim against Palmer's estate. The original claim was for $25,552.49, but Arkla now asserts that only $17,003.88, with interest, is still due. Attached to the claim as its only exhibit now in the record was a copy of Palmer's

guaranty agreement, which seems to indicate that the claim against the estate was initially based upon that agreement.

On October 16, 1968, the corporation and the estate executed a written agreement with the principal unsecured creditors of the estate. The probate judge, in rejecting Arkla's claim against the Palmer estate, based his conclusion almost entirely upon the language of the agreement. In view of its controlling importance in the case we find it necessary to quote its pertinent language at length:

AGREEMENT

By this instrument executed . . . the 16th day of October, 1968, Palmer Aero Service, Inc., a corporation . . . and Harriet L. Palmer, Administratrix of the Estate of H. C. Palmer, Deceased, First Parties, and Planters of Pine Bluff, Inc., Arkla Chemical Corporation, Thompson-Hayward Chemical Company and Nipak, Inc., Second Parties, have contracted and agreed as follows:

1. Second Parties are the principal unsecured creditors of Palmer Aero Service, Inc., and, because of accounting practices and intermingling of assets of Palmer Aero Service, Inc., and personal assets of H. C. Palmer in his lifetime, assert claims against the Estate of H. C. Palmer, Deceased, for the same amounts. The balances claimed by Second Parties are as follows:

Planters of Pine Bluff, Inc.	$49,398.02
Arkla Chemical Corporation	24,291.26
Thompson-Hayward Chemical Company	7,320.03
Nipak, Inc.	5,868.68
Total	$86,877.99

These accounts have not been verified and are subject to correction for errors by either party.

2. It is recognized that Palmer Aero Service, Inc. and the Estate of H. C. Palmer, Deceased, either severally or jointly, have insufficient liquid assets to

liquidate the said debts and that because of the security held by various secured creditors upon the principal assets of the corporation and the estate, any forced liquidation would result in substantial losses both to First Parties and Second Parties. For this reason it is to the mutual interest of First Parties and Second Parties to continue Palmer Aero Service, Inc. as an operating business with the purpose of attempting to recoup previous losses during the 1969 crop season and to place the business in such condition that it may ultimately be operated at a profit.

3. The principal asset of Palmer Aero Service, Inc. consists of certain accounts receivable aggregating, as of October 15, 1968, . . . $39,599.82. In addition, the Estate of H. C. Palmer, Deceased, is the owner of motor vehicles, airplanes and equipment used in the business of Palmer Aero Service, Inc. as set forth in the schedule hereto attached as Exhibit "A" and made a part hereof; said personal property is encumbered in part by security agreements or liens in favor of First National Bank of Poinsett County, Mid-South Grain Company, Citizens Bank of Jonesboro, and Associate Financial Service, some of which liens may be second liens.

4. It is agreed that First Parties will cause an account to be opened in Mercantile Bank of Jonesboro, Arkansas, in the name of Palmer Aero Service, Inc., Trust Account, with signatures authorized by Mrs. Harriet L. Palmer and Erma Brady (a secretary in the office of Frierson, Walker & Snellgrove, Jonesboro, Arkansas), and that eighty per cent (80%) of all collections from the aforementioned accounts receivable aggregating . . . $39,599.82 will be deposited in that account as collected and that the said trust account shall be a trust fund to be divided among the Second Parties pro rata according to the total amount of their respective accounts. The collections of said accounts receivable shall continue until the total collections deposited in said account aggregate thirty per cent (30%) of the total amount of accounts payable to the Second Parties or until all reasonable efforts to collect the said accounts have been exhausted; thereupon, the total amount deposited in the

said account shall be distributed to the said Second Parties pro rata. The funds in the trust account shall be used for no other purpose.

5. The balance of the collections of said accounts receivable shall be deposited to the general account of Palmer Aero Service, Inc. from which the officers of the corporation shall pay the expenses of operating the business and any accounts payable to other creditors, according to their judgment.

6. Harriet L. Palmer, as Administratrix of the Estate of H. C. Palmer, Deceased, will apply to the Probate Court of Poinsett County, Arkansas, for approval of this agreement insofar as the said Estate is concerned and for authority to pledge and encumber all of the personal property of said Estate set forth in Exhibit "A" attached hereto and to execute proper financing statements and security agreements to secure Second Parties, according to their respective interests. The said security agreements and financing statements . . . shall be subject to any existing liens.

7. In consideration of the payments agreed to be made and the security afforded by the preceding paragraph, Second Parties jointly and severally agree that they will withhold and forego any legal action against Palmer Aero Service, Inc. or against the Estate of H. C. Palmer Deceased, to collect their respective accounts until March 31, 1969 . . . .

8. On March 31, 1969, if First Parties have performed the agreements undertaken to be performed by them hereunder, and are able to demonstrate to Second Parties their ability to operate the business of Palmer Aero Service, Inc. during the crop season of 1969, and to make provisions for reasonable payment upon the indebtedness due Second Parties from the operating income of Palmer Aero Service, Inc. during the year 1969, Second Parties agree that they will withhold and forego legal action upon their respective debts until November 15, 1969, upon such terms and conditions as will enable them to receive payments pro rata from the operating

income of Palmer Aero Service, Inc. during the year 1969.

9. Upon the approval of Second Parties of the terms of this agreement, First Parties undertake to present same to the Probate Court of Poinsett County for its approval and thereupon to execute financing statement and security agreement as herein provided. The trust account shall be set up effective upon the date of this agreement irrespective of approval of the Probate Court of Poinsett County, Arkansas, and accounts receivable shall be paid into the said account as collected, independently of other terms of this agreement.

* * *

Palmer Aero Service, Inc.
By Harriet L. Palmer
President

Estate of H. C. Palmer, Deceased
By Harriet L. Palmer

Administratrix

FIRST PARTIES

Planters of Pine Bluff, Inc.
By M. Dunklin, Vice President

Ark-La Chemical Corporation
By A. L. Crossland, V. P.

Thompson-Hayward Chemical Company
By _____

Nipak, Inc.
By _____

SECOND PARTIES

Attached to the agreement, as Exhibit "A," was a list of airplanes, trucks, and other personal property.

Mrs. Palmer testified that when her attorneys learned of the agreement they were somewhat upset about it. Even so, Mrs. Palmer performed it at least to the extent of collecting the accounts receivable and sending to Arkla, in February, 1969, a check for $7,287.38, which was exactly 30% of Arkla's corrected claim of $24,291.26. It does not appear, however, that Mrs. Palmer made any attempt to have the agreement approved by the probate court or to execute the security agreements mentioned in paragraph 9 of the contract.

Apparently Arkla did not sell any fertilizer to the Palmer company after the end of the 1968 crop year. On June 17, 1969, Arkla filed a petition in the probate court asking that its claim (in the amount of $17,003.88) be approved either as a Class A claim, on the theory that it arose out of a business conducted by the executrix for the estate, or as a Class C claim, on the theory that it was a debt owed by Palmer at the time of his death and never paid. The probate court, as we have said, disallowed the claim.

The appellant's single point for reversal is that the trial court erred in refusing to allow the claim. Under that broad heading counsel presents a manifold argument that cannot readily be restated or summarized. Counsel's reasoning, however, embraces three basic contentions that must be discussed separately.

First, and primarily, it is argued that Arkla's demand should have been approved as a Class A claim, upon the theory that the corporate entity ought to be disregarded. We agree with the probate judge's conclusion that such a contention is contrary to the proof and to the position taken by the unsecured creditors in the contract which we have quoted.

It is clear from the record that after Palmer's death the unsecured creditors had a choice of courses to follow. Arkla, for example, might have stopped doing business with Palmer Aero Service and have sought instead to collect the account from Palmer's estate. That choice was understandably not attractive to Arkla's manage-

ment, because the assets of Palmer's estate were mortgaged to other creditors. Mrs. Palmer testified without contradiction that everything was mortgaged to the hilt. Paragraph 2 of the contract recognized the realities of the situation by reciting that any forced liquidation would result in substantial losses to all concerned.

As the contract itself stated, the unsecured creditors elected instead to continue doing business with the corporation in the hope that the company could eventually pay its debts. The agreement clearly and unequivocally recognized the separate existence of the corporation and the fact that the trucks, airplanes, and other items of personal property were owned by the estate. Arkla actually received 30% of its claim under the arrangement put into effect by Paragraph 4 of the contract. It is a familiar rule that one cannot take advantage of the favorable terms of an agreement and at the same time disclaim those that prove to be burdensome. *Williams Mfg. Co.* v. *Strasberg,* 229 Ark. 321, 314 S. W. 2d 500 (1958).

We find no sound basis for the appellant's insistence that the corporate entity should be disregarded. Ordinarily a corporation is a separate and distinct entity from its stockholders. *McCarroll* v. *Ozarks Rural Elec. Co-op. Corp.,* 201 Ark. 329, 146 S. W. 2d 693 (1940). The corporate structure is to be disregarded only when it is illegally abused to the injury of a third person. *Rounds & Porter Lbr. Co.* v. *Burns,* 216 Ark. 288, 225 S. W. 2d 1 (1949).

In the case at bar the executrix was authorized by the probate court to exercise the estate's controlling interest in the corporation and to continue the business of the corporation. Thus the court order itself recognized the separate existence of Palmer Aero Service, Inc., as did the contract with the unsecured creditors. It is unfortunate that the corporation's efforts to continue in business led eventually to its insolvency, but counsel has pointed to no fact in the record supporting the suggestion that the corporate form was illegally abused. To the contrary, all the company's bank statements

and records were open to inspection, but no specific instance of fraudulent conduct has been brought to our attention.

Secondly, it is argued that Arkla's demand should have been allowed as a Class C claim, upon the theory that the debt owed to Arkla by Palmer on the date of his death was never paid. The great preponderance of the evidence, if not the undisputed proof, rebuts that contention. At Palmer's death the business enterprise—individual or corporate—owed Arkla $22,971.86 for fertilizer purchased on credit. Arkla's own witnesses testified that the amount then owing was paid in full after Palmer's death. Here, for example, is the testimony of the claimant's employee, Frank Felts:

Q. On the date of his death, either Harry C. Palmer or Palmer Aero Service, one or the other, owed a considerable amount of money to Arkla Chemical Corporation?

A. Yes, sir.

Q. And that has all been paid?

A. Yes, sir.

Q. In other words, they were paid by invoices, is that right, as they came in?

A. That is correct.

* * *

Q. Every dime, either Harry C. Palmer or Palmer Aero Service owed at the date of his death was paid as per the invoices?

A. Yes, sir.

In view of such testimony the appellant's second argument need not be discussed further.

Thirdly, counsel refers to the guaranty agreement executed by Palmer in January, 1968. That agreement, however, provided that, as to future obligations, it could be terminated at any time by Palmer's giving written notice to Arkla. It is well settled that such a revocable guaranty contract is terminated by the guarantor's death, or, as it is sometimes put, by the other party's knowledge of that death. *First Nat. Bank of Boston* v. *McGowan,* 296 Mass. 101, 5 N. E. 2d 5 (1936); *Bedford* v. *Kelley,* 173 Mich. 492, 139 N. W. 250 (1913); *Tyler Bank & Tr. Co.* v. *Shaw,* 293 S. W. 2d 797 (Tex. Civ. App., 1956). The reasons for the rule were stated with clarity in *Gay* v. *Ward,* 67 Conn. 147, 34 Atl. 1025 (1895):

> But, when the guarantee has knowledge of the death of the guarantor, such knowledge works a revocation of the guaranty. The guarantee no longer relies upon the credit of the deceased guarantor. Each advance made by the guarantee constitutes a fresh consideration, and, when made, an irrevocable promise or guaranty on the part of the living guarantors. Each advance thereafter made is upon the credit of the living, not of the dead, guarantor. Were this not so,—unless it be held that the representatives of the deceased may upon notice terminate the guaranty,—the guaranty, terminable at the option of the guarantor during life, becomes, upon his death, never ending. The limitation which the law gives the living is denied the dead. Estates must remain unsettled, devises of property be withheld, so long as the guaranty may last, and the representatives of the deceased guarantor be powerless to save his estate from a loss which neither he nor they authorized or received benefit for. Such a result justifies and impels a court in reading into the guaranty a limitation of termination of the guaranty, upon notice of the death of the guarantor, as well as upon notice from the living guarantor.

In fact, Arkla's form of guaranty contract was apparently drafted with knowledge of the above rule, for it provides that after the guarantor's death the contract may be terminated by the sending of written notice of

the death to Arkla, by registered mail. Here Arkla concededly had actual knowledge of Palmer's death within a few hours after the fatal accident. Thus written notice by registered mail would have supplied no information that the company did not already have.

We should add, in closing, that we are not called upon to decide certain issues mentioned in the appellant's brief. Some complaint is made about Mrs. Palmer's management of the estate, but Arkla, not being a creditor of the estate, is not in a position to raise such an issue. Nor do we express any opinion about Mrs. Palmer's duty to specifically perform the obligations set out in Paragraph 9 of the contract. The probate court is not the proper forum for a suit for specific performance. *Merrell* v. *Smith,* 226 Ark. 1016, 295 S. W. 2d 624 (1956). Indeed, Arkla's counsel was evidently aware of that rule, for at the beginning of the hearing in the court below this statement was made by Mrs. Palmer's attorney: "There is another case pending. It is a chancery case wherein Arkla Chemical sued Mrs. Palmer, the estate, and the corporation. It is an action for specific performance of a contract." All we hold in the case at bar is that the appellant failed to establish a claim against Palmer's estate by a preponderance of the evidence.

Affirmed.

THE YELLOW CAB COMPANY *v.* CHARLES SANDERS ET AL

5-5534 465 S. W. 2d 324

Opinion delivered April 12, 1971

Wright, Lindsey & Jennings, for appellant.

Howell, Price, Howell & Barron, for appellees.

Joseph A. Madey, for cross appellant Charles Hunt.

LYLE BROWN, Justice. Charles Sanders and Leola Sanders, his wife, obtained judgments as a result of a traffic mishap which resulted in serious injuries. The judgments were against appellants, Charles Hunt and The Yellow Cab Company. Yellow Cab insists there

was no substantial evidence of negligence on the part of its driver which contributed to plaintiffs' injuries. Charles Hunt made Yellow Cab a third-party defendant but the jury awarded Hunt no damages against Yellow Cab, from which Hunt appeals. He contends (a) that the verdict was inconsistent, (b) that Charles Sanders was contributorily negligent and the jury did not consider that fact, and (c) that the court should have granted Hunt's motion for a mistrial.

The accident occurred at the intersection of Roosevelt Road and Center Street in Little Rock. Roosevelt Road runs east and west and is a four-lane boulevard. Center is a narrow street and there are stop signs which command traffic crossing Roosevelt from Center to stop before entering. As the Sanderses traveled east on Roosevelt and approached the intersection a yellow cab was stopped at the north entrance of Center to Roosevelt; on the south side of Roosevelt, Hunt had pulled up and stopped. The cab driver intended to turn east (to his left) and Hunt intended to turn west (to his left) on Roosevelt. Those two drivers were not directly facing each other as they were parked on their respective sides of Center Street. That is because there is an offset or jog which would place Hunt some twelve feet east of the cab on the opposite side of the street. Hunt testified that as he pulled out he intended to go directly across the south half of Roosevelt (Sanders' lane of travel) and then turn left; that he was prevented from doing so because the yellow cab moved about the same time as did Hunt and forced Hunt to cut sharply to his left to avoid the cab; and that as he made that movement he hit Sanders' car almost head-on. The cab driver insisted that he never moved from his position at the stop sign and that the impact of the two cars caused the Hunt car to slide backward and to make very slight contact with Yellow Cab's bumper.

Charles Sanders testified that he was driving east on Roosevelt, about 30-35 miles per hour; and that just before he reached the Center Street crossing Hunt "just pulled out in front of me." Sanders said he did not see

the yellow cab, that he was looking straight ahead and at the Hunt car.

Maggie Hunt, who lives near the Center Street crossing, heard the crash. She is Charles Hunt's wife. She said she looked out and saw the cab and her husband's car in proximity of each other. She went back into the house to cut off the gas on the kitchen stove, and started toward the wreck. When she got back out on her porch she said the cab was backing away from the scene.

Officer E. J. Ethridge arrived minutes after the accident. He found the impact to have originated near the center of Roosevelt Road. The accident occurred on a dry day and at about 3:00 p.m. The officer said he observed the cab parked some thirty to forty feet back from the intersection. The cab driver reported to the officer that he saw the accident. Officer Ethridge said that the cab driver never mentioned that contact was made with the cab.

The cab driver was M. W. Poole, Jr. He testified that he was still parked at the stop sign on Center Street and south of Roosevelt when the accident occurred. He insisted that his cab was parked with the front end of the cab behind the curb line. He said the impact, which occurred west of him, caused the cars to slide toward him and "one of the vehicles slid down into the intersection on my side of the street and it touched against my car. I felt it touch my bumper and it slid away from it and when I got out I checked to see if there had been any damage and there hadn't been any." He said he called his dispatcher and was instructed to stay at the scene until the policeman approved his leaving. He said he did not move his car until he left the scene.

On cross-examination the witness conceded that in trying to get out into the traffic he probably moved his cab slightly forward to get a better view. He said his cab was struck a slight and glancing blow on the bumper. He testified that he did not report the contact to the investigating officer because there was no damage. He recalled that either his boss (who came to the scene) or

the officer asked him to move the cab backward because traffic was being blocked.

Whether Yellow Cab was negligent and whether any such negligence was a proximate cause presents the first question to be decided. Yellow Cab argues that it was, as a matter of law, entitled to a directed verdict. In testing the correctness of Yellow Cab's position we view the evidence and all reasonable inferences in the light most favorable to the other parties. *Home Mutual Fire Ins. Co.* v. *Cartmell,* 245 Ark. 45, 430 S. W. 2d 849 (1968). The fact that the evidence is contradicted by Yellow Cab, "or the fact that we might think it was against the preponderance of the evidence, does not justify us in setting aside the verdict." *Arkansas Motor Coaches* v. *Williams,* 196 Ark. 48, 116 S. W. 2d 585 (1938). Of course we look for substantial evidence and if it is insubstantial Yellow Cab is entitled to prevail.

Hunt testified positively that as he pulled out from Center Street he started directly across the south lane of Roosevelt Road (Sanders' lane of traffic); that he was prevented from following that course of travel by the cab, which suddenly moved out and blocked the north lane of Roosevelt; and that the collision with Sanders was inevitable. If the jury believed Maggie Hunt's testimony they could have concluded that the cab was well out in Roosevelt when the crash occurred and that the cab immediately thereafter backed away from the wreck and for a considerable distance. The cab driver insisted that he was inside the curb line on his side when the collision occurred; yet on cross-examination he admitted that he may have moved forward somewhat in order to get a better view of the traffic. For reasons known only to the cab driver, he did not report to the officer that the Hunt car came in contact with the bumper of the cab. The jury may have attached some significance to the fact that the cab driver was instructed by radio to remain at the scene, notwithstanding he claims not to have been involved in the wreck. The owner of the cab company came to the scene of the accident, yet his driver claims to have been a mere witness to the collision. Also, we can tell from the record that the collision was recon-

structed on some type of blackboard and witnesses explained their versions of the occurrence on the board. The jury had the benefit of those reproductions while we do not. Then of course the jury had the advantage of seeing and hearing the witnesses, which is often a crucial factor in passing upon credibility. We are unable to say that fair-minded men would draw but one conclusion from the highly controverted evidence. Therefore we agree with the trial court that the facts and circumstances made a question for the jury.

The jury was given a general verdict form, which read: "We the jury find for the plaintiffs Charles Sanders and Leola Sanders against Charles Hunt and Yellow Cab Company and assess their damages as follows: Leola Sanders _____, Charles Sanders, _____." The jury returned that form of verdict but they amended it to apportion damages between Charles Hunt and Yellow Cab Company:

Charles Hunt	
Charles Sanders	$46,665.00
Leola Sanders	5,721.00

Yellow Cab Co.	
Charles Sanders	3,335.00
Leola Sanders	409.00

Yellow Cab argues that it was within the discretion of the trial court to reject the verdict as not being in conformity with the court's instructions to return a general verdict. Since the court accepted the verdict, says Yellow Cab, it should be entered as apportioned, which would mean that there could be no recovery greater than the smallest amount fixed by the jury. *Woodward* v. *Blythe,* 249 Ark. 793, 462 S. W. 2d 205. The court entered a joint and several judgment for the combined total damages, having concluded that the jury actually intended to apportion the negligence. The apportionment of damages was not made an issue by Yellow Cab in its original brief. It was raised as a point of error for the first time in its reply brief. Since it was not timely advanced in order that appellees could rebut it in their brief, we cannot consider it. *Ryall* v. *Water-*

works Improvement District, 247 Ark. 739, 447 S. W. 2d 341.

Now as to the appeal of Charles Hunt. He never filed a notice of appeal. The timely filing of such a notice is jurisdictional, both on appeal and cross-appeal. *Pinnacle Old Line Ins. Co.* v. *Ellis,* 228 Ark. 458, 307 S. W. 2d 882 (1957); *General Box Co.* v. *Scurlock,* 223 Ark. 967, 271 S. W. 2d 40 (1954). Nevertheless we have examined Hunt's points for reversal and a majority of the court finds no merit.

Affirmed.

JOE MCKIM *v.* JANE SUTHERLAND MCLINEY ET AL

5-5512 465 S. W. 2d 911

Opinion delivered April 12, 1971

Davis & Reed, for appellant.

Crouch, Blair, Cypert & Waters and *Wade, McAllister, Wade & Burke,* for appellees.

JOHN A. FOGLEMAN, Justice. Joe McKim alleges that the chancery court erred in sustaining general demurrers of Butane Service, Inc. and Jane Sutherland McLiney, et al, Trustees, to his amended complaint, which the court dismissed. We agree.

McKim alleged that he was the owner of the lands described in his complaint, and that he acquired his equity, ownership, title and interest in and to the foregoing lands by the following:

1. L-P Gas Company Warranty Deed to Joe McKim dated August 5, 1963, and filed for record August 6, 1963.

2. Quitclaim Deed from Cy Carney Et Ux to L-P Gas Company, dated April 16, 1970.

3. Purchase by Cy Carney of the entire assets of Butane Service Co., Inc. of Springdale, Arkansas on November 8, 1947, as reflected by contract exhibited.

4. Sam Ennis and Sylvia Ennis, husband and wife, Warranty Deed to Butane Service Co. of Springdale, Arkansas, dated April 8, 1946, and filed for record on April 20, 1946.

McKim further alleged that Jane Sutherland McLiney, et al, as Trustees for certain named persons were

making an apparent claim of title and possession by reason of a recorded quitclaim deed from L. R. and Ethel Mae Bennett to John W. Sutherland, dated March 23, 1967, and Sutherland's recorded deed of gift, dated January 19, 1970, conveying the lands to Jane Sutherland McLiney, et al, as Trustees for Thomas M. Sutherland, Mark B. Sutherland and Christopher L. Sutherland. (These appellees will hereinafter be referred to as the Sutherland trustees.)

McKim then alleged that he and his predecessors in title had been the sole and exclusive owners of the above described lands (which he alleged to be "wild"), in actual or constructive possession (except for such part as may have been entered upon by John W. Sutherland during the preceding 3-year period), for more than 25 years prior to the filing of his amended complaint, during which time they had continually paid the taxes thereon. Appellant asserted that Butane Service Company, Inc. might claim some interest in the land because of its failure to execute a conveyance pursuant to its contract with Carney. McKim further alleged that he had no adequate remedy at law to establish his equitable title or interest, to quiet or confirm his title, to revoke or cancel clouds thereon, or to establish a trust implied in law for his benefit. He prayed that any claim of Butane Service be declared subservient to his own and held subject to a trust in law for his use and benefit, and that this appellee be compelled to convey whatever title it had to him. He also prayed that the conveyances under which the Sutherland trustees claimed be canceled as clouds upon his title and that his title be quieted and confirmed.

Perhaps appellant's pleadings in many respects should have been more specific, but, under our code, pleadings are liberally construed and every reasonable intendment indulged in behalf of the pleader. *Craft* v. *Armstrong,* 200 Ark. 681, 141 S. W. 2d 39. Particular liberality is accorded the pleader on demurrer. If the facts stated in the pleadings together with every reasonable inference which may be drawn therefrom favorable to the pleader constitute the substance of a cause of ac-

tion imperfectly stated, a demurrer should be overruled. *Nelson* v. *Berry Petroleum Co.,* 242 Ark. 273, 413 S. W. 2d 46. When we apply these standards, we conclude that appellant stated a cause of action against both appellees.

THE DEMURRER OF BUTANE SERVICE, INC.

We agree with this appellee that the lands are not sufficiently described in the contract of sale between it and Carney to entitle McKim to have specific performance of the contract, absent other circumstances making that relief available. The only description in the contract which relates, in any way, to real estate is the statement of the agreement of Butane Service to sell and of Carney to buy "all the assets of whatever kind and nature of Butane Service, Inc., an Arkansas Corporation, except accounts receivable, this sale including all equipment and property as well as inventory of merchandise, which equipment and property is more specifically listed in Schedule A. attached hereto and made a part hereof." The schedule was not exhibited. We do not agree with Butane Service, however, that the contract did not relate to real estate. One clause in the contract calls upon the sellers to execute all necessary and proper *deeds* and other instruments required by the purchaser in order to execute this contract to the buyer's requirements. Other actions by the sellers were to be performed at the time of the delivery of the *deeds* and other documents to complete the sale. Another clause required the sellers to prepare all necessary *deeds* and other instruments within 15 days of the date of contract and to tender them to the buyer "with possession of all said property of sellers, at which time said purchase price will be paid by buyer." The buyer was given the option of using the name, Butane Service, Inc., or Co. or Company or any similar combination. From the language of the contract, a construction that the parties intended to include any real estate owned by the seller as part of "all the assets of whatever kind and nature" would certainly not be unreasonable. Even so, we have held that similar descriptions are not sufficiently definite and certain to furnish an adequate key to identification to form the basis for specific performance. *Bowlin* v. *Keifer,* 246 Ark. 693,

440 S. W. 2d 232; *Turrentine* v. *Thompson,* 193 Ark. 253, 99 S. W. 2d 585.

This does not mean that there are not any circumstances under which a conveyance by Butane Service can be compelled. Even though a written contract is defective because of an insufficient description of property, it will still be specifically enforced in equity if it is established that the case is taken out of the statute of frauds and evidence supplies proof of the proper description. *Hirschman* v. *Forehand,* 114 Ark. 436, 170 S. W. 98. See also *Stephens* v. *Ledgerwood,* 216 Ark. 404, 226 S. W. 2d 587. Thus, if under the allegations of his complaint, appellant can show that the real estate described in his complaint was an asset of Butane Service subject to transfer under the contract with Carney, and produce evidence to take the case out of the statute of frauds, he might well prevail.

The fact that McKim's title is based entirely upon a quitclaim deed executed by Carney dated April 16, 1970, does not constitute an impediment to McKim's enforcement of whatever rights Carney may have had against Butane Service. McKim's deed from L-P Gas Co., the grantee in Carney's quitclaim, was a warranty deed. A contract of sale of real estate creates an equitable estate in the purchaser which is alienable by deed, subject to the lien of the vendor to secure the purchase money. *Roach* v. *Richardson,* 84 Ark. 37, 104 S. W. 538; *Whittington* v. *Simmons,* 32 Ark. 377. This equitable estate is assignable or transferable, at least in equity, by quitclaim deed. *Corcorren* v. *Sharum,* 141 Ark. 572, 217 S. W. 803. See also *Whittington* v. *Simmons,* supra; *Lucado* v. *A. Hirsch & Co.,* 203 Ark. 792, 158 S. W. 2d 697.

The vendor of real estate becomes a constructive trustee for the purchaser holding the naked legal title, which he or his heirs must convey to the purchaser upon payment of the purchase price. *Stubbs* v. *Pitts,* 84 Ark. 160, 104 S. W. 1110; *State Bank of Decatur* v. *Sanders,* 114 Ark. 440, 170 S. W. 86; *Whittington* v. *Simmons,* supra; *Harris* v. *King,* 16 Ark. 122; *Arledge* v. *Rooks,* 22 Ark. 427. Partial or full payment of consideration to-

gether with the taking of possession by the purchaser, however, is sufficient. *Marshall* v. *McCray,* 241 Ark. 184, 406 S. W. 2d 863; *Hyder* v. *Newcomb,* 236 Ark. 231, 365 S. W. 2d 271; *Ferguson* v. *C. H. Triplett Co.,* 199 Ark. 546, 134 S. W. 2d 538. Consideration paid by forgiveness of a debt of the seller to the purchaser, the surrender of dominion over the property by the seller to the purchaser and subsequent payments of taxes and other exercise of acts of ownership of lands have been held sufficient. *Bostleman* v. *Henkle,* 152 Ark. 628, 239 S. W. 30. Payment of consideration by cancellation of a debt of a seller to a purchaser followed by his continued payment of taxes on the property has also been held sufficient to take the case out of the statute of frauds. *Henneberger* v. *Duncan,* 204 Ark. 4, 161 S. W. 2d 380.

McKim does not allege the specific acts which he claims constituted the actual or constructive possession of the lands by him and his predecessors in title, except for continuous payment of taxes. We take his allegations to be sufficient to permit introduction of evidence as to payment of taxes or any other acts of McKim or his predecessors in title indicating dominion and control or the exercise of ownership by him or his predecessors in title or the transfer of possession and dominion by appellee Butane Service to his predecessors in title. Such evidence, coupled with a showing of payment of the consideration called for by the contract, might well constitute sufficient part performance of the contract to take it out of the application of the statute of frauds and to warrant requiring Butane Service, Inc. to convey the title to the lands.

In this connection, the provisions of Ark. Stat. Ann. §§ 37-102 and 37-103 (Repl. 1962), relied upon by appellant, may come into play. Under the former section, possession of unimproved and unoccupied lands is deemed to be in one who, with color of title, pays the taxes for at least seven years in succession. Under the latter, color of title is presumed where there has been payment for 15 years. See *Burbridge* v. *Smyrna Baptist Church,* 212 Ark. 924, 209 S. W. 2d 685; *Coulter* v. *O'Kelly,* 226 Ark. 836, 295 S. W. 2d 753. For the purposes

of these acts, appellant's allegation that the lands are wild would normally bring them within the purview of these acts. We have acknowledged that the words "wild," "unimproved" and "unenclosed" have been used interchangeably. *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193. These statutes are not applicable, however, where two or more have adverse constructive possession. *Towson* v. *Denson,* 74 Ark. 302, 86 S. W. 661. Constructive possession of wild and unimproved lands is usually deemed to be in the holder of the legal title. *Hensley* v. *Phillips,* 215 Ark. 543, 221 S. W. 2d 412. But where neither party has actual possession, constructive possession is deemed to be in the holder of the superior title. *Nall* v. *Phillips,* 213 Ark. 92, 210 S. W. 2d 806. This rule applies where the lands are wild and unimproved unless the holder of the inferior title has continuously paid the taxes for the statutory period. *Smith* v. *Boynton Land & Lumber Co.,* 131 Ark. 22, 198 S. W. 107.

Appellee Butane Service, Inc. contends that the passage of time bars enforcement of its contract with Carney. This well may be the case, but the defenses of laches and the statute of limitations can be raised by demurrer only when they appear upon the face of the complaint. *Quinn* v. *Stuckey,* 229 Ark. 956, 319 S. W. 2d 839; *Morehead* v. *Niven,* 222 Ark. 116, 257 S. W. 2d 361. Otherwise, both defenses must be raised by answer. *Cullins* v. *Webb,* 207 Ark. 407, 180 S. W. 2d 835. When we consider appellant's amended complaint with the exhibits thereto, we find nothing to indicate that the statute of limitations has run. The time for performance is not fixed with sufficient definiteness for a bar by limitations to appear upon the face of the pleadings.

Laches depends upon more than mere lapse of time. It is delay that works to the disadvantage of another by change of circumstances or relations of the parties or loss of evidence and makes the enforcement of a claim inequitable. *Stricklin* v. *Mitchell,* 234 Ark. 31, 350 S. W. 2d 319; *Seawood* v. *Ozan Lumber Co.,* 221 Ark. 196, 252 S. W. 2d 829; *Mortensen* v. *Ballard,* 209 Ark. 1, 188 S. W. 2d 749; *Cullins* v. *Webb,* supra; *Walker* v. *Norton,* 199

Ark. 593, 135 S. W. 2d 315. No such change appears upon the face of the pleadings.

DEMURRER OF SUTHERLAND TRUSTEES

We take McKim's complaint in this regard to state a cause of action to cancel certain instruments of record which constitute a cloud on the title he claims. In Arkansas, the chancery court has jurisdiction of such a proceeding both under statute and in the exercise of its inherent equity powers. See Covington, Bills to Remove Cloud on Title and Quieting Title in Arkansas, 6 Ark. L. Rev. 83, et seq. Such a suit may be brought by the holder of an equitable title. *Bowling* v. *Stough,* 101 Ark. 398, 142 S. W. 512; *Morgan* v. *Kendrick,* 91 Ark. 394, 121 S. W. 278. While there are cases holding that a plaintiff must be in possession in order to cancel a cloud on his title, or that he must be the holder of the legal title, jurisdiction will be exercised in equity where neither party is in possession or where the remedy at law is not adequate. *Reynolds* v. *Plants,* 196 Ark. 116, 116 S. W. 2d 350; *Fisk* v. *Magness,* 193 Ark. 231, 98 S. W. 2d 958; *Chapman and Dewey Land Co.* v. *Bigelow,* 77 Ark. 338, 92 S. W. 534, appeal dismissed, 206 U. S. 41, 27 S. Ct. 679, 51 L. Ed. 953. Holdings in this regard are perhaps best summarized in *Rowe* v. *Allison,* 87 Ark. 206, 112 S. W. 395, where we said:

> Before a suit to remove cloud from title can be sustained by a plaintiff, he must show that he is in possession of the land, or that his title is an equitable one, or that the land is wild and unoccupied. Where a defendant is in possession, and the plaintiff asserts a legal title, a chancery court is without jurisdiction to remove the cloud upon it, as there is an adequate and complete remedy at law. But if other grounds for equity jurisdiction exist, which give the chancery court jurisdiction, it may proceed to administer complete relief, although a part of that relief is purely legal. *Apperson & Co.* v. *Ford,* 23 Ark. 746; *Branch* v. *Mitchell,* 24 Ark. 431; *Sale* v. *McLean,* 29 Ark. 612; *Lawrence* v. *Zimpleman,* 37 Ark. 643; *Bryan* v. *Winburn,* 43 Ark. 28; *Mathews*

v. *Marks,* 44 Ark. 436; *Ashley* v. *Little Rock,* 56 Ark. 391, 19 S. W. 1058; *Brown* v. *Bocquin,* 57 Ark. 97, 20 S. W. 813; *Brown* v. *Norvell,* 74 Ark. 484, 86 S. W. 306; *St. L. R. & W. G. Co.* v. *Thornton,* 74 Ark. 383, 86 S. W. 852; *Chapman & Dewey Land Co.* v. *Bigelow,* 77 Ark. 338, 92 S. W. 534.

Appellant had no adequate remedy at law because it is well established that an equitable title is generally not sufficient to maintain ejectment. *McCord* v. *Welch,* 105 Ark. 119, 150 S. W. 566; *Scott* v. *Rutherford,* 243 Ark. 306, 419 S. W. 2d 595. Of course, an equitable title coupled with the right to possession would support an action in ejectment. *Faulkner* v. *Feazel,* 113 Ark. 289, 168 S. W. 568. It may well be that evidence will show that McKim is entitled to possession so that he might have brought an ejectment suit, but the chancery court denied his motion to transfer to law after his demurrer was overruled, on the ground that McKim's allegations and prayer embraced an action cognizable only in equity and did not state a cause of action at law. We cannot say that on the face of the complaint he is not entitled to the equitable remedy to cancel the cloud on his title.

We have not overlooked such cases as *Winkle* v. *School District No. 81,* 215 Ark. 670, 221 S. W. 2d 884 and *Gibbs* v. *Bates,* 150 Ark. 344, 234 S. W. 175. They are not applicable here, because the plaintiff in each case had a plain, adequate and complete remedy at law as the claimant under a legal, rather than an equitable, title.

Appellee asserts that McKim's allegations with reference to possession are contradictory in that he claims actual possession in himself and his predecessors in title, then alleges that appellees are in possession of the lands, and later alleges that they are wild. It may be that there is some inconsistency, but we must consider the complaint on demurrer in a light favorable to the pleader. When we do, we cannot say that appellant has failed to state a cause of action.

It is true that McKim did not deraign his title to the sovereignty of the soil or to a common source of title. In an action to quiet title such as this one, it is necessary that there be such deraignment or allegations showing title in him or his predecessors in title by adverse possession or by payment of taxes. See *Coulter* v. *O'Kelly,* 226 Ark. 836, 295 S. W. 2d 753; *Griffin* v. *Isgrig,* 227 Ark. 931, 302 S. W. 2d 777; *Collins* v. *Heitman,* 225 Ark. 666, 284 S. W. 2d 628. If McKim is relying upon adverse possession his allegations appear to be sufficient. If not, the defect is not one that is reached by a demurrer but is properly subject to a motion to require his complaint to be made more definite and certain. However loosely drawn a complaint in equity may be, there is no ground for demurrer if a cause of action is stated, however defectively, when every allegation and every inference reasonably deducible therefrom are considered. *Shreve* v. *Carter,* 177 Ark. 815, 8 S. W. 2d 443. Any lack of specificity or other defect should be reached, at least in equity, by a motion to make the complaint more definite and certain. *Ford* v. *Collison,* 128 Ark. 119, 193 S. W. 531; *Shreve* v. *Carter,* supra. The rule is different in an action in ejectment, because of statutory requirement. Ark. Stat. Ann. § 34-1408 (Repl. 1962); *Scott* v. *Rutherford,* 243 Ark. 306, 419 S. W. 2d 595.

Since we find that the complaint states a cause of action when tested on demurrer, the decree is reversed and the cause remanded for further proceedings.

BRYAN MONROE *v.* SLEETIE MONROE

5-5539 465 S. W. 2d 347

Opinion delivered April 12, 1971

W. F. Denman, Jr., for appellant.

John L. Wilson, for appellee.

J. FRED JONES, Justice. This appeal involves a widow's rights in the homestead of her deceased husband and the question is whether she has abandoned it.

Sleetie Monroe lived with her husband, W. E. Monroe, on his rural homestead near Hope, in Hempstead County, Arkansas, until his death in November, 1952. Mr. Monroe left as his sole surviving heir Bryan Monroe, who was an only son by a previous marriage. Mrs. Monroe continued to live on the homestead until June, 1953, when she rented out the house on the homestead and moved to Hope where she has resided in different houses purchased by her since moving from the homestead. Bryan Monroe instituted the present action in the Hempstead County Chancery Court alleging that Mrs. Monroe has abandoned the homestead and he prayed for an accounting and award of damages for waste in the cutting and sale of timber from the homestead land. The chancellor found that Mrs. Monroe had not abandoned the homestead and entered a decree accordingly. On appeal to this court Bryan Monroe relies on the following points for reversal:

> "That the appellee has in fact abandoned her homestead in the subject land, by living elsewhere for these many years, allowing the house and out building to deteriorate, by acquiring three other homes during her absence.
>
> That appellee has in law abandoned her homestead in the subject land by leaving said land without a fixed intention to return to same, without maintaining a fixed intention to return to same and without possessing a fixed intention to return to same at the time of trial."

We are of the opinion that the chancellor's decree is not against the preponderance of the evidence and should be affirmed.

Article 9, § 3 of the Constitution of 1874 reads as follows:

> "The homestead of any resident of this State who is married or the head of a family shall not be subject to the lien of any judgment, or decree of any court, or to sale under execution or other process

> thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys collected by them and other trustees of an express trust for moneys due from them in their fiduciary capacity."

This section of the constitution applies to either the wife or husband when married, and to either of them, or to anyone else who is the head of a family, whether married or not. Consequently, any resident of this state of either sex, who is married, or who is the head of a family, is entitled to the exemption of a homestead under the constitution. *Thompson* v. *King,* 54 Ark. 9, 14 S. W. 925.

In addition to a married woman's right to homestead exemption, she has certain constitutional rights as a widow in the homestead of her deceased husband as set out in § 6 of Article 9 of the constitution, which is as follows:

> "If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

The case of *Butler* v. *Butler,* 176 Ark. 126, 2 S. W. 2d 63, involved the question of abandonment of a homestead; first by the husband, and then by the widow after her husband's death. In that case, as in the case at bar,

the litigation was between children of the deceased husband by a first marriage and their stepmother. In the *Butler* case John Butler had established a rural homestead in Logan County on which there was located a coal mine. In 1916 he moved with his family to Crawford County where he continued to reside until his death in 1918. After Mr. Butler's death, his widow went to Fort Smith to live where she purchased a home for herself and minor children in order to obtain the advantage of better schools for the children and employment for herself. One of the children by the previous marriage administered his father's estate and after winding up the administration, he turned the possession of the Logan County lands back to his stepmother and she continued to receive the rents and proceeds from both the farming operations and the mining of coal.

The husband of one of the Butler heirs by the first marriage brought the abandonment of the homestead into issue and the chancellor found that John Butler had not abandoned his homestead in Logan County by his removal to Crawford County, and that neither had the widow abandoned the Butler homestead in Logan County. The *Butler* decision distinguishes between an acquired homestead and the rights of a widow in her deceased husband's homestead; and the *Butler* case so clearly sets out the law applicable to the case at bar, we feel justified in quoting at length from *Butler* as follows:

> "The next question to be determined is whether John Butler abandoned his homestead in his lifetime. It is conceded by all parties that the land in controversy was his homestead until the fall of 1916, when he removed to Crawford County, but it is contended by appellants that, by such removal, he abandoned his homestead. It is not contended that he acquired a new homestead after his removal to Crawford County, and before his death. It is the rule of law in this State, announced by many decisions of this court, that the question of whether there has been an abandonment of a homestead once established, is almost entirely a question of intent on the part of the homestead owner so to do. In

other words, in order to constitute an abandonment of a homestead, the owner must leave it with the intention of renouncing and forsaking it, or leaving it never to return. The law does not require continuous occupation of the homestead to continue it as such. As was said in one of the earlier cases before this court, *Euper* v. *Alkire & Co.,* 37 Ark. 283: 'When a homestead right has once attached, a continuous actual occupation is not indispensable for its preservation. It is well settled by the authorities that a removal from the homestead for a temporary purpose, or with the intention of returning and again occupying it, is not such an abandonment as will forfeit the homestead right.' And in that case the court quoted with approval from *McMillan* v. *Warner,* 38 Tex. 410, as follows: 'The question of abandonment is almost exclusively a question of intent, since no legal abandonment can occur without a fixed intent to renounce and forsake, or to leave never to return; and to abandon a homestead, a party must forsake and leave it with the intent never to return to it again as a homestead.'

In the more recent case of *Gillis* v. *Gillis,* 164 Ark. 532, 262 S. W. 307, this court said: 'The question of whether one who removes from his homestead has abandoned same is one of intention, which must be determined from the facts and circumstances attending each case.'

A temporary removal from a homestead for business purposes does not constitute an abandonment. In this case it is shown that Mr. Butler, when he removed to Crawford County, went there to cultivate bottom lands, by which he thought he could earn sufficient money to pay off the mortgage on his homestead; that he rented his homestead for one year only for farming purposes; that he refused to sell same to persons who offered to purchase. It is also shown by a number of witnesses that he expressed, on many occasions, his intention of returning to his home in Logan County, and these expressions of intention in this regard continued up

to the very day of his death. While there is some conflict in the evidence regarding the question of his intention, we do not find that the chancellor's finding is against the preponderance thereof, and we therefore hold with the chancellor, that John Butler did not abandon his home in his lifetime.

The next question for determination is whether his widow, the appellee, Mrs. A. V. Butler, abandoned same. Section 6 of article 9 of the Constitution of 1874 reads as follows: * * *

The widow did not have a separate homestead in her own right at the time of her husband's death, and she also had minor children. Therefore, under the plain provision of the Constitution, the homestead, of her husband became hers for life, exempt from any debts, except the mortgage indebtedness, together with the rents and profits therefrom, to be shared by her and her minor children until they reach the age of twenty-one years. She could not abandon the homestead so as to be effectual against the minor children, and her act in purchasing a home in Fort Smith for the purpose of supporting and educating her children there, does not constitute an abandonment. The only qualification of her right to enjoy the rents and profits of the homestead during her natural life, contained in this section of the Constitution, is, 'if the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right.' Here there are children, and she had no separate homestead in her own right at the time of the death of her husband. In such a case the acquisition of a homestead in her own right, after the death of her husband, does not constitute an abandonment of her husband's homestead so as to deprive her of the rents and profits thereof during her natural life. As was said in the case of *Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A, 999: 'It is the settled policy of this court that homestead acts are remedial, and should be liberally construed to effectuate the beneficent purposes for which they are in-

tended.' And in the case of *Colum* v. *Thornton,* 122 Ark. 287, 183 S. W. 205, this court said:

'Our Constitution gives the homestead to the widow for life, without any restrictions. It is the settled policy in this State that laws pertaining to the homestead right of the widow and minor children shall be construed liberally in favor of the homestead claimants.' In this same case the court further said: 'Upon the death of her first husband, a life estate vests in her in his homestead, and she has the right to lease it and receive the rents from it, subject, of course, to the rights of her minor children to share same with her until each of them arrives at the age of twenty-one years; and we do not think she forfeits her homestead by a second marriage and removal to the homestead of her second husband.'

Again, in the same case, it is said: 'The general rule is that a remarriage by a widow will not operate to destroy the homestead character of a home left to her and her children by a former husband. Our Constitution does not require a widow to occupy the homestead. There is nothing in it to indicate that the framers intended that the marriage of a widow and her going to her second husband's homestead and occupying it with him should work a forfeiture of her previously existing legal rights. In short, there is nothing in our Constitution to indicate that the right of homestead of a widow should terminate, should she remarry and go to live with her husband on his homestead; and we do not think such an act on her part destroys the homestead character of a then existing homestead of herself and her children by her former husband.'

The effect of this holding is that a widow does not destroy her homestead right in her husband's estate by the acquisition of another home in her own right, for her own conveniences and purposes and that of her minor children. We therefore hold against the contention of appellants in this regard.

> The final contention of appellants for a reversal of the case is that there had been an abandonment of the mining operations at and after the death of John Butler, that constitute the leasing thereof by Mrs. Butler practically the same as opening a new mine. This contention must also be decided against appellants. It has been held by this court that coal underlying a homestead is a part thereof, and cannot be sold for the payment of the debts of the decedent's estate, but is protected therefrom the same as the homestead is protected. *Russell* v. *Berry,* 70 Ark. 317, 67 S. W. 864."

In the case at bar Mrs. Monroe testified that at the time of her husband's death, the cultivable land on the homestead had been permitted to grow up in brush, and that after his death she had the brush removed and the land planted to pine seedlings. She testified that she had harvested timber twice from the land through selective cutting, and the chancellor found that the truth of this evidence was borne out by previous orders of the Hempstead County Probate Court authorizing such procedure.

Mrs. Monroe further testified that she left the homestead soon after her husband's death and went to live with her sister and her sister's husband in Hope because they feared for her safety living alone on the homestead, and because she desired and obtained self-employment as a practical nurse in Hope. She testified that it has been, and still is, her intention to return and live on the homestead when she is no longer able to work in Hope. This avowed intention is borne out in the testimony of Mrs. Monroe's sister, who lives with her, and there is no evidence in the record to the contrary.

In the chancellor's findings of fact he recites that after the hearing Mrs. Monroe, through her solicitor, announced her intention of applying the money she had received through the harvest and sale of timber from the homestead, to the making of specified improvements to the residential buildings still on the homestead. The chancellor included in his decree orders pertaining to the

carrying out of these announced intentions and Mrs. Monroe has not appealed from this portion of the decree.

We are of the opinion that the decree of the chancellor is not against the preponderance of the evidence in this case, and that it should be affirmed.

Affirmed.

GRANITE STATE INSURANCE COMPANY *v.* RUSSELL C. ROBERTS, JUDGE

5-5562 465 S. W. 2d 332

Opinion delivered April 12, 1971

Whetstone & Whetstone, for petitioner.

Guy H. Jones, Phil Stratton and *Guy Jones, Jr.,* for respondent.

J. FRED JONES, Justice. This is an original action brought in this court by Granite State Insurance Company, as petitioner, seeking a writ of prohibition against the Honorable Russell C. Roberts, Judge of the Conway County Circuit Court, restraining Judge Roberts from proceeding further in connection with a suit now pending in said court wherein Grover L. Martin filed a suit against Granite State Insurance Company for recovery of the maximum amount payable under an uninsured motorist endorsement to an insurance policy issued by Granite State to Martin.

The factual background for Granite State's petition is as follows: On March 5, 1969, John L. Romes filed suit in the Pulaski County Circuit Court alleging that on March 1, 1969, he sustained personal injuries and property damage in a collision with an automobile operated by Martin in Pulaski County, Arkansas; that Martin's negligence was the proximate cause of the collision and Romes' resulting damage. The complaint prayed judgment against Martin in the amount of $35,000 for personal injuries, together with $500 for property damage.

On March 17, 1969, Martin filed his answer of general denial, and affirmatively alleged that whatever damages Romes sustained were entirely due to Romes' own negligence in the operation of his automobile. On November 12, 1969, Martin filed an amendment to his answer affirmatively alleging certain acts of negligence on the part of Romes as a complete bar to Romes' cause of action against him.

On November 24, 1969, Martin, through different attorneys, filed a counterclaim against Romes in the Pulaski County case alleging certain injuries sustained by Martin as a direct and proximate result of specifically alleged acts of negligence on the part of Romes in the operation of Romes' automobile and as a result of his alleged injuries, Martin prayed judgment against Romes in the amount of $50,000.

On November 26, 1969, Romes filed an amendment to his original complaint more specifically setting out the alleged acts of negligence on the part of Martin; and setting out that the plaintiff Romes' "collision" insurance carrier, had paid his property damage loss with the exception of $50 deductible under the policy, and the amendment prayed judgment for $35,050 rather than $35,500 as originally prayed.

At a jury trial of the issues as thus joined in the Pulaski County Circuit Court, the jury was unable to agree on a verdict as to Romes' complaint against Martin, but did render a partial verdict, finding for the plaintiff Romes on Martin's counterclaim against him. On January 16, 1970, judgment was entered on the verdict adjudging that Martin take nothing by reason of his counterclaim against Romes. The counterclaim was dismissed with prejudice and Romes was awarded his costs in connection with Martin's counterclaim. A mistrial was declared on Romes' complaint against Martin, and the matter was ordered placed on trial docket for retrial of those issues.

On appeal to this court from an order denying Martin's motion in arrest of judgment, we held that the trial court erred in entering judgment on the partial verdict and we reversed, holding that all the issues between the parties must be disposed of in a single action. *Martin* v. *Romes,* 249 Ark. 927, 462 S. W. 2d 460, (February 1, 1971).

On August 26, 1970, Martin, through the same attorneys who represented him on his counterclaim in the Pulaski County Circuit Court, filed a complaint in the Circuit Court of Conway County against the Granite State Insurance Company alleging that the defendant insurance company had issued an insurance policy to Martin; that Martin was involved in a collision in Pulaski County wherein his vehicle was struck from the rear by an automobile driven by John L. Romes; that Romes and his automobile were uninsured within the meaning of the language contained in Martin's insurance policy. A copy of the policy was made an ex-

hibit to the complaint and the complaint alleges that Martin sustained personal injuries to his damage in the amount of $50,000, and that the defendant, Granite State Insurance Company, is indebted to the plaintiff Martin in the aggregate sum of $10,000 under his policy of insurance. Martin prayed judgment against Granite State for $10,000, together with penalty and attorneys' fees.

On September 15, 1970, Granite State, through the same attorneys who filed answer for Martin in the Pulaski County case, filed a motion in the Conway Circuit Court praying a dismissal of the complaint filed against it by Martin in that county, for the reason that the same issues were still pending between the same parties in the Circuit Court of Pulaski County, and the Conway County Circuit Court was without jurisdiction. The trial court denied the motion and as a basis for its motion in this court for prohibition, the petitioner states:

> "For all practical and legal intents and purposes the matter now pending in the circuit court of Pulaski County involves the same subject matter, the same issues, and the same parties (privies) as that sought to be litigated in Conway Circuit Court and the Pulaski Circuit Court having first acquired jurisdiction, there is no jurisdiction in Conway County."

The insuring agreement under the uninsured motorist endorsement on the policy issued by Granite State to Martin provides as follows:

> "Damages for Bodily Injury Caused by Uninsured Automobiles: The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', sustained by the insured, caused by accident and arising out of the ownership, main-

tenance or use of such uninsured automobile; provided, for the purposes of this endorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company."

Granite State filed its petition now before us, through the attorneys who filed the answer for Martin in the Pulaski County Circuit Court. The attorneys who represented Martin on his counterclaim in Pulaski County, and who filed the suit now pending against Granite State in Conway County, have filed a brief in support of the action taken by the respondent, Russell C. Roberts, Judge. It is obvious that Granite State carried the liability insurance with the uninsured motorist endorsement on Martin's automobile. It is entirely possible that Granite State employed counsel only to defend the action brought by Romes against its insured in Pulaski County, and that Martin employed separate counsel to represent him in his counterclaim in that action; but, be that as it may, the record now before us is completely silent as to Granite State's interest in the Pulaski County case (*Martin* v. *Romes*, supra).

Assuming that Granite State is correct in its contention that "for all practical and legal intents and purposes the matter now pending in the circuit court of Pulaski County involves the same subject matter, the same issues, and the same parties (privies) as that

sought to be litigated in Conway Circuit Court. . ."; this contention is made in the face of the provision in the policy providing that:

> "no judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or of the amount of damages to which the insured is legally entitled *unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.*" (Emphasis added).

There is no evidence in the record before us that Granite State's insured, Grover L. Martin, ever obtained any kind of consent from Granite State before prosecuting his counterclaim against Romes in the Pulaski County Circuit Court. By the plain words of the insurance contract, the issues as to liability or any judgment Martin might obtain against Romes in the Pulaski County Circuit Court action, would not be conclusive as between Granite State and its insured Martin, unless the judgment should be entered pursuant to an action prosecuted by the insured *with the written consent of the company.*

There is no evidence in the record before us that Granite State was ever a party to the litigation pending in Pulaski County, and there is no evidence, as the record now stands, that Granite State did or did not consent to the action instituted or the judgment rendered in the Pulaski County Circuit Court. We conclude, therefore, that the petitioner, Granite State Insurance Company, has failed in the discharge of its burden of showing grounds for the invocation of the extraordinary powers of this court to prevent by prohibition the exercise of jurisdiction inherent in the trial court, and of showing that the respondent judge erred in denying Granite State's motion to dismiss Martin's complaint in the Conway County Circuit Court. *MFA Mutual Ins. Co.* v. *Bradshaw,* 245 Ark. 95, 431 S. W. 2d 252.

The petition for writ of prohibition is denied.

MARGARET KANE *v.* Francis R. ERICH ET AL

5-5516 465 S. W. 2d 327

Opinion delivered April 12, 1971

Hobbs & Longinotti, for appellant.

Wootton, Lamb & Matthews and *Cockrill, Laser, McGehee & Boswell,* for appellees.

CONLEY BYRD, Justice. After a jury returned a verdict for appellant Margaret Kane against appellee Francis R. Erich in the amount of $4,500.00 and a verdict in favor of Spa Transit, the court dismissed

appellant's action against appellee Spa Transit Co., Inc. Appellant filed a motion for new trial. For reversal of the trial court's action overruling the motion for new trial, appellant relies upon the following points:

> "1. The court erred in refusing to grant the plaintiff a new trial because of the failure of two jurors to be truthful in answering questions on voir dire.
>
> "2. The court erred in refusing to allow plaintiff to put on oral testimony at the hearing on the motion for new trial, and further erred in refusing to recognize in substance the offer of proof as to what the two jurors would have testified to had plaintiff's counsel been allowed to subpoena them and interrogate them."

Appellees Francis R. Erich and Spa Transit Co., Inc., contend that the trial court did not err in overruling the motion for new trial because appellant as the complaining party failed to show diligence in ascertaining the disqualification, if any, of the jurors. We agree with appellees.

The record shows that one of appellant's attorneys made an affidavit, filed with the motion for new trial, that Evelyn Ford untruthfully stated that she was not acquainted with appellant, whereas in fact Mrs. Ford and her husband had had business transactions with appellant and her husband, that certain disagreements arose and appellant found it necessary to secure the sheriff's services to effect return of an abstract.

With respect to juror Dean Matthews, the affidavit attached to the motion stated that Matthews was asked whether he was acquainted with respective counsel or whether they represented him in any capacity and that Matthews did not indicate that he was personally acquainted with appellees' counsel. It was also asserted that Matthews was asked whether he was connected with any casualty insurance company, either as agent or salesman, and he did not indicate to counsel

or the court that he had any connection whatsoever with casualty insurance, when in fact he was manager of the insurance department of the Arkansas First National Bank. After appellees' response and affidavits of jurors Ford, Matthews and Cox were filed, appellant's counsel on August 24th, made the following affidavit:

> ". . .that at the trial of this cause the first 18 prospective jurors called were asked certain questions by the court and in addition thereto were interrogated as to whether or not they had any connections with any casualty insurance companies as an agent, salesman, stockholder, or any other capacity. One juror answered this question in the affirmative, and there was some discussion as to whether or not that fact would influence him in any way in arriving at a decision in the present case, and the juror was finally excused.
>
> "Mr. Dean Matthews was present in the courtroom at the time these questions were being asked on voir dire to the prospective jurors, and he was also present in the courtroom at the time that the court itself asked the prospective jurors as a group if they were personally acquainted with the attorneys or litigants. When Mr. Dean Matthews was finally called as a prospective juror and entered the jury box, the court asked Mr. Matthews if he had been present in the courtroom at all times that the prospective jurors that were waiting in the jury box were being questioned by the court and respective counsel, and Mr. Matthews indicated that he had been, and he was then asked by the court if he had heard the questions propounded by the court and counsel to the other prospective jurors and whether or not his answers to the questions would be any different than were the answers of the other prospective jurors. Mr. Matthews did not say "yes" or "no" or indicate either way by nodding his head, but maintained a strict silence.

> "I do further state that neither myself nor my co-counsel was personally acquainted with Mr. Matthews, nor did any of the said parties have any knowledge of the fact that he was Manager of the Insurance Department of Arkansas National Company."

Juror Ford's affidavit denies that she was acquainted with appellant. It also denies the business disagreements asserted in appellant's affidavit. The affidavit of juror Matthews denies that he is employed by the Arkansas First National Bank but admits he is manager of the Insurance Department of the Arkansas National Company. This affidavit denies that Matthews was questioned as to whether he was acquainted with the attorneys and also denies that he was interrogated about any connection with casualty insurance companies. The affidavit of Freda Cox also denies that the last selected jurors were asked about their connection with any casualty insurance companies.

Ark. Stat. Ann. § 39-106 (Supp. 1969), provides:

> "No verdict or indictment shall be void or voidable because any juror shall fail to possess any of the qualifications required in this Act [§§ 39-101—39-108, 39-201—39-220] unless a juror shall knowingly answer falsely any question on voir dire relating to his qualifications propounded by the court or counsel in any cause. A juror who shall knowingly fail to respond audibly or otherwise as is required by the circumstances to make his position known to the court or counsel in response to any question propounded by the court or counsel, the answer to which would reveal a disqualification on the part of such juror, shall be deemed to have answered falsely."

In *Arkansas State Highway Commission* v. *Kennedy,* 233 Ark. 844, 349 S. W. 2d 133 (1961), we pointed out that under our statutes, as well as the practice in this state, it is too late after rendition of a verdict to raise the ineligibility of a juror to serve, unless it can

be shown by the complaining party that diligence was used to ascertain the juror's disqualification and to prevent his selection. We find this principle of law to be controlling as to juror Ford. Obviously appellant knew as much about her difficulties with juror Ford as juror Ford would have known and under the circumstances appellant owed an obligation to the trial court, the witnesses and the other jurors to call the matter to the court's attention at the earliest possible moment.

The issue with respect to juror Matthews is somewhat closer. However, as we read the August 24th affidavit of appellant's counsel, juror Matthews was asked if he had heard the questions propounded by the court and counsel to the other prospective jurors and whether or not his answers to the questions would be any different than those of the other prospective jurors. Since some of the prospective jurors had remained silent and others had answered and appellant's counsel observed that Matthews neither answered nor responded in any way to make his position known, we hold that appellant has failed to show due diligence with respect to juror Matthews also. Had the question asked, been one in which the silence amounted to an answer, then Ark. Stat. Ann. § 39-106, *supra,* would apply. However, as we read appellant's affidavits, juror Matthew's silence could not have been taken as an answer to the question as propounded.

Appellant also contends that the trial court erred in not hearing testimony on her motion. We find no merit in this contention because the trial court has no obligation to make a determination of whether or not a juror knowingly failed to respond audibly or otherwise as is required under the circumstances until such time as the movant has made a prima facie showing of diligence.

Affirmed.

F. F. MOON *v.* THE SPERRY AND HUTCHINSON CO., A CORPORATION

5-5507 465 S. W. 2d 330

Opinion delivered April 12, 1971

Brockman, Brockman & Gunti, for appellant.

Warren & Bullion, for appellee.

FRANK HOLT, Justice. Appellant instituted this action against the appellee, owner of the S & H Green Stamp

Center, for false imprisonment and detention. The trial court granted a motion for summary judgment against appellant and he appeals. For reversal appellant contends that the trial court erred because there were genuine issues of fact to be resolved by a jury.

Appellant entered the S & H Green Stamp Center to visit one of the employees who happened to be absent. An employee of appellee, Mrs. Lou Coil, thought she saw the handle of a pistol protruding from appellant's pocket while appellant was in the store, acting in a manner that aroused her suspicion. The appellant was a stranger to Mrs. Coil. Mrs. Coil left the store and called the police. Two officers were directed to the Center where they were met outside the building by Mrs. Coil who accompanied them into the store and identified appellant.

There is a conflict of testimony as to the events which occurred after the police arrived. According to the evidence adduced by appellee, the officers approached appellant and asked if he had a gun. Appellant denied possession by saying: "I do not, search me," and he put both hands up. The officer then "patted" the outside of appellant's clothing and determined that appellant was not armed. Appellant was not further detained nor was an additional search conducted. According to appellant's evidence, the police entered the store and approached him after Mrs. Coil had identified him as the man with a gun. After appellant had denied having a gun in his possession, the police asked him what he had in his hand, whereupon he showed them a car key in a leather case and told them he was a longtime local resident. The officers then stated: "Well, we have orders to arrest you and search you, put up your hands." Appellant replied: "Okay, if you find anything why give me half of it please." He stated the occurrence "kind of shocked me." As to the police officers' conduct during the investigation, appellant testified as follows: "I held my hands up and they went all over me. I wouldn't say whether they ran their hands in my pockets or out." Afterwards he left the store.

The only issue presented here is whether the trial judge acted properly in holding, as a matter of law, that appellee's employee's actions were insufficient to constitute false imprisonment.

Ark. Stat. Ann. § 29-211 (Repl. 1962) provides that a summary judgment shall be rendered if the pleading and proof on file show "that there is no genuine issue to any material fact and that the moving party is entitled to judgment as a matter of law." Under the provisions of this statute, any evidence submitted with the motion must be viewed in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party. *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S. W. 2d 89 (1963). In support of his contention that a genuine issue of material fact did exist as to whether appellee's employee did falsely arrest and detain him, appellant cites Ark. Stat. Ann. § 41-1601 (Repl. 1964) which defines false imprisonment as "the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority." It appears that appellee's employee's activities were confined to notifying the police and identification of appellant. The principle of law announced by this court in *McIntosh* v. *Bullard, Earnheart & Magness,* 95 Ark. 227, 129 S. W. 85 (1910) is: "Where a person does no more than to give information by affidavit to an officer relative to a matter over which he has jurisdiction, such person is not liable for a trespass for false imprisonment for the acts done under a warrant which the officer issues on said charge." The above mentioned rule was made in conjunction with an action for illegal arrest and false imprisonment, a fortiori, we think it controls in the case at bar.

This rule is in accord with the general rule laid down in 22 Am. Jur., False Imprisonment, § 30, p. 371, which reads as follows: "To be liable in an action for false imprisonment, one must have personally and actively participated therein directly or by indirect procurement." 32 Am. Jur. 2d, False Im-

prisonment, § 35, p. 99, sets out what constitutes direction or investigation as follows: "In short, the arrest by the officer must be so induced or instigated by the defendant that the act of arrest is made by the officer, not of his own volition, but to carry out the request of the defendant. Merely summoning an officer for protection or to keep the peace, or to deal with a person accused of crime, is not sufficient participation to impose liability, as a general rule." To the same effect, see Restatement, Second, Torts, § 45A. Even though Mrs. Coil was mistaken in her belief that appellant was carrying a gun, her actions of calling the police and identifying appellant are insufficient acts, in the circumstances, to constitute direct or indirect procurement of the alleged detention. 21 ALR 2d 643—717 [ALR 2d Later Case Service 3, §§ 23, 27]. As we view this record, there is no genuine issue of a material fact. When the evidence is considered most favorably to appellant, it merely shows that appellant was detained only by the police for a period of time sufficient to conduct a limited investigation by them.

Affirmed.

BYRD, J., concurs.

SALLIE JOHNSON *v.* C. H. JOHNSON ET AL

5-5517 465 S. W. 2d 309

Opinion delivered April 12, 1971
[Rehearing denied May 3, 1971.]

F. C. Crow, for appellant.

Raffelli, Hawkins & Carter, for appellees.

FRANK HOLT, Justice. This case involves the issue of a cotenancy. The appellees, some of the heirs of Jane Johnson who died intestate in 1919, brought this action against appellant and others in 1969 as cotenants

to partition 120 acres and to establish all of their respective interests. The appellant responded by asserting her ownership by virtue of a recorded deed in 1952 and also by adverse possession and asked that title be quieted in her. The chancellor found that the parties to this action are cotenants and ordered a partition of the lands.

At the time of Jane Johnson's death in 1919, two of her eleven children, Ralph and Fred Johnson, were living on the property and they continued to live there after her death. Several years later (1922), Ralph married Sallie and she moved onto the property with him. In 1926, while Ralph and Sallie were living on the property, the taxes were not paid and on June 13, 1927 a tax sale was held whereby C. F. Routon bought the property at the tax sale. Routon received a deed from the County Clerk of Hempstead County, Arkansas and recorded the deed on May 30, 1934. For the years 1927 through 1951, taxes ($302.69) on the 120 acres were paid by Routon, during which time Ralph and Sallie were his tenants. In 1952 Routon and wife conveyed by quitclaim deed their interest in the property for $500 to Ralph and Sallie Johnson. In 1954 Ralph and Sallie moved their residence to a nearby tract but continued to farm the 120 acres. In 1958 Ralph Johnson died. After his death, Sallie continued to either farm or rent the property and retained the profits for her sole benefit without interference from the other heirs until 1969 when this suit for partition was filed.

On appeal appellant asserts that the court erred in holding the 1952 deed from C. F. Routon and wife to Ralph and Sallie Johnson was a mere redemption for the benefit of all cotenants. We think the court was correct. It is well established that a tenant in common of land cannot acquire title to the interest of his cotenants by purchase at a tax sale nor by the purchase of the property from a third person who bought at the tax sale. *Findley* v. *Tyler,* 227 Ark. 663, 300 S. W. 2d 598 (1957); *Smith* v. *Smith,* 210 Ark. 251, 195 S. W. 2d 45 (1946); *Sanders* v. *Sanders,* 145 Ark. 188, 224 S. W. 732 (1920). Ralph and Sallie continued to remain

in possession of the property, without visible change to other members of the family or cotenants after the tax sale, throughout the entire time that Routon paid the taxes and also after the conveyance to them of the property by quitclaim deed. It appears that none of the other cotenants had reason to believe that a tax sale and subsequent conveyance to Ralph and Sallie had ever occurred. In fact, Sallie testified that the other cotenants were never notified that she and Ralph were occupying the lands as tenants of Routon because she thought she "had no right to tell them." The relationship between cotenants is one of trust and confidence and it would be inequitable to permit one of them to do anything which prejudiced the interest of the other.

Appellant also asserts ownership by adverse possession and asked that title be quieted in her. Ralph, until his death in 1958, and Sallie, to the present time, continued to use and possess the land after their purchase from Routon in 1952. In order for one cotenant to acquire the title of his cotenants by adverse possession, use and possession of the land alone is insufficient; there must be some act sufficient in itself to give notice that the cotenant in possession is claiming in hostility to and not in conformity with the rights of others having an interest in the property. The cotenant must bring home "to his cotenants the knowledge of his hostile claim, either directly or by acts so notorious and unequivocal that notice must be presumed." *McGuire* v. *Wallis,* 231 Ark. 506, 330 S. W. 2d 714 (1960). See, also, *Staggs* v. *Story,* 220 Ark. 823, 250 S. W. 2d 125 (1952); *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690 (1944). In order for appellant Sallie Johnson to establish ownership by adverse possession, where a family relationship exists, she must sustain the burden of proof of such possession and such proof must be by stronger evidence than that required in cases involving adverse possession against a stranger. *Staggs* v. *Story, supra.* There is a conflict in appellant's testimony concerning the year in which notice of the Routen deed was given the cotenants. On direct examination she testified to giving notice of the 1952 pur-

chase to one of the cotenants, Mrs. Wafer, about a year after Ralph Johnson's death in 1958. However, on cross-examination she replied: "Yes, sir" when asked, "In other words, it could have been five or six years ago that you told them you had the property in black and white." As previously indicated, she also stated that neither she nor her husband, prior to the Routon deed, gave their cotenants notice of being tenants of Routon as a result of the tax sale. She testified: "I told you I didn't claim the property until I got it in black and white" (1952 deed). The appellees adduced evidence that they were unaware of appellant's asserted claim of adverse possession until three or four years at the most before instituting this action. Since there was testimony showing that actual knowledge of the adverse holding was not timely brought home to the cotenants, the trial court could find that appellant Sallie Johnson failed to establish her claim of adverse possession by the required burden of proof.

Nor do we find any merit in appellant's contention that laches bars the claim of the cotenants, the appellees. Appellant Sallie Johnson was permitted to occupy and benefit from the use of the property without any accounting to the appellees. Any improvements made to the property appear to consist of the construction of a small barn and the expenditure of $40 for a fence. See *Vesper* v. *Woolsey,* 231 Ark. 782, 332 S. W. 2d 602 (1960).

As a subsidiary contention, appellant poses the question as to the correctness of the court's findings with respect to the purchasers of the interests of two of the heirs. Upon a canvass of the entire record, we are of the view there is no merit in this contention.

After having considered each of appellant's contentions for reversal, we cannot say that the chancellor's findings are against the preponderance of the evidence.

Affirmed.

COMMERCIAL PRINTING CO., INC. *v.* ARKANSAS POWER AND LIGHT COMPANY AND ARKANSAS PUBLIC SERVICE COMMISSION

5-5468 466 S. W. 2d 261

Opinion delivered April 19, 1971
[Rehearing denied May 24, 1971.]

Darrell Hickman, for appellant.

House, Holmes & Jewell and *Benjamin C. McMinn,* for appellees.

CARLETON HARRIS, Chief Justice. In November, 1968, the Arkansas Power and Light Company, an appellee herein, filed with the Public Service Commission, in accordance with the provisions of Ark. Stat. Ann. § 73-217-18 (Repl. 1957) for approval of a new rate schedule entitled "Gross-Net Billing Rider Rate Schedule M15", the new schedule to become effective on December 31, 1968. Pursuant to law, the effective date of this rate schedule was suspended by order of the Commission. Upon filing the rate schedule, notice was given by having a copy served on the elected officials of every

municipality in Arkansas in which appellee operated. Thereafter, two separate groups of consumers intervened, attacking the terms, conditions, and provisions of the rate schedule. In January and February of 1969, the Commission conducted hearings in which testimony was taken, with full participation of the commission staff and representatives of the interveners. An order was entered on May 9, 1969, in which the schedule, with certain modifications, was approved. Following approval by the commission, Rate Schedule Rider M15 was applied to billings of the company. No consumer interveners petitioned for judicial review, and the time for review expired. Briefly stated, the order permitted the company, when a customer had not paid his bill within ten business days from the time of billing, to add an amount equal to 8% of the first $15.00 of the bill, plus 2% of the net bill amount in excess of $15.00.

On November 14, 1969, appellant, Commercial Printing Company, Inc., instituted suit in the Pulaski County Circuit Court against appellee and the Public Service Commission, wherein appellant stated that it had followed a practice of paying its bills on or before the tenth day of each month but that as a result of Rate Schedule M15, appellant found itself in the position of being a delinquent consumer; that the application of the penalty was discriminatory against appellant and other consumers, and was unreasonable and exorbitant. It was also alleged that the penalty was usurious. The prayer of the complaint was that the penalty be declared null and void; that a restraining order be issued prohibiting the enforcement of the said penalty and that appellee company be restrained from disconnecting utility service to appellant. The complaint was subsequently amended to allege that the suit was brought as a class action by appellant on its behalf and that of the rest of the customers who were affected by the order. Arkansas Power and Light Company answered, denying that the provisions of Rate Schedule M15 were discriminatory, unreasonable, exorbitant, or usurious; asserting that the order of the Commission was final and conclusive, there having been no petition for court review; further, that the complaint constituted a collateral at-

tack on the orders of the commission and it was prayed that the complaint be dismissed. The company also counterclaimed for the amount which it contended Commercial Printing Company, Inc. owed to it. The Public Service Commission answered, asserting that consideration and determination of the procedures of billing set out in Rate Schedule M15 were matters solely within its jurisdiction, subject only to judicial review, and that no judicial review having been sought, the order had become final. Subsequently, Arkansas Power and Light Company amended its answer to assert that the cause of action was barred by *res judicata* under the Supreme Court decision in the case of *Coffelt* v. *Arkansas Power and Light Company,* 248 Ark. 313, 451 S. W. 2d 881. After the filing of motions by appellant for the commission to be required to file certain records, and power and light company to answer certain interrogatories, appellees moved for summary judgment, supporting said motion with affidavits and exhibits. These included a certified copy of the order of the Public Service Commission approving Rate Schedule M15, dated May 9, 1969, and an order of the Public Service Commission dated June 2, 1969, wherein a petition for review and reconsideration filed by intervener Odell Smith for himself and as representative of a class of persons was denied, and Smith's notice of appeal noted. Further exhibits included a complaint filed in the Chancery Court of Pulaski County as a class action by Kenneth Coffelt, individually, and as a citizen and tax payer of the State of Arkansas, the answer of the Arkansas Power and Light Company to such complaint, the order of the Chancery Court granting a motion for summary judgment in the case of *Coffelt* v. *Arkansas Power and Light Company supra,* and a copy of the opinion of the Arkansas Supreme Court affirming the decision of the Pulaski County Chancery Court in that case. The motion was further supported by the affidavit of O. V. Holeman, Manager of Rates and Research of Arkansas Power and Light, which set out that upon the filing of the aforementioned rate schedule with the Arkansas Public Service Commission, copies of the rate schedule and notice of the filing had been filed with city officials of each of the incorporated municipalities

in which appellee company provided service. The affidavit incorporated the contents of Rate Schedule M15, and further recited that on December 26, 1968, an intervention was filed by a group of interested consumers in which they objected to the rate schedule; that it was suspended to prevent its becoming effective pending hearings which were subsequently conducted, following a second intervention by an additional group of consumers; that following the approval of the rate schedule by the Public Service Commission, no petition for review of this order was filed with the commission or with the Circuit Court of Pulaski County by any party. The affidavit of the assistant treasurer of the company was simply that appellant had been billed in accordance with the schedule, had not made payment, and was indebted to the company in the amount of $124.58. Counter-affidavits, or exhibits, were not filed by appellant, but it did file an unverified response reiterating that summary judgment should be denied because the order was discriminatory against appellant and the class of consumers represented, and it stated that *res judicata* could not be relied upon because of *Coffelt* v. *Arkansas Power and Light Company supra,* that case being heard entirely on the issue of usury and not on the issue of discrimination. The court granted the motion for summary judgment, finding that the commission was the agency invested by law with the authority to hear matters pertaining to the issues raised by appellant, and that appellant was afforded an adequate, complete and expeditious remedy at law under the statutes authorizing appeals from orders of the commission for judicial review. The court found that there was no genuine issue as to any material fact, and granted the summary judgment, dismissing the complaint.[1] From the judgment so entered, appellant brings this appeal. For reversal, it is simply urged that "The lower court was the proper forum to adjudicate the illegal and unlawful order of the Public Service Commission".

[1]The court also held that the motion of appellant to require the commission to file certain records and for the power and light company to answer certain interrogatories "are therefore moot". The counter-claim of the power and light company was also dismissed without prejudice to the company for recovery of any sums due it by appellant under the appellee's approved rate schedule.

Appellant commences its brief with an erroneous premise. From appellant's brief:

"It must be assumed that all of the allegations of the complaint and the amended complaint are true. The lower Court granted motions for summary judgment filed by both defendants and found that there was no genuine issue as to any material fact.

It cannot be denied, for purposes of review, that the order in question is discriminatory, illegal and unjust. It must be admitted, for the purposes of review, that these facts are not in dispute. Therefore, we consider this matter on appeal on the basis of the cause of action stated in the complaint and the amended complaint in light of the laws of the State of Arkansas."

We do not treat motions for summary judgment in the same manner as a demurrer. It is true that when a demurrer is filed, the allegations of the complaint are treated as true for the purpose of testing the sufficiency of the complaint in stating a cause of action. But this is not true where a motion for summary judgment is supported by affidavits and other exhibits. In *Coffelt* v. *Arkansas Power and Light Company supra,* we said:

"We should add that the appellant is mistaken in suggesting in his brief that the facts supporting the motion for summary judgment must be treated as being disputed by the plaintiff's verified complaint. That view was originally taken by some federal courts in construing the Federal Rules of Civil Procedure, but both the Rules and our summary judgment act have been amended to make it clear that proof must be met with proof. This is the pertinent language in Act 160 of 1967: 'When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.' Ark. Stat. Ann. § 29-211 (e) (Supp. 1969). Inasmuch as the plaintiff in the case at bar filed no response whatever to the defendant's

motion for summary judgment, the facts established by that motion stand undisputed."

No specific reason whatsoever is set forth why the order is discriminatory, but at any rate, the matters complained of are clearly rate making functions. Were the court to have complied with the prayer to determine the issue urged in appellant's complaint, it would have been necessary to originally determine all of the issues and questions which arise at a rate hearing, functions which are certainly legislative and administrative in nature. As pointed out in the brief filed by the Arkansas Power and Light Company, what would have been the final result if the court had denied the motion for summary judgment, found that *res judicata* did not apply, and that the court had jurisdiction to hear the facts which appellant contends would have disclosed discrimination? Let us assume that the court heard the evidence and found that the rate schedule operated in a manner to discriminate against appellant. Would the court then have redesigned the schedule, added new terms, or taken away some of its provisions? If so, it is clear that it would have been engaged in what the General Assembly has declared to be a legislative function, *i. e.,* the regulation of rates of a public utility. If, in fact a court is empowered to take such action, what then is the need for the Arkansas Public Service Commission, and its group of experts? The only other action the court could have taken would have been to refer the matter back to the Public Service Commission for further consideration. The effect of such action would result in appellant being given a judicial review several months subsequent to the legal time limit provided in Ark. Stat. Ann. § 73-233 (Repl. 1957). While apparently a notice of appeal was given by one of the interveners, the matter was not pursued. To allow the procedure contended for by appellant would be to repeal the statutory provision for court review of the Public Service Commission orders; the appeal provisions would simply, in effect, be stricken from the statute.

In *Southwestern Gas & Electric Co.* v. *City of Hatfield,* 219 Ark. 515, 243 S. W. 2d 378, we said:

"Orderly procedure and administrative efficiency demand that the regulatory body be vested with authority to make *preliminary determination of legal questions* (our emphasis) which are incidental and necessary to the final legislative act. Otherwise endless confusion would result because different phases of the same case might be pending before the Commission and the courts at one time."

This does not mean that no adequate remedy at law is provided. In *McGehee* v. *Mid South Gas Co.,* 235 Ark. 50, 357 S. W. 2d 282, we squarely held that the procedures (mentioned in the sections already referred to) provide an adequate remedy at law. The background of that case is as follows: Mid South Gas Company and Arkansas Louisiana Gas Company entered into an agreement by the terms of which Arkla would issue a certain number of shares of its common stock to Mid South and would assume the debts and obligations of Mid South, all in exchange for the properties and assets of Mid South as a going concern. Since both of these companies were public utilities, the agreement was subject to the approval of the Public Service Commission, and the two companies filed their joint application for approval of the plan, the commission setting the matter for hearing. McGehee was a stockholder in Mid South and filed a complaint in the Pulaski Chancery Court against that company, its officers and directors, alleging in his complaint that it was a class suit in his behalf and that of others similarly situated, and that, without notice to the stockholders, the officers and directors of Mid South had entered into the agreement with Arkla. He then set out several reasons why he considered the agreement to be illegal and void and prayed that Mid South, its officers and directors, be restrained from further proceeding in the agreement with Arkla. On the same day that McGehee filed his suit in Chancery Court, he also filed before the Public Service Commission a motion for continuance, advising the commission of his chancery suit and praying that the commission delay any action with regard to approval of the plan until the chancery case could be heard and decided. He also filed a response and objection to the

proceedings, presenting the same questions that he had raised in the chancery court.

The Public Service Commission overruled his motion for continuance, denied the objections and response of McGehee, and approved in every respect the agreement. Thereafter, Mid South filed a motion in the Chancery Court to dismiss McGehee's complaint, setting out *inter alia* that the same questions were being presented in the chancery case that had been presented before the commission; that McGehee could appeal the adverse ruling by the commission, and that such remedy at law by appeal was adequate and complete. McGehee responded, claiming that the Public Service Commission was without jurisdiction to hear the matter; that his rights of appeal from the commission's ruling were not adequate and complete; that the commission was merely an administrative tribunal and had no authority to adjudicate the questions raised in the chancery court. The chancellor sustained the motion to dismiss and McGehee appealed to this court.

In a comprehensive opinion, this court mentioned several of our prior holdings, and then stated:

"In these four cases—and others could be cited to the same effect—we have held that the Commission in the first instance and the courts on appeal could consider such matters as each of the five points of attack made by McGehee in the case at bar. It thus follows that McGehee's remedy through the proceedings before the Commission and on appeal, was full, adequate and complete in that he could urge every point that he alleged in the Chancery Court. That his remedy through the Commission's proceedings was expeditious is shown by the fact that the Commission's Order was made on July 5, 1961, affirmed by the Circuit Court on September 25, 1961, and an appeal to this Court was dismissed on February 19, 1962, because McGehee had not pursued his appeal expeditiously and within the time prescribed by law. The fact that McGehee lost his appeal to this court—questioning the Public Service Commission's Order—by failing to prosecute it in due time,

does not reinstate equity jurisdiction, because where a legal remedy has been lost, through failure to seek it at the proper time, equity will not for that fault entertain jurisdiction."

It should be clear that since this decision applies to the extraordinary equity jurisdiction of the chancery court, it very clearly would also apply to the circuit court's jurisdiction at law. Particularly pertinent to the present litigation is the fact that McGehee's appeal from the order of the commission to the circuit court was not heard—due to the fact that he did not timely prosecute it. Here also, no appeal was prosecuted, leaving the decision of the commission unchallenged—and fully effective.

Nor was this court's action in *McGehee* inadvertently taken; rather it was specifically called to the attention of this court by the lone dissenter who, in effect, presented the same argument made here. Quoting from the dissent:

"If McGehee can substantiate the allegations of his complaint in chancery court, it means money in his pockets. I assume that no one questions his right to try to prove his case against Mid South in a court of competent jurisdiction. The majority opinion denies McGehee this right unless the Arkansas Public Service Commission is in fact such a court.

To my mind, to state the above issue is to answer it. I have never heard it contended or even intimated that the Arkansas Public Service Commission was a court, in law or equity, to resolve legal differences between individuals or corporations.

It cannot be disputed that the Public Service Commission has only such powers as are given it by the legislature. Ark. Stats. § 73-115 contains that grant of powers which is 'all matters pertaining to the regulation and operation of—' (naming the several utilities). Nowhere is the commission invested with the general powers of a court. Yet, the effect of the majority opinion

is to invest the commission with the *general* jurisdiction of a duly constituted court."

The dissenting opinion then states that the right of appeal to the circuit court is not adequate because, in a court hearing, evidence would be introduced in accordance with rules developed by decisions over a long period of time, but that the commission is not bound by the strict technical rules of pleading and evidence; that the appeal to the circuit court would be only heard upon the record presented, which in the view of the dissenting Justice, was not adequate. As stated, this court, by a vote of six to one, held to the contrary, and what was said in *McGehee, i. e.,* that his remedy "through the proceedings before the commission and on appeal, was full, adequate and complete * * *" is fully applicable to the instant litigation.

Appellees also offer an additional defense to appellant's complaint, *viz,* that the cause of action was barred under the doctrine of *res judicata,* this defense being based on our opinion in *Coffelt* v. *Arkansas Power and Light Company supra.* There may well be merit in this contention, but since we consider the first point, heretofore discussed, to be dispositive of the question posed in the litigation, there is no need to discuss the second.

Affirmed.

DORA BERRY *v.* CLARENCE BIERMAN ET AL

5-5552 465 S. W. 2d 688

Opinion delivered April 19, 1971

Kenneth Coffelt, for appellant.

Hall, Tucker & Lovell, for appellees.

GEORGE ROSE SMITH, Justice. This case is a sequel to an earlier one in which we held that the appellee Bierman was the owner of a certain house and lot, subject to the appellant's option to repurchase the property from Bierman for $2,100. *Berry* v. *Bierman,* 248 Ark. 440, 451 S. W. 2d 867 (1970). That opinion was delivered on April 6, 1970, and became final 17 days later. Ark. Stat. Ann. § 27-2142 (Repl. 1962); Supreme Court Rule 20 (a). Our mandate to the trial court was duly issued on April 24, 1970.

On July 14, 1970, which was 82 days after our decision became final, the dwelling house in question was destroyed by fire. On March 3, 1970, Bierman had obtained and paid for a $7,000 fire insurance policy upon the house. After the fire the appellant, who had not previously exercised her option to repurchase, claimed the proceeds of the fire insurance policy, which the in-

surer paid into court. This appeal is from a decree awarding the money to Bierman.

In seeking a reversal counsel for the appellant misconstrues our decision in the earlier case, by saying that we held "that Mrs. Berry was the fee simple title holder to the property and that Bierman had no title, or color of title, to the property, whatsoever." That was not the effect of our decision, as a review of the facts will demonstrate.

In 1955 Mrs. Berry conveyed the property to Bierman (her brother) for $2,100, reserving in the deed an option to repurchase the property for the same price at any time after four years from the date of the deed. In 1969 Bierman filed the complaint in the first case, asking that the deed be reformed by a cancellation of the option to repurchase. Mrs. Berry filed a counterclaim in which she sought to enforce the option to repurchase. Bierman then amended his complaint by seeking to recover the value of his improvements if Mrs. Berry were allowed to repurchase the property. The effective part of the decree in that case consisted of these three paragraphs:

> 1. That plaintiff's prayer for reformation of the deed introduced into evidence at the trial is denied.
>
> 2. That plaintiff, Clarence C. Bierman, has made improvements upon the land . . . in the sum of $1,500.00 and that Dora Berry must pay Clarence C. Bierman the sum of $3,600.00 to exercise her option in the repurchase of the property . . .
>
> It is, therefore, by the Court, considered, ordered and adjudged that plaintiff's prayer for reformation of the deed . . . is hereby denied, and that Dora Berry must pay Clarence C. Bierman the sum of $3,600.00 in order to repurchase the property described in the complaint of the plaintiff and exercise her option.

Bierman did not appeal from the chancellor's denial of his prayer for reformation. Upon Mrs. Berry's appeal

we held that the chancellor was in error in allowing Bierman $1,500.00 for his improvements. After referring to the betterment statute, Ark. Stat. Ann. § 34-1423 (Repl. 1962), we concluded our opinion in these words:

> The deed in question does not fall in the category of a "color of title" instrument as that phrase is used in the betterment statute. See Thompson, The Law of Real Property, § 2650 (1940). On its face the deed from Berry to Bierman contains a right of redemption or repurchase which limits the fee simple conveyance.
>
> We reverse and remand with directions that appellee be relieved of any liability for the improvements.

In the section of Thompson's treatise which we cited, the author makes it clear that color of title is actually no title at all: " 'Color of title' is anything in writing which, upon its face, professes to pass title, but which does not do it . . . It implies that a valid title has not passed to the claimant. . . . Color of title is not, in law, title at all. It is a void paper, having the semblance of a muniment of title, to which, for certain purposes, the law attributes certain qualities of title." Thompson, *supra.*

Hence when we said that the Berry-Bierman deed was not color of title, our reasoning was that the deed conveyed *actual* title (subject to the option to repurchase) rather than a mere *semblance* of title. In that view Bierman was the owner of an insurable interest in the dwelling house when he obtained the fire insurance policy upon that structure. Mrs. Berry had not exercised her option to purchase when the house burned. To the contrary, the trial court's decree in the first case, which we merely modified, declared that "Dora Berry must pay Clarence C. Bierman the sum of $3,600.00 in order to repurchase the property described in the complaint of the plaintiff and exercise her option." The decree, significantly, did not direct Mrs. Berry to exercise her option; it merely recognized her right to do so if she chose. If the house had been uninsured when it burned,

Bierman could not have compelled Mrs. Berry to pay $2,100 for the vacant lot.

Mrs. Berry had not exercised her option to repurchase when the house was destroyed by fire more than 80 days after our decision became final. Consequently Bierman was still the owner of the property and is entitled to the proceeds of the insurance policy which he bought and paid for. We need not discuss the appellant's offer to prove at the trial that Bierman had orally agreed back in 1955 to keep the property insured. Not only would such an agreement violate the parol evidence rule, as the trial court held, but also the point is not argued in the appellant's brief.

Affirmed.

MARTHA U. HEISS, EX'X ET AL *v.* AETNA CASUALTY AND SURETY CO.

5-5533 465 S. W. 2d 699

Opinion delivered April 19, 1971

Richard H. Mays and *Mahony & Yocum,* for appellants.

Shackleford & Shackleford, for appellee.

LYLE BROWN, Justice. Appellants are Martha U. Heiss, executrix of the estate of Henry A. Heiss, and Dorthea T. Hall, individually and as executrix of the estate of T. M. Hall. Appellee is the carrier of an automobile insurance policy containing uninsured motorist provisions and issued to T. M. Hall. The latter, accompanied by Henry A. Heiss and Dorthea T. Hall, collided with an uninsured motorist. Mr. Hall and Mr. Heiss received fatal injuries and Dorthea T. Hall was seriously injured. Another passenger in the Hall car, W. J. Robertson, received minor injuries for which he was satisfactorily compensated and he is not a party to the appeal. The two estates and Mrs. Hall were paid $2,000 each for medical which was the maximum under the medical coverage. Robertson was paid $565.20. Appellee then filed this suit in chancery court impleading the sum of $13,434.80. Appellee contended that it was entitled to deduct the medical payments from the $20,000 maximum contained in the uninsured motorist section of the policy. Whether that deduction, which was upheld by the chancery court, was proper is the issue on appeal.

Part II, Coverage C—Medical Payments—insured T. M. Hall and all occupants of his vehicle for medical expenses in a maximum amount of $2,000 for each person. For that coverage the insurer charged nine dollars. Part IV, Coverage G—Family Protection (Damages for Bodily Injury [uninsured motorist provisions]) carried a separate premium of $5.00 and contained this provision:

> To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death, resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; . . .

It is undisputed (1) that all occupants of the Hall vehicle were insureds, (2) that the limits of the policy were $10,000 for each insured and $20,000 total for each accident, and (3) that all occupants of the Hall vehicle, except Robertson, suffered total damages far in excess of the maximums payable under the policy.

The uninsured motorist clause contained this limitation of liability:

> The Company shall not be obligated to pay under this coverage that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under Part II.

Our uninsured motorist law is found in Ark. Stat. Ann. § 66-4003 (Repl. 1966):

> No automobile liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, in not less than limits described in section 27 of Act 347 of 1953 [§ 75-1427], as amended, under provisions filed with and approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage.

Ark. Stat. Ann. § 75-1427 (Supp. 1969), provides:

> No policy or bond shall be effective under Section 26 [§ 75-1426] unless issued by an insurance com-

> pany or surety company authorized to do business in this State, except as provided in subdivision b of this section, nor unless such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than $10,000 because of bodily injury to or death of one (1) person in any one (1) accident and subject to said limit for one (1) person, to a limit of not less than $20,000 because of bodily injury to or death of two (2) or more persons in any one (1) accident, and if the accident has resulted in injury to, or destruction of property, to a limit of not less than $5,000 because of injury to or destruction of property of others in any one (1) accident.

We take the position that the deduction for medical expenses recited in the uninsured motorist section is in derogation of the explicit requirement of our uninsured motorist statute and financial responsibility law set forth in § 66-4003 and § 75-1427, supra, which require limits of *"not less than"* $10,000 for injury to or death of one person and $20,000 for injury to or death of two or more persons. Although our court has not had occasion to pass on the question, it has been met squarely in other jurisdictions, as we shall now point out.

Bacchus v. *Farmers Insurance Group Exchange,* 475 Pac. 2d 264 (Ariz. 1970). The Arkansas and Arizona statutes on uninsured motorists are almost identical. In *Bacchus* the insurer reduced the amount paid under the uninsured motorist provision by the amount it had already paid under the medical payments clause. In condemning the procedure the court said:

> Permitting offsets of any type would allow insurers, by contract, to alter the provisions of the statute and to escape all or part of the liability, which the Legislature intended they should provide. The medical payment coverage part of the policy is independent of the uninsured motorist coverage and should be treated the same as if it were carried with a different company.

* * *

> By our statute against financially irresponsible drivers a minimum coverage must be made available to insureds, not as a convenience but rather as a Legislative mandate and in amounts of dollars and cents which leave nothing to the imagination of drafters of the insurance policies—$10,000 per person and $20,000 per occurrence. The fact that the motorist sees fit to clothe himself with other insurance protection and pays a premium therefor—such as medical payments—cannot alter the mandatory safeguards that the Legislature considers necessary for the well being of the citizen-drivers of our state. More particularly, a policy provision which the insured considers to be additional protection and for which he pays a premium with such extra protection in mind cannot be transposed by the insurer into a reduction of the mandatory minimum coverage.

Stephens v. *Allied Mutual Insurance Co.,* 156 N. W. 2d 133 (Nebr. 1968). Again the Nebraska statutes on uninsured motorists and financial responsibility are substantially the same as ours. In *Stephens* the court faced the same problem which is before us. In rejecting the insurer's attempt to use the medical payments as a setoff the court said:

> The complex, if not devious, ramifications of the application of the language of this clause can be quite simply illustrated. If the plaintiff in this case had contracted for medical expense coverage in the sum of $10,000 and had suffered medical expenses in excess of this amount, the effect of the setoff clause herein involved would be to completely eliminate the uninsured motorist coverage. By its terms this provision is not in the nature of subrogation but a limitation of liability. It can be contended that not only would the insurer pay nothing under the statutory coverage, but under its policy subrogation rights it would be entitled, to the extent of its medical expense payments, to any proceeds recovered from the uninsured tort-feasor motorist.
>
> * * *

> We therefore hold that a provision in an automobile liability policy that an insurer shall not be obligated to pay under the uninsured motorist coverage for that part of the damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under the medical payments coverage of the policy is void and against public policy in that it reduces the minimum coverage of uninsured motorist protection prescribed and required by the law.

Tuggle v. *Government Employees Ins. Co.,* 207 So. 2d 674 (Fla. 1968). Again we have the same statutes as ours. Referring to the setoff clause in the uninsured motorist section, the court said: "The clause on its face is one to decrease uninsured motorist coverage beneath the statutory minimum, and one which means that under certain conditions (medical benefits in excess of $10,000) there will be no uninsured motorist coverage whatever."

Robey v. *Northwestern Security Ins. Co.,* 270 F. Supp. 466 (Ark. 1967), and *Boehler* v. *Insurance Company of North America,* 290 F. Supp. 867 (Ark. 1968), dealt with the setoff provision at hand. Those cases, decided without benefit of precedent from our court, held the setoff to be proper. Of course those decisions are persuasive but not binding on us. We think the more rational conclusion is that which we have reached and that it is in line with the trend of authorities and particularly in harmony with a number of decisions which have been announced since those two cases. With the exception of the two cited district court cases we have been cited to no precedent contrary to our holding, keeping in mind the particular facts, statutes, and contractual provisions in the case at bar. Appellee cites *MFA Mutual Ins. Co.* v. *Wallace,* 245 Ark. 230, 431 S. W. 2d 742 (1968), and *MFA Mutual Ins. Co.* v. *McKinley,* 245 Ark. 326, 432 S. W. 2d 484 (1968). The facts in those cases lend no precedent to the case at hand.

Reversed.

FOGLEMAN, J., concurring.

JOHN A. FOGLEMAN, Justice, concurring. I do not disagree with the result reached on this particular policy in this particular case. The closing language of the majority opinion appears to so restrict it, but earlier language is so general that it would seem to me to apply to any such policy. Certainly the precedents relied upon are not so restricted.

We must constantly keep in mind the fact that uninsured motorist insurance is not liability coverage on the uninsured motorist, but is indemnity to the insured against the perils of injury by an uninsured motorist. *MFA Mutual Ins. Co.* v. *Bradshaw,* 245 Ark. 95, 431 S. W. 2d 252. See also *Southern Farm Bur. Ins.* v. *Daniel,* 246 Ark. 849, 440 S. W. 2d 582. We must also remember that the parties to the insurance contract are limited in the terms of the contract only by statute and public policy. We have said that acceptance by an insured of such a policy including uninsured motorist coverage is deemed to be approval of all reasonable conditions and limitations expressed therein which are not contrary to public policy. *MFA Mutual Ins. Co.* v. *Bradshaw,* supra. We must also remember that our statutes do not make the uninsured motorist coverage mandatory. They only require that the coverage be offered. They do not require that medical payments coverage be included or offered. Consequently, the freedom of the parties to contract with reference to medical payments is wholly unrestricted. Such payments can be limited in any way the parties see fit.

As pointed out by Drummond in "Uninsured Motorist Coverage—A Suggested Approach to Consistency," 23 Ark. L. Rev. 167, 181, the clause used in this policy says absolutely nothing about reduction of *uninsured motorist coverage.* The reduction under the clause before us only relieves the insurer from payment of that part of the damages which the insured may be entitled to recover from the uninsured tort-feasor which represents an amount paid or payable under medical payments coverage. The example given by Drummond at page 182 of his article is so clearly expository of the application of the policy clause we are considering, I take the liberty of quoting his language, viz:

> If, on the other hand, the language of the alternative policy form is utilized, the "damages which the insured may be entitled to recover from the owner or operator of an uninsured automobile" would be $30,000, and of that sum, $2,000 "represents expenses for medical services paid or payable" under the medical payments coverage. Thus, $30,000 less $2,000 is $28,000, but with an applicable uninsured motorist limit of only $10,000, A would be limited to a recovery of that amount.

Drummond's summary of the effect of the clause seems so clearly a correct interpretation that I also set it out, as follows:

> Thus, despite the interpretation announced by insurers and most courts, the clauses in the two uninsured motorist insuring agreement forms relative to the application of amounts paid under medical payments coverage are not parallel. The first form states clearly that the uninsured motorist *insurance* shall be reduced. The second states with equal clarity that legally recoverable damages shall be reduced, and the authors of this policy form presumably had the option of selecting the alternative form. Instead, they elected to say essentially this: (1) If the insured's total damages are less than the limits of the uninsured motorist coverage, then that coverage is reduced by the amount paid under the medical payments coverage; (2) If the insured's total damages exceed the sum of the uninsured motorist limits and the medical payments limits, there is no reduction of the former by the latter; (3) If the insured's total damages exceed the uninsured motorist limits but are less than the combined uninsured motorist and medical payments limits, then you must determine the insured's total damages, reduce them by the amount of medical expenses covered by the medical payments coverage, and pay the difference under the uninsured motorist coverage up to the limits of that coverage.

This case comes before us on appeal from a denial of a motion for summary judgment by appellants, and

an order dismissing their counterclaims. It was stipulated that Heiss was conscious for some period prior to his death which occurred within 1½ hours after the collision; that he left a widow who suffered mental anguish and loss of consortium; that he also left three children; that he was an engineer employed at a salary of $40,000; and that he had a life expectancy of 16.81 years. It was stipulated that Hall received various injuries, that he left surviving a widow whose life expectancy was 27.81 years and one child, and that he had a life expectancy of 14.14 years. It seems highly unlikely that the damages to either appellant would be so small as to reduce recoverable damages below the policy limits, but the application of the requisite standard should be a matter for the trial court upon remand.

For various reasons, I do not consider the cases cited in the majority opinion applicable. For instance, in *Stephens* v. *Allied Mutual Insurance Co.,* 182 Neb. 562, 156 N. W. 2d 133, 26 A. L. R. 3d 873 (1968), the clause was voided upon the premise that the coverage required by the statute of that state "is in the nature of a substitute liability policy,"—a premise that has been rejected by us. It is also based upon two separate and *independent* contractual provisions for which a separate premium is charged and collected. In the case before us the affidavit of appellee's actuary is uncontradicted. He states that in computing the premium charged for uninsured motorist coverage under its policy the clause in question is taken into consideration, and that an increased premium rate for uninsured motorist coverage would result from payment of medical expense losses in addition to uninsured motorist coverage. This explanation is consistent with Drummond's theory as to the effect of the clause. Furthermore, in that case the Nebraska court relied to some extent upon decisions that an insurer may not limit its liability under uninsured motorist coverage by setoffs or limitations through "other insurance" clauses, such as reduction claimed with respect to workman's compensation or other insured motorist coverage, a position we have not taken. As a matter of fact, we have taken a contrary position as to "other insurance" coverage in *MFA* v. *Wallace,* 245 Ark.

230, 431 S. W. 2d 742, where we refused to follow decisions of federal district courts in Arkansas. We should have a consistency in the philosophy of our decisions on uninsured motorist coverage. While *Wallace* is certainly not controlling in this case before us, a result based upon *Stephens* certainly constitutes the adoption of an inconsistent philosophy.

Bacchus v. *Farmers Insurance Group Exchange,* 106 Ariz. 280, 475 P. 2d 264 (1970) follows *Stephens* as a precedent. Another factor entered into *Bacchus,* however, in that a *different* policy clause was under consideration. In that policy, the medical payments were classified as advancements to be repaid in the form of a set-off against other insurance available under another provision of the same policy. There again, it is clear that separate premiums were paid for the two coverages, with no indication that either premium rate was in any respect dependent upon or related to the other coverage.

In *Tuggle* v. *Government Employees Ins. Co.,* 207 So. 2d 674, 24 A. L. R. 3d 1343 (Fla. 1968), decided by a 3-2 division, the Florida court emphasized the fact that the two classes of coverage "were contracted separately, with independent premiums."

I would remand the case for further proceedings consistent with Drummond's interpretation hereinabove set out and reverse questions as to other such clauses and as to other factual backgrounds until they are really necessarily in issue.

ENERGY OIL CO. *v.* ROSE OIL CO. OF PINE BLUFF

5-5553 465 S. W. 2d 690

Opinion delivered April 19, 1971

W. F. Denman Jr., for appellant.

Wootton, Lamb & Matthews, for appellee.

LYLE BROWN, Justice. Appellant instituted this suit under the Unfair Practices Act to prohibit appellee from retailing gasoline at less than cost. Ark. Stat. Ann. § 70-301 et seq. (Repl. 1957). The chancellor granted appellee's motion for summary judgment. The case must be affirmed under Rule 9 (d).

The documents on file at the time the summary judgment was granted consisted of the complaint, the answer, motion for summary judgment, affidavit of W. F. McGhee for appellee, affidavit of Horace Jones for appellant, request for admissions and answers thereto, and two sets of interrogatories and answers. No abstract in the first person was made of the contents of the affidavits; appellant merely states *its conclusions* respecting two items mentioned in the affidavits. Abstracting the affidavits in the first person would permit us to reach *our own conclusions.* Neither the request for admissions nor the request for interrogatories is mentioned in the abstract. The judgment of the court

is referred to only scantily. The purported abridgement of the record is not such as enables us to fairly understand the issues and to rule equitably thereon.

Appellant, in its reply brief, inserted nine pages of abstracting in an effort to cure the dilemma. That procedure has been disapproved. *Young* v. *Farmers Bank & Trust Co.,* 248 Ark. 613, 453 S. W. 2d 47 (1970); *Tenbrook* v. *Daisy Mfg. Co.,* 238 Ark. 532, 383 S. W. 2d 101 (1964); and *Reeves* v. *Miles,* 236 Ark. 261, 365 S. W. 2d 460 (1963). In *Reeves* we said "we do not intimate that an appellant would be penalized for a mere deficiency such as may result from inadvertence or from a failure to anticipate the appellee's arguments." The void in the abstract at hand does not fall within the categories mentioned.

Affirmed.

C. R. BURGESS, COUNTY JUDGE, MILLER COUNTY, ARK. ET AL *v.* FOUR STATES MEMORIAL HOSPITAL

5-5521 465 S. W. 2d 693

Opinion delivered April 19, 1971

Norman M. Smith, for appellants.

Smith, Stroud, McClerkin & Conway, for appellee.

JOHN A. FOGLEMAN, Justice. Appellants, who are the County Judge and Tax Assessor of Miller County, assert that the chancery court erred in refusing to dismiss appellee's suit to require them to remove all of its property from the county tax rolls, claiming exemption from taxation under Article XVI, Section 5, of the Arkansas Constitution. Appellants raised no jurisdictional questions, and the matter proceeded to trial on the merits. The chancellor, after hearing all the evidence, found that one building once used as a nursing home and another built on the premises by appellee, together with the lands upon which they are located, were not exempt from taxes because appellee received rental income from this property and did not use it exclusively for public charity. He found that all other property of appellee qualified for the exemption, but held that he had no jurisdiction to relieve appellee from 1969 taxes.

Appellee, Four States Memorial Hospital, is a nonprofit Arkansas corporation. Its articles of incorporation prohibit the payment of any net earnings, dividends or other distributions to any officer, director, member or private individual, except as compensation for services rendered or reimbursement of expenses incurred

in connection with the corporation's affairs. Its stated general purpose is scientific, educational and charitable, particularly for ownership and operation of hospitals and other facilities for the care and treatment of sick, injured and disabled persons and incidentally for the education and training of medical students, interns, physicians, nurses, technicians, pathologists and other hospital personnel and for carrying on scientific research for alleviation of human suffering. The corporation has no shares or capital stock, but is composed of one class of members with voting rights. On dissolution or liquidation, all its net assets are to be distributed to one or more scientific, religious, charitable or educational organizations exempt from Federal Income Tax under Section 501(c)(3) of the Internal Revenue Code of 1954 (or the corresponding section of future law). Any such assets not disposed of by the corporation may be distributed for such purposes or to such organizations as may be directed by the circuit court of the county in which the principal office of the corporation is then located.

While appellants refer to their motion as one for a directed verdict, we take it to be a motion challenging the sufficiency of the evidence to warrant the granting of the relief sought pursuant to Ark. Stat. Ann. § 27-1729 (Repl. 1962). In order for the court to have granted such a motion, there must have been no substantial evidence which, when given its strongest probative force in favor of appellee, would have made a prima facie case for appellee. *Nowlin* v. *Spakes,* 250 Ark. 26, 463 S. W. 2d 650. We find ample evidence to justify the denial of the motion. As a matter of fact, we could not say that the chancellor's findings on the merits were not supported by a preponderance of the evidence.

Appellants' argument is that appellee failed to meet its burden of showing that its buildings, grounds and materials were used exclusively for public charity as required by the pertinent constitutional provision. Its basic premises are:

1. Appellee accepted the property as a gift from St. Louis Southwestern Railroad Company, commonly called the Cotton Belt.

2. The administrator employed by appellee was, at the time his services were engaged, Inspector of Hospital Services in the employment of the railroad.

3. Appellee accepted from the Cotton Belt Employees Hospital Trust Association an unsecured, interest-free loan of $127,000 of which $7,000 was used to improve income-producing property not used by appellee for hospital purposes, but rented to a maintenance employee for $45 per month.

4. Living quarters in a building which had been a nursing home were rented by appellee to a doctor who was not on its medical staff, but was an employee of the Employees Trust.

5. All except two of the members of the board of directors of appellee are the same as the directors of the Employees Trust.

6. Only three charity patients have been treated at the hospital.

It is undisputed that the hospital operated by appellee was formerly owned by the St. Louis Southwestern Railroad Lines Hospital Trust and commonly called the Cotton Belt Hospital. It was used exclusively by employees of the railroad or its subsidiaries who were members of the trust. All of the buildings, equipment and lands which were used in connection with the hospital were donated by the railroad company and the hospital trust to appellee about September 1, 1967. The buildings, in addition to the hospital itself, consisted of a dwelling house,[1] and the former nursing home building.

[1]Apparently this house was torn down after the property was given to appellee and another built in its stead.

Sam Raney, appellee's administrator, was in charge of the operation of the hospital. He testified that the loan from the Employees Trust was to be repaid when and if appellee could do so. The only writing evidencing the loan was in the minutes of the board of directors of the lender. Raney stated that there were 28 doctors from the local community on the actual medical staff and 9 doctors on a courtesy staff. Any number of patients of a member of the actual staff could be admitted to the hospital, according to the skills or ability of the member physician to treat them. Only four patients of a member of the courtesy staff can be admitted in any one calendar year. Raney exercises discretion as to admission of a patient referred by a physician on the staff, but none is refused treatment and service which the hospital and its staff can adequately render. He said that, even though 50% to 53% of the hospital patients were Employees Trust members, 700 to 1,000 patients who were not members had been cared for by appellee at the hospital. In addition, the hospital admitted approximately 2,000 patients under the Medicare program administered by the United States Department of Health, Education and Welfare. The hospital also provided services under the state Medicaid program, whose payments are limited, however, to 20 days of inpatient services and 12 outpatient visits, after which one becomes a charity patient unless he is transferred to a Little Rock hospital. One of these patients had six admissions and four outpatient visits.

Raney said that a new surgical suite, a new recovery room, a clinic, a new conference room, a nurse's station, an emergency power unit and an x-ray film developer had been added to the hospital by appellee to enable it to adequately serve "public" patients. He also testified that two surgical suites and the second floor of the west entrance had been remodeled and a waiting room converted to a semiprivate visitors' room for this purpose. He added that new desks, chairs and beds had been purchased. He estimated that appellee had spent a couple of hundred dollars for bulldozer work. He totalled expenditures for such purposes from the loan at $123,000.

The hospital has neither emergency room nor maternity ward. The reason given for not having an emergency room was inability of appellee to find doctors to adequately staff it. Raney admitted that a pregnant woman had been denied admission by him, but explained that the hospital wasn't equipped to treat her.

A resolution requiring that the hospital be operated in such a manner as to satisfy criteria of the Federal Internal Revenue Service necessary for an institution for "charitable" patients and directing officers and employees of the hospital not to refuse to accept patients in need of hospital care solely on the basis of their inability to pay was adopted by appellee's board of directors. All patients admitted are charged the same rate. Bills are paid by the patient, insurance companies, federal or state welfare programs, employee associations or not at all. The payment for Medicare patients is based upon a per diem rate adjusted annually with the HEW Department, based upon actual cost of operation plus 2%. The difference between the amount billed to the patient at the regular rate and the Medicare rate is written off by the hospital at the end of the month after the patient's discharge. Raney testified that this difference must be made up by paying patients. Over a three-year period the hospital had written off $46,-227.28 in this manner. It had also written off $2,700 to the Arkansas Public Welfare Department and $2,500 for Arkansas Public Welfare and Medicaid. In its second year of operation the hospital showed a gain of $45,-152, most of which went to offset a deficit of $38,208 in the succeeding year, and the balance into service and improvements. It appears that there would have been a great many more purely charity cases, had it not been for Medicare payments.

It has been held that a benevolent and charitable organization's property used as a hospital may be constitutionally exempt from taxation if it is open to the general public, if no one may be refused services on account of inability to pay and if all profits from paying patients go toward maintaining the hospital and extending and enlarging its charity. *Hot Springs*

School Dist. v. *Sisters of Mercy,* 84 Ark. 497, 106 S. W. 954. We do not agree with appellant that appellee's operation is so oriented toward service of the Employees Trust Association that, as a matter of law, it is outside the scope of the constitutional exemption. There is really no evidence to indicate that appellee has not conformed its practice to its stated corporate purpose. Raney testified that all money received by the hospital is expended for its maintenance and improvement and none diverted from the institution in any manner. Nor is there any evidence that the gift of the property was not outright and without any obligation of appellee to the railroad or its Employees Trust Association.

We do not understand how the failure of the hospital to provide emergency and maternity service could be taken to disqualify it from the tax exemption. There was evidence that it has dietary, maintenance, administration, pharmacy, nursing, surgical, x-ray, laboratory and physical therapy departments and limited outpatient services. We are not aware of any requirement that a hospital provide all services which can possibly be provided by any hospital in order to make its use exclusively for public charity. There is no reason why a hospital whose services are limited, e.g., to surgery or to maternity, should not be entitled to the tax exemption.

It does not appear that the hospital administrator is answerable, in any way, to the railroad or its hospital trust or that the common directors of the hospital and the trust have acted, in any way, to prefer members of the trust over any member of the general public. The mere fact that the members of the trust use the hospital along with other members of the general public, and on the same basis, would not necessarily change its charitable purposes so long as its receipts from any source are held in trust for the furtherance of these purposes. *Fordyce* v. *Women's Christian National Library Association,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (n.s.) 485.

The chancellor found that the part of appellee's property for which rents were collected was not being used directly and exclusively for public charity and directed that this part be identified and subjected to taxation. This distinction is proper as the exemption is based upon the actual use of the property, rather than the use of its revenues. *Hot Springs School Dist.* v. *Sisters of Mercy,* 84 Ark. 497, 106 S. W. 954; *Brodie* v. *Fitzgerald,* 57 Ark. 445, 22 S. W. 29; *Robinson* v. *Indiana & Ark. Lbr. & Mfg. Co.,* 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426. See also Ark. Stat. Ann. § 84-206 (Repl. 1960). The exemption of that property of appellee which is used exclusively for public charity is not affected because other parts are not exempt. See *Hilger* v. *Harding College,* 231 Ark. 686, 331 S. W. 2d 851.

Appellee cross-appealed from that part of the court's decree which found that it had no jurisdiction of the 1969 tax assessment. The court's decree must be affirmed on cross-appeal. The basic relief asked by appellee was a writ of mandamus to the county judge to remove its property from the tax rolls, and an injunction against the tax assessor restraining his placing the property on the tax rolls. In the first place, the chancery court had no jurisdiction to issue a writ of mandamus. *Nethercutt* v. *Pulaski Co. Spl. Sch. District,* 248 Ark. 143, 450 S. W. 2d 777; *Harber* v. *Rhodes,* 248 Ark. 1188, 455 S. W. 2d 926. Even the circuit court, which has superintending control and appellate jurisdiction over county courts under Article VII, Section 14, of our Constitution, could not direct the county court's action by mandamus. *Rolfe* v. *Spybuck Drainage District No. 1,* 101 Ark. 29, 140 S. W. 988.

In the second place, exclusive original jurisdiction of all matters pertaining to county taxes is vested in the county court. Article VII, Section 28, Constitution of Arkansas; *Turner, ex parte,* 40 Ark. 548; *Price* v. *Madison County Bank,* 90 Ark. 195, 118 S. W. 706. Within the limits of its jurisdiction the county court is a court of superior jurisdiction. *Strawn* v. *Campbell,* 226 Ark. 449, 291 S. W. 2d 508. No other court may

disregard or invade that jurisdiction. *Curry* v. *Dawson,* 238 Ark. 310, 379 S. W. 2d 287. See also *Stumpff* v. *Louann Provision Co.,* 173 Ark. 192, 292 S. W. 106; *Bragg* v. *Thompson,* 177 Ark. 870, 9 S. W. 2d 24; *State* v. *Wilson,* 181 Ark. 683, 27 S. W. 2d 106. This jurisdiction is exercised by the county court, not the county judge. *Needham* v. *Garner,* 233 Ark. 1006, 350 S. W. 2d 194. There is no suggestion that the county judge has acted, attempted to act or proposed to act in this matter in any capacity other than as presiding judge of the county court, that any wrongful diversion of public funds or fraud is involved, or that a tax which is itself illegal is being levied. In these circumstances, the action of the county court cannot be dictated by mandamus, injunction or other process of either the chancery or circuit court. See *Curry* v. *Dawson,* supra; *Turner, ex parte,* supra; *Ward* v. *Boone,* 231 Ark. 655, 331 S. W. 2d 875.

It is true that appellee had a judicial remedy if the property was exempt from taxation for the year 1969, without resort to appeals from the tax assessment. *Clay County* v. *Brown Lumber Co.,* 90 Ark. 413, 119 S. W. 251. There is no doubt that a court of equity may grant relief against a void or illegal tax assessment. *W. P. Brown & Sons Lumber Co.* v. *Sims,* 146 Ark. 253, 225 S. W. 322; *State* v. *Mississippi A. & W. Ry. Co.,* 138 Ark. 483, 212 S. W. 317.

Even if appellee's action against the tax assessor should be outside the exclusive original jurisdiction of the county court, the passage of time had taken the matter of 1969 tax assessments entirely out of his hands, so that it was not possible for him to effectuate any decree that the court might have rendered. The courts will not render judgments which have no practical effect in settling the rights of litigants. *Kirk* v. *North Little Rock Special School District,* 174 Ark. 943, 298 S. W. 212; *Griffin* v. *Anderson-Tully Co.,* 91 Ark. 292, 121 S. W. 297, 134 Am. St. Rep. 73.

The assessor was required to make his real estate assessment prior to July 1, 1969. Ark. Stat. Ann. §

84-415 (Repl. 1960). He was required to certify his completed assessment record to the county board of equalization on or before August 1, 1969. Ark. Stat. Ann. § 84-463.1 (Repl. 1960). His report of assessment was to have been filed with the county clerk by the third Monday in August 1969. Ark. Stat. Ann. § 84-447 (Repl. 1960). Assessments were then subject to action by the equalization board until the third Monday in September 1969 [Ark. Stat. Ann. § 84-708 (Repl. 1960)] unless conditions prevailed which extended the time until the third Monday in November 1969 [Ark. Stat. Ann. §§ 84-706, 84-477 and 84-717 (Repl. 1960)], after which even it had no authority to change a tax assessment. *Jones* v. *Crouch,* 231 Ark. 720, 332 S. W. 2d 238. It was the duty of the county clerk to deliver the tax books to the tax collector on or before the third Monday in February 1970.

This suit was filed on September 17, 1969, at which time the assessor had no control over the assessment. The decree dated July 25, 1970 was filed on the 11th day of August, 1970, and resulted from a hearing on the 20th day of July, 1970. On these latter dates the 1969 tax books were in the hands of the tax collector. Neither the tax collector nor the county clerk was ever made party to the action. Insofar as both the county judge and tax assessor are concerned, the question of the validity of the 1969 tax assessment has become an academic one, so the chancellor properly declined to act. *Catlett* v. *Republican Party of Arkansas,* 242 Ark. 283, 413 S. W. 2d 651; *Dermott Drainage District* v. *Cherry,* 217 Ark. 829, 233 S. W. 2d 387. See also *Connor* v. *Ricks,* 212 Ark. 833, 208 S. W. 2d 10.

The decree is affirmed on appeal and cross-appeal.

JESSE WILLIS DECEASED EMPLOYEE *v* CITY OF DUMAS AND HARTFORD ACCIDENT AND INDEMNITY CO.

5-5546 466 S. W. 2d 268

Opinion delivered April 19, 1971
[Rehearing denied May 24, 1971.]

Paul K. Roberts, for appellant.

Bridges, Young, Matthews & Davis, for appellees.

J. FRED JONES, Justice. This is a workmen's compensation case involving injury and subsequent death of Jesse K. Willis as a result of an automobile collision. The single question presented is whether the injuries sustained by Mr. Willis grew out of, and occurred within the course of, his employment as Chief of Police of the City of Dumas in Desha County, Arkansas. The collision occurred in Jefferson County while Chief Willis and his wife were in route from Dumas to Pine Bluff. The Workmen's Compensation Commission found that the accidental injuries did not arise out of and occur within the course of the employment, and the circuit court affirmed. On appeal from the judgment of the circuit court, the appellant relies upon the following points for reversal:

> "There is no substantial evidence in the record sufficient to support the judgment of the court and the opinion of the full Commission and said judgment and opinion were based on surmise and conjecture.
>
> The court erred as a matter of law in failing to award benefits to which he was entitled."

The burden rests on the claimant to prove by a preponderance of the evidence before the Commission, that he is entitled to compensation benefits under the law. *Pruitt* v. *Moon,* 230 Ark. 986, 328 S. W. 2d 71. And, if there is any substantial evidence to support the decision of the Commission, the courts must affirm. This rule has been stated so often that citation of cases would add volume without value to this opinion.

The Arkansas Workmen's Compensation Law only covers accidental injury and death *arising out of* and *in the course of* employment. Ark. Stat. Ann. § 81-1302 (d) (g) (Repl. 1960).

Ark. Stat. Ann. § 81-1305 (Repl. 1960) provides, in part, as follows:

> "Every employer shall secure compensation to his employees and pay or provide compensation for

> their disability or death from injury arising out of and in the course of employment. . ."

The burden of proof is on a claimant to show that injury or death of an employee was the result of an accidental injury that not only arose in the *course of employment,* but in addition that it arose *out of or from* the employment. *Duke* v. *Pekin Wood Products Co.,* 223 Ark. 182, 264 S. W. 2d 834.

In *Martin* v. *Lavender Radio & Supply, Inc.,* 228 Ark. 85, 305 S. W. 2d 845, this court adopted the rule laid down in an opinion by Chief Justice Cardozo in the 1929 New York case of *Mark's Dependents* v. *Gray,* 167 N. E. 181. This rule was quoted again with approval in *Brooks* v. *Wage,* 242 Ark. 486, 414 S. W. 2d 100, and as stated in *Lavender,* is as follows:

> "The decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils. * * * We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. * * * and sufficient within itself to occasion the journey."

Applying the above rules of law to the evidence in the record before us, we are of the opinion that there is no substantial evidence that Chief Willis' death grew out of, or occurred within the course of, his employment as Police Chief of the City of Dumas. The style of this case, as carried in the transcript and briefs, is slightly confusing, but since the identity of the claimant is immaterial to the question presented, we also refer to the decedent as the claimant and the appellant.

The record reveals the following facts: In July, 1968, Jesse K. Willis was Chief of Police of the City of Dumas and was also a deputy sheriff of Desha County. His regular working hours as Chief of Police were from 8 a.m. to 5 p.m., but he was on call at all times. Chief Willis lived in a rented house in Dumas with his wife and his only child, a son Jesse D. Willis, who was serv-

ing in the Armed Forces at the time of Mr. Willis' injuries. Before becoming Chief of Police at Dumas, Chief Willis had served on the Pine Bluff Police Force and he and Mrs. Willis still owned their home in Pine Bluff, and made frequent trips from Dumas to Pine Bluff at the end of his regular workday, and on weekends. Mr. and Mrs. Willis were on their way to Pine Bluff on July 22, 1968, when they were injured in an automobile collision and from which injuries they both died.

As specific background for the claim, the evidence of record is to the effect that on July 10, 1968, one Mose Martin, a resident of Pine Bluff, had been fined on a misdemeanor conviction in the municipal court presided over by the Mayor of Dumas, and had escaped from a prisoner work detail while working out his fine on the streets of Dumas. The Mayor of Dumas told Chief Willis to issue a warrant for the arrest and return of Martin. Chief Willis issued the warrant and placed it in or on his desk, and remarked to some of the other officers that he would bring Martin back to Dumas to work out his fine. After court was adjourned on July 22, 1968, Chief Willis announced that he was going to Pine Bluff. At approximately 6:45 p.m., while driving north on Highway 65, Chief Willis' automobile was involved in a collision with another automobile during a rainstorm and both Chief Willis and his wife, who was riding with him, received the injuries from which they subsequently died.

The Honorable Billie Free, Mayor of Dumas, testified that Chief Willis had advised him that Martin had escaped and that "he thought the boy was in Pine Bluff." He says that he instructed Chief Willis to issue a warrant and bring the defendant back to Dumas, but that he did not specify any time that this should be done. He testified that Chief Willis went to Pine Bluff, not on City of Dumas business, four or five times a week. He testified that although Chief Willis was on call duty 24 hours a day, to his knowledge Chief Willis had never gone out of town to return a prisoner who had escaped. He says that Highway 65 is the only route from Dumas to Pine Bluff.

On cross-examination Mayor Free testified that when city prisoners escape he usually issues a warrant and sends it, by the county sheriff or by a state trooper, to the sheriff of the county to which the prisoner has gone. He testified that Chief Willis' regular work hours were from 8 o'clock in the morning to 5 p.m., but at 5 o'clock he would get into his private automobile and leave. He testified that Chief Willis rented a home in Dumas; that he understood he owned a home in Pine Bluff; that when around 5 o'clock came Chief Willis would "head for Pine Bluff." Mayor Free testified that he ordinarily requested the Desha County sheriff to deliver warrants to other counties, but that on the afternoon of July 22 Chief Willis told him he was going to Pine Bluff and that he asked Chief Willis to issue a warrant and take it up there and give it to the sheriff. He testified that he wanted the warrant given to the sheriff of Jefferson County and the man brought back, but that he did not tell Chief Willis when to issue the warrant or when to take it to Pine Bluff. Mayor Free testified as follows:

> "I sign these warrants, and when I instructed Mr. Willis, I said, 'I want a warrant issued for this man and brought back to the City of Dumas to work out his fine or pay the fine that was due the City of Dumas.' Now, I cannot swear that Mr. Willis fixed that warrant that afternoon, and I'm not going to swear to it."

Mayor Free testified that Chief Willis was not prompt in coming to his office at 8 o'clock unless he was called and that "when the bell rung at 5 o'clock in the afternoon, he got in his car and took off just like that."

> "Q. Did you say that Chief Willis came to Pine Bluff as a matter of practice four or five times, four and five nights a week? I understood you to say that.
>
> A. Well, when I wanted him and couldn't find him at night, I knew where he was, because

he was either in Pine Bluff or Little Rock. It wasn't his desire. It goes back into the other side of his family.

Q. But the fact was that he would be in Pine Bluff?

A. Yes, sir.

Q. At night more often than he would be in Dumas?

A. I would back that up a hundred percent.

Q. Would it also be fair to say that, as you put it, when the bell rang at five o'clock he got in his car and got out of there, that he was going to Pine Bluff?

A. I don't say he was going to Pine Bluff, but his automobile would be headed towards Pine Bluff.

Q. He would at least be leaving Dumas?

A. Yes, sir."

Mayor Free testified that the City of Dumas only owned one police car and that it did not leave the City of Dumas. He then testified as follows:

"Q. If you sent an officer out of the City of Dumas to transact some business, he would of necessity have to use his own private car, would he not?

A. Ask the question again, sir.

Q. If you were to send one of your officers outside of the City of Dumas to transact some business, then, that officer would have to use his own personal car?

A. I am not going to send him outside the City limits to perform a duty, but Mr. Willis told me that afternoon he was going to Pine Bluff, and I asked him to take this warrant up there. As I stated in the beginning, Mr. Willis was very lax in the collection of his fines.

Q. You had information Mr. Willis had told you he was going to Pine Bluff that afternoon?

A. That's right.

Q. And you asked him to take this warrant?

A. I told him I wanted this warrant given to the Sheriff or Deputy Sheriff in Jefferson County and have this man brought back."

The Mayor then testified that he usually signed blank warrants and the Chief of Police filled them in. He testified that he saw the warrant and the carbon copy issued for Martin; that he does not remember the date on the warrant, but the warrant was still in Dumas when Chief Willis was injured.

"Q. You say the warrant had never been served?

A. The warrant was still in the desk when Mr. Willis had the wreck.

Q. Was still in the desk?

A. Yes, sir. If it is there now, I cannot answer that because a new Chief took over.

* * *

Q. When did you find it?

A. I found it a week after the accident happened, when they brought Mr. Willis to Dumas. I was going through his personal drawer there. It wasn't locked and the warrant was still right there in the drawer."

Mr. A. L. Morgan succeeded Mr. Willis as Chief of Police and was on the Dumas Police Force at the time of Mr. Willis' collision. He testified that he saw the warrant for the arrest of Martin on Chief Willis' desk sometime between Martin's escape and the date of the collision. He testified that Chief Willis told him that he would take the warrant to Pine Bluff and get one of the officers in Pine Bluff to pick Martin up. Chief Morgan says that he has looked for the warrant but hasn't found it since Mr. Willis' death.

State Trooper Green testified that he investigated the accident in which Mr. Willis was injured; that he talked to Mr. Willis in the hospital at which time Mr. Willis advised that he had started to Pine Bluff but did not say why. He testified that he saw some papers scattered on the floorboard of Mr. Willis' automobile, as well as some on the front and back seats, but that he does not know what they were.

The testimony of other witnesses adds nothing to the testimony above set out. There was testimony to the effect that Chief Willis returned to his office on at least one occasion in the two weeks' interval between the date of his injury and the date of his death, but there is no evidence at all as to what happened to the warrant that had been issued for Martin; and there is no evidence at all that Chief Willis was on his way to Pine Bluff for the purpose of serving the warrant or delivering it to the law enforcement officers in Jefferson County when his injuries occurred.

We conclude, therefore, that there is substantial evidence in the record before us that Chief Willis' injuries which resulted in his death, did not arise out of or occur within the course of his employment as Chief of Police of the City of Dumas.

The judgment is affirmed.

CLOYS A. THOMAS *v.* STATE OF ARKANSAS

5562 465 S. W. 2d 704

Opinion delivered April 19, 1971

Tackett, Young, Patton & Harrelson, for appellant.

Ray Thornton, Attorney General; *Mike Wilson,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. The appellant, Cloys A. Thomas, was convicted of second degree murder in the Howard County Circuit Court and was sentenced to ten years in the penitentiary. On his appeal to this court he relies on the following points for reversal:

"The verdict and judgment are contrary to the law.

The verdict and judgment are contrary to the evidence.

The verdict and judgment are contrary to the law and to the evidence.

The Court erred in refusing to sustain Defendant's motion at the conclusion of Plaintiff's testimony for a directed verdict."

Under Arkansas law, murder is the unlawful killing of a human being, in the peace of the state, with malice aforethought, either express or implied. Ark. Stat. Ann. § 41-2201 (Repl. 1964). All murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or which is committed in the perpetration of or in the attempt to perpetrate, arson, rape, robbery, burglary or larceny, shall be deemed murder in the first degree. Ark. Stat. Ann. § 41-2205 (Repl. 1964). All other murder shall be deemed in the second degree. Ark. Stat. Ann. § 41-2206 (Repl. 1964).

The facts are not in dispute that about midnight on Friday, January 16, 1970, Billie June Thomas, the wife of the appellant, died from a .22 caliber rifle bullet fired at close range through her heart while in the bedroom of their trailer home. The appellant then carried his wife's body from the trailer; placed it in the trunk of his automobile; drove to a secluded area about two and one-half miles from their trailer home, and there he secreted the body under brush and leaves. On Saturday morning he went to visit a girl friend in Hooks, Texas, and on Sunday evening he returned to Nashville and reported to his brother, who lived about 150 yards from the appellant's trailer, that his wife was missing. On Monday following the death of his wife, the appellant told Eugene Ray about where he left his wife's body and he solicited the assistance of Eugene in going to the spot for the purpose of burying the body. He and Eugene went out to the area on Monday night but were unable to find the body. On Wednesday he went with Eugene to Hot Springs to deliver a truckload of tomatoes and on this trip he continued in his effort to convince Eugene that his wife was dead and that he had secreted her body. Either on Wednesday or Thursday night, he again went to the scene with a shovel, and this time he found his wife's body and buried it in a shallow grave. Eugene Ray refused to believe what the appellant had told him, but after learning that Mrs.

Thomas was missing, Ray told the officers what the appellant had related to him, and the officers soon found the body buried in the shallow grave.

The record is replete with testimony of threats made by the appellant to kill his wife, but on such occasions appellant would be either drunk or drinking and there is ample evidence that he became belligerent when under the influence of alcohol. The evidence is also clear that on the night of Mrs. Thomas' death, she and the appellant had both been drinking when they went to their trailer from his brother's home about 11:30 at night.

The appellant made a statement to the officers which was accepted in evidence and he also testified in his own defense. The theory of his defense was that his wife accidentally shot herself while moving a .22 rifle and a shotgun from a corner of the bedroom where he had left them, to a closet in the bedroom of the trailer. The appellant testified that he and his wife had many quarrels, as well as separations, during the ten years they were married to each other. He testified that on the Friday night of his wife's death, he and his wife visited in his brother's home until about 11:30 when they returned to their house trailer. He says that he had been bird hunting and had his shotgun in the car when he and his wife returned to the trailer from his brother's home; that after going into the trailer his wife went about putting some groceries up while he returned to his car, got his shotgun and put it in the corner of the bedroom where he usually kept his guns. He says he did not notice the .22 rifle that he usually kept in the corner but that it was probably there. He testified that after he put his gun and hunting shell vest in the corner, he turned on the TV and lay down on a couch in the living room to watch it. He says that in about three minutes he heard a muffled gunshot and a lot of racket. He says that he went into the master bedroom and that his wife was lying on the bed with one leg hanging off the bed, and that he saw her breathe one time. He says that both guns were laying on the bedroom floor with one or two coat hangers in between

the guns; that the clothes closet door was off the track and that there were some coat hangers hanging inside the bedroom closet door. He says that he checked his wife's pulse and felt for her heart beat. He says that he picked up the guns and placed them in the corner and,

> "I thought I'd carry her to the hospital. Picked her up in this sheet that she was laying on, and I got down to the bottom of the steps and I got to thinking about all the trouble we'd had. I had been going with women, and she had been going out with these men. I got to thinking that people would think I was the cause of her death, had killed her, so I put her in the trunk of the car. I started driving this car, and I never could think where I was going to, but I went to this place where I used to hunt. I took her out of the car, put her in the leaves and went back home. I don't remember driving the car back home, but I know I did because it was setting out in the yard next morning. Next morning my dog woke me up scratching at the door. I let him in and he went into the bedroom, and this all come back to me. First I thought I'd had a bad dream. I couldn't find June and I got to looking around, and I found her shoes and her dress, and I knew it happened. I set down at this table and I got to thinking. I didn't know what to do, so I told this friend that lives at Hooks. I told her about it."

The appellant testified that in the past few years he had not cared anything about his wife and he didn't think she cared anything about him. He testified that when he checked his wife's pulse and found that she was dead,

> "I first started to the hospital and I started down these steps and I got to thinking about all the trouble we had had, things that she had said about everything, and I had been going with this woman from Texas. She had been going with about every man she could go with. I got scared. * * * When I started down those steps I got scared. I got to thinking about all the trouble we'd had, the things

she had said, I got to thinking about the women I had went with and the men she had went with, and I went berserk, and I put her in the trunk of the car.

* * *

Q. . . . You say that you and June came into the trailer the last time, and you lay down on the couch?

A. Yes, sir.

Q. And that two or three minutes later your heard this noise?

A. Yes, sir. I turned on television before I laid down on the couch.

Q. Didn't you say she brought some groceries in with her?

A. Yes, sir.

Q. What did she do with those?

A. When I first opened the door, she had this steak, and I believe it was an apple pie, a frozen apple pie. I said, 'I've forgot my shotgun.' She went in the kitchen and put the groceries up, and I got my shotgun and put it in the corner. Then I turned on TV and laid down on the couch.

Q. And it must have been immediately then that you heard the shot.

A. Approximately two or three minutes.

Q. Possibly two or three minutes.

A. Approximately two or three minutes.

Q. And you relate that up to that second of time there had been nothing whatever unusual or out of the way happen?

A. She mumbled something in there. I had the TV on. Maybe she was trying to slide the door open or something. She mumbled something. I didn't understand what she said. She might have cussed or something."

In the statement that the appellant gave to the officers, the appellant stated, in part, as follows:

"A. We hadn't been in the trailer but just a few minutes 'till—I was in the living room and she was in the bedroom, and I heard the gun shoot, and I went in there and she was—fell back on the bed.

Q. Now, for the time being, I wish you would go ahead and tell in your own words, Tom, what happened then. Just relate what you did.

A. She was trying to put the guns in a closet, the way I thought, and the guns was laying there, and one coat hanger was laying out in the middle of the floor. She had a bunch of coat hangers she had brought back from Texarkana. And she didn't live a minute. By the time I got in there she breathed once or twice. So I started to call an ambulance, and I didn't want to run off and leave her. I got scared. I checked her pulse to see if she was still alive, and she didn't have no pulse.

Q. All right, then what?

A. I went out—I first started to call an ambulance and Lewis Tollett, and when I got scared I got to thinking maybe somebody would think I had shot her. We'd had so many arguments during her lifetime. So I got her and put her in the turtle hull. I didn't know

where I was going. I just took off driving, and I carried her to that place up there in them woods. I didn't have anything to bury her with, so I checked her again to see if she was still alive. She had got stiff.

Q. What did you do at that time to hide the body?

A. I don't think I hid her very good.

Q. Did you cover her with leaves?

A. I didn't have anything to cover her with but my hand.

Q. How was the body dressed at that time when you covered her with leaves there?

A. She might have been trying to take a bath. I don't know, or go to bed one. She had a brassiere and her britches on.

Q. When you say britches, you are referring to what a lot of people call panties?

A. Yes.

Q. All right. And then, Tom, what happened after you—What did you do after you left her there?

A. I burned that sheet. Or I might have burned it before, and I drove back to the house.

Q. Now, in talking about that sheet, I believe you told us that you had taken her from the house—

A. —in a sheet.

Q. In a sheet. Was this the sheet from the bed?

A. Yes.

Q. Was it the bottom sheet on the mattress on the bed, off the bed?

A. Yes.

Q. Was that the only sheet that you had out there with the body?

A. Yes.

Q. And you burned the sheet down at the gravel pit?

A. Yes.

Q. For the record, that's the gravel pit just on down a few yards, maybe a half a quarter, past the point where the body was buried?

A. (witness nods affirmatively.)

Q. All right. Now, Tom, that was after midnight on Friday night, wasn't it?

A. Yes, sir."

In his statement to the officers the appellant stated that he had left the shotgun and the .22 rifle in the corner of the bedroom; that he left the chamber open on the pump shotgun and that there wasn't supposed to be a bullet in the .22 rifle. He stated that he never did leave a live round of ammunition in the barrel of the rifle, but there must have been one left in the barrel on the night his wife was killed. He stated that he and his brother's little boy had recently been squirrel hunting, "and I always left it with a hull in the chamber where he would have to reload to where it would fire, you know." He stated that regardless of the fact that he never left a live shell in the barrel of his .22 rifle, "I know there was bound to be a live shell in the barrel when it was stood up there." He stated that he always kept his guns in the corner of the bedroom but when his wife was there she would put them in the closet. He says that when he heard the shot and went into the bedroom, his wife was lying on her back across the bed with her feet hanging off of it, and that the guns were lying in the middle of the floor.

He stated that he saw the wound just below her breast. He stated that his wife had a brassiere and panties on, and that the .22 rifle was lying on the floor with the barrel pointed towards the bed; that the shotgun was also in the floor with the barrel pointed kind of towards the closet. He stated that there was a coat hanger or two lying with the guns and that the slide closet door was off the track. He explained in his statement as to why he did not call his brother who lived nearby:

"A. I got scared. I didn't know what to do. And I got to thinking that we had had so many arguments in the past that everybody would think that I shot that gun.

Q. Did you have your hand on the gun before it was fired?

A. No, I had put my shotgun over there, but I never touched the twenty-two.

Q. You hadn't touched the twenty-two that night before she was killed?

A. No. There was a hull in the twenty-two, but there wasn't no other bullets.

Q. Since that time have you re-loaded that gun?

A. Yes, I have re-loaded it.

Q. Why did you do that?

A. My little dog got out, and somebody kicked it out there, or it run into a bush. It hollered out the side of the trailer. I heard it holler, and it come back in. He was—

Q. Let me ask you this. There was an empty shell found out there in your trailer. Is that the shell that killed her? Is that the casing from the shell that killed her?

A. No.

Q. What did you do with the shell that was in the gun?

A. I throwed it out in front of the yard.

Q. Throwed it out in front of the yard? You mean you threw it out the front door?

A. Yes.

Q. Straight out the front door, or the right, or to the left?

A. It hit my car fender out there. I heard it hit.

* * *

Q. When did you take that shell out?

A. Right that night.

Q. Right after it happened?

A. And throwed it out. And I checked and there wasn't any shells in the gun for the next two or three days, and I reloaded it.

Q. Why did you re-load it? Because of the dog incident?

A. I heard the dog holler and I thought there was somebody out there. The hull, if there was one in the trailer, I shot that gun at a field lark out there several times, a long time ago.

Q. Now, Tom, why was the body found without anything on it other than brassiere around the neck?

A. Her britches was on her unless they hung on

something about the turtle hull. The britches are still out here—her pants is.

Q. You are saying, Tom, that her panties are definitely there in the grave?

A. Or between there at that place somewhere, because I hung them when I started—They hung when I started out with her.

Q. Why was her brassiere up around her neck?

A. I guess it's when I moved her. It probably slipped up.

Q. You have told us before this afternoon that when you went out there and moved the body from where it was covered with leaves down to the shallow grave that you dug Monday night, that you may have pulled her by her brassiere.

A. I might have.

Q. You didn't take the brassiere off of her body and put it around her neck?

A. No.

* * *

Q. I believe you told us earlier that you did not take a piece of that sheet to this barrel just north of your trailer and burn it.

A. I don't know whether I did or not. I was so scared.

Q. Did you tear the sheet?

A. I don't remember that sheet.

Q. You don't think you could remember if you took a piece of this bloody sheet and—

A. I don't believe I carried any out, but I possibly could.

Q. You say you don't believe you carried any back to the trailer?

A. I know I didn't carry any back. I might have took it out before I left, but I don't even remember it. I can't—I was so scared I didn't know what to do.

Q. Are you sure this body was stiff when you first—by the time you got there?

A. Yes. I checked it three or four times, and I checked it up there.

Q. I believe you told us earlier it was between 30 and 40 minutes after she died that you took her out there.

A. It took me a long time to lift her.

Q. And get her in your car?

A. Around 40 minutes. Or 30 minutes.

Q. Did you fire up your car then and turn the lights on and drive out toward Center Point when you took the body out there?

A. Yes.

Q. Tom have you changed the mattress on the bed since that happened?

A. No.

Q. Didn't it have blood on it?

A. No.

Q. You must have taken the body off the bed right away.

A. I checked it 30 minutes, 30 or 40 minutes.

Q. You mean the body remained on the bed 30 or 40 minutes?

A. It sure did.

Q. You're saying then that it stayed on the bed till you got ready to take it out, put it in your car and go on out to the woods?

A. That's right. I didn't know where I was going when I started out."

We are of the opinion that the evidence in this case is amply sufficient to sustain the conviction of murder in the second degree. It is well settled that in testing the sufficiency of the evidence on appeal to sustain a jury verdict in a criminal case, the evidence must be viewed in the light most favorable to the state, and that circumstantial evidence has long been recognized by law as sufficient to sustain a conviction. *Cook* v. *State,* 248 Ark. 332, 451 S. W. 2d 473. We are also of the opinion that there was ample circumstantial evidence in this case from which the jury could have reasonably found that the appellant fired the gun that killed his wife.

The jury had a right to consider the circumstantial evidence of the appellant's mistreatment and threats to kill his wife over the years, as well as his panic following her death, and his attempt to secrete her body first by covering it with leaves and then burying it in a shallow grave.

There is no question but that the gun was fired at close range as evidenced by powder burns around the hole in the brassiere the deceased was wearing, as well as powder stains on the skin around the wound. The appellant testified positively that it was only a very short period from the time they entered the trailer until he heard the gunshot. The deceased put groceries up while the appellant put his shotgun in the corner, yet his wife

was completely undressed with the exception of her brassiere and panties according to his testimony. The appellant testified positively that when he went into the bedroom following the shot, his wife was lying on her back across the bed and with the .22 rifle also lying with the shotgun on the floor of the trailer with the rifle barrel pointed in the direction of the bed. The most damaging bit of circumstantial evidence is the course of the bullet through the deceased's thoracic cavity. The state medical examiner, Dr. Rodney F. Carlton, testified as follows:

"Q. Did you in your autopsy determine the course that the bullet had taken through the body?

A. Yes, I did.

Q. What did you determine that to be?

A. The bullet went front to back, left to right, with a slightly downward deviation. The resting site of the bullet was approximately one to one and a half inches below the entrance site in the skin.

Q. Now, Dr. Carlton, when you say—Did you say a slightly downward?

A. Yes, sir.

Q. Can you tell the jury what you mean by slightly downward through the body?

A. Approximately one and one-half inches from the entrance wound to the resting site, down, toward the feet.

Q. Did you examine the internal organs between the place of the entrance wound and the place where the bullet rested?

A. Yes, I did.

Q. And did that confirm the course of the bullet through the body?

A. Yes, sir.

Q. Can you describe the track between the entrance wound and where the bullet lay, or rested?

A. Yes, sir. It entered the first cavity through the fourth intercostal space, that is, the space between the fourth and fifth ribs. It perforated the right and left side of the heart, went through the sac enclosing the heart and into the backbone, which was practically in the mid-line of the body.

Q. Then there wasn't any substantial deviation in the course of the bullet after the bullet entered the body and where it wound up?

A. No, sir."

The jury might well have concluded from this evidence that had the deceased accidentally shot herself, the bullet would have ranged upward through her body rather than downward, and that she would have fallen forward on the floor rather than backwards onto the bed. The jury might well have considered that the most logical explanation for the position of the body and the course of the bullet was that the appellant simply shot his wife while she was sitting on the side of the bed. Another bit of circumstantial evidence the jury might well have considered as pointing to the guilt of the appellant, was his admitted effort to burn the bedsheet bearing the blood stains from his wife's fatal wound. He remembered attempting to burn the sheet in the gravel pit near where the body was found and in which a part of the burned sheet was found. He remembered nothing of attempting to burn the sheet in the barrel incinerator near the trailer, but admits that he may have attempted to do so.

Another very potent item of circumstantial evidence unfavorable to the appellant lay in his attempted explanation of the ejected .22 rifle ammunition casing found on the bedroom floor of the trailer. He testified that the rifle was a pump type repeating rifle and that when the rifle was last used, an empty casing was left in the barrel. He also testified that after the round was fired that killed his wife, he ejected the empty casing from the chamber of the rifle and disposed of the casing by throwing it into the yard. He does not attempt to explain how the empty casing got onto the floor of the trailer, except to state that he had shot at a field lark sometime previously. Of course, if there was an empty casing in the firing chamber of the rifle when he left it standing in the corner of the bedroom, it would have been necessary to eject this casing before a live round of ammunition was placed in the chamber for firing. The appellant testified that there must have been a live round of ammunition in the firing chamber rather than a spent casing, but the jury might well have concluded that if the empty casing found on the floor of the trailer did not originally contain the bullet that killed Mrs. Thomas; then it must have been the casing which was ejected, at the same time the live ammunition that did kill Mrs. Thomas, was injected into the firing chamber of the rifle. There was also uncontradicted evidence from the police officers who examined the rifle, that they could not cause it to fire accidentally by jarring it, and no fingerprints could be found on the rifle.

In the appellant's statement admitted in evidence, he stated that he remained in the trailer from 30 to 45 minutes before attempting to remove the body of his wife and he makes no explanation of what he was doing during this time. In the testimony he gave before the jury, he testified that when he was carrying his wife's body out of the trailer, and as he was going down the steps of the trailer, he panicked and decided to secrete the body. The jury might well have considered such delay as deliberate on the part of the appellant to make sure his wife was dead before he attempted to do anything for her, or to do anything with her dead body.

We conclude, therefore, that the evidence was substantial and that the jury was lenient in assessing the penalty at only ten years on the appellant's conviction of murder in the second degree.

The judgment is affirmed.

LASHLEE STEEL COMPANY ET AL. *v.* EUGENE F. DODRIDGE

5-5564 465 S. W. 2d 691

Opinion delivered April 19, 1971

Terral, Rawlings, Matthews & Purtle, for appellants.

Hardin & Pickard, for appellee.

CONLEY BYRD, Justice. The Workmen's Compensation Commission allowed the claim of appellee Eugene F. Dodridge for hernia. The circuit court on review affirmed and appellants Lashlee Steel Company and its carrier, The Travelers Insurance Company, appeal on the basis that the claim does not come within the purview of Ark. Stat. Ann. § 81-1313(e) (Repl. 1960) which provides:

"In all cases of claims for hernia it shall be shown to the satisfaction of the Commission:

(1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;

(2) That there was severe pain in the hernial region;

(3) That such pain caused the employee to cease work immediately;

(4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter;

(5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within forty-eight (48) hours after such occurrence."

Claimant testified that he was injured on September 18, 1969, while lifting a beam that weighed from 250 to 300 pounds. Upon experiencing pain in his back and lower stomach or groin on the left side, he was unable to continue work. He then punched his time card and went home. The next day he did not work but when he went by to pick up his check, he reported to the bookkeeper, the man in charge when the boss was not there, that he had hurt his back and had pain in the area where the hernia was subsequently found. He first went to a doctor on Tuesday following the Thursday injury. His explanation for the delay was that he had had back trouble in the past and that he thought the pain was a recurrence of his old back trouble.

We agree with appellants that there is no substantial evidence to show a compliance with the fifth requirement, above, and that the commission erroneously allowed the claim.

In *Miller Milling Company* v. *Amyett,* 240 Ark. 756, 402 S. W. 2d 659 (1966) and *Harkleroad* v. *Cotter,* 248 Ark. 810, 454 S. W. 2d 76, we pointed out that the showing of severe pain in the hernial region required by subsection (2) of the statute, above, is a *subjective*

test whereas the subsection (5) requirement that the physical distress must be such as to require attendance of a licensed physician within 48 hours after the occurrence is an *objective* test and that if we held proof of the severity of the pain amounted to a substantial compliance with subsection (5), then subsection (5) would add nothing to the requirement that severe pain must occur.

Here the only evidence of pain is subjective. There is no objective evidence to show that the distress was such as to require the attendance of a licensed physician within 48 hours after the occurrence.

Our language in *Harkleroad* v. *Cotter, supra,* is here most appropriate. In that unanimous opinion we said:

> "It might be argued, with considerable logic, that the specific statutory requirements as to proof in claims for hernia, penalize the honest, industrious and conscientious workman who fails or refuses to put down his tools immediately and rush to a doctor every time he feels pain following sudden strain or effort. The record before us in the case at bar indicates that the appellee was just such workman. It is a well recognized fact, however, that hernias may occur following any one of the numerous strains and efforts the average active individual workman may encounter during the 128 hour rest week, as well as during the 40 hour work week. It is a matter of common knowledge that witnesses do not *see* hernias sustained by fellow workmen as they would see a broken leg or broken arm. Consequently, the people have seen fit to make, and the legislature has seen fit to leave, a compensable hernia a rather dramatic occurrence under the statute, with little or no room left for question or doubt that it did occur within the course of employment as an immediate result of sudden effort, severe strain or force applied to the abdominal wall. The wording of the statute assumes the existence of a hernia. The statutory requirements of proof are

directed at *claims* for hernia and not the existence or occurrence of a hernia."

Reversed and dismissed.

EVERETT KING *v.* STATE OF ARKANSAS

5575 465 S. W. 2d 712

Opinion delivered April 19, 1971

Powell Woods, for appellant.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. The appellant was charged by information with two counts of possession of stolen property. The jury assessed his punishment at three years in the State Penitentiary on each count. From a judgment on that verdict comes this appeal.

Appellant, through his court-appointed trial counsel, contends for reversal that the evidence was in-

sufficient to establish that the automobile (one count in the information) was stolen. We must agree with the appellant. The owner of the automobile was alleged in the information. It was also alleged that the appellant possessed the car "with the unlawful and felonious intent then and there to deprive the true owner of its property." The State adduced evidence that the appellant was apprehended in possession of the vehicle as described in the information. However, the alleged ownership was never established. Ownership is a material element in the definition of the crime of possession of stolen property. Ark. Stat. Ann. § 41-3938 (Repl. 1964). The punishment is the same as in cases of larceny. Although an officer testified that the vehicle was reported stolen, there was no competent evidence establishing the ownership of the property. Since the alleged ownership in the information is a material and vital element in the alleged offense, we must hold that the evidence supporting this allegation was insufficient. See *Fletcher* v. *State,* 97 Ark. 1, 132 S. W. 918 (1910); *Sutton* v. *State,* 67 Ark. 155, 53 S. W. 890 (1899). Cf. *Rogers* v. *State,* (Ark. May 11, 1970) 453 S. W. 2d 393. The allegation of ownership permits an accused to make preparation for trial, to be confronted by the witness claiming ownership, and to be able to plead former acquittal or conviction should he ever again be accused of this same offense.

Appellant also contends for reversal that "without proof" as to the value of certain credit cards, there could be no conviction for the unexplained possession of them. There was evidence that appellant was found in possession of several credit cards. It is the State's theory, which was supported by the owner's testimony, that the various credit cards were of unrestricted value as to the amount that "might be collected thereon." See Ark. Stat. Ann. § 41-3906 (Repl. 1964). The appellant's theory is, however, there was no evidence that the value of the credit cards exceeded $35.00 or that he acquired any property in excess of $35.00 by using the credit cards. Therefore, at the most, he asserts that the alleged violation would be only a misdemeanor. We think that appellant was entitled to present to the jury his

theory of a lesser offense which is in accordance with our recent view in *Pierce* v. *State,* (Ark. Mar. 9, 1970) 451 S. W. 2d 219.

We have examined other contentions appellant urges for reversal and find them to be without merit.

Reversed and remanded.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY AND CHARLES KIRK

v.

PAUL HUGHES, A MINOR, BY HIS FATHER AND NEXT FRIEND, LEWIS HUGHES

5-5511 467 S. W. 2d 150

Opinion delivered April 26, 1971

[Rehearing denied June 14, 1971.]

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

James C. Cole, for appellee.

CARLETON HARRIS, Chief Justice. This litigation relates to a railroad crossing accident. On May 24, 1968, a vehicle operated by Thelma Hughes, and in which her brother-in-law, Paul Hughes, appellee herein, was a passenger, was struck by a Chicago, Rock Island & Pacific Railroad Company train at a gravel road crossing in Malvern. Paul Hughes suffered injuries, and subsequently instituted suit against the railroad company and Charles Kirk, and Howard Smith, crewmen,[1] for damages. On trial, the jury returned a verdict for Hughes in the amount of $20,000. From the judgment so entered, appellants bring this appeal. Two points are alleged for reversal, the first being that the trial court erred in submitting to the jury the issue of failure to keep a lookout. It is also asserted that the trial court erred in using modified versions of standard AMI instructions. We proceed to discuss these points in the order listed.

Thelma Hughes testified that she was driving a 1967 Opel Cadet automobile, and that her son Ricky was riding in the front seat with her. Appellee was riding to the right of Ricky. The automobile was a station wagon, having one door on each side, and a lid that lifted up at the back. The back door had a handle on the outside but no handle on the inside. The three were on their way to a little league park, and Mrs. Hughes had crossed at this particular crossing before. She stated that on approaching the crossing, she came to a complete stop about ten feet from the track, heard no whistle blowing or bell ringing, and proceeded to change gears and start up on the track. The motor went dead with the automobile in about the middle of the track, the front wheels being completely over and the back wheels not having crossed the track at all. She attempted to start the car five or six times and then heard "the roar and looked and saw the train coming". She said that it was not traveling very fast and she attempted to start the car again, but without success. She then hollered "jump" and leaped out of the left side of the car, her son following immediately behind her. Paul

[1]The court directed a verdict for Smith.

"went over the back seat", but was unable to open the back door since there was no handle on the inside. The train struck the automobile, but was not traveling fast enough to overturn the vehicle, and came to a complete stop within fifty or sixty feet beyond the crossing. Appellee suffered injuries from the collision as heretofore stated.

We think the court erred in submitting the issue of whether the train crew failed to keep a proper lookout. In *Lovegrove* v. *Mo-Pac Railroad Co.,* 245 Ark. 1021, 436 S. W. 2d 798, we held on the question of failure to keep a constant lookout, the railroad company was entitled to a directed verdict if the undisputed testimony of the train crew reflected that such a lookout was being kept; we added that the jury might disregard the crew's testimony when it was inconsistent within itself or contrary to other accepted testimony. In the instant case, we are of the view that not only did the evidence given by the train crew show that a proper lookout was being kept, but also, the other evidence offered, on behalf of appellee, substantiated this fact.

What was the evidence? Charles Graves, classified as a brakeman, testified that he was seated on the front seat on the west side, or left-hand side of the engine. Charles Kirk is an engineer but was classified as a fireman at the time because there had been a reduction in force; however he had served as an engineer in his own right on other runs, and had passed all the requirements as an engineer. He was sitting on the right-hand side of the engine. Howard Smith is an engineer, and at the time, was observing from the left-hand side of the train. As to keeping a lookout, Graves testified:

"Well, we came around the curve and Mr. Kirk was blowing the whistle in this curve and he made a reduction. He set the air brakes and the train slowed down and we, just as we came around the curve, I guess, I don't know approximately how far we were from the crossing, 275 to 300 feet from the Collie Road crossing —we call it the ballpark crossing, I saw this car pull up there. * * * * The car stopped right on the tracks."

He said that the automobile was approximately 15 or 20 feet from the tracks when he observed it and that he pulled the emergency brake valve as soon as the car stopped, this putting "the train in emergency". Graves stated that the train was traveling around fifteen or fourteen miles per hour when he threw it into emergency; that it was moving about four or five miles per hour when it made contact with the car and then traveled about an engine's length past the crossing, or 50 or 60 feet.

Kirk testified that when the car came upon the track, he was able to see the hood and part of the front door, the train traveling around a slight curve. When asked how long it was between the time he saw the door and hood of the car and the time the train went into emergency, Kirk replied "The train was in emergency. The brakeman Graves, had already pulled the emergency valve". He said that he was entirely satisfied with the stop made by the train and it was the best stop that could have been made.

Smith testified that the train was traveling from fifteen to eighteen miles per hour as it approached the crossing; that there is a twenty mile per hour restricted speed at that portion of the track. He said that he first saw the automobile when it drove up to the crossing and stopped, and that the train was between a quarter and a third of a mile away. The witness stated that only a few seconds elapsed from the time the car pulled into view and stopped, and the train was put in emergency. His testimony was that the speed of the train was between two and three miles per hour at the time it struck the automobile.

Thus the testimony by the members of the crew is all to the effect that the automobile was observed as soon as it could have been observed, and the train practically immediately put in emergency. The testimony of Mrs. Hughes is to the same effect. She said that after five or six attempts to start the car, she heard the roar, looked, and saw the train coming; that it was "not very fast". From the record:

"Q. Was the train traveling very fast?

A. Well, when it come around the bend it started braking.

Q. Did you get any impression it was traveling at a fast speed or slow speed?

A. I couldn't tell how fast it was going when it come around the bend. It started slowing as it come around the bend.

Q. You have never measured the distance up to the bend, have you?

A. No, sir."

Further, from the record:

"Q. Did you see the train when it came around the bend as you were sitting on the track?

A. No. I was trying to start my car and heard the noise as the train started around the bend. I looked and saw it as it started around the bend.

Q. At that time when the train first came into sight, was it putting on its brake at that time?

A. Yes.

Q. In other words, as soon as he saw you he started putting on brakes. Is that what it amounted to?

A. Yes.

Q. Did you think the train was going to get stopped before it hit you?

A. Yes.

Q. I gather it slowed down to the point it was barely moving when it came in contact with your car?

A. Yes.

Q. Could you hear the brakes squeaking and squealing or however you want to describe it?

A. Yes.

Q. Did they squeal all the time from the time you first saw it—could you hear that?

A. Just as it came around the bend it started applying his brakes.

Q. It kept slowing down as it got closer and kept getting slower and slower?

A. Yes.

Q. Did I understand you to say after you saw or heard the train coming around the bend you tried to start your car some more after that?

A. Yes.

Q. You know about how many times you tried to start it?

A. Two or three times."

Thus, Mrs. Hughes stated that the train started braking as it came around the bend (when she first could have been observed) that it was traveling slowly; that the brakes were squealing the entire time from when first applied until the car was struck, and that it (train) was barely moving when contact was made. Appellee, Paul Hughes, was not looking and did not even know a train was approaching until his sister-in-law hollered "jump". We think the evidence herein set out clearly shows that there was no justification for the submission of the issue of whether a proper lookout was being maintained.

It is next asserted that the court erred in giving AMI 305-A instead of following the "Note On Use", and giving AMI 305-B. 305-A, given, states "It was the duty of the railroad company, its agents, servants and employees, before and at the time of the occurrence, to use ordinary care for the safety of Paul Hughes". Appellants contend that B should have been given instead of A, 305-B reading as follows. "It was the duty of all persons involved in the occurrence to use ordinary care for their own safety and the safety of others."

We think appellants are correct in this contention. Several specific objections were made to the giving of 305-A, but it is sufficient to point out that the Note On Use states that A should be used when negligence on the part of the plaintiff is not an issue, and that B should be used when negligence on the part of the plaintiff is an issue. The negligence of Paul Hughes was an issue in this case, and in fact AMI 2109, instructing on comparative negligence, was given by the court at the request of appellants. The court gave no reason for using 305-A instead of 305-B, and we hold that error was committed.

Finally, it is asserted that the trial court erred in giving the jury a modified form of AMI 502, this modification consisting of adding a sentence to the instruction. AMI 502 reads as follows:

"When the negligent acts or omissions of two or more persons work together as the proximate cause of damage to another, each of those persons may be found liable. This is true regardless of the relative degree of fault between them. If you find that negligence chargeable to the defendant railroad proximately caused damage to Paul Hughes, it is not a defense that some third person may also have been to blame."

The court then added to this instruction the following sentence, "However, in this case you are told that the negligence of Thelma Hughes, if any, cannot be chargeable to Paul Hughes". We agree with appellant that this addition should not have been made, and is a clear violation of the *per curiam* order of this court

dated April 19, 1965, wherein we stated that if AMI contains an applicable instruction it should be used "unless the trial judge finds that it does not accurately state the law". The order then provides that the court shall state its reasons for refusing the AMI instruction. No reason was given by the court for adding the last sentence, and in addition to what has already been said, we think appellants are correct in stating that the addition was to the advantage of appellee. The word "However", according to Webster's Third New International Dictionary (Unabridged), means *inter alia,* "nevertheless, notwithstanding". In other words, it seems to qualify, or limit, the first part of the instruction, and to overly emphasize that the possible negligence of Thelma Hughes cannot be chargeable to Paul Hughes. Actually, of course, the additional sentence does not really add anything to the meaning of the instruction, for AMI 502 very definitely states that *if negligence of the railroad proximately caused appellee's damages it is not a defense that some third person may also have been to blame.* This "third person" can only have reference to Thelma Hughes, the driver of the automobile. The effect of the addition was simply to tell the jury twice that any negligence on her part could not be charged to appellee.

For the reasons stated herein, the judgment of the Hot Spring County Circuit Court is reversed, and the cause remanded.

It is so ordered.

CHARLIE BROOKS *v.* KATIE McGILL

5-5518 465 S. W. 2d 902

Opinion delivered April 26, 1971

Odell C. Carter, for appellant.

George Howard, Jr., for appellee.

CARLETON HARRIS, Chief Justice. This litigation relates to who is the owner of Lot Nine of Paul's Addition to the town of Grady, Arkansas. In September, 1946, a warranty deed was given from Sam Bass and wife to Ira McGill and Katie McGill to land described as Lot Nine in Block Three of Paul's Addition to the town of Grady. In November, 1951, Lem Mosley and wife conveyed by warranty deed to Charlie Brooks, appellant herein, land described as Lots Five and Eight in Block Three of Paul's Addition to the town of Grady. In 1968, Katie McGill, appellee herein, obtained a deed from Southeast Arkansas Levee District for Lot Twelve, Block Three of Paul's Addition to the town of Grady. Appellee's residence is located on this lot; also, in this same year, she obtained a deed from the State of Arkansas for Lot Twelve Block Three of Paul's Addition to the town of Grady. Accordingly, though Mrs. McGill, together with her husband, had received a deed in 1946 to Lot Nine, she actually placed her house on Lot Twelve, thinking it was Lot Nine. Appellee testified that she did not know when she discovered that her home was actually on Lot Twelve; as noted, she did acquire the two deeds heretofore referred to in 1968. In August, 1969, Mrs. McGill instituted suit in the Lincoln County Chancery Court against Brooks

alleging that nine months previously, Brooks had entered on her property without her consent, permission, or approval, had stacked lumber on the premises and had interfered with her enjoyment and use of the premises. It was contended that Brooks was financially irresponsible; that an action for damages would be of no value; that she had no adequate remedy at law, and she prayed the Chancery Court, in addition to seeking $5,000 damages for appellant's unauthorized entry, use and occupation of the property, to restrain Brooks from coming upon any part thereof. Appellant filed a motion to dismiss the complaint, asserting that he was in possession of the land referred to, and had been for twenty years; that he had planted a garden thereon and used it for many years, and was the owner of the land; further, that the action was purely an ejectment action, and the proper remedy would be a suit in ejectment in the Circuit Court of Lincoln County. This motion was denied, and Brooks filed an answer setting out more fully his acts of possession; he also renewed his motion that the complaint be dismissed, or in the alternative, that the cause be transferred to the Circuit Court of Lincoln County. The court overruled the motion, and the cause proceeded to trial, the court entering a decree for appellee at the conclusion thereof. Three points are relied upon for reversal, but since we agree that the trial court erred in refusing to transfer the case to Circuit Court, there is no need to discuss the other points relied upon.

It is clear from the record that Brooks was in possession of Lot Nine at the time this suit was filed; in fact, the complaint itself asserts that he had been in possession for nine months. This being true, we cannot examine further the evidence heard by the chancellor, for the motion to transfer should have been granted. In *Gibbs* v. *Bates,* 150 Ark. 344, 234 S. W. 175, this court said:

"In the present case the plaintiff claims under a legal title, and the defendant is in possession of the land claiming to hold adversely to the plaintiff and to all other persons. The plaintiff claiming under a legal title and the defendant being in possession, the plaintiff

had a full and complete remedy at law, and chancery had no jurisdiction in the premises."

See also *Jackson* v. *Frazier,* 175 Ark. 421, 299 S. W. 738, and cases cited therein.

The same situation exists in the case before us.

Reversed and remanded, with directions to transfer to the Lincoln County Circuit Court.

AUSTIN L. BOYETTE *v.* STATE OF ARKANSAS

5585 465 S. W. 2d 901

Opinion delivered April 26, 1971

Lester E. Dole, for appellant.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty Gen., for appellee.

GEORGE ROSE SMITH, Justice. Shortly after noon on June 24, 1970, Ella Lewis, an 80-year-old resident of Hampton, was brutally attacked by an assailant who used some sort of blunt instrument to inflict two heavy blows upon Mrs. Lewis's head. The wounds quickly proved fatal. The appellant, charged with first degree

murder, was convicted of second degree murder and was sentenced to imprisonment for 21 years. His principal contention for reversal questions the sufficiency of the proof.

The State's case rested upon circumstantial evidence, but we find it amply sufficient to sustain the verdict. The crime was discovered not long after noon when Mrs. Lewis, sitting on her own front porch, sought help from some passing high school students. The students did what little they could, and obtained medical assistance, but the situation was hopeless. The police investigation indicated that robbery had been the assailant's motive. There was blood inside the house—especially in the bedroom, where the attack apparently occurred. The decedent's purse, which she customarily kept pinned inside the front of her dress, had been torn away and stuffed under the mattress, with only 3 or 4 pennies left in it. It was also shown that Mrs. Lewis usually kept her food in a small box, which she wrapped in a bread paper and stored in her freezer.

Boyette, the appellant, is apparently an alcoholic. On the morning of the crime he appeared at a liquor store in Hampton, begged a dollar from the proprietor, who knew him well, and bought a fifth of a gallon of wine with the dollar. Later in the morning Boyette came back and vainly tried to sell the proprietor some frozen food from a small box wrapped in a bread paper. Still later Boyette came back again with 55 cents in change and bought a smaller bottle of wine.

It was shown that during the lifetime of Mrs. Lewis's husband, Boyette had stayed with the couple at times. The jury were warranted in inferring that Boyette knew where the decedent kept her money and her food. There was also extremely damaging testimony from witnesses who saw Boyette running away from the back part of the victim's house at about the time the assault must have taken place. Boyette was drunk when he was arrested later that same afternoon.

There was other corroborating proof that we need not narrate. There were also discrepancies, such as dif-

ferences about exact times of day, of the kind that often emerge when witnesses give their own versions of an exciting or violent occurrence. Such conflicts in the testimony are matters to be considered by the jurors when they weigh the testimony. We find in the record an abundance of substantial evidence to support the verdict, which concludes our inquiry into the sufficiency of the proof.

The appellant also complains about the trial court's action in allowing the State to show that before Mrs. Lewis went into a coma she stated that it was Boyette who had hit her. That statement is not shown to have been admissible, but the court corrected the error by later admonishing the jury not to consider it for any purpose. The defense was apparently satisfied with the admonition, for there was no renewal of the objection nor any request for a mistrial. In the circumstances, no reversible error appears. *Howe* v. *Freeland,* 237 Ark. 705, 375 S. W. 2d 666 (1964); *Wiley* v. *State,* 234 Ark. 1006, 356 S. W. 2d 240 (1962).

Affirmed.

ST. MICHAEL HOSPITAL AND ARGONAUT INSURANCE COMPANY *v.* BARBARA SUE WRIGHT

5-5544 465 S. W. 2d 904

Opinion delivered April 26, 1971

Tackett, Young, Patton & Harrelson; By: *Nicholas H. Patton,* for appellants.

John W. Goodson and *Newman, Smith & Britt;* By: *Norman Smith,* for appellee.

LYLE BROWN, Justice. Appellee filed a claim for workmen's compensation benefits against appellant hospital, her employer, alleging that she had sustained an injury while attempting to move a patient from a stretcher to a bed. The commission found that appellee had sustained a compensable injury to her back. The circuit court affirmed and appellant hospital and its workmen's compensation carrier appeal. The sole question here is whether there is substantial evidence to support the finding of the commission that claimant was injured in the course of her employment.

Appellants first contend that due to the fact that the referee was the only person who had an opportunity to personally hear the testimony of the claimant and the other witnesses, his decision to disallow recovery should somehow be given more consideration than the commission apparently gave it, particularly in the instant case since the commission's order was the result of a two to one vote. Needless to say, there is no basis in any of our decisions for appellants' suggestion, as they recognize by their citation to *Potlatch Forests, Inc.* v. *Smith,* 237 Ark. 468, 374 S. W. 2d 166 (1964). In that case the court quoted from *Moss* v. *El Dorado Drilling Co.,* 237 Ark. 80, 371 S. W. 2d 528 (1963), wherein we said: "We take this occasion to point out that it is the duty of the commission to make a finding according to a preponderance of the evidence, and not whether there is any substantial evidence to support the finding of the referee." After quoting the above rule from the *Moss* case, the court in *Potlatch Forests* said: "Thus, as stated at the outset, we can only concern ourselves with whether the finding of the full commission was supported by any substantial evidence." To the same effect see *Lane Poultry Farms* v. *Wagoner,* 248 Ark. 661, 453 S. W. 2d 43.

The remaining arguments of appellants are that the commission's reasoning in arriving at a conclusion as to disability was improper and that the commission ignored testimony which tended to contradict appellee's testimony. The rule we follow is that if there is substantial evidence to support the commission's decision, we will affirm. Substantial evidence to support the commission is the extent of our inquiry on appeal.

In determining whether there is substantial evidence to support the findings of the commission, we view the evidence in the light most favorable to the action of the commission. *Herman Wilson Lumber Co.* v. *Hughes,* 245 Ark. 168, 431 S. W. 2d 487 (1968). There we said: "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." With that rule in mind we summarize claimant's testimony. She said she sustained an injury to her back while attempting to move a heavy and intoxicated patient from a stretcher to a bed; that at the time she was acting in the course of her employment as head nurse of the intensive care unit of the appellant hospital; that she felt a sharp pain go down her leg; that she immediately took a medication for relaxing muscles; that she tried to work the next night but was unable to do so; and that she was admitted to the emergency room the following day in severe pain, subsequently hospitalized, and later operated upon to remove a herniated disc. According to our decision in *Nationwide Warehouse Market* v. *Whisenant,* 249 Ark. 604, 460 S. W. 2d 90, the foregoing testimony is sufficient to support the commission. In *Whisenant* this court said:

> Appellee produced no eyewitnesses to corroborate the occurrence; he testified that he was working alone in a back room of the warehouse. There was testimony adduced by appellant to sustain its contentions (1) that appellee had said he injured himself while playing with his children; (2) that appellee attempted to influence some witnesses to testify in his behalf; and (3) that the incident was not reported to the appellant at the time of occurrence. On those conflicting issues it is apparent that the

> commission accepted appellee's evidence and rejected the evidence which was in conflict therewith. What we said in *Kivett* v. *Redmond Company,* 234 Ark. 855, 355 S. W. 2d 172 (1962), is equally applicable here: "The question is ultimately a simple one of credibility, a matter lying within the exclusive province of the commission. . . . We are bound by the commission's findings upon the disputed question of fact."

Although we have already found substantial evidence to support the commission, appellee also introduced evidence to corroborate her own testimony. Witness Teresa Gardner testified that she saw appellee reach across the bed and pull the patient and heard appellee say she hurt her back. The testimony which appellants introduced to contradict the testimony of appellee and Teresa Gardner need not be reviewed since our inquiry is whether there is substantial evidence to support the commission, not whether there is substantial evidence to support some other finding. *Hughes, supra.* Further, the *Hughes* decision states: "In order to justify a reversal of the commission's decision, one appealing must show that the proof is so nearly undisputed that fair-minded men could not reach the conclusion arrived at by the commission." Certainly, appellants have not met that requirement.

Affirmed.

CLIFTON WHITLEY AND KATHRYN D. WHITLEY *v.* HAROLD STANLEY IRWIN AND IONA JANE IRWIN

5-5490 465 S. W. 2d 906

Opinion delivered April 26, 1971

Warner, Warner, Ragon & Smith, for appellants.

Charles I. Evans, for appellees.

JOHN A. FOGLEMAN, Justice. This case involves the proceeds of a policy of fire insurance for $2,000 issued by Fireman's Insurance Company to appellants Clifton and Kathryn D. Whitley on October 31, 1964. It covered a two-story dwelling house. On March 5, 1966, the Whitleys conveyed the property on which the house was located to appellees Harold Stanley and Iona Jane Irwin. The Irwins agreed to pay the Whitleys $700 cash and to assume a note secured by mortgage payable to W. W. Carolan, Trustee, on which the balance amounted to $1,734. The Irwins also executed a note in favor of the Whitleys for $1,266 payable at the rate of $60 per month, plus interest until it was fully paid. A few days after this conveyance, Mrs. Whitley attempted to cancel the policy, but the insurance agent who issued the policy advised that there could be no cancellation without surrender of the policy. Thereafter, on March 18, 1966, while the Whitleys were still in possession of the dwelling house it was destroyed by fire. When the insurance

company denied liability, appellants filed suit on August 15, 1967, against the insurance company, which answered denying liability. W. W. Carolan, Trustee, intervened claiming the policy proceeds to the extent of the Whitleys' liability on the note payable to him. During the pendency of the litigation the balance due on this note was paid by the Irwins. At the time of the trial they had also paid the note due the Whitleys.

The insurance company later paid the face amount of the policy into the registry of the court on April 15, 1968. On the date of this payment, the Irwins intervened claiming the policy proceeds. One-third of the policy proceeds was paid to the attorney for the Whitleys. The chancery court, to which the case was transferred on October 29, 1969, on motion of appellees, awarded the balance to the Irwins.

Appellants assert three points for reversal, which are:

> I. There was no effective transfer of the insurance policy from the Whitleys to the Irwins due to the personal nature of the insurance contract.
>
> II. The purported transfer of the insurance from the Whitleys to the Irwins was void for lack of consideration.
>
> III. The equitable maxims requiring good faith and diligence in the assertion of one's rights should bar the appellees from any recovery of the insurance proceeds.

Appellants' argument that the contract of insurance was personal and did not pass with the title to the property is correct. Appellants paid the premiums to the insurance company. The contract was personal with them for their benefit and was in no sense the proceeds of the property destroyed. *Barner* v. *Barner,* 241 Ark. 370, 407 S. W. 2d 747. Under the circumstances, if appellants were not entitled to recover on it, no one was. *Langford* v. *Searcy College,* 73 Ark. 211, 83 S. W. 944. *McDonald* v. *Rankin,* 92 Ark. 173, 122 S. W. 88;

National Union Fire Ins. Co. v. *Henry,* 181 Ark. 637, 27 S. W. 2d 786. This principle of law is not contested by appellees. They contend, however, that it is inapplicable because appellants are estopped by their own actions from denying appellees' right to the insurance proceeds, that appellees asserted their own claim with due diligence, that they are entitled to be subrogated to the rights of Carolan, that actual transfer of the policy was prevented by unavoidable casualty and that appellants are unjustly enriched if they are permitted to retain the insurance proceeds.

Determination of the questions raised depends for the most part upon the answers to points asserted by appellees in support of the decree. The sale by appellants to appellees was closed in the office of the appellees' attorney on Saturday morning. He inquired whether the insurance was to be transferred. The Irwins did not have the money to pay the unearned premium, but testified that it was to have been transferred and that Mr. King, who was her father, and Mrs. Rhea Eichor, both of whom were present, offered to advance the unearned premium to the Whitleys. Mrs. Eichor testified that her offer to lend the money was declined by the Irwins. Mrs. Irwin stated that at that time it was thought that the office of the insurance agency where the transfer would have had to have been accomplished was closed. Mr. King and Mrs. Eichor stated that the primary reason for deferring action was the Irwins' haste to return to Louisiana. It was agreed that the matter would be deferred until the Irwins returned from their residence in Louisiana after Mr. Irwin had completed the following week's work. Mr. Irwin testified that, as soon as the insurance was transferred and the unearned premium paid, the insurance and insurable interest were to be theirs.

The Irwins admittedly did nothing else to accomplish the transfer, or to collect the insurance proceeds, until the Whitleys had sued and recovered even though both of them knew that the Whitleys were trying to collect from the insurance company. Mrs. Irwin testified that she did not talk to either of the Whitleys about

the collection of the insurance during the year following the occasion when Mrs. Whitley called to advise the Irwins that the house had burned. There is little room for doubting that Mrs. Irwin knew that the Whitleys were endeavoring to get a lawyer to sue the insurance company.

Testimony of Mr. Whitley that he reserved the bathroom fixtures and cabinets in the house was disputed. Evidence that the Irwins intended to convert the house into a barn was undisputed.

We find nothing on which to base an estoppel against appellants in this case, to indicate that it was an issue in the trial court or to imply that the trial court found an estoppel. On the other hand it might well be said that the Irwins effectively estopped themselves from claiming the insurance proceeds.

In the first place, the absence of evidence that any action or inaction on the part of the Irwins was induced by any representation made by the Whitleys bars any valid claim of estoppel. *Morgan* v. *Wells,* 242 Ark. 499, 415 S. W. 2d 323. In the second place, the primary requisite of equitable estoppel is lacking because the Whitleys did not, by acts, language or silence, misrepresent or conceal any material fact from the Irwins at any time. *Exchange Bank & Trust Co.* v. *Gibbons,* 228 Ark. 454, 307 S. W. 2d 877. In the case just cited, we pointed out that estoppel operates to put the party entitled to its benefit in the same position as if the thing represented were true. We also held the doctrine inapplicable where the result is attributable to carelessness or ignorance of the law on the part of the party claiming its benefit. Here, there was nothing said by either of the Whitleys which could have been the basis of any change of position by the appellees. The position of the Irwins clearly resulted from their own failure to take any steps to effect a transfer of the insurance policy or their ignorance of the legal effect of the insurance contract and of their failure to effect the transfer, or both. Furthermore, estoppel must be based on facts existing at the time the injured person is caused to

act and not upon subsequent events. *Pohnka* v. *The First National Bank of Wynne,* 224 Ark. 599, 275 S. W. 2d 641.

The Irwins' failure to assert their claim after the destructive fire and after being apprised of efforts by appellants to collect the insurance proceeds was actually a bar to their assertion of a claim to the proceeds after the efforts of the Whitleys caused their payment into court. Where one stands by and fails to assert a claim, he cannot be heard to assert it against the interest of those who relied on his silence. *Johnson* v. *Spencer,* 222 Ark. 710, 262 S. W. 2d 290. It seems only reasonable to assume that the employment of an attorney by the Whitleys and the institution of the suit against the insurance company following the failure of the Irwins to take any step toward effecting a transfer of the policy and their failure to assert any claim whatever to the proceeds with full knowledge that appellants were asserting a right thereto were in at least partial reliance upon this silence and inaction. Such silence and inaction may be the basis of equitable estoppel. *Keylon* v. *Arnold,* 213 Ark. 130, 209 S. W. 2d 459. Mere silence and inaction does constitute an estoppel under circumstances existing here, where appellees could have easily put both appellants and the insurance company on notice of their claim, if indeed they had any, and could have commenced the very action they did institute when they learned that the company had paid the policy proceeds into court. Their failure to do so could be taken to constitute a misleading reticence and apparent acquiescence in, and ratification of, what was being done. *Stewart Oil Co.* v. *Bryant,* 153 Ark. 432, 243 S. W. 811.

Appellees base their claim of subrogation upon a clause in the Carolan mortgage stating the agreement of appellants to keep the dwelling insured for full insurable value with loss clause in favor of the mortgagee. There was no such clause in the policy. We have held that such a stipulation is an appropriation of the insurance proceeds to the satisfaction of the mortgage indebtedness. See *Bonham* v. *Johnson,* 98 Ark. 459, 136 S. W. 191; *Sharp* v. *Pease,* 193 Ark. 352, 99 S. W. 2d

588. Even so, the doctrine of subrogation comes into play in Arkansas only when one not primarily liable pays the debt. See *Baker* v. *Leigh,* 238 Ark. 918, 385 S. W. 2d 790. The primary liability of the Irwins for the payment of the debt is beyond question. In *Lindley* v. *Marriatt,* 196 Ark. 1178, 114 S. W. 2d 453, we said:

> When one purchases property on which there is an encumbrance and assumes and agrees to pay off the encumbrance, he becomes, so far as the debt is concerned, primarily liable, and he cannot, by paying it off, be subrogated to the rights of the mortgagee against the person from whom he purchased.

Appellees cite no authority whatever for their contention that unavoidable casualty prevented the accomplishment of the transfer of the insurance. It is based on the fact that Mr. Irwin suffered an injury during the week following the conveyance of the property and the statement that he was unable to travel prior to the destruction of the property some 13 days later. We are unable to fathom the basis of this contention. Any merit it might have is negated by the total absence of any effort on the part of either of the appellees to make any other arrangement for the transfer, to offer any explanation for their nonappearance or even to attempt any step to establish their rights before the collection of the insurance proceeds in spite of the fact that they were at all times making payments on both the note due Carolan and that due appellants. Either Mr. King, Mrs. Irwin's father, who lived in the vicinity with the Eichors, or Mrs. Eichor might have been utilized as an agent to make the payment and accomplish the transfer, but was not. Appellees did not avail themselves of the services of their attorney who represented them in the closing. While Mr. Irwin's injury may have been such as to prevent travel by either him or his wife, it did not foreclose timely use of the telephone or mails. The record does not reveal any attempt on the part of appellees to pay the unearned premium to the Whitleys before or after the fire. We find no merit in this argument.

We do not find the doctrine of unjust enrichment to require payment of the insurance proceeds to appellees. In the deed from the Whitleys to the Irwins a lien was retained to secure the payment of the note representing the balance of the purchase price. In effect, the Whitleys held a mortgage on the property, subject only to the Carolan mortgage. The general rule recognized and applied in this state is that a mortgagee of real property who effects insurance on the mortgaged property at his own expense and for his own benefit, which is not limited to his interest as mortgagee, has a right to recover the proceeds of the insurance for his own use and benefit and the money received by him is not a payment on the mortgage, even when his only insurable interest is that of a mortgagee. *Ponder* v. *Gibson-Homans Co.,* 166 Ark. 591, 266 S. W. 682.

The maxim or doctrine appellees rely upon is that no one shall be allowed to unjustly enrich himself at the expense of another. The word "unjustly" as so used means "unlawfully." *Sheasgreen Holding Co.* v. *Dworsky,* 181 Minn. 79, 231 N. W. 395 (1930); *American University* v. *Forbes,* 88 N. H. 17, 183 A. 860 (1936); *Greenwich Contracting Co.* v. *Bonwit Const. Co.,* 156 Conn. 123, 239 A. 2d 519 (1968). One who is free from fault cannot be held to be unjustly enriched merely because he has chosen to exercise a legal or contract right. *Worthen Bank & Trust Co.* v. *Franklin Life Ins. Co.,* 260 F. Supp. 1 (D. C. Ark. 1966), aff'd 370 F. 2d 97 (8th Cir. 1966); *Pelser* v. *Gingold,* 214 Minn. 281, 8 N. W. 2d 36 (1943). One is not unjustly enriched by receipt of that to which he is legally entitled. *American University* v. *Forbes,* supra.

As appropriately stated by District Judge Henley in the *Worthen* case, "Parties to business transactions are required to act justly and honestly, but they are not required to act unselfishly or altruistically." A moral duty does not meet the demands of equity in this regard, in the absence of some specific legal principle or situation which equity has established or recognized bringing a case within the scope of the doctrine. *American University* v. *Forbes,* supra. *Anderson* v.

Anderson, 155 Kan. 69, 123 P. 2d 315 (1942). No recovery of money received can be based upon unjust enrichment when the recipient can show a legal or equitable ground for keeping it. *Beauregard* v. *Orleans Trust Co.,* 108 Vt. 42, 182 A. 182 (1936).

Since the Whitleys had a legal right to the proceeds of the insurance policy, the doctrine of unjust enrichment will not support the decree.

The decree is reversed and judgment entered for appellants for the proceeds of the policy held in the registry of the chancery court.

HENRY HIGGINS *v.* GENERAL MOTORS CORP. ET AL

5-5398 465 S. W. 2d 898

Opinion delivered April 26, 1971

Howell, Price, Howell & Barron, for appellant.

Wright, Lindsey & Jennings and *Barber, Henry, Thurman, McCaskill & Amsler,* for appellees.

FRANK HOLT, Justice. This is a tort action for damages allegedly resulting from a defectively manufactured brake hose. In September 1964, appellant purchased a 1965 Pontiac Catalina from appellee Horace Terry Pontiac Company (doing business at that time as Milner-Terry Pontiac Company). Almost four years and some 16,000 miles later, the Catalina's front brake hose ruptured, thus rendering the hydraulic braking system ineffective and allegedly causing appellant to ram into the rear of another vehicle. In April 1969, or about ten months after the accident, appellant received a recall letter from appellee General Motors Corporation stating that the front brake hoses on some full-size 1965 Pontiacs were subject to fatigue and rupture after extensive usage and should be immediately replaced. The letter further indicated that: "If this condition should exist on either hose, a sudden heavy brake application might cause the brake hose to rupture and result in a loss of hydraulic braking action."

On June 30, 1969, appellant filed suit against both appellees (hereinafter referred to as Terry and General Motors), premising his complaint only on the theory of

strict liability in tort. Terry answered and General Motors demurred. Upon arguments of counsel, the trial court sustained the demurrer and dismissed the complaint as to General Motors, from which ruling appellant does not appeal. Thereafter, Terry filed a cross complaint against General Motors as a third-party defendant for full indemnity or, in the alternative, contribution in the event of an adverse judgment. At about this same time, appellant received a second notice from General Motors warning him of the potential danger of the brake hose originally installed in his Catalina and urging him to have it replaced.

Prior to trial, Terry propounded a "request for admissions" to third-party defendant General Motors. In its answer, General Motors admitted that there existed a possibility of an unexpected rupture of the brake hose and a resulting loss of braking power in certain of its 1965 Pontiacs, including the Catalina model. General Motors objected, however, to the introduction into evidence of either this request or its answer. A ruling on the objection was reserved and the case proceeded to trial with the court sitting as a jury. Appellant attempted to enter the recall letters into evidence, to which both appellees objected. General Motors objected in that appellant had no cause of action against it (the demurrer having been sustained); Terry objected in that the letter:

> * * * is not relevant or an admission against Horace Terry Pontiac, but we don't have any objection to the letter being in evidence itself. We do have an objection to it being considered on the complaint of the plaintiff against Horace Terry. It's not an admission by Horace Terry of anything. That's the only basis for our objection.

Subsequently the trial court ruled that the request for admissions, its answer, and the recall letters were all properly admissible into evidence and so received them.

After considering all testimony and evidence introduced by the parties, the trial court made, in pertinent part, the following findings of fact:

> That said 1965 Pontiac Catalina was in a defective condition in that the flexible front brake hoses did fatigue after extensive usage.
>
> * * *
>
> That . . . no evidence shows adnormal or abusive use of the product, or use in a manner not intended by the seller.
>
> * * *
>
> That a defective right front brake hose that ruptured was a proximate cause of the collision and the damages sustained by [appellant].
>
> That [appellant] was not guilty of any negligence that was a proximate cause of his damages.

However, the court also found that there was no allegation or proof that the defect was caused by the negligence of either appellee. The reason for this deficiency was, of course, because appellant chose to proceed under the theory of strict liability which obviates the necessity of proving negligence. Nonetheless, the trial court concluded that since Arkansas law has not yet embraced the rule of strict liability in defective product cases, appellant was not entitled to judgment. Hence this appeal urging for reversal that the tort theory of strict liability should be adopted in products liability cases and, thus, replace the sales theory of warranty.

We think that even if this jurisdiction had previously adopted the theory of strict liability in tort for defective products, appellant still could not have prevailed because of his failure to have effectively proven a pre-existing defect by admissible and competent evidence.

Generally speaking, strict liability simply eliminates the necessity of proving negligence as a prerequisite to recovery for injuries received from defective products. See, *e. g., Putman* v. *Erie City Mfg. Co.,* 338 F. 2d 911 (5th Cir. 1964); *Santor* v. *A & M Karagheusian, Inc.,* 44

N. J. 52, 207 A. 2d 305 (1965). However, a plaintiff must still prove a defect in design or manufacture which was a proximate cause of his injury. This imposes upon him the burden of proving that the product was in a defective condition at the time it left the hands of the particular seller. See Comment (g), Restatement Torts, Second, § 402(a). In the absence of direct proof that the product is defective because of a manufacturing flaw or inadequate design, plaintiff must negate the other possible causes of failure of the product for which the defendant would not be responsible in order to raise a reasonable inference that the dangerous condition existed while the product was still in the control of the defendant. See *Jakubowski* v. *Minnesota Mining & Mfg.*, 42 N. J. 177, 199 A. 2d 826 (1964). Otherwise, proof of proximate causation would be reduced to rank speculation [see *Delta Oxygen Co.* v. *Scott*, 238 Ark. 534, 383 S. W. 2d 885 (1964)]; and this clearly is not an objective of strict liability.

In the case at bar, appellant is now prosecuting his claim only against appellee Terry, the distributor or retailer. The admissions which Terry elicited in its request for admissions as part of its third-party action were binding only on General Motors. See *Young, Adm'r.* v. *Dodson*, 239 Ark. 143, 388 S. W. 2d 94 (1965). Similarly, the recall letters were not proper evidence against Terry. When the letters were proffered by appellant, Terry responded by urging the propriety of their introduction for the limited purpose of substantiating its third-party complaint against General Motors, but specifically objected to their relevancy or competency (since they were admissions only by and solely against General Motors) as evidence for appellant's claim against appellee Terry. The trial court tentatively allowed the letters into evidence; and subsequently, in its written conclusions of law, found the letters to be admissible. It is unclear whether the court intended this evidence to be admitted only for the limited purpose urged by Terry. But since no such specific delimitation was expressed, we may assume that the recall letters issued by General Motors were also admitted against Terry. If so, we cannot agree.

Although the letters were certainly relevant to the issue of a pre-existing defect in the brake hoses, they were not competent as against Terry in view of the restrictive objection. The letters emanated from a source other than the party against whom they were sought to be introduced. As such, absent a showing that they were adopted by or otherwise binding upon it, the contents of the letters of recall constituted mere hearsay and *res inter alios acta* as to Terry. See, *e. g., Central Mfg. Co.* v. *St. Louis-San Francisco Ry. Co.,* 394 F. 2d 704 (8th Cir. 1968); *Southern Express Co.* v. *Todd,* 56 F. 104 (8th Cir. 1893). See, also, 31A C. J. S. Evidence § 318. However, the admissions contained in the letters were clearly competent for the limited purpose of Terry's third-party action against General Motors.

Since neither the answer of General Motors to the request for admissions nor the recall letters were competent evidence by appellant against Terry, appellant's proof is deficient that the brake hoses were in a defective condition at the time he purchased the Catalina from the dealer. The evidence does not sufficiently negate the possibility that the rupture resulted from normal wear and tear or discount other various contingencies which may have caused the rupture for which the seller could not be held responsible under a theory of strict liability. Thus, there was neither competent direct proof of a pre-existing defect, nor any other proof from which there could properly arise a reasonable inference that a dangerous condition existed while the Catalina was still in the control of Terry. Consequently, we need not at this time determine the propriety of judicially accepting or rejecting strict tort liability in this jurisdiction for defective products, for even under that theory appellant could not have prevailed. Moreover, appellant cannot prevail under traditional tort concepts since he neither alleged nor proved negligence on the part of Terry. It follows that the judgment below must be affirmed and the case dismissed as to appellee Terry and, also, as to appellee General Motors on the cross complaint.

Affirmed.

BILLY JOE HANEY *v.* LOUISE NOBLE AND R. R. NOBLE

5-5547 466 S. W. 2d 467

Opinion delivered April 26, 1971
[Rehearing denied May 31, 1971.]

Brown, Compton, Prewett & Dickens, for appellant.

Richard Earl Griffin and *Switzer, Switzer & Tanner,* for appellees.

FRANK HOLT, Justice. This controversy arose out of an automobile accident. The appellee R. R. Noble accompanied by his wife, appellee Louise Noble, had stopped their pickup truck at the entrance to an intersection when their vehicle was struck from the rear by

an automobile driven by appellant. A jury awarded Louise Noble $15,000 and R. R. Noble $2,000.

Appellant first contends for reversal of the judgment that the evidence is insufficient to support the amount of damages awarded appellees. It is an often stated rule of this court that on appeal the evidence will be viewed most favorably to the appellee to determine whether the jury's award is so great as to shock the conscience of the court, or demonstrates that the jurors were motivated by passion or prejudice. *Gordon* v. *Smith,* 247 Ark. 253, 444 S. W. 2d 873 (1969). Accordingly, we review the evidence.

There was medical evidence that Mrs. Noble has a 10% permanent partial impairment of the cervical spine and of her body as a whole as a result of hyperextension flexion of the cervical spine and that this condition will probably worsen. Appellee has suffered pain since the accident (a year) and the pain will continue for the rest of her life. She is 58 years old with a life expectancy of 17 years.

Mrs. Noble testified to having spent 13 days in the hospital following this accident, during which time she was kept in traction and was never free of pain. After her release, she wore a "collar" every day for four months which afforded partial relief. Becoming dissatisfied with her improvement, she consulted an orthopedic surgeon who prescribed a traction head-halter treatment and, also, pain relieving and muscle relaxant medications. This traction treatment requires that she sit for 10-minute intervals two to three times a day in a harness which is attached by a rope to an 8- to 10-pound weight suspended from a pulley. This device temporarily breaks the cycle of pain. She testified that this continuous treatment and medication improved her condition; however, she was still unable to move her neck without experiencing pain and was unable to perform the activities she normally engaged in prior to her injury.

Appellees offered evidence showing that Mrs. Noble maintained her home and her yard without assistance

prior to the accident and that she spent one-third of her time helping Mr. Noble (who is 70 years of age) in the operation of their farm by driving a tractor, mending fences, and harvesting crops. After the accident she was unable to effectively accomplish her household chores and could not maintain her yard or assist in the farm work. She is no longer able to sew because of partial numbness in her fingers. The evidence shows that appellees were constant companions. Their work, as well as their recreational activities, was carried on as a husband and wife team. Since the accident, Mrs. Noble has been unable to accompany her husband on fishing trips and other recreational activities. As a result, they sold their camper. Appellees have also sold their house trailer because of non-use since she is also unable to travel.

In view of this substantial evidence, we cannot say that the damages awarded appellees were excessive. *Blissett* v. *Frisby,* 249 Ark. 235, 458 S. W. 2d 735 (1970); *Bailey* v. *Bradford,* 247 Ark. 1048, 449 S. W. 2d 180; *Dyer* v. *Payne,* 246 Ark. 92, 436 S. W. 2d 818.

Appellant contends that no evidence was adduced at trial concerning future medical expenses and that the court erred in giving an instruction (AMI 2204) which allowed Mrs. Noble to recover for future medical expenses. Appellees' medical witness said: "I would assume that she would have continuous symptoms that probably might get worse." This statement, together with the evidence that appellee had a 10% permanent impairment of the body as a whole and the expenditure of $836.68 for past medical expenses, is sufficient for the jury to consider and calculate future medical expenses. In *Belford* v. *Humphrey,* 244 Ark. 211, 424 S. W. 2d 526 (1968) we allowed the jury to infer future medical expenses where the jury had before it a history of past medical expenses that had accrued prior to trial. Therefore, no error was committed by the trial court.

Appellant also complains that error was committed by submitting to the jury the issue of diminished earning capacity in the future (AMI 2207). Appellant asserts there is "not one iota of testimony" showing Mrs.

Noble to have ever been employed or to have earned wages and, therefore, the jury would have to speculate as to her future loss of earning capacity. We find no merit in this contention. The record here clearly shows Mrs. Noble as being a productive member of her household by performing services much greater than those ordinarily rendered by a wife. Her capabilities were not limited to performing only the usual household affairs. Also included were sewing for her relatives "and all," and assisting her husband one-third of her time in their farm activities. Such capabilities are not devoid of some value. Mrs. Noble's capacity and ability to work were clearly demonstrated. The jury could reasonably infer a probable diminution in her earning capacity based upon her impaired abilities. Cf. *Long* v. *Henderson,* 249 Ark. 367, 459 S. W. 2d 542 (1970) and *Blissett* v. *Frisby,* 249 Ark. 235, 458 S. W. 2d 735 (1970). We have long recognized the right of minors to recover for future diminution of earning capacity where no history of wage earning was demonstrated. *Missouri Pac. R. Co.* v. *Maxwell,* 194 Ark. 938, 109 S. W. 2d 1254 (1937); *St. Louis, I. M. & S. R. Co.* v. *Waren,* 65 Ark. 619, 48 S. W. 222 (1898). A fortiori, certainly such reasoning would apply in the case at bar to an adult who is a productive member of the family.

Affirmed.

MAYBELL ROOKS *v.* STATE OF ARKANSAS

5543 466 S. W. 2d 478

Opinion on rehearing delivered April 26, 1971

Bon McCourtney & Associates; By: *Richard Jarboe,* for appellant.

Ray Thornton, Attorney General; *Milton Lueken,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was charged by information with first degree murder for the fatal shooting of her husband. A jury found her guilty of murder in the second degree and imposed a sentence of twenty-one years in the State Penitentiary. This appeal is taken from a judgment on that verdict. Appellant first contends for reversal that an improper procedure was permitted in impeaching her testimony.

Testifying in her own behalf at trial, appellant claimed self-defense. She related to the jury, and adduced other evidence, that her husband, the deceased, was an intemperate drinker, that he had on several occasions threatened to take her life, and that, at least twice in the past, he had intimidated her with a knife. Shortly before the shooting, according to appellant, an altercation erupted between her and the deceased in their backyard where he was working on a car. There was evidence that he was intoxicated at this time. The argument became violent; and, as she fled the scene, she was struck in the arm by a flying object (a wrench) thrown at her from the yard by the deceased. Although the object hit her with little force and only slightly bruised her, appellant claimed that the incident, coupled with her husband's immediate further threat as she entered their house: "I'm going to gather up a bunch of tools and I'm going to kill you," caused her to panic and to momentarily pass out. When she came to, the appellant, according to her testimony, at once obtained a shotgun from inside the house, returned to the yard and shot her husband as he was advancing upon her.

On cross- and recross-examination the prosecuting attorney, over defense objections, sought to impeach appellant by reference to a statement which she had made to the police while in custody. On recross-examination, for example, the prosecuting attorney asked:

> * * * When you told your story that night, you said that your husband was running away from you when you shot him at that time, didn't you?

Counsel for appellant objected to this reference to a prior statement because it had not previously been ad-

mitted into evidence. The objection, however, was overruled and appellant thereafter denied making this statement. Later, in an attempt to further impeach appellant's story and thereby discredit her plea of self-defense, the State adduced rebuttal testimony from an investigating officer that appellant had made an in-custody statement that she shot her husband while he was "walking or running away from her." Objection was again registered against reference to that statement on the grounds that it was in the nature of an in-custody admission and had not been judicially determined, in the proper manner, to have been voluntarily made. However, the State argued, in effect, that inasmuch as the prior inconsistent statement was being offered simply for the limited purpose of impeaching appellant's testimony and not as an admission, its consideration at trial was neither contingent upon a judicial predetermination of voluntariness nor subject to any exclusionary rules. Ultimately, the trial court overruled appellant's objection and denied her subsequent motion to strike the officer's testimony.

Appellant now asserts that the trial court erred in permitting the State to impeach her in-court testimony by the use of an in-custody statement without first having determined its voluntariness. Appellant contends in her brief that the language in *Miranda* v. *Arizona,* 384 U. S. 436 (1966) "controls the disposition of the case at bar. Many state and federal cases on this issue point to the clearness of the Supreme Court's discussion about impeachment to reach a result favorable to appellant. [citing cases] Likewise, appellant submits that the language quoted from '*Miranda*' is so clear that it is not susceptible to argument. What could be clearer than what the Court has said about impeachment? It said that statements used to impeach must comply with its guidelines. Therefore, since the statement in the case at bar was not shown to be incompliance, the verdict must be set aside." However, after appellant's brief was filed, and following the submission of this case, the United States Supreme Court specifically held contrary to appellant's contention. In doing so the Court acknowledged that *Miranda* "can indeed be read as indicating

a bar to use of an uncounseled statement for any purpose." The Court, in *Harris* v. *State of New York,* 401 U. S.____, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), held that, even though a defendant's statement is inadmissible against him in the State's case in chief because of the lack of procedural safeguards which *Miranda* requires, the statement, however, can be used for purposes of impeachment to attack and test the credibility of the testimony of a defendant-witness about prior inconsistent in-custody statements where the trustworthiness of the evidence satisfies legal standards. Therefore, in the case at bar, we hold that it was permissible for the State to test the credibility of appellant's trial testimony by cross-examination and by the rebuttal testimony of the investigating officer with respect to her allegedly voluntary and contradictory statement. In *Harris* the court said: "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the truth-testing devices of the adversary process. * * * The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."

Appellant also cites to us *Jackson* v. *Denno,* 378 U. S. 368 (1964), and Ark. Stat. Ann. § 43-2105 (Supp. 1969) in support of her assertion that a *Denno* hearing was never held to determine the voluntariness of the contradictory statement. It must be remembered that this asserted contradictory statement was not offered in evidence by the State in presenting its case in chief. The appellant insists that from the evidence, the allegedly volunteered statement by appellant, before interrogation, was made when in custody and in a police dominated atmosphere. In denying that she made the statement, she testified that she was nervous and upset and could not remember making the statement. In *Harris* there was no contention that the contradictory statement was involuntary. However, the court also noted that the voluntariness of a confession is irrelevant when the defendant becomes a witness, and further stated: "We reject such an extravagant extension of the Constitution."

In the circumstances, it is our view that the latest expression of the United States Supreme Court in *Harris* is controlling in the case at bar and renders *Miranda,* which appellant cites as dispositive of this case, inapplicable. In doing so, it appears to restore the validity of our previous decisions, such as *Decker* v. *State,* 234 Ark. 518, 353 S. W. 2d 168 (1962), 98 ALR 2d 1. There the contention was made that cross-examination of the defendant about inconsistent statements was impermissible since they were in the category of a confession and the proper foundation had not been established for the admission of a confession. We said: "Of course, a defendant in a criminal case who elects to testify is subject to impeachment like any other witness, and the purpose of the questioning was to establish that Decker had earlier made contradictory statements as to the circumstances of the killing."

We turn now to appellant's second and final point for reversal. At the close of all the evidence, appellant moved that the prosecuting attorney be required to fully disclose in his opening argument the grounds upon which he would rely for a conviction. We agree with appellant that the trial court should have granted the motion by admonishing the State to comply with the request. Ark. Stat. Ann. § 43-2132 (Repl. 1964) provides that the party having the burden of proof shall also be entitled to give the opening and conclusion of final argument. However, this statute also expressly indicates that the party having the burden shall not enjoy the privilege of concluding the argument without first, upon demand of the adverse party, making a full statement of the grounds upon which he claims a verdict.

An examination of the record demonstrates, however, that the refusal of the appellant's motion amounted to harmless error since the prosecuting attorney did in fact make an adequate preliminary disclosure of the grounds upon which he would rely for a conviction. Appellant complains that the prosecution, in the concluding portion of final argument, commented for the first time concerning her failure to produce any evidence of the deceased's reputation for violence and also for the

first time asserted that appellant's son, who did not testify, in all probability planted a wrench under the deceased's body and put the shotgun in the house. However, we think the State's concluding argument contained only proper rebuttal material in light of the matters discoursed upon in appellant's preceding closing argument.

Affirmed.

FOGLEMAN, J., not participating.

JOHN WEBER *v.* STATE OF ARKANSAS

5565 466 S. W. 2d 257

Opinion delivered May 3, 1971

C. E. Blackburn, for appellant.

Ray Thornton, Attorney General; *Garner L. Taylor, Jr.,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. John Weber, appellant herein, was charged with larceny of a truck and of a boat, with escape from the county jail, and with being an habitual criminal. The court directed a verdict of not guilty on the charge of stealing the truck, but the jury convicted Weber of Grand Larceny (stealing the boat); also, it convicted him of Escape, and thereafter found him guilty under the habitual criminal statute. He was sentenced to 26 years for grand larceny and five years for escape. From the judgment so entered, appellant brings an appeal from the grand larceny conviction. For reversal, three points are asserted, which we proceed to discuss.

It is first contended that the court erred in admitting incompetent, irrelevant, and immaterial testimony by certain witnesses. Weber, who was being held in the Cleburne County jail on a charge of second degree murder, escaped on the morning of June 12, 1970. A manhunt was organized and Weber was located and arrested on the afternoon of that date by two deputy sheriffs on a road near Greers Ferry Lake. Denny Douglas, who lives close to the Lakefront Lodge, testified that he arose on the morning of June 12, between daylight and sunup, and noticed a man at the boat dock starting a dark colored boat "looked green from where I was". He could not tell what type of clothing the man was wearing, nor could he describe the individual, other than that he was of average size. Actually, the witness knew no facts that connected Weber with the offense of stealing the boat, and his testimony deals more with the charge of stealing the truck, though the value of his evidence on that charge was negligible. It is true that the testimony was of no value to the state, but, that being true, we certainly cannot find any prejudice. No fact was testified to that could have possibly aided in the conviction, and if the testimony was inadmissible, it certainly has not been demonstrated that it was prejudicial. See *Stout* v. *State,* 244 Ark. 676, 426 S. W. 2d 800.

The same complaint is also made with reference to the testimony of State Trooper Noel Baldridge, but we certainly cannot agree with appellant that this testimony

was irrelevant, incompetent, or immaterial. Baldridge testified that he learned that a boat and motor were stolen, was given a description of them and given a description of Weber's height, weight and the color of his hair; also, that the escapee was wearing brown pants and a levi jumper. The officer stated that as he was crossing the Edgemont Bridge, he observed a man in a green fishing boat, going under the bridge. He said the occupant was a male with dark curly hair and was wearing a levi jacket; that he hollered and waved at the occupant of the boat, trying to get the latter to stop; that the man cut back behind him, turning his head in the other direction and went on under the bridge, and proceeded south.

"After I hollered at him from the bridge and he wouldn't look toward me, I radioed to the command post at that time and told them that a boat of the description that we had and a man of the description that we had in the boat had gone under the bridge and they advised me to pursue this boat. I drove my unit to the, I believe it's the Baker Boat Dock and got in a boat with a couple of fishermen and we gave pursuit to this green fishing boat."

Baldridge stated that the closest they were able to get to the occupant of the green boat was from 100 to 150 yards, and that the other boat simply "outran us". He said that four or five miles up the "Middle Fork" of Red River, the boat was found on the right bank with no one around it, and the gas tank empty. The officer took the number of the boat, and Phillip Davidson, operator and owner of the Lakefront Lodge and Restaurant, stated that the boat belonged to him, and had been taken from a boat dock. The only evidence that might have been considered objectionable was the statement by the officer that the boat found on the bank was the same boat that he had been chasing; however, though at the conclusion of the testimony by the witness, defense counsel moved that all of his testimony be stricken, there was no objection at all made to the answer referred to. We have already said that Baldridge's testimony, in the main, was pertinent; accordingly the motion to strike was properly denied, and there being no objection to the specific ques-

tion to the officer, nor to the answer made, there can be no merit to any contention of prejudice. The evidence of Baldridge was, of course, circumstantial, but it tied in with other circumstances that connected Weber with the crime. For instance, Ben Hubby testified that he saw appellant on the lake by Cove Creek,[1] Weber being out of gas, and he (Hubby) towed him in. They looked for gas, finally found some at a store, went back to the boat, and Weber started the motor and left. The witness identified Weber, whom he did not know before that occurrence, and described the green boat in which he was traveling. This occurred between 9:00 and 10:00 o'clock in the morning.

Gerald Melton, who was fishing with his son and another person, saw Weber in the boat, and subsequently saw him again when appellant came to the fishing camp endeavoring to find gasoline. Melton described the boat and motor, and identified Weber as the operator. Deputy Sheriff Walt Barden testified that he, together with Deputy Sheriff Delbert Hooten, arrested Weber about "two miles up from Middle Fork" on an old logging road. Dogs were used and were apparently taken to the abandoned boat where they struck a trail. Weber was found standing in the road about an hour before dark. The testimony was sufficient to sustain the conviction.

It is next asserted that the court erred in failing to instruct the jury on the lesser offense of joy-riding or trespass as requested by the defendant. This point is tied in with point three which asserts that the state failed to sustain its burden of proof of the crime of grand larceny. As far as criminal trespass is concerned, the record does not reveal that any request was made for an instruction on this offense, nor was there any objection made to the court's not giving such an instruction. But that is actually immaterial for our statutes on both criminal trespass and joy-riding do not include a boat. The criminal trespass statute, Ark. Stat. Ann. § 41-3919 (Repl. 1964) provides a fine for one, who without the consent of the owner,

[1]This point would have been reached before the location where the boat was found abandoned.

takes possession "of any horse, mule, automobile, bicycle, wagon, buggy, motorcycle and/or airplane[2] for the purpose of riding or driving the same * * * *". It will be noticed that the word "boat" is not included. It is so firmly established as to need no citation of authority that criminal statutes are strictly construed, and nothing can be added or taken away from the precise or express language of the Act.

We have two "joy-riding" statutes. Both are found in Title 75, Motor Vehicles, Chapter 1, §§ 75-101 through 75-194 (Repl. 1957). The first is § 75-170:

"75-170. Unlawful taking of a vehicle.—Any person who drives a vehicle, not his own, without the consent of the owner thereof and with intent temporarily to deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in any such unauthorized taking or driving, is guilty of a misdemeanor."

This section is a part of Act 142 of 1949. In this Act the word "Vehicle" is defined, § 75-102 (a), as:

"Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."

Certainly a boat does not come within this definition of vehicle. Immediately following the definition of "Vehicle" is a definition of "Motor Vehicle", also a part of Act 142, § 75-102 (b), which reads as follows:

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[2]All of these items except horse and mule were added to the statute by an amendment in 1943.

"Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails."

Of course, the definition of a motor vehicle is simply a definition of a class of "vehicle", i. e., it refers to those vehicles defined in (a) which are motorized.

It is apparent that these sections have no reference to boats. The other joy-riding statute is § 75-194 and is a part of Act 134 passed in 1911. It provides as follows:

"No chauffeur or other person shall drive or operate any motor vehicle upon any street or highway in this State in the absence of the owner of such motor vehicle without said owner's consent,[3] * * * Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be fined a sum not exceeding two hundred dollars [$200.00] or imprisonment in the county jail for a period not exceeding six [6] months, or both, at the discretion of the court."

Obviously, this statute has no reference to a boat.

Since these statutes do not in anywise deal with boats, there can be no merit in appellant's contention.

The judgment is affirmed.

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[3]The deleted portions of the statute refer to provisions that are not pertinent to this appeal.

LOIS ROGERS *v.* STATE OF ARKANSAS

5561 466 S. W. 2d 252

Opinion delivered May 3, 1971

Kenneth Coffelt, for appellant.

Ray Thornton, Attorney General; *Ken Stoll,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, along with two other men, was charged with the crime of having unlawfully possessed a stolen tractor. Tried separately, the appellant was found guilty and was sentenced to imprisonment for five years. For reversal the appellant contends only that the trial court erroneously allowed police officers to narrate to the jury an admission of guilt which the officers wrongfully obtained by threatening to charge the appellant's father with the offense, which the appellant himself had allegedly committed.

A study of the record shows that the appellant's argument is based upon a misconception of what happened at the trial. The defense vigorously argued that the appellant's admission of guilt was improperly obtained, because the officers resorted to a threat against the elder Rogers, as we have indicated. According to the record, however, the court sustained the argument of defense counsel and permitted the jury to hear only

an admission made by the younger Rogers before the threat in question was made. We agree with the trial court's conclusion that the earlier admission was voluntarily made. The court properly ruled that all statements elicited by means of the threat were involuntary and were not to be submitted to the jury. In the circumstances the record is simply devoid of prejudicial error with respect to the only point for reversal that is before us.

Affirmed.

JOHN WEBER *v.* STATE OF ARKANSAS

5568 466 S. W. 2d 253

Opinion delivered May 3, 1971

Reed & Blackburn, for appellant.

Ray Thornton, Attorney General; *Milton Lueken,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. John Weber appeals from a second degree murder conviction arising out of the death of Claude Brock on the night of December 15, 1969, in the community of Concord, Cleburne County. Appellant advances three points for reversal:

I. The court erred in allowing the introduction of ballistics testimony in that (a) appellant's counsel was not permitted to cross-examine one of the State's witnesses on that point; and (b) a proper foundation was not laid for the introduction of a shell casing;

II. Admissions purportedly made by the accused should have been suppressed; and

III. The court erred in ruling that Eva Jane Carter, a/k/a Eva Jane Weber, was not the wife of appellant and in permitting her to testify against appellant.

On the morning of December 16 Claude Brock was found dead in his front yard. He had been shot in the back by a high powered rifle. It was the State's theory that appellant and Eva Jane drove to the Brock home on the previous night; that Brock was driving away from his home but stopped on the approach of the Weber vehicle; that the two men got out of their cars and engaged in conversation; and that appellant shot Brock with a rifle which appellant had, about a month before, obtained

from Roscoe Brackett. The State's case rested mainly on two items of proof. First, it showed by the testimony of Eva Jane that she and appellant drove to the Brock home on the night of December 15; that the two men conversed while standing outside their cars; that she heard a gun fire but could not say who fired it; and that appellant returned to the car exclaiming, "My God, Jane, I have got to get you out of here." The witness said she knew appellant had a 30-30 rifle which was obtained from Roscoe Brackett and it was in the back seat of the car when the couple left Memphis the morning before the shooting that night. Second, Sgt. Honeycutt of the State Police, criminal investigation division, testified that he recovered a 30-30 bullet hull at the spot from whence the shot was said to have been fired. He obtained another bullet hull from Brackett, which was claimed to have been fired by the same rifle in November while Brackett owned the gun. Captain Paul McDonald, arms expert in charge of the State police laboratory, testified that "without a doubt" the two bullets were fired by the same rifle.

The foregoing recitation of testimony is sufficient to an understanding of appellant's first point for reversal. Appellant says his counsel was not permitted to cross-examine Sgt. Honeycutt. The sergeant was called to identify the shell hulls which the State sought to introduce. After direct examination was completed the witness was instructed to stand aside. Appellant's counsel suggested that he should be permitted to cross-examine Honeycutt. The court replied that such opportunity would be afforded. After witnesses Brackett and McDonald completed their tracing of the shells, Sgt. Honeycutt was called back to the stand and he was cross-examined extensively by appellant's counsel. While the better practice would have been to permit the cross-examination immediately on completion of the direct examination, we see no prejudice in the adopted procedure.

The other assertion of error in Point I is that a proper foundation was not laid for the introduction of the shell hull obtained from Brackett. If there was a motion to strike the testimony of either Brackett or Officer Honeycutt, it is not abstracted. Furthermore, we have examined

the detailed testimony of both witnesses on the point in question and it is clear that the evidence was sufficient to present a fact question.

The second point challenges the admissibility of statements purportedly made by the accused to the officers. On May 5, 1970, Sgt. Honeycutt interviewed appellant in the jail about mid-morning. The officer conceded that appellant appeared disheveled and sleepy, as if he had been up all night. The officer detected no odor of alcohol and said appellant responded coherently. The sergeant recited the preliminary statements he made to appellant which consisted of all the Miranda warnings, and said appellant indicated a willingness to answer questions. The officer said he asked these questions: "What did you do with the 30-30 rifle that you used to shoot Claude Brock with?" "What did you do with the automobile you were driving at the time the shooting occurred?" To those questions the appellant is said to have replied that he sold them somewhere in Mississippi. Appellant was asked about the 30-30 rifle he bought at Concord and he replied that he did not buy it, that he traded a drilling machine for it. (The latter statement corroborated a similar statement by Brackett.) The officer said he then asked appellant if he wanted to go into detail about the incident "and he stated he better consult a lawyer and the interview discontinued at this point." A deputy sheriff testified that he was present when Sgt. Honeycutt interviewed appellant and fairly corroborated the sergeant's testimony.

The accused testified at the Denno hearing. He categorically denied that he was given the Miranda warnings. He agreed that Honeycutt asked him the questions about the gun and the automobile, but he denied giving the answers Honeycutt recited. He said he told them he had been in Florida and he agreed with the officer that "running isn't much fun." He also admitted telling the officers he traded off the gun he got from "Slick" Brackett. Appellant said he was not drunk at the time of questioning and clearly recalled the interrogation. His main difference with the questioning officers was that he denied having been asked if he used the car and gun in connection with the killing of Claude Brock.

We have carefully reviewed the record on the question of voluntariness of the statements and considering the respectful consideration we give to the trial judge's findings on the issue, we are unable to say the court erred in holding the statements to have been made and voluntarily given. *Harris* v. *State,* 244 Ark. 314, 425 S. W. 2d 293 (1968).

This brings us to appellant's final point. The State gave notice in pretrial that it intended to call Eva Jane Carter, a/k/a Eva Jane Weber, as a witness against appellant. Appellant filed a motion to exclude her testimony on the ground that Eva Jane was his wife. At the conclusion of an evidentiary hearing the trial court ruled that Eva Jane and appellant were not husband and wife and therefore held the State could call her as a witness.

Eva Jane was the principal witness at the hearing on the motion to exclude her evidence. She relied (1) on a common law marriage in Texas and (2) on a marriage ceremony performed in Mexico. Here is a summary of her testimony on those two points:

> John and I started dating in February 1958 and started living together as husband and wife in Seattle, Washington, in May 1958. We lived there six months and then went to Lubbock, Texas, where we lived and worked some four months. John worked as a mechanic and I was a waitress. From Lubbock we went to Colorado Springs and worked during the tourist season. From there we lived at various intervals in Idaho, Seattle, Indiana, following seasonal work, including the harvests. Then in 1963 we moved back to Lubbock and lived there three months. Then we returned to the west coast. During all those times we continuously considered ourselves husband and wife, cohabited as such, and held ourselves out as man and wife. Our baby was born in 1960. Here is my social security card in the name of Eva Jane Weber. Here is one of my withholding statements in the name of Jane Hunter Weber. We sent and received many letters in our travels and they all have

> our names on them as Mr. and Mrs. Weber. Here are some of them.
>
> Then in 1964 we decided we should go through a marriage ceremony, especially since we had a baby. We went across the border to Texacali, Mexico. We inquired about where a couple could get married and we were directed to a lawyer's office. He performed the marriage ceremony, charging us fifteen dollars. Here is our receipt. The receipt is styled MARRIAGE * * * * * RECORDING * * * * * RECEIPT. It gives the lawyer power of attorney to record our marriage, receipts us for our money and certifies that he would send us our official marriage certificate after recording. We never received the certificate; I had a letter sent to him but it came back showing the lawyer deceased.
>
> We have continued to live together. There have been times when we had quarrels and separated but would go back together. In fact I started divorce proceeding once but we made up and the matter was dropped.

Texas recognizes common law marriages and the requirements may be classified as minimal. "To establish a common law marriage there must be an agreement express or implied between the parties to become husband and wife, cohabitation in pursuance of such agreement, and a holding out by the parties that they are husband and wife." *Moore* v. *Jordan,* 328 S. W. 2d 343 (1959). See *Darling* v. *Dent,* 82 Ark. 76, 100 S. W. 747 (1907). In *Darling* this court had occasion to treat with favor the validity of a Texas common law marriage. Eva Jane gave uncontradicted testimony which showed clearly that the parties met the three requirements of Texas law. In support thereof she produced her social security card, withholding statement, and numerous letters, all in the name of Mrs. Weber. Then there was the birth of the child, of which appellant was indisputably the father.

With respect to the purported marriage in Mexico, Eva Jane gave positive testimony that a marriage was

there performed and presented a document which strongly corroborated her recitation of facts.

Appellant, having moved to exclude Eva Jane's testimony on the ground that she was his wife, initially carried the burden of sustaining the point. *McFarland* v. *State,* 165 Ark. 431, 264 S. W. 938 (1924). But once substantial evidence of a marriage is introduced the marriage is presumed to be valid "and the burden of proof is on the party attacking it." *Yocum* v. *Holmes,* 222 Ark. 251, 258 S. W. 2d 535 (1953). In *Yocum* the only evidence of the marriage was the bare statement of the wife that "she married Holmes in April 1950 in Camden, Arkansas." That testimony was held sufficient to make a factual question as to whether the marriage took place.

A Mexican marriage was involved in *Miller* v. *State,* 235 Ark. 880, 362 S. W. 2d 443 (1962). There the court said: "No presumption of law is much stronger than the presumption that a marriage is lawful, innocent and not criminal." It was further said that the presumption is so strong and so positive as to require one who asserts illegality to assume the burden of proving that illegality.

The abundance of evidence presented by the testimony of Eva Jane, and her supporting exhibits, were certainly sufficient to raise the presumption of marriage, both at common law in Texas and a ceremonial marriage in Mexico. Faced with that evidence it became incumbent on the State to refute it and not a syllable of testimony was offered to repudiate Eva Jane's evidence. The trial court should have granted the motion to exclude.

Reversed and remanded.

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

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result and all of the opinion except that part relating to the common law marriage. As I view the testimony, it clearly establishes the fact that the relationship between the witness and appellant was meretricious in its inception. This being so, it was necessary that there be af-

firmative proof of an abandonment of this relationship and the commencement of a new relationship. Even though the testimony of the witness was uncontradicted, it remained for the circuit judge to reach conclusions from inferences to be drawn from the testimony. The drawing of inferences is a part of the fact-finding process. I do not think it was unreasonable to have drawn an inference that the relationship continued as meretricious, at least until the attempted Mexican marriage. The circuit judge found discrepancies in the testimony of the witness at different times, and stated that he did not believe the later testimony of the witness about the parties' living in Texas.

In determining the admissibility of this testimony, the circuit judge was the trier of the facts. If there is substantial evidence to support his finding when he is by law trier of the facts, we affirm. *Mullins* v. *State,* 240 Ark. 608, 401 S. W. 2d 9; *Vaughan* v. *State,* 169 Ark. 1212, 277 S. W. 866; *Matthews* v. *Clay County,* 125 Ark. 136, 188 S. W. 564; *Cady* v. *Pack,* 135 Ark. 445, 205 S. W. 819; *French* v. *State,* 187 Ark. 782, 62 S. W. 2d 976; *Hooper* v. *State,* 186 Ark. 1197, 57 S. W. 2d 810; *Decker* v. *State,* 85 Ark. 64, 107 S. W. 182; *Beason* v. *State,* 166 Ark. 142, 265 S. W. 956.

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

HOUSING AUTHORITY OF THE CITY OF LITTLE ROCK, ARKANSAS *v.* GUSSIE ALMAN

5-5556 466 S. W. 2d 266

Opinion delivered May 3, 1971

Smith, Williams, Friday & Bowen; By: *John T. Williams* and *William L. Terry,* for appellant.

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

JOHN A. FOGLEMAN, Justice. This condemnation proceeding involves the taking of certain lots in Little Rock. Appellee Gussie Alman questioned the right of appellant to exercise the power of eminent domain and caused the transfer of the case to chancery court. That contention

has now become unimportant. The chancellor heard four qualified expert witnesses called by appellee and two called by appellant on the value of the lands taken. The court found that the testimony of Lewis Block, one of appellee's witnesses, was rather clear and specific on all points and that this appraisal fixed the value of the property at $114,335.08, and awarded that amount as compensation.

Appellant contends that the decision of the chancellor is against the preponderance of the evidence and is not supported by substantial evidence, that the value fixed by the chancellor was excessive and that Block erroneously added the value of certain improvements to the land value in arriving at his valuation of the property taken. We agree on the latter two points, but we are unable to say that the chancellor's finding as to the land value fixed by Block is clearly against the preponderance of the evidence.

There is no substantial dispute as to the physical condition of the property, its size, location and the uses to which it was being put or might be put. The area of the property was 31,900 square feet.

Mr. Block has been engaged in the real estate business in Little Rock for about 46 years. In spite of a long familiarity with the property, he testified that he went all over it when appellee asked for an appraisal. He testified that the highest and best use of the property was for commercial and industrial purposes for a warehouse, wholesale business or manufacturing. For that use he fixed a land value of $3 per square foot or $95,700. He added to this land value $18,635.08 for improvements, consisting of residential rental property. As comparable sales, he considered sales made by his company, and did not check others because these seemed sufficient to him to establish market value and because of his knowledge and experience in real estate values in Little Rock. It was his opinion that one could not arrive at a fair market value of commercial and industrial property without considering the improvements on it.

Appellant questioned the comparability of the sales considered by Block, because they were located either on Broadway or east of it. Block testified, however, that the subject property was only one block off Broadway, which he said was one of the busiest streets in Little Rock, and one block off West Ninth, on which he said there was a tremendous amount of traffic. Jack Farris, another of appellee's expert witnesses, testified that the highest and best use of the property was for purposes other than residential, mentioning distribution warehouses, retail business and garages as specific potential uses. He also found sales on Broadway to be fairly comparable, although he found no directly comparable sale in which the Housing Authority had not been involved.

Ralph Sprigg, retired real estate manager for the Kroger Company, now engaged as a real estate broker and property manager, valued the property at $103,675. Morris High, another real estate broker, who also bought and sold property for himself, valued the land at $110,000. He considered that the highest and best use of the property would be as an annex to Mount Holly Cemetery, across the street, and the next best for warehousing. These witnesses did not consider sales that appellant's experts considered comparable. All of appellee's expert witnesses, other than Block, stated that the present improvements on the property added nothing to its value for its highest and best use.

No useful purpose would be served by outlining the testimony of appellant's expert witnesses, both of whom are under contract with the Housing Authority to perform specific appraisal duties. One of them fixed the value of the property at $51,000 and the other at $54,000. They considered the highest and best use to be for commercial purposes. They found no market value in the improvements in addition to the land value except for whatever salvage value there might be. One of them did not consider sales on Broadway comparable because of the heavier traffic concentration there.

We cannot say that the sales considered by appellant's witnesses were more nearly comparable to the condemned

property than those considered by appellee's experts as a matter of law. Neither can we say that the chancellor's finding Block's testimony to carry the greatest weight is clearly against the preponderance of the evidence. We do find that Block included an impermissible item in his total value. The practice of intermingling of present values of residential improvements with land values based on a present highest and best use for commercial uses to arrive at present market value was condemned in *Arkansas State Highway Commission* v. *Toffelmire,* 247 Ark. 74, 444 S. W. 2d 241. In *Arkansas State Highway Commission* v. *Griffin,* 241 Ark. 1033, 411 S. W. 2d 495, we said that a jury verdict based partly on commercial value of land taken and partially on testimony relating to the land's value for residential purposes would not be proper. Yet this is exactly the basis of the chancellor's award. We do not mean to say that testimony as to the value of residential improvements on land should not be admitted when there is a fact question as to the highest and best use of the property or when the improvements are such that they enhance the market value of the property. See *Arkansas State Highway Commission* v. *Brewer,* 240 Ark. 390, 400 S. W. 2d 276; *Arkansas State Highway Commission* v. *Wallace,* 249 Ark. 303, 459 S. W. 2d 812; *Arkansas State Highway Commission* v. *Richards,* 229 Ark. 783, 318 S. W. 2d 605. But no witness, not even Block, testified that the buildings on this property would affect its market value for the agreed highest and best use.

Since the trial here is de novo and the error in the chancery court can be accurately evaluated in dollars and cents, we can correct that error by reducing the judgment awarded in the court's decree. We modify the decree by reducing the award to $95,700, and affirm the decree as thus modified.

ROBERT L. MARSHALL *v.* STATE OF ARKANSAS

5571 466 S. W. 2d 920

Opinion delivered May 3, 1971
[Rehearing denied June 7, 1971.]

W. M. Herndon, for appellant.

Ray Thornton, Attorney General; *Ken Stoll,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. This appeal by Robert L. Marshall from his conviction of the attempted burglary of the McSpadden Drug Store in North Little Rock is grounded upon his argument that the evidence was not sufficient to present a jury question. We think that it was.

The drug store was equipped with a burglar alarm system connected by direct line on the telephone system with speakers in the respective bedrooms of the McSpadden brothers, who owned the drug store. David McSpadden testified that he was awakened by sounds from the speaker at about 1:30 a.m., January 8. His brother called the police. The two then proceeded to the store, arriving about 10 minutes after the sounds were first heard. When

they arrived they found three police cars and three or four policemen at the scene. The police had taken into custody two persons, whom the McSpaddens could not identify, and were bringing them, handcuffed, around the building where the drug store was located toward one of the police cars, in which they were then placed and taken to the police station. Inspection revealed that the roof of the drug store had been cut from the outside and some of the decking broken.

The weather was quite cold, and some snow had fallen earlier. As David McSpadden recalled there was quite a bit of snow on the ground around the buildings but not on the streets, and the sidewalks were not covered with snow. There was a marquee on the front of the building over the sidewalk. A barber shop and a washateria were near the drug store building.

Traffic Patrolman Larry Dubose was patrolling about two blocks from the drug store when the incident was reported to him at about 1:30 a.m. He testified that he arrived at the drug store a minute or so later and proceeded to check the doors of the building and walked around to the back of it. By this time, three other police officers had arrived. He said he noticed more than one set of footprints in the snow leading up on the back of the store via a roof or a shed. According to him there was about one-half inch of snow in this area, and the footprints were clearly visible and freshly made. Dubose followed the footsteps up on top of the store building. He testified that he found three crowbars, a hammer, a small chisel, a screwdriver, an open knife, two saws and some rope. He observed footprints on the roof leading over to the side of the building. He turned the tools he found over to Officer McFarlin when he came down. At that time McFarlin and Officer Lange had appellant Marshall and a man named Tommy Lawson in their custody.

Officer Lange was only two or three minutes' travel away when he received the call from the police department. He testified that, upon arrival, he saw Marshall and Lawson about 50 feet from the building walking

westwardly away from it. Patrolman McFarlin received the call at about 1:38 a.m., and arrived shortly thereafter. He testified that he started checking the drug store doors, but that Dubose came to the front of the building and reported that this had already been done. According to McFarland, Dubose then went to the rear of the building and hollered that he had found footprints. McFarlin testified that he then proceeded around the building and observed Marshall and Lawson walking away in a westerly direction. They stopped when this officer commanded them to do so. He and Lange then took them into custody. They searched both suspects. Both officers testified that they found no knife or any weapon on either. McFarlin testified that they backtracked the footprints from the place these suspects were standing when arrested to the building and found that they terminated a few feet from the edge of the building. Lange testified that he saw Dubose with a knife. McFarlin said that Dubose handed him the knife and that he took it to police headquarters, where Marshall claimed it when he placed it between two piles of property of the two suspects. Lange corroborated the testimony that Marshall claimed the knife. Both these officers testified that an official report that Officer McFarlin found the knife on top of the building was erroneous.

Marshall claimed that he had left his girl friend's house about 2½ blocks from the drug store only a few minutes before he was arrested, and stopped at the washateria to use a telephone. He testified that he was en route to the ice house to telephone for a cab when the officers called for him and Lawson to stop. His version was that no officers came to them, but that upon command they proceeded to the officers at the front corner of the drug store. He said that Officer McFarlin then searched him and took the knife from his person. He admitted previous convictions of larceny and possession of burglar tools.

This testimony, considered in the light most favorable to the state, was certainly sufficient circumstantial evidence to present a question of appellant's guilt for jury determination. Appellant points out certain incon-

sistencies in the testimony (such as Lange's statement that the footprints extended about 35 feet from the wall of the building and his statement that appellant and Lawson were apprehended about 50 feet from the building) and conflict of the officers' testimony with the police department report with respect to the knife and alleged conflicts in their testimony about when, where and by whom it was found. Resolution of conflicts in the testimony was a jury function, which it has performed, so that we are bound. *Boyette* v. *State,* 250 Ark. 536, 465 S. W. 2d 901; *Murchison* v. *State,* 249 Ark. 861, 462 S. W. 2d 853.

Appellant argues that the circuit court erred in permitting the state to introduce circumstantial evidence of footprints in the snow without their being identified as those of appellant. We take the circumstantial evidence that appellant made one set of the footprints to be rather strong.

We find no error. The judgment is affirmed.

LLOYD L. HAYS ET UX *v.* OTTIS WATSON ET UX

5-5557 466 S. W. 2d 272

Opinion delivered May 3, 1971

Walter R. Niblock and *Truman Smith,* for appellants.

Charles W. Atkinson, for appellees.

J. FRED JONES, Justice. This appeal originates from a suit in the Washington County Chancery Court brought by the appellees Ottis Watson and his wife against the appellants, Lloyd L. Hays and his wife to enforce restrictive covenants contained in a bill of assurance, and for an injunction against the use of a septic tank sewage disposal system installed by Hays on lots purchased from Watson. The chancellor granted the relief prayed and we agree with the chancellor.

The facts are briefly these: In 1960 Ottis Watson and his wife, Helen, subdivided some land they owned in Washington County and platted it into 105 residential building lots dedicated to the public as Bird Haven Terrace Addition to the City of Fayetteville. On June 23, 1960, they filed for record a bill of assurance for Bird Haven Terrace Addition, the pertinent provisions of which, as applied to the case at bar, are as follows:

> "2. No lot shall be used except for residential purposes, no building shall be erected, altered, placed, or permitted to remain on any lot other than one detached single family dwelling not to exceed two and one-half stories in height and a private garage for not more than two cars.
>
> 7. No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance nuisance to the neighborhood.
>
> 11. No lot shall be used or maintained as a dumping ground for rubbish, trash, garbage or other waste shall not be kept except in sanitary containers. All incinerators or other equipment for the storage or disposal of such material shall be kept in a clean and sanitary condition.

12. No individual sewage-disposal system shall be permitted on any lot unless such system is designed, located and constructed in accordance with the requirements, standards and recommendations of State Approval of such system as installed shall be obtained from such authority.

14. These covenants are to run with the land and shall be binding on all parties and all persons claiming under them for a period of twenty-five years from the date these covenants are recorded for successive periods of 10 years unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part.

15. Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenants either to restrain, violation or to recover damages."

The above provisions are obviously deficient in punctuation and sentence structure but their meaning, as relates to this case, is clear.

Block "F" of Bird Haven Terrace Addition consists of 14 lots consecutively numbered from south to north along the east boundary line of the Addition. Lloyd L. Hays and his wife, Joan, own land immediately east of Bird Haven Terrace Addition and their west boundary line coincides with the east boundary line of Block "F" in Bird Haven Terrace Addition. Mr. and Mrs. Hays maintain a trailer park on their property and as of the date of trial, they had 52 trailers in the park. About June 3, 1969, Mr. and Mrs. Hays purchased from Mr. and Mrs. Watson, through a Mrs. Elizabeth Beaty, Lots 3 and 4 in Block "F" of Bird Haven Terrace Addition. Prior to the purchase of the lots Hays had plans and specifications prepared for a septic tank sewage disposal system designed for the lots and to accommodate or service 45 of his trailer spaces. Immediately following the purchase of the lots, Mr. and Mrs. Hays started construction of their sewage disposal plant, thereon, resulting in the decree as

already stated and as hereafter more specifically set out. Mr. and Mrs. Hays have designated the following points on which they rely for reversal:

> "That the appellees did not sustain their burden of proof in presenting clear, cogent, and decisive evidence as to the alleged violation of the covenants in the bill of assurance.
>
> It was error for the court to overrule the appellants' demurrer to the evidence.
>
> That the appellees did not present clear, cogent and decisive evidence of any irrepairable damage.
>
> That the court did not give sufficient weight to the appellants' compliance with all State and local building requirements for a sewage disposal system."

None of the testimony is abstracted in this case, nor is the bill of assurance abstracted. It is rather difficult for any one of the seven members of this court to whom has been assigned the transcript along with a set of briefs, to circulate the transcript among the other six members of the court for a determination of whether the appellee has sustained his burden of proof by the evidence, or whether the court erred in overruling a demurrer to the evidence, or whether evidence is clear as to damage, or for any other purpose necessary to a clear understanding of the case. It is even more difficult and time consuming for the six members of the court to whom the case has not been assigned, to review the evidence from a single, and in many instances, a voluminous record. See *Hurley* v. *Owens,* 238 Ark. 874, 385 S. W. 2d 636.

In the case at bar, however, the excellent memorandum opinion with which the chancellor has favored us enables us to avoid the unpleasant duty of applying our Rule 9 (d). As a matter of fact, we have thoroughly examined the chancellor's opinion and his application of the law to the evidence recited, so nearly coincides with our own opinion, that we adopt it as the opinion of this court.

Before quoting the chancellor's opinion, however, we emphasize that this was originally an action for the enforcement of restrictive covenants in a bill of assurance and was not, as might be interpreted from the appellants' argument, a suit to enjoin or restrain the creation of a prospective nuisance. After stating some of the facts as above set out, the chancellor continues:

> "Hays commenced preparations for construction of his sewage disposal system in April, 1969, before he acquired title to lots 3 and 4 (Stp. Ex. No. 8), and by June 9, 1969, or shortly thereafter construction had commenced. At some time, not certainly fixed by Watson, he observed excavation on lots 3 and 4, and upon inquiry of Hays, learned its purpose, and upon voicing his objections was told by Hays that the latter had authority from the city, and Hays may have told him he had authority from the state, as well. It is not shown that plaintiff had any knowledge of the projected construction before he saw the excavation. This suit for injunction was filed on August 26, 1969, at which time, according to Hays, the total job was about 2/3 completed, and was completed about two months later.
>
> At the time construction commenced in June, 1969, plaintiff still owned 94 of the original 108 lots. Prior thereto, all of the unsold lots were listed for sale at $850.00 per lot, with The Stanton Company, a licensed real estate brokerage business in Fayetteville. No lots have been sold since construction started; The Stanton Company, by letter to Watson, October 16, 1969, (Plf. Ex. 1) advised that persons theretofore prospectively interested in buying all of Bird Haven Terrace were no longer interested, in view of completion of the sewer system on lots 3 and 4. Plaintiff, on his own account, has made no lot sales when the fact of the sewer system was discovered by prospects. It is shown that one residence was under construction on a lot diagonally across the street from lots 3 and 4, after the sewer system construction was commenced, but the only evidence in the record

(Watson's) is that this lot was sold before Hays started his construction.

There is no evidence that the sewer system has thus far caused any noxious or offensive odors, no manifestation of surface percolation of sewage effluent, nor that the surface of lots 3 and 4 presents other than a generally grassy and green appearance. Evidence by the city plumbing inspector indicates that the field was properly laid out and should function properly.

Watson contends in essence, that Hays' actions are a clear violation of the covenants in the Bill of Assurances; that the existence of the sewer system has inhibited his sale of lots, and that he is entitled to protection and enforcement of the Bill of Assurances.

Hays contends that no nuisance condition has in fact been created or made manifest, no damage has been suffered by Watson; and that it would be inequitable to enforce the covenants against him under these harmless conditions, and after he has expended substantial sums in construction.

The general rule governing the interpretation, application and enforcement of restrictive convenants of the kind here considered is that the intention of the parties as shown by the covenant governs. 20 Am. Jur. 2d 755, 'Covenants, Conditions, etc.,' Sec. 186. The rule of strict construction against itself limited by the basic doctrine of taking the plain meaning of language employed.

The latest reported Arkansas case squarely in point is *Casebeer* v. *Beacon Realty,* 248 Ark. 22, where, after stating the strict construction rule, it is said, at page 26:

'This doctrine was recognized by this court in *Faust* v. *Little Rock School Dist.,* 224 Ark. 761, 276 S. W.

2d 59, wherein we said that where there is uncertainty in the language by which a grantor in a deed attempts to restrict the use of realty, freedom from restraint would be decreed. We have also held that when the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed and that it is improper to inquire into the surrounding circumstances or the objects and purposes of the restriction for aid in its construction.'

This latter language is consonant with general authority, as stated in Am. Jur. 2d (supra) Sec. 187:

'. . . but such strict rule of construction shall not be applied in such a way as to defeat the plain and obvious purpose of the restriction.'

The plain purpose of the restrictions in this case, particularly set out in item 2 of the Bill of Assurances, above quoted, is to limit the use of each lot in Bird Haven Terrace to single family, residential purposes. Item 12 of the Bill of Assurances prohibits an 'individual sewage disposal system' on any lot unless it meets with 'State approval.'

These two items must be read together, and can mean nothing other than that a single family residence on each lot (no more permitted) can have only a single disposal system. * * * The covenants mean, quite clearly, one dwelling house, one septic tank sewage disposal system.

The conclusion is inescapable that the construction of numerous septic tank sewage disposal systems on and under lots 3 and 4, even without dwelling houses, is a plain violation of the plain, unambiguous restrictions of the covenants. It is equally plain that the purpose of the restriction is to prevent such multiple systems, as a matter of general assurance and protection to all lot owners in the addition, whether a demonstrable nuisance condition exists or not.

On the question of damages to Watson, as a requisite to injunctive relief, it is true that the loss of lot sales by Watson is only speculative. But the general rule does not require a showing of damages. Again referring to Am. Jur. 2d (supra) Sec. 330:

'As a general rule, it is not necessary to show damages in order to obtain equitable relief against violations of a restrictive covenant.'

The fact remains that no lots have been sold, and the only evidence of record as to why is the existence of the large sewage disposal field. Defendant Hays' cited case of *Ryall* v. *Waterworks,* 247 Ark. 431, is not in point. That case dealt with attempted injunction against a prospective nuisance, not the enjoining of violation of a restrictive covenant.

On the related point of Watson's right to have mandatory cessation and/or removal of Hays' sewage disposal network, as against Hays' money investment, the text writer in Am. Jur. 2d, Sec. 313 says:

'Mere pecuniary loss to the defendant, as a result of the enforcement of a restriction will not prevent a court of equity from enforcing it.' Cited as footnote support for this statement is *Storthz* v. *Midland Hills Land Co.,* 192 Ark. 273. In that case, this language appears:

'It has been held . . . that the fact that the restricted property is of less value for residential purposes than it would be for some other purpose is no valid reason to ignore the restriction.'

Thus, here, while lots 3 and 4 may be of little or no value to Hays for residential purposes, and the fact that he has chosen to render them less valuable by expending his money for purposes violative of the restrictions, is no valid reason for denying Watson the right of enforcement, even though it be costly to Hays. To the same general effect, see the con-

cluding paragraph in the opinion of *Robertson* v. *Berry,* 248 Ark. 267.

The court concludes that plaintiffs are entitled to the relief sought, insofar as continuation of use of the entire sewage disposal system on lots 3 and 4 is concerned. Defendants will be enjoined from such use henceforth.

Because the restrictive covenant is addressed to the limitation of only one system per lot, no harm is seen to plaintiffs, nor any violation of covenant effected, if Hays desires to use his existing system as a sewage outlet for a single residence only, on each lot; in this case, one of his mobile home units. Or, if he should build a dwelling on either lot, that dwelling is entitled to be served, as a single unit, by such system as is now in place.

No further protection would be afforded Watson by requiring Hays to dig up and remove all of the existing system; Hays may do so if he wishes as, for example, to cut his losses, but he will not be required to do so.

It is therefore, ordered, adjudged and decreed that the defendants, Lloyd L. Hays and Joan C Hays, be, and they are hereby enjoined from using and operating their private sewage disposal system installed underground on Lots 3 and 4, Block F, Bird Haven Terrace, a subdivision in the City of Fayetteville, Arkansas, and said defendants be, and they are hereby ordered, to disconnect the discharge lines running from their mobile home park upon their adjoining property to said sewage disposal system within sixty days after this date, and in disconnecting said lines running from their mobile home park to the septic tank or tanks located on said Lots 3 and 4, Block F, Bird Haven Terrace it shall be done in such a manner that they cannot be reconnected.

It is further ordered, adjudged and decreed that the said defendants, Lloyd L. Hays and Joan C. Hays, husband and wife, be, and they are hereby permanently enjoined from using their sewage disposal system located on Lots 3 and 4, Block F, Bird Haven Terrace to serve any portion of their said mobile home park and said sewage system may be used only to serve not more than two single family residence units, only one of which may be located on each of said lots.

The costs of this action are assessed against the defendants."

The decree is affirmed.

IKE VAN METER *v.* EMMA MURPHY ADDINGTON ET AL

5-5560 466 S. W. 2d 249

Opinion delivered May 3, 1971

W. G. Dinning Jr., for appellant.

David Solomon, for appellees.

CONLEY BYRD, Justice. Appellant Ike Van Meter acquired a State tax deed from the State Land Commissioner under the following description:

"Parts of Section Exc. 1A W of RR SW ¼ NE ¼ Sec. 22 Twp. 2S, Range 3E, Acres 24, 100ths .00 year for which forfeited 1966."

In a quiet title suit by appellees Emma Murphy Addington and Deborah White, the trial court held the description void. We affirm for the reasons stated in *Brinkley* v. *Halliburton,* 129 Ark. 334, 196 S. W. 118 (1917), *Halliburton* v. *Brinkley,* 135 Ark. 592, 204 S. W. 213 (1918), and *Irby* v. *Drusch,* 220 Ark. 250, 247 S. W. 2d 204 (1952).

Affirmed.

FRANK NALL *v.* STATE OF ARKANSAS

5590 466 S. W. 2d 252

Opinion delivered May 3, 1971

Louis W Rosteck, for appellant.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Frank Nall appeals from a circuit court order denying his petition for relief under our Criminal Procedure Rule 1. Nall was tried by the court on one of several charges for receiving stolen property and was found guilty. The other charges were not pursued. In his petition and his testimony, Nall alleged that he requested, in fact demanded, a jury trial, which demand was ignored in violation of his constitutional rights. No record was made at the trial. In addition to his testimony, the court heard the contrary testimony of his then counsel

and the special judge, and found that appellant had intelligently waived his right to a jury trial. We find that the record fully supports the action of the circuit court.

Affirmed.

PINE BLUFF NATIONAL BANK *v.* FIRST FEDERAL SAVINGS & LOAN ASS'N OF PINE BLUFF AND BILLY E. PARKER

5-5566 466 S. W. 2d 249

Opinion delivered May 3, 1971

John Harris Jones, for appellant.

Coleman, Gantt, Ramsay & Cox, for appellees.

FRANK HOLT, Justice. This is an appeal from an order setting aside a judgment during term time.

Pine Bluff National Bank, appellant-garnisher, sued appellee Billy Parker on a debt and secured a writ of

garnishment against appellee-garnishee First Federal Savings & Loan Association of Pine Bluff. The garnishee's answer disclosed that Billy Parker had $11,-231.53 on deposit. Subsequently, a consent judgment in favor of the appellant and against Parker was entered December 1, 1969. This consent judgment recited that Parker owed appellant $24,600 for which he had executed three notes payable in installments. The garnishee was furnished a copy of the judgment which ordered it to hold the $11,231.53 (except for interest and dividends) until the further order of the court. The judgment provided that upon 61 days default by Parker in payment of any installment, the court would then enter an order requiring the garnishee to pay over the $11,231.53 to appellant. Billy Parker approved and signed the judgment.

When Parker defaulted, the court rendered a judgment on April 17, 1970, ordering the garnishee to pay the impounded funds to appellant. On July 2, 1970, the garnishee filed a motion to set aside this judgment, alleging that its original answer mistakenly stated that Parker had $11,231.53 on deposit when in fact, the deposit was a joint account in the name of Frank or Billy Parker; that the mistake was discovered after the April judgment against the garnishee; that the judgment should be set aside and the garnishee be permitted to file an amended answer stating that the joint account existed and making both Parkers parties to the action.

In resisting the motion, the appellant asserted that in negotiating the December consent judgment with Billy Parker it had relied upon the truth of garnishee's answer that Parker had a $11,231.53 deposit with it; that appellant had extended credit to Billy Parker based upon his signed financial statement that he had a $10,000 savings account with the garnishee in July 1967; that the garnishee was served with a copy of the December 1969 consent judgment; that the garnishee acknowledged by letter the receipt of the December order and in the letter stated that it would comply with the terms of the order; that Frank Parker had knowledge that the joint account was impounded by the court's order and he had not intervened in the action.

On September 18, 1970, during term time, the trial court, finding that sufficient cause was shown, set aside the judgment entered on April 17, 1970. From that order, which also granted appellee-garnishee leave to file an amended answer, appellant-garnisher appeals. Appellant contends that the trial court erred in failing to show good cause or reasonable diligence to justify setting aside the judgment. We find no merit in this contention. Our long-established rule recognizes the inherent right of a court of record to set aside its judgment during term time, without assigning a cause. *Hill* v. *Wilson,* 216 Ark. 179, 224 S. W. 2d 797 (1949); *Stinson* v. *Stinson,* 203 Ark. 888, 159 S. W. 2d 446 (1942); *Browning* v. *Berg,* 196 Ark. 595, 118 S. W. 2d 1017 (1938); *Union Sawmill Co.* v. *Langley,* 188 Ark. 316, 66 S. W. 2d 300 (1933); *Ashley* v. *Hyde,* 6 Ark. 92 (1845).

Nor can we agree with appellant that *Robbins* v. *Guy,* 244 Ark. 590, 426 S. W. 2d 393 (1968) supports its contention. In *Robbins* we were concerned not only with the policy of allowing the trial judge to set aside a judgment rendered during term time but also with the public policy of enforcing the stability of a judicial sale. In that situation we said the court did not possess unlimited discretion. No similar situation exists in the case at bar. In *Hill* v. *Wilson, supra,* we recognized that: "We have repeatedly held that, during the term of court at which a judgment is rendered, the court has the inherent power to set aside the judgment, and it may do so without stating any cause." This well-established recognition of the inherent power of our courts is applicable in the case at bar. This is in accord with the general rule that during term time a judgment is "within the breast of the court" and the judgment can be set aside during that term. *Hawkeye Tire & Rubber Co.* v. *McFarlin,* 146 Ark. 491, 225 S. W. 632 (1920); 8 ALR 3d § 4, p. 1291.

Appellant-garnisher also submits that the consent judgment created contractual duties between it and the appellee-garnishee which could not be dissolved by the motion to set aside the judgment; thus, the setting aside of the judgment against the appellee-garnishee was

error. Appellant argues that the December consent judgment, which Billy Parker approved and signed, operated as an assignment or pledge of the Parker savings account, which judgment garnishee accepted. Appellant asserts that Billy Parker, by the terms of the signature card, had the right to "first act" and by doing so had released the garnishee loan company of a depositor's claim. Thereupon, the garnishee owed duties to the appellant independent of the writ of garnishment. We do not reach the merits of this contention as to contractual rights because in our view the order setting aside the judgment was not a final or an appealable order within the meaning of Ark. Stat. Ann. § 27-2101 (Supp. 1969). The order merely permitted appellee-garnishee leave to amend its answer. It did not release the funds. The garnishee was ordered, as in the December consent judgment against Billy Parker, to hold the funds pending further proceedings. The trial court's order setting aside the judgment was based upon the pleadings and one exhibit (depositor's card). It did not purport to determine the rights of the parties in respect to the impounded funds. See *Hawkeye Tire & Rubber Co.* v. *McFarlin, supra.* As we said in *McPherson* v. *Consolidated Cas. Co.,* 105 Ark. 324, 151 S. W. 283 (1912): "Cases cannot be tried by piecemeal, and one cannot delay the final adjudication of a cause by appealing from the separate orders of the court as the cause progresses. When a final order or judgment has been entered in the court below determining the relative rights and liabilities of the respective parties, an appeal may then be taken, but not before." See, also, 8 ALR 3d § 3, p. 1287 and *Hicks* v. *Light,* 229 Ark. 306, 314 S. W. 2d 479 (1958). Appellant's assertion that contractual rights resulted from the December and April judgments pertains to the rights and liabilities of the parties and should be adjudicated at a trial on the merits.

Being prematurely taken, the appeal is dismissed.

HARRIS, C. J., not participating.

FARMER L. BLACK *v.* STATE OF ARKANSAS

5584 466 S. W. 2d 463

Opinion delivered May 10, 1971

Skillman & Furrow; By: *Vincent E. Skillman, Jr.,* for appellant.

Ray Thornton, Attorney General; *John D. Bridgforth,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Farmer L. Black, appellant herein, was charged by the Prosecuting Attorney of the Second Judicial District with the separate offenses of Kidnaping and Sodomy, it being alleged that these offenses were committed on March 3, 1970, in Crittenden County. On trial, Black was acquitted of the sodomy charge but was convicted of kidnaping under Ark. Stat. Ann. § 41-2302 (Repl. 1964), and his punishment fixed by the jury at imprisonment in the state penitentiary for a period of ten years. From the judgment so entered, appellant brings this appeal. For reversal, three points are asserted which we proceed to discuss, though not in the order listed by appellant.

It is first alleged that the court erred in permitting the prosecuting attorney to question Black relative to a charge of rape in Tennessee. The record reveals the following on cross-examination:

"Q. Were you guilty of homicide in 1958, in Memphis, Tennessee?

A. No, sir.

Q. Were you convicted of that charge?

A. No, sir.

Q. You were not? All right. Now then, you say that you did not forcefully have sexual relations with Stephanie? [given name of the alleged victim in the present case] Is that correct? You did not put that gun to her stomach and tell her to strip her clothes off, you were going to make love to her?

A. I did not.

Q. You did not do that? You are guilty of having raped a twenty year old married woman on March 1, 1970, are you not, Mr. Black, in Memphis, Tennessee?

A. No sir, I am not guilty of that charge."

It is appellant's contention that the last question was reversible error since that charge is only pending against Black, not yet having been tried. We do not agree, and have held contrary to this contention in several cases. It will be noted that the prosecutor did not ask Black if he had been *indicted* or *charged* with raping a woman in Memphis, but rather asked him if he were not guilty of that offense. We have held that one cannot be asked if he has been indicted, or charged, or accused, of other crimes, but for the purpose of testing credibility, one may be asked if he has been convicted of a particular offense, or if he was guilty of some particular offense. The state is bound by the answer that the witness gives. See *Johnson* v. *State,* 236 Ark. 917, 370 S. W. 2d 610, and cases cited therein. See also the recent case of *Hughes et al* v. *State,* 249 Ark. 805, 461 S. W. 2d 940.

It is also asserted that there was no corroboration of the testimony of the prosecuting witness relative to being kidnaped and the jury verdict was nothing more than speculation and conjecture. Again we disagree, actually for two reasons. In the first place, there *was* corroboration of the kidnaping. John Connors Donovan, who was traveling with the young woman allegedly assaulted, testified that the two, hitchhiking, were picked up by appellant on the highway; after driving for a few miles, appellant stopped the car, said that he had to check his tires, and then pulled out a rifle and pointed it at the witness. Donovan stated that Black then pointed the gun at the young woman, told her that he was in the mood for love, and that she was to take off her clothes. When this happened, she opened the door and ran down the highway; Black chased her, and Donovan started running the other way. He heard a woman screaming, started back toward the car, but heard the car door slam and the car "took off". Donovan then reported the matter and officers were notified. Subsequently, the officers located the car parked on a gravel road, the young woman jumping out of the automobile and running to the officers, and Black getting out after being ordered several times to do so, and after the officers had fired a warning shot. Black was completely

nude except that he was wearing one sock. The woman had been severely beaten in the face.[1]. There was certainly corroboration, but actually, the woman not being an accomplice, no corroboration was necessary. See *Bradshaw* v. *State,* 211 Ark. 189, 199 S. W. 2d 747. Of course, if the prosecuting witness accompanied Black voluntarily, there simply was no kidnaping, but the jury heard the evidence of both the state and appellant, Black stating that she went with him of her own accord, and this conflict was a matter for jury determination.

Finally, it is argued that under the statute defining kidnaping, the acquittal of appellant on the charge of sodomy rendered it impossible as a matter of law for appellant to be guilty of the crime of kidnaping. We find no merit in this argument. The statute[2] does not require that the defendant *consummate* the felonious act before being guilty of kidnaping; it only requires that the forcible stealing or taking of the victim be done for the *purpose* of committing a felony. And even when all the proof offered on behalf of the prosecution shows that the act was consummated, and the proof on the part of a defendant shows that the offense did not take place, it has been held that one can still properly be convicted of an attempt to commit the offense. In *Lindsey* v. *State,* 213 Ark. 136, 209 S. W. 2d 462, the evidence on the part of the state reflected that the defendant was guilty of the crime of rape; on the other hand, the defendant denied that he acted improperly in any manner from a sexual standpoint. There was absolutely no evidence

[1]The prosecuting witness said that Black struck her several times with the rifle.

[2]Ark. Stat. Ann. § 41-2302: "Every person, either as principal or accessory, who shall unlawfully or forcibly steal, take or arrest any man, woman or child in this State and carry or transport him or her, against his or her will, from one place to another place in this State, or from his or her usual and customary place or abode, or from his or her usual and customary place of work or occupation, in this State, to another place in this State or into another State or territory for the purpose of extortion, ransom, robbing, maiming, torturing or of committing any felony or for the purpose of preventing or thwarting arrest or detection after having committed a felony or after having aided, abetted, or assisted in committing a felony, in this State, either as principal or accessory, shall be deemed guilty of kidnaping."

that he simply attempted a rape but failed to consummate the act; nonetheless, we affirmed his conviction for assault with intent to rape In the California case of *People* v. *Fisher,* 157 P. 7, Fisher was charged with kidnaping, it being asserted by information that he unlawfully, feloniously, and forcibly enticed and carried away a certain named person, with the intention to restrain such person, and thereby to commit extortion and robbery. It was contended by the appellant that such a purpose was not accomplished and that he could not be found guilty of the offense, but the court disagreed, stating:

"Of course, it is not necessary for the purpose charged in the information to be accomplished in order to make it effectual as an element of the crime. All that is required is that some overt act be done toward the execution of the purpose and the fulfillment of the intent. The forcible removal of Mr. Henderson and the other preparations indicated by what was found in the automobile satisfy the requirement of the law in that respect. It may be illustrated by the proof of intent in burglary. Therein if the defendant is charged with the entry of a building with intent to commit larceny there must be the overt act of entering the building before a conviction can be had, but from this entry under suspicious circumstances the jury may infer the intent to commit larceny, although no larceny was actually accomplished."

See also *Crum* v. *State,* 101 S. W. 2d 270 (Texas), where it was held in a prosecution under the statute dealing with kidnaping for extortion, that it was immaterial whether the criminal enterprise was successful or unsuccessful, since the intent to commit was sufficient to constitute the offense.

So, it was only necessary, in order to convict appellant of kidnaping, that the state show that the young woman was forcibly taken by appellant for the purpose of committing a felony, and though the jury found that the felony had not been committed, it does not follow that Black could not have been guilty of a felonious

purpose. It might be added that it was not necessary that the jury even find that there was an intent to commit sodomy, for the kidnaping information only charges that Black's purpose was to commit a felony. There is evidence that Black endeavored to commit the crime of rape, but was unsuccessful because of his physical inability to perform the act. In fact, Black himself testified that he was unable at the time to perform the act of intercourse, though he stated that the woman was willing.

In nowise was the charge of kidnaping dependent upon the charge of sodomy. The two are entirely separate offenses, and it was not necessary that the sodomy charge be filed in connection with the kidnaping. In the recent case of *Umbaugh* v. *State,* 250 Ark. 50, 463 S. W. 2d 634, the appellant was prosecuted under this same kidnaping statute and the proof on the part of the state reflected that Umbaugh kidnaped a young female for the purpose of raping her. As in the instant case, he was only charged with kidnaping "for the purpose of committing a felony", and though the proof on the part of the state reflected a consummated rape, no charge of rape was ever filed. This court affirmed Umbaugh's conviction for kidnaping.

Likewise, in the California case of *People* v. *O'Ferrell,* 325 P. 2d 1002, the California court (District Court of Appeal, Fourth District) stated that the commission of a kidnaping for the purpose of robbery is separate and distinct from the crime of robbery, though the latter crime is the object of the kidnaping.

From what has been said, it is apparent that we find no reversible error.

Affirmed.

FOGLEMAN, J., not participating.

BILLY N. HARLAN ET AL *v.* C. W. CURBO
GUARDIAN AD LITEM FOR JAN CURBO A MINOR

5-5526 446 S. W. 2d 459

Opinion delivered May 10, 1971

John D. Eldridge and *Terral, Rawlings, Matthews & Purtle,* for appellants.

Hodges, Hodges & Hodges, for appellee.

GEORGE ROSE SMITH, Justice. The three plaintiff-appellants, Billy N. Harlan, his wife, Cherry Harlan, and their five-year-old son, Robert Harlan, brought this action for personal injuries and property damage sustained when their car ran into the back of a car being

driven by the minor appellee, Jan Curbo. The collision occurred on Highway 33 at a point several miles south of Augusta. It was the plaintiffs' theory that Curbo negligently backed out of a driveway onto the highway and had just started moving forward when his vehicle was struck from behind by the oncoming Harlan car.

The case was submitted to the jury on interrogatories. The jury apportioned the total negligence in the ratio of 40% to Billy N. Harlan and 60% to young Curbo. The verdict fixed the plaintiffs' total damages at $750 for Billy N. Harlan, $1,000 for Cherry Harlan, and zero dollars for Robert Harlan. In appealing from the judgment upon the verdicts the Harlans contend that the amount of each verdict is demonstrably inadequate. The three appellants present separate contentions, which must be discussed individually.

First: Billy N. Harlan's verdict for $750. According to the undisputed proof, this verdict is inadequate. It was stipulated that the damage to Harlan's car amounted to $784.50. In addition, Harlan suffered a deep cut on his scalp, which was closed by 13 surface stitches and a number of additional subcutaneous stitches. The doctor's original treatment took from 30 to 45 minutes, and Harlan had to return a few days later for the removal of the outer stitches. Yet the jury's verdict, fixed without regard to any issue of comparative negligence, was less than the stipulated property damage. The judgment therefore falls within the rule that the recipient of a substantial but inadequate award is entitled to a new trial if other prejudicial error is shown. *Smith* v. *Ark. Power & Light Co.,* 191 Ark. 389, 86 S. W. 2d 411 (1935).

Such other error does appear. Even though Curbo's car had just begun to move forward, the court gave AMI 902, Civil, with respect to the superior right of the forward vehicle. In the circumstances the giving of that instruction was error, because no specific applicable purpose for which Curbo supposedly had a superior right to the use of the highway existed, and consequently no such purpose was inserted in the instruction. In *Smith* v. *Alexander,* 245 Ark. 567, 433 S. W. 2d 157

(1968), we pointed out that such a specific purpose must be inserted whenever the instruction is used.

The court also erred in instructing the jury that in passing upon the question of the plaintiffs' negligence the jurors might take into consideration the fact that seat belts were available for the plaintiffs' use. The only evidence about seat belts was a statement that such belts were available, at least for Mr. and Mrs. Harlan, and that the belts were not fastened at the time of the collision. The court had already given AMI 305B, Civil, explaining the duty of all persons involved in the occurrence to use ordinary care for their own safety. The additional reference to the Harlans' failure to use seat belts not only was an unnecessary duplication but also singled out a particular fact for undue emphasis. *Rutland v. P. H. Ruebel & Co.,* 202 Ark. 987, 154 S. W. 2d 578 (1941).

The two erroneous instructions that we have mentioned may have led the jury to attribute to Billy N. Harlan a greater percentage of the total negligence than should have been the case. Harlan's judgment must therefore be reversed and the cause remanded for a new trial.

Second: Cherry Harlan's verdict for $1,000. With respect to this verdict there is no prejudicial error. The two erroneous instructions already discussed were not prejudicial to Mrs. Harlan, because the court ruled that Mrs. Harlan, as a passenger in the car, was not guilty of negligence. Therefore the court did not submit the issue of her possible negligence to the jury. Since the two erroneous instructions touched only upon the matter of negligence, they did not adversely affect the jury's consideration of Mrs. Harlan's claim. (It is true that the seat belt instruction should have referred to Billy N. Harlan only, rather than to "the plaintiffs." That inaccuracy of wording would doubtless have been corrected had a specific objection been made, but no such objection was interposed.)

Thus in Mrs. Harlan's case the jury returned what she considers to be an inadequate award, though it is substantial. No other error appears. If Mrs. Harlan had any damages that were subject to exact pecuniary measurement, their total amount was decidedly less than the jury's award of $1,000. Hence her case falls within the statutory ban against the granting of a new trial when the only asserted error is the inadequacy of a verdict upon a claim for damages not subject to precise measurement. Ark. Stat. Ann. § 27-1902 (Repl. 1962); *Munson* v. *Mason,* 245 Ark. 686, 434 S. W. 2d 815 (1968).

Third: The jury's failure to award any damages to Robert Harlan. According to the undisputed proof this child suffered only minor bruises that required neither treatment nor medication. The jury evidently found the injuries to be so trivial as not to justify an award of compensatory damages. Hence in Robert's case the jury inserted in the form of verdict a finding of zero damages.

It is now insisted that Robert was entitled at least to nominal damages. In the only case cited by counsel, however, we were dealing with a property right stemming from the plaintiffs' ownership of land. *Adams* v. *Adams,* 228 Ark. 741, 310 S. W. 2d 813 (1958). In that situation an award of nominal damages serves a real purpose, for it establishes the property right in issue and lends force to the decree as a final adjudication in favor of the prevailing party. See, for example, *Brown* v. *Bradford,* 175 Ark. 823, 1 S. W. 2d 14 (1927), where we observed that "a new trial will not be granted for a failure to assess nominal damages where no question of a permanent right is involved."

In the case at bar no permanent right is involved, the only asserted cause of action being for an injury caused by negligence. Robert Harlan suffered an injury so slight that the jury did not see fit to dignify it by an assessment of compensatory damages. We must therefore adhere to our usual rule, that the trial court's failure to award nominal damages is not reversible error. *Reese* v. *Haywood,* 235 Ark. 442, 360 S. W. 2d 488 (1962); *Wells* v. *Adams,* 232 Ark. 873, 340 S. W. 2d 572 (1960).

Reversed as to Billy N. Harlan; affirmed as to Cherry Harlan and Robert Harlan.

CHARLES SHINSKY *v.* STATE OF ARKANSAS

5581 466 S. W. 2d 909

Opinion delivered May 10, 1971
[Rehearing denied May 31, 1971.]

Tinnon, Crain & Neimic, for appellant.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant was sentenced to four years imprisonment upon a jury ver-

dict finding him guilty of illegal possession of narcotic drugs; namely, marijuana and LSD. The drugs were discovered by police officers while they were searching a trailer occupied by Shinsky. The principal argument for reversal is that the magistrate who issued the search warrant did not have sufficient proof before him to justify the issuance of the warrant.

The rules of law that were controlling when this search warrant was issued are well settled. A search warrant might then be issued on the basis of oral testimony. *Tygart* v. *State,* 248 Ark. 125, 451 S. W. 2d 225 (1970). (Act 123 of 1971 now provides that the warrant be issued only upon affidavit.) The proof may consist of hearsay information, but in that event the magistrate must be furnished with underlying facts sufficient to enable him to exercise his independent judgment about the validity of the informant's conclusions and about the reliability of the informant's source of information. *Spinelli* v. *United States,* 393 U. S. 410 (1969); *Aguilar* v. *Texas,* 378 U. S. 108 (1963).

Two witnesses testified at the hearing below on the defendant's motion to suppress the evidence. James D. Lester, a Criminal Investigator for the State Police, obtained the search warrant from Judge Engeler, the municipal judge at Mountain Home. Officer Lester identified the affidavit that he submitted to Judge Engeler, which simply stated that certain drugs would be found on Shinsky's person and in his trailer, which was sufficiently identified. The affidavit alone would not have been a sufficient basis for the issuance of the search warrant.

Judge Engeler, before issuing the warrant, placed Officer Lester under oath and heard his testimony. Lester's testimony before the judge was to this effect: On the night of May 20, 1970, Lester was informed by John Turnage that three persons—Tim Winkler, Larry Corbin, and an unidentified woman—had apparently been under the influence of narcotics at Turnage's residence. Officer Lester interviewed Winkler and the woman, who admitted the truth of Turnage's statements.

The two also said that they had gone to a place known as Popeye's, in Memphis, Tennessee, to obtain drugs for themselves and for several others, one of whom was the defendant Shinsky. Winkler said that he had personally delivered drugs to Shinsky and to others. Winkler also said that the drugs would be consumed at Shinsky's trailer on the evening of May 21. Under the authority of the warrant the officers searched the Shinsky trailer on that evening and found the drugs.

The other witness at the hearing was Judge Engeler, who corroborated Officer Lester's testimony. Upon the basis of that proof, which was not contradicted, the circuit judge held that Judge Engeler had had before him sufficient proof to sustain the issuance of the warrant.

We agree with the trial court. As Officer Lester pointed out, Turnage's statements were later verified in every detail by other evidence. Both Tim Winkler and the woman appeared to have direct first-hand knowledge of the facts which they related to the officers. Popeye's place was already known to the police as an outlet where illegal drugs could be purchased. Taking the testimony as a whole, we are convinced that Judge Engeler had before him sufficient evidence to enable him to reach his own independent conclusion that the underlying facts supported Officer Lester's belief that Shinsky had illegal drugs in his possession and that Lester's informants were credible and reliable sources of information. Therefore Judge Engeler was justified in finding the existence of probable cause for the issuance of the warrant.

Secondarily, the appellant contends that the trial court should have granted a continuance to permit the accused to obtain the testimony of Tim Winkler. On the date of the trial Winkler was apparently in the military service, at an overseas station. Shinsky's motion for a continuance did not disclose either what Winkler's testimony would be or when he would be available as a witness. There is nothing in the record to suggest that Winkler's testimony would be favorable to the accused; in fact, the implications are to the contrary. In the cir-

cumstances no abuse of the trial court's discretion in the matter has been shown. *Fisher* v. *State,* 241 Ark. 545, 408 S. W. 2d 894 (1966), cert. den. 389 U. S. 821 Ark. 545, 408 S. W. 2d 894 (1966), cert. den. 389 U. S. 821 (1967); *Maxwell* v. *State,* 216 Ark. 393, 225 S. W. 2d 687 (1950).

Affirmed.

ARKANSAS POWER & LIGHT CO. *v.* EDWARD M. FURLONG ET AL

5-5530 466 S. W. 2d 476

Opinion delivered May 10, 1971

House, Holmes & Jewell, for appellant.

Botts & Jenkins, for appellee.

LYLE BROWN, Justice. For the purpose of erecting an electrical substation and distribution line appellant, by eminent domain proceeding, took slightly less than two acres out of a corner of appellees' farm. The jury fixed just compensation at $4,500. Appellant contends there

was no competent and substantial evidence to support the verdict.

The only witness for the landowners who placed a monetary value on the lands taken was John Gunnell. He has been circuit clerk since 1938 and as such is the ex-officio recorder of deeds and mortgages. He said he had a general knowledge of land sales throughout the county by virtue of the deeds coming through his office. As ex-officio commissioner in chancery he said he had sold considerable real estate at public sale and "I have bought and sold a little myself." Then in 1967 Gunnell became a licensed realtor. Operating under that license he has since sold a few parcels of property.

Gunnell fell short of being qualified to testify as a value witness in this case because of his unfamiliarity with the land taken. He had never been on the subject lands. He had not made a study to determine the highest and best use of the property taken. He was not aware that appellant power company had in years past purchased a right-of-way across the two-acre tract under consideration. That easement was one hundred feet in width and extended the entire length of the tract. A high voltage transmission line running into DeWitt is erected thereon. When that fact was revealed to the witness he had this to say about value:

Q. Mr. Gunnell, you are saying it is worth thirty six hundred dollars with nothing on it?

A. Yes, sir.

Q. Now I am asking what would it be worth with something on it.

A. With what on it.

Q. Arkansas Power and Light Company's right-of-way a hundred feet wide across it?

A. I don't know.

Following the recited testimony the witness was again taken on direct examination and he changed his approach to market value. He said he would deduct from his previously stated just compensation the cost of the right-of-way, which was $1,500. He insisted that "some type of industry" could be placed on the lands taken and the right-of-way could be used as a parking lot.

For the reason discussed—witness's unfamiliarity with the land—we agree with appellant that his value testimony was insubstantial. Whether his evidence was substantial was not a question of fact but one of law. *Arkansas State Highway Comm'n.* v. *Byers,* 221 Ark. 845, 256 S. W. 2d 738 (1953). Gunnell testified to a conclusion based on a cursory look at the property in driving by it. See *Arkansas State Highway Comm'n.* v. *Ptak,* 236 Ark. 105, 364 S. W. 2d 794 (1963).

Appellant says the only competent testimony on just compensation was that of their witness, William A. Payne. We are asked to adopt his figure of $1,200 and enter judgment accordingly. That we cannot do. Payne used the before and after value which involved the Furlong tract of 240 acres. Since no damages to the remainder were claimed the "value of the part taken" rule was the appropriate rule to follow. *Arkansas Louisiana Gas Co.* v. *Burkley,* 242 Ark. 662, 416 S. W. 2d 263 (1967); *Lazenby* v. *Arkansas State Highway Comm'n.,* 231 Ark. 601, 331 S. W. 2d 705 (1960).

Reversed and remanded for new trial.

CHARLES SHINSKY *v.* STATE OF ARKANSAS

5582 466 S. W. 2d 911

Opinion delivered May 10, 1971

Tinnon, Crain & Neimic, for appellant.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant Charles Shinsky was charged with aiding four persons to escape from the county jail by supplying them with hacksaw blades. He was convicted, fined, and given a jail sentence. Ark. Stat. Ann. § 41-3511 (Repl. 1964). Appellant contends that his motion for a continuance should have been granted, that the court erred in compelling one of the escapees to testify against the wishes of the escapee, and that the evidence was insufficient to support a verdict.

During the night of August 23, 1970, four prisoners lawfully in custody escaped from the Baxter County jail. A string from a mattress was lowered out the window and someone on the ground tied two hacksaw blades thereto. When a sufficient opening was made

the prisoners lowered themselves to the ground by means of a rope made from quilting. The four escapees were captured the next day. They were Leonard O. Naugle, Howard L. Estes, Glenn Sheley, and Ronald Smith. Three of the four men testified for the State. Since the sufficiency of the evidence is attacked we will relate the essential testimony and in the light most favorable to the State.

Leonard Naugle testified that he gained his freedom by the use of hacksaw blades; that they were tied to a string by some person unknown to him; and that one of the blades was found on his person at the time of arrest. Glenn Sheley said that early in the night he talked to Charles Shinsky about bringing some hacksaw blades to the jail but received no reply. He denied having made a statement to the deputy prosecutor that Shinsky brought the blades to the jail. He said he stated that if Shinsky in fact brought the blades there he probably got them from the elder Shinsky's cabinet shop.

The third escapee called as a witness by the State was Howard Estes. He was asked if he was one of the escapees of August 24 and he declined to answer "on the grounds that it might incriminate me." That statement resulted in a hearing in chambers. There it was revealed that Estes was charged in the same court with violating the escape statute and had not yet been tried. Ark. Stat. Ann. § 41-3513. He did not want to testify in the instant case because he was fearful his testimony would tend to prejudice him in his case. It was also shown that Estes had, prior to trial, signed a waiver and had given a written statement to the prosecuting attorney. The waiver and statement were given on advice of Estes's attorney. When those circumstances came to light, Estes's attorney, who was present at the hearing, withdrew any objection to Estes testifying. Back on the witness stand Estes still refused to answer those questions which he thought might result in prejudice to him. Then he was asked about his signed statement in which he recited that Sheley asked Shinsky to bring the blades and that Shinsky returned in a few minutes with them. The statement fur-

ther recited that Estes threw a string out the window and pulled it back up after Shinsky tied the blades to it. When asked by the prosecutor if he made those statements he replied "that's what it reads there." There was no objection by appellant to the described line of questioning.

Douglas Shutt testified that on the night of the escape he drove to the jail accompanied by Shinsky; that Shinsky wanted to talk to Glenn Sheley; that Shinsky got out of the car and went over near the jail and conversed with Sheley; and that Sheley told Shinsky to bring some hacksaw blades to Sheley, to which request Shinsky nodded in the affirmative. After that conversation Shutt said he drove to Shinsky's house trailer. Shutt said he asked Shinsky if he was going to take the blades to the jail and that Shinsky responded "I don't know." Shutt left alone.

We have no hesitancy in saying there is no merit in appellant Shinsky's contention that there is no substantial evidence to support the verdict.

Appellant's contention that the trial court erred in refusing to grant a motion for continuance is likewise without merit. Appellant was arrested August 24, 1970. He was freed on bond within three days. On September 3 he appeared in court with his attorney and entered a plea of not guilty. On the eve of trial he filed his motion for continuance, asserting that his attorneys needed more time to prepare his defense. That motion was overruled and appellant was put to trial on September 16. From the date of appellant's arrest until the trial date almost four weeks intervened in which he could prepare for trial. The motion for continuance simply stated the conclusion that appellant's counsel "have not had adequate time in which to prepare a defense." We find no abuse of discretion. *Nash* v. *State,* 248 Ark. 323, 451 S. W. 2d 869.

We now come to the third and final point for reversal. It is contended that the trial court erred in compelling Howard Estes to testify against appellant

when Estes claimed his constitutional right to remain silent. The right to claim the privilege was personal to Estes and appellant cannot claim the privilege or take advantage of any error of the court in denying the privilege to the witness Estes. 8 Wigmore, Evidence § 2196 (McNaughton rev. 1961); *Bowman* v. *United States,* 350 F. 2d 913 (1965); *United States ex rel Berberian,* 300 F. Supp. 8 (1969). There are a host of other cases to the same effect and they can be found in the cited authorities.

Affirmed.

INTERNATIONAL PAPER COMPANY *v.*
CARL J. TIDWELL

5-5555 466 S. W. 2d 488

Opinion delivered May 10, 1971

Gaughan, Laney, Barnes & Roberts, for appellant.

Smith, Williams, Friday & Bowen; By: *G. Ross Smith,* for appellee.

JOHN A. FOGLEMAN, Justice. Two questions are presented on this appeal. The first is whether the Arkansas Workmen's Compensation Commission has jurisdiction of this claim—or more properly stated, whether the Arkansas Workmen's Compensation Law can be applied. The second is whether the claimant Tidwell has suffered a compensable injury. The commission held against appellant on both points. There has been no determina-

tion that appellee has suffered a permanent disability resulting from accidental injuries. This matter was reserved until the commission hears additional evidence as to the end of the healing period and as to permanent disability. The only award made is for compensation for a period from August 8, 1968, through September 22, 1968 and from October 17, 1968, until a date to be later determined and for medical expenses incurred as well as those to be incurred for additional medical treatment to be arranged by International Paper Company through Dr. Jim Moore.

The first is a mixed question of law and fact. Insofar as the factual determinations are involved, the findings of the commission are binding upon the courts if there is any substantial evidentiary support. *Voss* v. *Ward's Pulpwood Yard,* 248 Ark. 465, 452 S. W. 2d 629. We must accept that view of the facts which is most favorable to the commission's findings. *Albert Pike Hotel* v. *Tratner,* 240 Ark. 958, 403 S. W. 2d 73. Where fair-minded men might honestly differ as to the conclusion to be drawn from facts, either controverted or uncontroverted, the drawing of inferences and reaching of conclusions are for the commission, not the courts. *Guynn* v. *Helena Hospital,* 240 Ark. 56, 398 S. W. 2d 526. The commission found it had jurisdiction because appellee was a citizen and resident of Arkansas both prior to and at the time of his injuries, was paid under the supervision of appellant's Arkansas office, was paid his wages in Arkansas and the contract of employment was entered into in Arkansas. There was substantial evidence to support these findings.

Tidwell was born in Arkansas. He was employed by the United States Corps of Engineers for 10 years prior to his employment by International. He was operating a bulldozer at Lake Ouachita in this previous employment when he applied for a job at appellant's regional office in Camden, Arkansas. He took a physical examination at Camden to meet appellant's requirements. He testified that he considered Hot Springs, Arkansas, to be his home. He had no family, except for his parents who lived at Mt. Ida, Arkansas. He did not live with

them. Tidwell reported to work at Jefferson, Texas, on Monday, June 24, 1968, as a member of a five-man crew of which one Wells was foreman. Wells' orders and directions came from the Camden office. Paychecks of all employees of International working in Texas and other parts of the Western Region are issued from Camden. When Tidwell needed medical attention after August 7, he returned home and went to Dr. Lon E. Reed at Hot Springs, under whose care he remained for four weeks. When his doctors advised him to return to work, he went back to Jefferson and worked September 23 and 24. He suffered a recurrence of his earlier symptoms, had to be relieved from driving a bulldozer, and returned home to Hot Springs. Subsequently, at the suggestion of Grady Collier, appellant's Road Maintenance Foreman for its Western Region, he drove a dump truck at Hampton, Arkansas, about two weeks, after which he felt that he was unable to continue in that work. All his medical treatment has been in Arkansas.

Tidwell testified that he left his job in Arkansas on Friday before reporting to his new employer in Texas on Monday. His work required him to move from place to place in Texas and to obtain a place to live in each. While in Texas he lived at Jefferson in a room in a private home for three or four days in June, at Carthage in a motel for about three weeks and at Center in a boarding house for about two weeks just prior to August 2. All of these are within a radius of 30 miles. Orders for these various job assignments came from the Camden headquarters. All of the members of Tidwell's crew lived in private homes, boarding houses or motels and had to find new places to live as they moved about their territory.

The Western Region of International encompasses Arkansas, the eastern half of Louisiana, east Texas and a part of Oklahoma. Its headquarters are at Camden, and Tidwell was hired by Collier there. He was employed to work in Texas and considered a regular member of his crew in one of the districts there. Each district has its on management. The road foreman for In-

ternational's entire Western Region lives in Arkansas, but his duties take him over the entire region. The International employee with whom Tidwell roomed while he worked at Hampton was a Texas resident. Tidwell was treated as a Texas employee by International. The timekeeper, who had responsibility for payroll, insurance and compensation matters for the company had his office at Camden. Tidwell was covered by the company's workmen's compensation insurance in Texas, and his wages reported to the State of Texas for that purpose.[1] The company uniformly carried its workmen's compensation insurance on those employed to work in a particular state in that state. It contends that, since Tidwell was employed to work in Texas and suffered whatever injury he did suffer in that state, Texas law governs. Since the evidence, when given its strongest probative force in favor of the commission's findings of fact, is substantial, as we have illustrated, the question becomes one of law.

We have never directly passed upon this question. In approaching it, we have no specific statutory provision to govern us as do most other states. See I Schneider, Workmen's Compensation Text, Chapter 5; 3 Larson, Workmen's Compensation Law 375, *et seq.*, §§ 87.00, *et seq*. Workmen's compensation is governed wholly by statute, so unless we find a statutory basis for entertainment of a claim, an employee must be left either to his common law remedy or to the compensation laws of another state when the injury took place in that state. Ark. Stat. Ann. §§ 81-1323 (b) (Repl. 1960) and 81-1325 (b) (Supp. 1969) contain the only express mention of extraterritoriality in our act. In the former section, we find clear recognition that a claim may be allowed when the accident took place outside the state if compensation is payable under the act. Then the hearing may be held either in the county of the employer's residence, or of his place of business or of greatest convenience as determined by the commission. The later section only provides that appeal from the commission's action goes to the circuit court of the county in which the hearing was

[1]There is no evidence that Tidwell had any knowledge of this fact or that he consented to this coverage.

had when the accident occurred outside the state. It should be noted that there is no limitation in these sections on the nature of out-of-state accidents which may be heard by the commission. Consequently, we must turn to other provisions for any limitations there might be. If there is a limitation it must be found in provisions having to do with coverage. Insofar as the facts of this case are concerned: an employee is one in the service of an employer under a contract of hire, Ark. Stat. Ann. § 81-1302 (b) (Repl. 1960); an employer is one carrying on an employment, Ark. Stat. Ann. § 81-1302 (a) (Repl. 1960); and employment means every employment carried on in the state, Ark. Stat. Ann. § 81-1302 (c) (Repl. 1960). Liability for compensation is based upon disability or death from injury "arising out of and in the course of employment." Ark. Stat. Ann. § 81-1305 (Repl. 1960).

In considering these statutory provisions and definitions, we must construe and apply them liberally in favor of a claimant in the light of the beneficent and humane purposes of the act, resolving all doubtful cases in his favor. *Reynolds Metals Co.* v. *Brumley,* 226 Ark. 388, 290 S. W. 2d 211; *Arkansas Nat. Bk.* v. *Colbert,* 209 Ark. 1070, 193 S. W. 2d 806; *E. H. Noel Coal Co.* v. *Grilc,* 215 Ark. 430, 221 S. W. 2d 49; *Donaldson* v. *Calvert McBride Printing Co.,* 217 Ark. 625, 232 S. W. 2d 651; *Clemons* v. *Bearden Lumber Co.,* 236 Ark. 636; 370 S. W. 2d 47; *Clemons* v. *Bearden Lumber Co.,* 240 Ark. 571, 401 S. S. 2d 16; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579. Liberality of construction with reference to individual rights under our act is resorted to whenever obscurity of expression or inept phraseology appears and, given a restrictive construction, would have the effect of defeating praiseworthy purposes that undoubtedly actuated our lawmaking body. *Massey* v. *Poteau Trucking Co.,* 221 Ark. 589, 254 S. W. 2d 959. See also *McGehee Hatchery Co.* v. *Gunter,* 237 Ark. 448, 373 S. W. 2d 401; *Sallee Bros.* v. *Thompson,* 208 Ark. 727, 187 S. W. 2d 956.

Recognized purposes of the act are to improve employer-employee relationships, to insure the security of

employees following covered employment by substituting awards for losses sustained by reason of such employment which are more nearly proportionate to the loss and more certain and more satisfactory than former remedies in tort, to ameliorate the condition of disabled workers by shifting a part of the burden of accidents in covered employment to the public in general and to charge to the ultimate consumers a part of the loss from risks of such employment. *Hughes* v. *Hooker Bros.,* 237 Ark. 544, 374 S. W. 2d 355; *Hunter* v. *Summerville,* supra; *Williams Mfg. Co.* v. *Walker,* 206 Ark. 392, 175 S. W. 2d 380. We have said that these purposes are based upon a contractual relationship and the public welfare. *Gentry* v. *Jett,* 235 Ark. 20, 356 S. W. 2d 736.

In considering cases involving out-of-state accidents, we have followed a policy of liberality rather than restrictiveness. In *McGehee Hatchery Co.* v. *Gunter,* 234 Ark. 113, 350 S. W. 2d 608, we held that a Mississippi resident, who was a traveling salesman for an Arkansas concern, injured in an accident in Mississippi, was entitled to pursue his claim against his Arkansas employer under Arkansas law in spite of the fact that he had been paid maximum benefits under Mississippi law for the same accident by a Mississippi employer. We also rejected a narrow and restricted construction when we said that an employment did not cease to be "carried on in this state" by reason of only temporary and incidental operations in another state, in holding that an employer was subject to the act, even though he did not have five employees, unless those working in Missouri at the time one of them was injured were counted. *Feazell* v. *Summers,* 218 Ark. 136, 234 S. W. 2d 765. We also found no sound reason that the laws of a state in which an employee was injured could keep this state from discharging its contractual obligation under the Workmen's Compensation Act to one of our citizens. *Gentry* v. *Jett,* 235 Ark. 20, 356 S. W. 2d 736.

In considering federal constitutional limits on application of state laws in compensation cases, Professor Larson points out six grounds on which the applicability of a particular compensation act has been asserted. They are:

(1) Place where the injury occurred;
(2) Place of making the contract;
(3) Place where the employment relation exists or is carried out:
(4) Place where the industry is localized;
(5) Place where the employee resides; or
(6) Place whose statute the parties expressly adopted by contract.

Professor Larson then expresses the opinion, which seems to be supported by authority, that the state which was the *locus* of any one of the first three items and perhaps of the next two, can constitutionally apply its statute if it wants to, in spite of "full faith and credit" attacks. 3 Larson's Workmen's Compensation Law 368, § 86.10.

Satisfaction of constitutional standards is not a sufficient basis for a state's application of its own law. The state itself must make the application, or authorize it, by statute.[2] Early decisions held that these statutes had no application to extra-state injuries without unequivocal statutory language making them applicable. See *In re Gould,* 215 Mass. 480, 102 N. E. 693 (1913). This approach is not in accord with the liberal construction view we take. Many later decisions have not followed the Massachusetts court. As early as 1915, the Connecticut Supreme Court recognized that no statute has extraterritorial effect unless the intention that it have is clearly expressed or reasonably to be inferred from the language of the act, but held that in determining whether such an inference was reasonable, its workmen's compensation act was to be given a liberal construction to effectuate its remedial purpose and to be read in the light of its purpose, subject matter and history. That court found that a limitation of the act to compensation for intrastate injuries would tend to defeat the ends in view. On the other hand it found a

[2]An excellent discussion of the problems involved, and approaches taken and factors considered in solving them will be found in American Conflicts Law by Dr. Leflar, §§ 158, 159, 160 and 161.

reasonable inference that the legislature deemed the place of injury unimportant when it bottomed the right to compensation upon contract. In interpreting its act, that court found significance in the place of domicile of the injured party, the place of contract between the employer and employee and the location of the employer. The Connecticut act was not as extensive on the subject as ours, as it apparently limited filing of awards to the county in which the injury occurred and appeals to the superior court for the county in which the injury was sustained. *Kennerson* v. *Thames Towboat Co.,* 89 Conn. 367, 94 A. 372 (1915).

Most of the jurisdictions lacking specific and unequivocal statutory language have followed similar approaches. In *Grinnell* v. *Wilkinson,* 39 R. I. 447, 98 A. 103 (1916), the court followed the Connecticut decision, saying that its own act should be read into every contract of employment between those subject to its terms. In reaching its decision the Rhode Island court mentioned the likelihood that one of its residents injured elsewhere would come home for treatment and prosecution of his remedy and would be subject to examination in Rhode Island.

In giving a liberal construction to the Iowa act, some emphasis was placed by the court upon a statutory provision like ours for compensation for any and all injuries sustained, without any limitation other than that they shall occur in the course of and arise out of the employment. *Pierce* v. *Bekins Van & Storage Company,* 185 Iowa 1346, 172 N. W. 191 (1919). [See Ark. Stat. Ann. § 81-1302 (d) (Repl. 1960)]. Later the rule that out-of-state injuries were covered by the Iowa compensation act was extended to an employment carried on by the employee, an Iowa resident, wholly within the state of Oklahoma, as contemplated by the parties when the contract of employment was entered into in Iowa. *Haverly* v. *Union Const. Co.,* 236 Iowa 278, 18 N. W. 2d 629 (1945). In that case, the Iowa office of the employer reimbursed the local office in Oklahoma for payroll disbursements approved in Iowa, general manage-

ment and control was maintained in the Iowa office, and all bills were paid and books kept in the Iowa office.

In New Jersey, it was held that a contract of employment entered into in New Jersey with an employer maintaining a New Jersey office calling for services to be performed by a New Jersey resident exclusively in Pennsylvania, containing a provision that it be interpreted according to the laws of Pennsylvania, did not prevent New Jersey compensation law from entering into the contract by operation of law, regardless of the place where the compensable injury occurred. *Gotkin* v. *Weinberg,* 2 N. J. 305, 66 A. 2d 438 (1949).

It was also held that the Wisconsin commission had jurisdiction to make a compensation award to a Wisconsin resident who accepted an offer of employment by a Wisconsin corporation and immediately went to Michigan in furtherance of his employment, where he was injured. The court held that upon these facts, the status of employee and employer was covered under the Wisconsin act, even though no work was performed by the employee within Wisconsin. *Julton-Kelly* v. *Industrial Commission of Wisconsin,* 220 Wis. 127, 264 N. W. 630 (1936). See also *Dunville* v. *Industrial Commission,* 228 Wis. 86, 279 N. W. 695 (1938).

In New York, the rule seems to be that the New York laws are applied in cases of extrastate injuries to employees whose services are performed in another state if there are sufficient significant New York contacts, whenever the employment is not carried on at a fixed location. See *Cameron* v. *Ellis Const. Co.,* 252 N. Y. 394, 169 N. E. 622 (1930); *Nashko* v. *Standard Water Proofing Company,* 4 N. Y. 2d 199, 149 N. E. 2d 859 (1958); *Rutledge* v. *Kelly & Miller Bros. Circus,* 18 N. Y. 2d 464, 223 N. E. 2d 334 :1966); *Shorr* v. *U-Wan-Na-Wash Frocks,* 284 App. Div. 778, 135 N. Y. S. 2d 143 (1954); *Baduski* v. *S. Gumpert & Co., Inc.,* 277 App. Div. 591, 102 N. Y. S. 2d 297 (1951); *Burton* v. *Ziegler Pharma-*

cal Corp., 9 App. Div. 2d 811, 192 N. Y. S. 2d 509 (1959); *Levin* v. *Eutectic Welding Alloys Corp.*, 21 App. Div. 2d 925, 251 N. Y. S. 2d 127 (1964).

It is true that the acts in some of the above states are elective and that the employee in some cases from others either had previously performed employment for his employer in the state where the claim was asserted or did regularly perform a part of his duties in that state. None of them had more specific statutory prescription of extraterritorial application than we have. When we consider the interest that this state has in the welfare of its residents, in minimizing the likelihood of their becoming public charges or objects of local charity, in having a procedure for a remedy readily available to its residents, and in securing compensation to physicians and hospitals in Arkansas which might not otherwise be available to a claimant, we cannot say that reason and logic require a different approach to a liberal construction of our statute because of these limited dissimilarities, in spite of the fact that a different result has been reached in other jurisdictions, and the fact that the injury might be compensable under the laws of another state.

We have no hesitation in holding that where the contract of employment is entered into in this state between an Arkansas resident and an employer who is localized as a resident or who maintains an office which exercises general superintendence and control over the employment which is not carried on at a fixed location, the Arkansas Workmen's Compensation Act applies and the Arkansas Workmen's Compensation Commission has jurisdiction, even though the injury occurred in a state in which it was contemplated by the parties that the employment would be entirely performed. This result is consistent with our previous decisions earlier cited. It is also harmonious with Restatement of the Law, Conflict of Laws § 398.

The second point for reversal presents a close question. Appellant argues that appellee's disabilities are attributable entirely to vascular disease and that his

employment did not contribute in any way to his condition. Appellee contends that exertions required of him in the performance of the duties of his employment aggravated his condition and accelerated his disability, so as to provide the necessary causal connection. Appellant says, however, that whatever exertion was required of Tidwell only excited symptoms of his vascular disease but did not aggravate his condition or cause any damage to Tidwell's system that was disabling. While the question is not free from doubt, and we might well have sustained a contrary finding by the commission, we cannot say that the evidence in support of the commission's award, when all doubts are resolved in favor of the claimant, was not substantial.

Inasmuch as the question here is one peculiarly within the realm of scientific knowledge, we must find support in the medical testimony in order to say that the evidence of causal connection is substantial. We will review the evidence forming the background for medical testimony only to the extent necessary to connect Tidwell's condition with his medical examinations and treatments. The commission related Tidwell's disability to an occasion on August 5 when he crawled under a truck, furnished him by his employer for performance of his duties, to grease it, and to another occasion on August 7 when he assisted in putting a misaligned bulldozer track on its proper supports. It found that the claimant had some disabling residual paralysis from a pre-existing carotid vascular disease characterized by a syndrome of atheromatous plaques in the carotid artery, contributed to and aggravated by claimant's work. Specific reference was made by the commission to the opinion of Dr. Jim Moore, a Little Rock neurosurgeon, that the immediate cause of the claimant's blurring of vision and numbness in his left arm and leg was related to a decreased oxygen supply to appellee's brain due to a marginal right carotid artery at a time when the brain demanded increased oxygenation because of increased body heat and exertion.

Tidwell satisfied his employer's health requirements. He apparently worked without any difficulty

until August 5 as a heavy equipment operator in a road construction crew, although he had not been feeling well for the last two weeks of the period. On August 5 he was driving a truck servicing tractors with water, fuel, oil and grease. He crawled under a bulldozer to lubricate some part and began to feel ill and to experience aching and numbness in his arms and legs and a blurring of his vision. He crawled out, lay down and rested for about an hour. Having no drinking water, he drove his truck to a place where other employees were working, drank some water, ate a part of a sandwich and helped load a water pump. His foreman cautioned him that he might be taking the "flu" and to be careful. He explained to his foreman that he had gotten awfully hot, that he really was not "working all that hard" but was out of water. The temperature was in the mid-nineties. Tidwell testified that his difficulties occurred while he was working in a hot sandy area which was exposed to the sun and from which any breezes were obstructed.

On August 6 he did only very light work by the direction of his foreman, but on August 7 went with his foreman to help five or six other employees in attempting to replace a misaligned bulldozer track. It was a hot day and all of the men thus employed were suffering from heat and resting in the shade at frequent intervals. He worked from 10:30 a.m. until 5:00 p.m. Tidwell said that he was overheated by this work, and could not even get up enough strength to use a grease gun. He told his foreman he had had enough and went home where he saw his Hot Springs physician the next day.

Tidwell did not see Dr. Moore until October 17, after he had driven a dump truck at Hampton for 13 days. He quit because the work on the narrow roads made him nervous and because he was having some difficulty with his vision. Dr. Moore diagnosed his disease in both carotid arteries. He attributed the basic cause to hardening of the arteries, which produced an abnormal collection of tissues or plaques in the arteries, which tend to cause an obstruction therein. When one's arteries are thus obstructed, he will experience inter-

mittent episodes of numbness in the extremities, a tingling sensation in his hands and feet and some blurring of vision, according to Dr. Moore.

The disease is clearly not occupational. After the first episode, Dr. Reed, a general practitioner, had originally diagnosed appellee's trouble as heat exhaustion, but later sent him to a neurosurgeon who only found a chronic syndrome attributable to plaques in a carotid artery. On his first examination, Dr. Moore found evidence of a partial paralysis of the left side of Tidwell's body, which evidenced abnormality of the carotid artery. He found the extent of Tidwell's development of hardening of the arteries unusual for his age. He stated that obstruction of the artery creates a swirling or eddy type of current in the blood flow, and in the carotid artery, and this affects the person's brain. The plaques in the arteries are not caused by a single episode of exertion, but Dr. Moore felt that stress and aging are factors which have a bearing upon the condition. It was this physician's opinion that the plaque causing Tidwell's difficulties had been present and steadily progressive before his first episode in Texas; that Tidwell's initial symptoms developed on the basis of aggravation from exertion; and that his exertion had required an increased oxygen supply in the brain. The following question was propounded and answer given by this doctor:

> Q. Do you think becoming overheated would have had any effect on this condition by itself, just that one thing?
>
> A. It could possibly. Certainly increasing body heat, increasing metabolism and increasing the need for oxygenation, and if a part is already at a point of tenuous supply, it's more or less the straw that broke the camel's back.

The doctor later stated:

> A. * * * I think also, again going back to his history and perhaps wrongly assuming that

> August Five would be in the summertime, knowing some relatively very limited information as to the stress that is required on bulldozer procedure, that the immediate cause of this patient's complaints as they were, blurring of vision, numbness of the left arm and leg, and, then, intermittent episodes of this was related to decrease in oxygen supply to the brain, and this in turn was due to the fact that he had a marginal artery in the first place to supply this. Therefore, I think stress is the thing that precipitated this man's problem.
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> * * *
>
> A. First of all, the plaque formation could have been increased by development of some soft clot, not complete; secondly, there could have been enough embarrassment of brain cell, and apparently were, was enough embarrassment of the brain cells for this patient to still be marginal in his ability to function, even at a more sedentary level of walking around, and I might say that I have recorded that he described this intermittent episode of numbness of the left arm and leg, that he felt it was more pronounced at a period of exertion than he did it recurring at other times.

The only other medical testimony of any significance was that of Dr. Reed who testified that heat precipitated Tidwell's partial paralysis, and that he would not have advised a man with Tidwell's condition to be out in the hot sun driving a bulldozer. Dr. Reed did say that one with Tidwell's condition, whose blood circulation to the brain was substantially decreased, would suffer a minor stroke or strokes and have damage to the brain which might be evidenced by sudden aging, or a complete change of personality.

The closest analogy in our cases where awards are based on aggravation of a pre-existing condition are those where heart disease is involved. In most of them,

the only real difference seems to be that the atheromatous plaques resulting from arteriosclerosis are localized in the arteries around the heart rather than in the carotid arteries as is the case here. Any obstruction resulting from these plaques seems to cause a deficiency in the oxygen supplied by the blood which affects the heart in one case and the brain in the other. The result is a heart attack or a stroke, of varying intensity, depending to some extent upon the extent and duration of the obstruction.

We have found substantial evidentiary support for awards in heart cases upon even less certain medical testimony. See *Kearby* v. *Yarbrough Brothers,* 248 Ark. 1096, 455 S. W. 2d 912; *Bradley County* v. *Adams,* 243 Ark. 487, 420 S. W. 2d 900. We found "accidental injury" where there had been a collapse on the job resulting from unusual exertion or strain by a worker having a pre-existing ailment in such cases as *Dougan* v. *Booker,* 241 Ark. 224, 407 S. W. 2d 369. This case is closely parallel to *Reynolds Metals Co.* v. *Cain,* 243 Ark. 483, 420 S. W. 2d 872, involving a disability from a myocardial infarction. There the claimant twice had to quit his work because of pains in his chest and arms. The medical testimony supporting the claim was to the effect that the claimant's exertion on the job placed demands upon his heart which could not be met by his arteries which were diseased because of arteriosclerosis and that this might well have aggravated a pre-existing coronary insufficiency, the ultimate result of which was precipitation of a myocardial infarction. In another such case, we found substantial evidence of causation in medical testimony that an employee's work activities before he became ill, particularly longer than usual hours, may have contributed to his massive coronary occlusion due to arteriosclerosis from which he had suffered for about five years. The doctor there, on cross-examination, stated that in his personal opinion he thought that the work of that day was a contributing factor. *Georgia-Pacific Corporation* v. *Craig,* 243 Ark. 538, 420 S. W. 2d 854. Of course, we have long held that any work aggravation of an existing arterial disease which hastens either injury or death is compensable as

arising in the course of, and out of, the employment. *Reynolds Metals Co.* v. *Cash,* 239 Ark. 489, 390 S. W. 2d 100. It is consistent with our holdings in these cases involving heart ailments due to arteriosclerosis to say that the testimony of the physicians, relating to precipitation of a partial paralysis and the likelihood of brain damage (or embarrassment of brain cells) because of demands for increased oxygen supply to the brain brought on by stress and unusual exertion by Tidwell in the conditions under which he was working, constitutes substantial evidence of aggravation or acceleration of his pre-existing condition resulting in some injury or damage to support a finding of causal connection, insofar as his disability is concerned. It must be remembered that as yet there has been no finding that Tidwell suffered any permanent disability as a result of this aggravation or acceleration of his condition.

The judgment is affirmed.

HARRIS, C. J., dissents.

BYRD, J., dissents only as to the question of jurisdiction.

CARLETON HARRIS, Chief Justice, dissenting. I do not reach the question of jurisdiction, since it is my opinion that claimant did not suffer a compensable injury. Tidwell's difficulties were occasioned by diseased carotid arteries, and from the way I read the record, the work he was doing only caused the *symptoms* of that disease to appear. The numbness he described and the blurring of his vision were simply symptoms of a partially blocked artery, and in fact, these symptoms enabled the correct medical diagnosis to be made. I cannot find from the record any disability that he suffered. The disability occasioned by a blocked artery is a stroke, and no one contends that Mr. Tidwell suffered a stroke. In fact, in the testimony of the physician relied upon by appellee, Dr. Jim Moore, there is frequent use of the word, "symptoms". For instance, in his January 3, 1969, report, Dr. Moore described his diagnosis as follows:

"Basically, it is my feeling that this patient, although he had some pre-existing atheromatous plaque in the carotid arteries, had an aggravation *of his symptoms* [My emphasis] by the exertional episodes required in his working activities as outlined and as occurred on or about August 5, 1968."

Further:

"I don't think the plaque itself was caused by a single episode of exertion; stress, aging, all of these factors have to bear. I think this patient's *symptoms,* [My emphasis] as they developed, were on a basis of aggravation from exertion."

Still further:

"I feel this plaque had been present for an indefinite and undetermined period of time, had been steadily progressive, likely. Probably, certainly, had been there before this episode, but I think that the fact that the exertion tended to require an increase in oxygen supply to the brain, it's most likely to cause this patient's initial *symptoms,* [My emphasis] so far as the history as was given to me."

It is interesting to note that during a six weeks period when Tidwell was not working at all, he still complained that his arms and legs were "going to sleep" and his vision was not good. I repeat that these were simply symptoms of the disease, which had progressed at that time to an extent that these symptoms appeared at rest as well as at work.

I would reverse.

BURKS MOTORS, INC. *v.* INTERNATIONAL HARVESTER CO. ET AL

5-5425 466 S. W. 2d 945

INTERNATIONAL HARVESTER CO. ET AL *v* EARL PIKE ET AL

5-5427

Supplemental opinion on rehearing
Delivered May 10, 1971
[Petitions for rehearing denied.]

Wootton, Land & Matthews, for appellant, Burks Motors, Inc.

Wright, Lindsey & Jennings, for appellees, International Harvester Co.

Wright, Lindsey & Jennings, for appellants. International Harvester Co.

J. Hugh Lookadoo & McMath, Leatherman, Woods & Youngdahl, for appellee, Pike.

JOHN A. FOGLEMAN, Justice. Burks Motors, Inc. in a petition for rehearing in 5-5425 asks that we amplify and clarify our opinion of March 1, 1971, to state that the judgment of contribution is binding between it and International Harvester Company, by reason of the judgment of the trial court and International's failure to seek contribution from Burks or ask reversal of the judgment for contribution here. International's petition in this case is for amplification only and asks that we declare that the judgment rendered against it is reversed and remanded in its entirety so that the determination of proportionate fault between it and Burks is nullified. International also filed a petition for rehearing in 5-5427, on its successful appeal, asking amplification or supplementation of the opinion as asked by it in 5-5425, asserting that until and unless there is an adjudication of liability against International on retrial, it cannot possibly be a joint tort-feasor, from whom contribution may be obtained. Burks filed a petition for rehearing in

5-5427, as a party to the appeal, asking that our opinion in that case be amplified and supplemented to state that the judgment against both it and International was reversed and remanded, so that Pike has no judgment against Burks, or, alternatively, that the opinion in 5-5425 entitles it to a 91% contribution from International. None of the parties cites any authority for its position.

While most of the questions raised by the parties are prematurely posed, the basic one is the status of the judgment against Burks. As pointed out in our opinion in 5-5425, that judgment was joint and several. Reversal as to one tort-feasor or defendant does not necessarily call for a reversal of a several judgment against another. *A. S. Barboro & Co.* v. *James,* 205 Ark. 53, 168 S. W. 2d 202. Any benefit to which Burks might have been entitled because of the points asserted by International have been waived. On International's appeal (No. 5-5427) Burks was specifically designated as an appellee. Burks then gave notice of appeal and filed a designation of the record on its appeal. This designation specifically named only the judgment, the interrogatories posed to the jury and the jury's answers as the record on appeal. Burks filed this record (No. 5-5425) on August 3, 1970, one day before International filed the entire record designated by it on its appeal (No. 5-5427). The filing of the partial record limited the scope of our review on Burks' appeal to those assignments of error appearing upon that record. *Hanson* v. *Anderson,* 91 Ark. 443, 121 S. W. 736; *Little Rock Road Machinery Co.* v. *Jackson County,* 233 Ark. 53, 342 S. W. 2d 407. Burks filed an abstract and brief in 5-5425 on September 14, 1970, 15 days before any brief was filed by International in either appeal. Burks abstracted only the record designated by it and thereby limited the scope of our review on its appeal to the sole question raised by it—the proposed modification of the percentage of fault to reduce that attributable to Burks from 9% to 0.9%. *Arkansas State Highway Commission* v. *Lewis,* 243 Ark. 943, 422 S. W. 2d 866; *Rural Single School District* v. *Lake City Special Sch. Dist.,* 144 Ark. 362, 223 S. W. 381. Burks' statement of the points to be relied upon also limited the scope of our review as to it as it only assigned error in the court's

application of the jury's answer to interrogatories relating to allocation of responsibility between it and International. *Arkansas Power & Light Co.* v. *City of L. R.,* 243 Ark. 290, 420 S. W. 2d 85. See also *Eveland* v. *State,* 189 Ark. 517, 74 S. W. 2d 221.

Burks expressly waived any other point or argument in its brief in its statement of the case which includes the following:

> This appeal does not question the issue or issues of liability nor the amount of damages but only seeks to correct the Judgment of the Court to require it to conform to the Jury's findings in the Interrogatories.

The conclusion of the brief reads as follows:

> The Judgment of the trial court should be modified to provide for contribution in favor of Appellant Burks and against Appellee International for any amounts Appellant Burks pays in excess of $783.00, together with its pro rata share of any interest and costs.

Limitation of its attack on appeal to one ground constituted an abandonment of all others. *Stevens* v. *Shull,* 179 Ark. 766, 19 S. W. 2d 1018, 64 A. L. R. 1258. Furthermore, the failure of Burks to argue any other point asserted by it in the only brief filed by it constituted a waiver or abandonment of such other points. *Gordon* v. *Street Improvement District,* 242 Ark. 599, 414 S. W. 2d 628; *Commercial Standard Ins. Co.* v. *Coffman,* 245 Ark. 1005, 436 S. W. 2d 83; *Cummings* v. *Boyles,* 242 Ark. 923, 415 S. W. 2d 571; *Commonwealth Public Service Co.* v. *Lindsay,* 139 Ark. 283, 214 S. W. 9; *Purifoy* v. *Lester Mill Co.,* 99 Ark. 490, 138 S. W. 995; *Bowling* v. *Stough,* 101 Ark. 398, 142 S. W. 512.

Present assertions that International's appeal should redound to the benefit of Burks are not supported by the record. As an appellee on that appeal, Burks is not entitled to a new trial on the judgment against it as a result of the reversal of the judgment against Interna-

tional. *A. S. Barboro & Co.* v. *James,* 205 Ark. 53, 168 S. W. 2d 202. The issues argued by International were not all applicable to Burks, as suggested by the latter. As a matter of fact, one of International's principal arguments was directly adverse to Burks. This was the contention that Burks' negligence was an efficient intervening proximate cause and relieved International of any liability to Pike. One of the points on which the International judgment was reversed had to do with closing argument by Pike's counsel. Burks neither objected nor moved for mistrial, so this issue was not applicable to Burks. There was never the remotest suggestion that International's arguments, either in its brief filed September 29, 1970, or in oral argument, were advanced on behalf of Burks. Nothing in the motion to consolidate, made only by International the next day after filing its brief in 5-5427, made any such suggestion. International expressly limited the application of its point to itself in its statement of points to be relied upon. Burks never filed any brief except its brief as appellant in 5-5425. This brief strictly limited Burks' position and Burks did not indicate in any manner whatever that it adopted any of International's arguments. Its attorney did not participate in the oral argument in any way. International did not, on appeal, press the point that there was error in the assessment of liability between it and Burks, which it asserted in its motion for new trial in the circuit court. Burks would have been an appellee on this point. In its brief in response to Burks' in 5-5425, filed after consolidation, International only resisted a modification of the judgment for contribution to decrease the proportionate liability of Burks or to increase its own contribution to Burks, and did not mention or suggest reversal or remand of this judgment. These actions and omissions, of course, constituted a waiver of the point.

The judgment as to Burks must be affirmed as no error has been asserted against it by Burks. *Price* v. *Price,* 217 Ark. 6, 228 S. W. 2d 478. Arguments not asserted or points not argued in the briefs of the parties cannot be considered by this court. *Smith* v. *Snider,* 247 Ark. 342, 445 S. W. 2d 502; *Tumlinson* v. *Harville,* 237

Ark. 113, 372 S. W. 2d 385; *Groves* v. *Keene,* 105 Ark. 40, 150 S. W. 575. While there was a reversal on International's appeal for failure of the court to give an instruction requested by International submitting the question of Pike's negligence, Burks entered a general objection to that instruction even though it did request a similar one later. Still, Burks did not complain on appeal about any of the instructions given or requested, so it waived any error in regard thereto. *Firemen's Insurance Co.* v. *Jones,* 245 Ark. 179, 431 S. W. 2d 728, 33 A. L. R. 3d 1059; *Harrell* v. *Davis,* 210 Ark. 939, 198 S. W. 2d 180. In their original briefs neither Burks nor International made the contentions they are now asserting, so they cannot be considered on petition for rehearing. *Berry* v. *Gordon,* 237 Ark. 547, 865, 376 S. W. 2d 279, 289; *Bost* v. *Masters,* 235 Ark. 393, 361 S. W. 2d 272, 277; *Midland Valley R. Co.* v. *LeMoyne,* 104 Ark. 327, 148 S. W. 654.

Except for the question of finality of the judgment against Burks, other points raised by Burks and International depend upon future developments and must be litigated in the trial court in the light of those developments. It is certain, however, that Burks cannot be entitled to a money judgment against International under any set of circumstances until Burks has either paid the judgment or discharged more than its pro rata share. Ark. Stat. Ann. § 34-1002 (Repl. 1962). The eventual determination of the question of Burks' right to recover from International depends to some extent upon whatever rights it has to indemnity as well as contribution. International conceded, in the trial court, that if Burks should be held liable as a vendor because of improper design or breach of warranty, it was entitled to indemnity against International.

Except for our statements as to the finality of the judgment against Burks and as to Burks' entitlement to a money judgment against International the petitions for rehearing are denied.

HARRIS, C. J., and BYRD AND HOLT, JJ., dissent.

CONLEY BYRD, Justice, dissenting. In the trial court a joint and several judgment was entered in favor of Earl Pike against both Burks Motors Inc. and International Harvester Company. In addition, a judgment in favor of Burks and against International Harvester was entered on Burks Motors Inc.'s request for contribution —it being there determined that for purposes of contribution Burks Motors Inc. was liable for only 9% of the joint and several judgment. These matters were entered in one instrument dated May 7, 1970. International Harvester filed notice of appeal, designated both Pike and Burks Motors as appellees and in cause no. 5-5427 (*International Harvester Company* v. *Pike,* opinion delivered Feb. 15, 1971) we held that, for the errors committed, International Harvester was entitled to a new trial on all issues. This of course did not affect the joint and several judgment that Pike had against Burks Motors. See *A. S. Barboro & Co.* v. *James,* 205 Ark. 53, 168 S. W. 2d 202 (1943).

However, since Burks Motors' judgment over against International Harvester was already set aside by our Feb. 15, 1971 decision, it is my conclusion that we decided nothing in cause no. 5-5425 when we, on March 1, 1971, said that Burks was not entitled to have its responsibility reduced to 0.9%. If on the other hand our decision in cause no. 5-5425 (*Burks Motors, Inc.* v. *International Harvester Company,* March 1, 1971) did decide that International was liable over to Burks for 91% of the total judgment, then I am at a loss to understand what International accomplished when it obtained a new trial in cause no. 5-5427.

For the reasons herein stated and to avoid the confusion expressed by the parties, I would declare that the joint tort contribution issues between Burks and International in cause no. 5-5425 became moot with the new trial granted International Harvester in cause no. 5-5427 and that that issue stood for trial anew.

The parties by their petitions for clarification have expressed their confusion from the two decisions and I have attempted to show mine. How the trial court may

read them one can only speculate. Unless we resolve the confusion, it is possible that we have created more controversy than we have solved.

HARRIS, C. J., and HOLT J., join in this dissent.

C. W. ABEL *v.* CARL DICKINSON, EXECUTOR ET AL

5-5559 467 S. W. 2d 154

Opinion delivered May 10, 1971
[Rehearing denied June 14, 1971.]

Basil H. Munn, for appellant.

John M. Graves, for appellees.

JOHN A. FOGLEMAN, Justice. This case involves the contest of the will of Grace Abel Evans by her 74-year-

old brother C. W. Abel. Mrs. Evans died in the Ouachita County Hospital on April 12, 1969, when she was 81 years of age. She was a widow without any children and survived only by appellant with whom she had lived for many years. Abel had never been married. Mrs. Evans had successfully operated cafes and boarding houses. Because of a heart attack, high blood pressure and failing eyesight, she retired from the operation of a coffee shop in Chidester three years before her death. She was not able to operate her automobile. She and her brother lived on a farm about 1½ miles from Chidester for over 15 years. Abel had farmed the lands for over 20 years. This land was conveyed to Mrs. Evans by her mother, shortly before the latter's death. Mrs. Evans employed Mrs. Belton Stinnett, who was not a relative, to drive her automobile for her, and to mow and keep her downtown lots and other yards, and care for her flowers. She paid Mrs. Stinnett $1 per hour for her services.

The will was not probated or its existence disclosed to appellant until after Mrs. Stinnett's death in an automobile collision one month after Mrs. Evans' death although he testified that Mrs. Stinnett frequently came out to the house, where he and his sister had lived, after Mrs. Evans' death and that she borrowed his sister's car (which she was using at the time of her death) from him on several occasions. After Mrs. Evans' death Mrs. Stinnett's son disclosed that the will was in his mother's purse. Later the will was delivered by Henderson Stinnett, the widower of Mrs. Belton Stinnett, to Carl Dickinson, the executor nominated therein. Dickinson caused a copy of the will to be made, which he delivered to appellant. Later he took the original to its scrivener, Mr. Thomas Gaughan, an attorney at Camden, who offered it for probate.

The will directed payment of Mrs. Evans' debts, devised a life estate in a 40-acre tract and a 2-acre tract of land to appellant, with remainder to Charles Franklin Stinnett, one of the sons of Mrs. Stinnett, and devised lots in Chidester to Mrs. Stinnett. Carl Dickerson [Dickinson] was nominated as executor. No mention

was made of personalty and the will contained no residuary clause, although Mrs. Evans owned her automobile, an interest in her mother's furniture and other personal property. Mrs. Evans had no close relatives, other than her brother. Neither Mrs. Stinnett nor her son was related to Mrs. Evans by blood or marriage.

The probate judge found that the evidence was insufficient to show that Mrs. Evans was incompetent to make a will at the time of its execution, that a preponderance of the evidence showed that she was of sound and disposing mind and memory and fully competent to dispose of her property and estate by last will and testament, and that she was not acting under the influence of Mrs. Belton Stinnett or any person whatsoever in the making or publication of the will.

Appellant's first point for reversal is that the court failed to exclude the lots in Chidester from the will. He contends that his sister did not own the lots since he was the owner of an undivided one-half interest as a tenant in common, as the only heir of his mother beside Mrs. Evans. The lawyer who drafted the will explained that he failed to note that the ownership of this property indicated on the tax receipts given him to identify Mrs. Evans' property was listed in the names of both Mr. Abel and Mrs. Evans. Resort to tax receipts and deeds of a testator to determine what he meant by a land description he employed is proper. *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176. Appellees conceded that this one-half interest was never owned by Mrs. Evans and has never been claimed as a part of her estate. They also concede in their brief here that the will devises only the undivided one-half interest of Grace Abel Evans. If there was any error in this regard, it is harmless, because appellees could not hereafter require appellant to elect whether he will retain his own property and repudiate his sister's will or conform to the will and permit Stinnett to keep the full title to the lots, as otherwise might be the case under such decisions as *McDonald* v. *Shaw,* 92 Ark. 15, 121 S. W. 935, 28 L.R.A. (n.s.) 657.

Appellant next contends that the will is so unreasonable as to overcome the presumption of testamentary capacity and so unnatural as to give rise to an inference that it resulted either from lack of testamentary capacity or undue influence. The fact that a will is unjust, unreasonable or unnatural does not affect its validity. *Blake* v. *Simpson,* 214 Ark. 263, 215 S. W. 2d 287. No relative, however near or however deserving of a testator's bounty he may be, has any claim which can be asserted against a legally executed will. *Blake* v. *Simpson,* supra. One possessed of testamentary capacity, acting free from inducement by fraud or undue influence, may make testamentary dispositions of his property to whomever he chooses, no matter how capricious or frivolous they may seem to others. *Hiler* v. *Cude,* 248 Ark. 1065, 455 S. W. 2d 891. It is not necessary that the objects of a testator's bounty be meritorious in order for a will to be valid. It is only essential that it be the free and voluntary act of a mind having testamentary capacity. *Jones* v. *Jones,* 234 Ark. 163, 350 S. W. 2d 673.

We have held, however, that the courts may consider that the provisions of a will are unjust, unnatural and unreasonable as a circumstance in determining the mental capacity of the testator. See *Brown* v. *Emerson,* 205 Ark. 735, 170 S. W. 2d 1019. This does not mean that this circumstance alone overcomes the natural presumption of sanity or testamentary capacity or creates any presumption of lack of testamentary capacity or of the existence of undue influence. The disposition made by a testator may give rise to an inference of mental illness or undue influence, but not to any presumption. See *Scott* v. *Dodson,* 214 Ark. 1, 214 S. W. 2d 357; cf. *Alford* v. *Johnson,* 103 Ark. 236, 146 S. W. 516. Evidence of an unjust, unreasonable and unnatural disposition is admissible only as a help to be considered with other evidence, as tending to show an unbalanced mind or one easily susceptible to undue influence. *Howell* v. *Miller,* 173 Ark. 527, 292 S. W. 1005. A court cannot strike down a will in favor of what it deems to be a more equitable disposition of the testator's property, unless it appears from the evidence that

it was induced by undue influence or that the testator lacked testamentary capacity. *Toombs* v. *Blankenship,* 215 Ark. 551, 221 S. W. 2d 417.

We are unable to say that a preponderance of the evidence shows that the disposition made by Mrs. Evans by her will was unjust, unnatural or unreasonable. It is only where a testamentary disposition is unaccountably unnatural that less evidence is required to establish undue influence. *Dunklin* v. *Black,* 224 Ark. 528, 275 S. W. 2d 447.

This is not a case where a parent attempted to disinherit her only child in favor of her youngest brother, a successful 40-year-old businessman of independent means, as was the case in *Brown* v. *Emerson,* supra, or a case where the testatrix disinherited a sister for whom she had great affection and who had given her part of their mother's estate to the testatrix by favoring a male business associate with whom she had become infatuated as was the case in *Howell* v. *Miller,* supra. It is unexplained inequality and unreasonableness which do violence to natural instincts of the heart, to the dictates of affection, to natural justice, to solemn promises and moral duty that are entitled to weight in considering questions of testamentary capacity and undue influence. *Brown* v. *Emerson,* supra. If a disposition can be rationally explained, it cannot be said to be unnatural. *In re Llewellyn's Estate,* 83 Cal. App. 2d 534, 189 P. 2d 822 (1948); *In re Walther's Estate,* 177 Ore. 382, 163 P. 2d 285 (1945). See *Scott* v. *Dodson,* 214 Ark. 1, 214 S. W. 2d 357; *Dunklin* v. *Black,* 224 Ark. 528, 275 S. W. 2d 447. The expression "unjust and unnatural will" is usually applied when a testator leaves his estate, or a large portion of it, to strangers, to the exclusion of natural objects of his bounty without any apparent reason. *In re Shay's Estate,* 196 Cal. 355, 237 P. 1079 (1925). See *Scott* v. *Dodson,* supra. A will cannot be said to be unnatural because a testator preferred one for whom she had developed a close and affectionate relationship [*In re Walther's Estate,* supra; see *Scott* v. *Dodson,* supra; see also *In re Ewart's Estate,* 246 Pa. 579, 92 A. 708 (1914)], or when the

natural objects of the testator's bounty are in no need of funds, aid or assistance. *In re Llewellyn's Estate,* supra. A will is unnatural in the legal sense only when it is contrary to what the testator would have been expected to make in the light of his feelings and intentions at the time, even though they may be prejudiced, however much it may differ from the ordinary actions of people in similar circumstances. *In re Ewart's Estate,* supra.

Facts which mitigate against a finding that Mrs. Evans' will was unjust, unnatural or unreasonable are appellant's advanced age, his and the testatrix's childlessness, the absence of any other close relatives, the provision for a life estate for Abel, his inheritance of any personal property of his sister remaining after payment of debts and expenses of administration, his succession to three joint bank accounts (once amounting to at least $22,000) established by the testatrix, and the relationship that had developed between Mrs. Evans and Mrs. Stinnett. Among Mrs. Evans' personal belongings was a collection of antiques and of her own works of art, some of which were shown to have some value. She also owned some stocks, which Abel said had been "cashed out" after her death. Not only does it clearly appear that Mrs. Stinnett performed well the services for which she was employed by Mrs. Evans, it is also obvious that these two ladies shared a warm affection for each other. Abel himself testified that Mrs. Stinnett "loved his siter to death," "petted her all the time," and would sit down and talk and "gossip" with her nearly every day of the week during Mrs. Evans' entire three years' illness. Abel said that Mrs. Stinnett visited his sister on occasions when she was "not on the payroll." Charles Franklin Stinnett, her son, was a pallbearer at Mrs. Evans' funeral. He testified that he visited Mrs. Evans about once a month during the two or three years preceding her death. He said that she had loaned him money and given him advice about saving money. Etheleen Garrison, Ouachita County Health Nurse, observed that Mrs. Evans became more and more dependent on others. The nurse rarely met any social visitors when she made at least semi-

monthly professional calls on Mrs. Evans. We cannot say that Abel was in need of his sister's bounty or that Mrs. Evans' bounty to Mrs. Stinnett and her son is not rationally explained or that it is unaccountably unnatural.

Giving the disposition made by Mrs. Evans its strongest probative force, however, we still could not say that the chancellor's findings are clearly against the preponderance of the evidence.

For proof of lack of testamentary capacity, appellant relies upon Mrs. Evans' age, her being an invalid for two or three years and her loss of memory which he claimed to have resulted from a stroke about one month before the will was made, in addition to the alleged unnatural disposition of her real property. He depends for the most part on his own testimony, particularly as to the alleged stroke. He concluded that an illness suffered by his sister was a stroke because when she awakened him about 1:00 a.m. she was lying in the bed with her eyes open and in such condition that he knew something was badly wrong, causing him to get help to get an ambulance to take her to a hospital where she remained for two weeks. His conclusion was contradicted by the testimony of a supervising nurse at the hospital where Mrs. Evans was a patient. This witness, called by appellant, testified that there was no diagnosis of a stroke prior to Mrs. Evans' death, that she did not see anything like that on the patient's chart, and did not observe any personality change in the testatrix after a time at least one month prior to the alleged stroke.

Dr. J. L. Dedman was Mrs. Evans' physician for about five years, beginning July 7, 1964. He attributed her death to heart failure. For four or five years she was in his office every month or so. She was under his care in the hospital approximately a dozen times. Before her death, she was coming to the doctor's office every three or four weeks. Each of her visits was for a period of five to ten minutes. He described her mental condition as "sharp as a tack." He identified a nota-

tion on her will dated April 18, 1968, that Mrs. Grace Evans was mentally able to take care of her business as having been written and signed by him. Although he said that Mrs. Evans was getting worse and weaker all the time, and was "going downhill" after February 1968, he saw her thereafter on March 12, and found no difference in her mental condition. He attributed her hospital visits to the necessity for draining fluid that accumulated in her system because of a heart weakened by high blood pressure and hardening of the arteries. He stated that Mrs. Evans did not have a stroke during his treatment of her. He stated that he knew nothing of her mental ability to know the nature and extent of her property or the just deserts of her different kinsmen.

Mr. Thomas Gaughan, a practicing attorney at Camden since 1934, was the scrivener. The will was dated February 26, 1968, and prepared in his office to which Mrs. Evans and Mrs. Stinnett came on that date. He testified that Mrs. Evans asked him to prepare her will, and told him the disposition she wanted to make of her property. He had not known either Mrs. Evans or Mrs. Stinnett prior to this occasion. He observed that the testatrix was approaching 80 years of age. He discussed the matter with the two ladies, who remained in the room while he dictated the will to his secretary. He said that Mrs. Evans looked at the will before signing it. According to him, Mrs. Evans was in his office 1½ to 2 hours. He testified that he evaluated Mrs. Evans as having testamentary capacity, or he would not have prepared the will. His consultation revealed nothing to him abnormal or subnormal, except for her advancing years, and he was of the opinion that she knew her property.

The burden of showing lack of testamentary capacity lay upon appellant. *Hilter* v. *Cude,* 248 Ark. 1065, 455 S. W. 2d 891. We are unable to say that evidence adduced by appellant preponderates over the testimony of the physician and the attorney, whose respective actions strongly corroborate their testimony. For the most

part, it consisted of: Abel's testimony that Mrs. Evans was unable to see without her glasses, that she had the mind of a 10-year-old child after her "stroke" that she did not recognize people and that she was forgetful; the testimony of Juanita Norwood that for the last two years Mrs. Evans was failing with regard to her mental state, and had poor memory; and the testimony of Etheleen Garrison, Ouachita County Health Nurse as to Mrs. Evans' gradual decline after February 1968, her deteriorating mental condition from 1967 until her death, her increased dependency on others, her inability at times to complete a statement or remember what she was talking about, her forgetfullness, and her discarding of two checks received in the mail about a year prior to her death. Complete sanity in a medical sense was not essential to testamentary capacity, if the power to think rationally existed when the will was made. *Hiler* v. *Cude,* supra. Awareness of her relatives, of the property owned and of the disposition made of it is the critical factor. See *Rogers* v. *Crisp,* 241 Ark. 68, 406 S. W. 2d 329. It was not shown to be lacking.

This leaves the question whether the preponderance of the evidence shows that Mrs. Evans' will was induced by the undue influence of Mrs. Belton Stinnett. While the burden of proof on this issue was upon appellant, he seeks to shift it, just as the appellants did in *Hiler* v. *Cude,* supra, and *Sullivant* v. *Sullivant,* 236 Ark. 95, 364 S. W. 2d 665. He relies upon the rule that where the will is drawn or procured by a beneficiary, there is a presumption of undue influence, making it incumbent upon the proponents of the will to show beyond reasonable doubt that the testator had both the requisite mental capacity and freedom of will and action to render the will legally valid. See *Orr* v. *Love,* 225 Ark. 505, 283 S. W. 2d 667. This rule, however, does not shift the burden of proof, in the sense of ultimate risk of nonpersuasion, from the contestant, although it may shift the burden of going forward with the evidence. *Hiler* v. *Cude,* supra. Of course, there are two essential elements necessary to establish undue influence. First, the influence must not be that which springs from natural affection or is acquired from kind offices, but

must be such as results from fear, coercion, or other cause that deprives the testator of his free agency in the disposition of his property. Second, it must be directly connected with the execution of the will and specially directed toward the object of procuring a will in favor of particular parties. *Thiel, Spec. Admr.* v. *Mobley,* 223 Ark. 167, 265 S. W. 2d 507. The presence of Mrs. Stinnett in the attorney's office was not sufficient to shift the burden of proof, if the will was drafted according to explicit directions of Mrs. Evans, given without prompting or instructions by Mrs. Stinnett. *Sullivant* v. *Sullivant,* 236 Ark. 95, 364 S. W. 2d 665.

Appellant relies upon the fact that one of the principal beneficiaries of the will, who was the mother of the other, drove Mrs. Evans' automobile to the office of the scrivener, helped her into the office, and engaged in discussions about the terms of the will. There was, as appellant admits, no element of fear or duress involved. Furthermore, there is no actual proof that Mrs. Stinnett procured the will or directed its making. The mere fact that a beneficiary is present when the will is made does not give rise to any presumption of undue influence when there is no evidence that he induced or procured the execution of the will. *Jones* v. *National Bank of Commerce,* 220 Ark. 665, 249 S. W. 2d 105. Appellant testified that the undue influence Mrs. Stinnett exercised consisted of petting his sister to death and running out all the time and getting every dollar she could out of her. He only suspected that Mrs. Stinnett "carried the ball' while some unidentified person gave her plenty of help. Of course, the testimony of the scrivener is of vital importance. Certainly a practitioner of his long experience would be particularly alert to any attempt on the part of Mrs. Stinnett to dictate or direct the terms of the will. He could not recall any particular comment she made while the three were discussing the will. He said that it did not appear to him that Mrs. Evans was under duress, compulsion or restraint or in fear. His testimony as to directions given by Mrs. Evans and her insistence on paying for his services immediately tends to negate any undue in-

fluence on her. He testified that after Mrs. Evans directed that the will provide for a remainder in the 42 acres of land in Charles Franklin Stinnett, either she or Mrs. Stinnett or both explained to Gaughan that Mr. Abel was unmarried and without descendants and that the testatrix had no children. This fact is not indicative that Mrs. Stinnett was directing the action or procuring the particular testamentary disposition. After the will was typed, Mr. Gaughan read it to both ladies, before he handed it to Mrs. Evans. He testified that Mrs. Evans was not told what to do or given any commands while in his office. Appellant sought to discredit the testimony of this lawyer by showing alleged inconsistent statements made to a friend of appellant. These statements were denied by Mr. Gaughan. We cannot say that the probate judge erred in according greater credibility to the scrivener's testimony. Neither can we say that Mrs. Stinnett was the procurer of the will nor that the probate judge's finding on undue influence is against the preponderance of the evidence.

CITY OF CROSSETT, ARKANSAS *v.* C. W. ANTHONY ET AL

5-5488 466 S. W. 2d 481

Opinion delivered May 10, 1971

Thomas S. Streetman, for appellant.

W. P. Switzer, for appellees.

J. FRED JONES, Justice. At a special election, properly called for the purpose, the electors of the City of Crossett, Arkansas, voted in favor of annexing two areas to the City of Crossett. One of the areas lay north of the present city limits and is referred to as "North Crossett." The other area lay south of the present city limits and is referred to as "South Crossett." Both North and South Crossett are contiguous to the present corporate limits but not to each other.

Following the election the City Council, hereafter called "City," filed its petition for annexation in the Ashley County Court as provided by statute (Ark. Stat. Ann. §§ 19-302—19-307 [Repl. 1968]). The county court gave due notice of a hearing on the petition and C. W. Anthony, Harold Bryant, Nolan Jeffress, W. M. Stover and Chesley Peters filed a response in opposition to the petition. The two areas involved were treated as separate cases and the county court denied the petition as to both North and South Crossett. The City appealed to the circuit court where the cases were consolidated for trial and the petition as to both areas was also denied by the circuit court on trial de novo. The City has appealed to this court and relies on the following points for reversal:

> "Lower court erred in denying appellant's motion to dismiss contest as to South Crossett for lack of standing to sue by appellees.
>
> There is no substantial evidence to support the findings of the trial court as to:
>
> A. North Crossett.
> B. South Crossett."

We agree with the City on its first point, but we must affirm the judgment of the trial court as to North Crossett.

The fact situation in this case presents a rather unique problem for the City of Crossett. The Georgia Pacific Corporation and its predecessor, Crossett Lum-

ber Company, apparently at one time owned all lands inside the present city limits of Crossett as well as most of the surrounding lands in the area. Georgia Pacific still owns all the vacant land inside the corporate limits of Crossett, and from time to time develops, and sells to individuals, such residential and business lots as it considers necessary for the orderly growth of Crossett and as it considers the demand and need exists. It appears from the record that Georgia Pacific places certain restrictive covenants in its deeds of conveyance apparently designed to control a uniform and orderly construction of homes in connection with adjacent areas of the city. As Georgia Pacific develops and sells lots from its lands inside the city, it constructs streets and extends utilities, all of which apparently goes into the cost price of the lots; thereby leaving a prospective purchaser with the option of purchasing a lot from Georgia Pacific inside the present city limits or going outside the city limits where there is more competition in the open market for building lots and where there is more latitude in restrictive use covenants or none at all. As a result the City of Crossett has actually expanded, and continues to expand, in a haphazard manner beyond its corporate limits, both north and south along the highways, and into areas unplanned and unrestricted as to use, zoning, location or structure. It is apparent from the overall record before us that Crossett could very easily be swallowed up by slums over which it has no control and in which it has no legal jurisdiction.

The guide lines for the annexation of contiguous property to a town or city as laid down in the case of *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891, have been so consistently followed by this court since the rendition of the *Vestal* decision in 1891, that we deem it unnecessary to repeat them here. See *Mann* v. *City of Hot Springs,* 234 Ark. 9, 350 S. W. 2d 317, and *Planque* v. *City of Eureka Springs,* 243 Ark. 361, 419 S. W. 2d 788. It is also well settled that the vote of electors favoring annexation makes a *prima facie* case for annexation and the burden rests on those objecting, to produce sufficient evidence to defeat the *prima facie* case. *Mann* v. *City of Hot Springs* and *Planque* v. *City of Eureka*

Springs, supra. This burden of proof does not shift but remains the same when tried in the circuit court de novo on appeal from the county court, *Marsh* v. *City of El Dorado,* 217 Ark. 838, 233 S. W. 2d 536, and the circuit court findings have the same weight and effect as the verdict of a jury. In such situation we are not called upon to decide where the preponderance of the evidence lies, but we are obligated to affirm the trial court's judgment if we find any substantial evidence to support it. *Garner* v. *Benson,* 224 Ark. 215, 272 S. W. 2d 442.

We render no opinion as to whether the City of Crossett fully met the guide lines for annexation as laid down in *Vestal, supra,* for that is not the question before us on this appeal. We are not called on to determine whether the trial court erred in *granting* the petition; we are called on to determine whether the trial court erred in denying it. We now proceed to the questions that are before us.

Ark. Stat. Ann. § 19-102 (Repl. 1968) provides that "any person interested may appear and contest the granting the prayer. . ." So, the first question is whether the protestants have such interest that entitles them to contest the petition on appeal in circuit court for the annexation of South Crossett. We are of the opinion that they have shown no such interest.

In the early case of *Perkins, et al* v. *Holman, et al,* 43 Ark. 219, Perkins and 36 other persons attacked the annexation of territory to the incorporated town of Locksburg through certiorari for the want of notice prescribed by law and for other causes. After the proceedings and orders of the county court had been certified up, the defendants filed a motion to quash the writ of certiorari—in legal effect a demurrer to the petition—because it appeared that the judgment and proceedings were regular and in pursuance of law. The motion was sustained and the petition dismissed. In affirming the trial court, this court said:

> "Without considering the merits of the controversy, there is one insuperable obstacle in the way of re-

> versing the judgment below. Neither the petition, nor any other part of the record, shows that the petitioners have any interests to be affected by the determination of the question sought to be presented. It is not alleged that they, or any of them, reside, or own property, either in the old town, or in the territory proposed to be annexed. It does not appear what right the petitioners have to interfere to prevent annexation. This is a subject upon which no presumptions can be indulged by an appellate court. There must be a substantial error, injurious to the appellants, before we can disturb the judgment of the Circuit Court."

In the case at bar all of the protestants testified. Their testimony was confined to where they lived and owned property. Mr. Anthony testified that he lived on Route 3, North Crossett, but not within the area subject to annexation. He testified, however, that he did own a business inside this area of North Crossett, but owns no property in South Crossett. Mr. Bryant testified that he lives in the North Crossett area under consideration for annexation and has never resided or owned property in South Crossett. Mr. Jeffress testified that he lives in North Crossett in the area subject to annexation and that he does not live or own property in South Crossett. Mr. Stover testified that he lives in North Crossett in the area subject to annexation and does not reside or own property in South Crossett. It was stipulated that Mr. Peters resides in North Crossett in the area subject to annexation and that he does not live or own property in South Crossett.

The City of Crossett filed a motion in the circuit court which reads, in part, as follows:

> "That in their response to the petition for annexation the above named respondents state that they are residents and property owners in the area proposed to be annexed and described in the petition for annexation filed herein by petitioners; that the proof before the court establishes conclusively that none of the respondents were residents of or prop-

erty owners in the area commonly known as South Crossett in this annexation action and more particularly described as being all of the Southwest Quarter of Section 29, Township 18 South, Range 8 West lying South of the existing city boundary of the City of Crossett and the Northwest Quarter of Section 32, Township 18 South, Range 8 West.

That no party to this action has shown any standing to contest the annexation of the area known as South Crossett and the contest as to that area ought to be dismissed and the area deemed to be annexed to and a part of the City of Crossett, Arkansas.

WHEREFORE, petitioner moves the Court to grant its motion dismissing the contest as to the area described above and known as South Crossett for the reasons hereinabove stated."

While it is true that these protestants filed their protest for themselves and *others similarly situated,* they do not reside or own property in the South Crossett area subject to annexation or within the present city limits of the City of Crossett. We are of the opinion, therefore, that the protestants, for themselves as well as for others similarly situated, have not shown such interest within the meaning of the statute that would permit them to question the propriety of the annexation of an area to a city in which they have shown no interest in the city or in the area to be annexed. If these protestants have such interest, there would be no reason why any other citizen within the trade area of Crossett; or indeed within Ashley County, would not also have such interest. We hold, therefore, that "any person interested" as referred to in the statute, means any person who actually has some interest in the city or in the area to be annexed, and that at least some such interest must be shown on trial de novo in the circuit court in the face of a motion to dismiss for lack of interest.

As to the North Crossett area, the case of *Pine Bluff* v. *Mead,* 177 Ark. 809, 7 S. W. 2d 988, is very much in point. In that case the majority of electors in

Pine Bluff voted to annex contiguous territory. The county court approved the annexation and on appeal to the circuit court conflicting evidence was submitted on trial de novo and the petition was denied. After reciting the conditions under which it is proper for the boundaries of a city or town to be extended as laid down in *Vestal* v. *Little Rock, supra,* this court in *Mead* said:

> "We think it unnecessary to set out or to review the testimony offered in support of and in opposition to the prayer of the petition for annexation. We are of the opinion that by far the greater part of the territory involved is shown, under the tests announced by Judge Hemingway, by the great preponderance of the evidence, and much of it by the undisputed evidence, to be territory which should be annexed to the city. But, before we could reverse the finding and judgment of the circuit court, we would have to say that all of the land included in the petition was adapted to urban uses.
>
> We do not interpret the court's finding as meaning that none of the land embraced in the petition was adapted to urban uses, but only that lands were included in the petition which should not have been, and, if that finding is supported by substantial testimony, we must affirm the judgment of the circuit court, which denied the prayer of the petition. *Brown* v. *Peach Orchard,* 162 Ark. 175, 257 S. W. 732.
>
> There was testimony that a forty-acre tract of land owned by W. M. Simpson is unplatted and is used exclusively for agricultural purposes, and its present value is due to that use and is not attributable to its adaptability for urban purposes. Similar testimony was offered as to certain other tracts of land.
>
> This testimony was not undisputed. On the contrary, the testimony on the part of the petitioners was to the effect that all this land was adapted to urban uses and derived its principal value from that fact. But we are required to affirm the judgment of

the court below if it is supported by substantial testimony, and it is so supported.

In the Vestal case, *supra,* this court on the appeal held that most of the territory embraced in the annexation petition should properly have been annexed, including a forty-acre tract of land which was said to be vacant, low, flat, wet, and covered with timber, but the judgment of the circuit court which had affirmed the order of the county court annexing the unincorporated town of Argenta to the city of Little Rock, was reversed because another forty-acre tract of land was embraced in the annexation petition, and the court found that the owner of this land had no need of local government and the city had no need of his land.

A similar finding was made by the court below as to certain agricultural land included in the petition, and, as there is substantial testimony to support that finding, the judgment must be affirmed, and it is so ordered."

In the case at bar the trial court found, among other things, as follows:

"The principal area sought to be taken is North of the City of Crossett containing about 2000 acres of the total acreage sought. A part of this area, lying along U. S. Highway 82, is densely populated and there are several platted additions and a street system in this area. On the other hand, there are extensive areas that are not densely populated or populated at all and which are not served by streets or municipal services or adjoined by platted additions. There are more than 327 acres of timber land in the North Crossett and 123.84 acres in the South Crossett area according to the testimony of the county tax assessor and 355 acres of open unimproved land, possibly farm lands, in the North Crossett area according to the testimony of the Manager, U. S. Department of Agriculture office.

* * *

> . . . a large portion of the areas sought to be annexed include a large part, possibly as much as 800 acres, in vacant, unimproved, open land, under cultivation or in timber and uninhabited and not served with streets or roads and which is not suitable for annexation.
>
> * * *
>
> This is not to say that a part of the proposed area is not suitable for annexation but because of the large portion that is not suitable this court has no alternative but to deny the petition of the City of Crossett for annexation in its entirety and in this respect the motion of the city to dismiss as to the South area should be denied."

Mr. Harold Bryant, in surrebuttal, testified that there is some farm land under cultivation in the North Crossett annexation area. He testified that a Mr. Mann owns 40 acres within the area which he uses for pasturing cows and horses; that a Mr. Barnett lives within the proposed annexation area and owns 60 acres of which about 40 acres is in cultivation; that Tommy Barton lives within the area and owns about 120 acres which he also uses for pasture. He testified that Belouts have 60 acres within the area which is not being used for anything now, but which has been used for pasture. He testified that Dr. Barnes' estate consisting of 79 acres of open land is within the area but that it is not being used for pasture. He testified that Sonny Courson has about 20 acres within the area which has been used in the past for horse pasture.

None of the vacant land owners testified and there is no evidence in the record as to enhancement of land values because of adaptability to municipal inclusion. It was stipulated that Mr. J. C. McGoogan, a real estate agent, if called as an expert witness, would testify that the highest and best use of the undeveloped land within the proposed annexation area would be for residential and commercial purposes.

Mr. Joe West was the only witness who lived or owned property in South Crossett. His testimony was directed primarily to the water system now in use in South Crossett. He also testified that a petition was circulated in South Crossett and a majority of the residents signed the petition opposing annexation.

Certainly if the trial court had granted the petition for annexation, there would have been substantial evidence to support such judgment—but that is not the case. The trial court denied the petition and as we said in *Mead,* "before we could reverse the finding and judgment of the circuit court, we would have to say that all of the land included in the petition was adapted to urban use." We cannot say this for the reason that there is substantial evidence that some of the land in the North Crossett proposed annexation area is not adapted to urban use.

The judgment as to North Crossett is affirmed and the judgment as to South Crossett is reversed. This cause is remanded to the trial court for entry of an order annexing South Crossett to the City of Crossett.

Affirmed in part; reversed in part and remanded.

GEORGE ROSE SMITH, BROWN AND BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. I disagree with that portion of the majority opinion holding that the trial court should have annexed the South Crossett area. The error of the majority opinion is that it considers the property owners as the appellant in the circuit court whereas in fact the city was the appellant and as such had the duty under Ark. Stat. Ann. § 19-101 to notify all interested persons by newspaper publication of the time and place of the hearing it desired the court to hold. If the county court had ordered the annexation of the South Crossett area then *Perkins* v. *Holman,* 43 Ark. 219 (1884), would be authority for the position here taken. However, the appellant here was also the appellant in the circuit court and in that case the matter stood for trial de novo, as if it had originally been

brought in that court, see *Pike* v. *City of Stuttgart,* 200 Ark. 1010, 142 S. W. 2d 233 (1940), upon the petition of the city for annexation.

Ark. Stat. Ann. § 19-307, authorizing annexation by a city, provides that after a favorable vote the city must present a petition to the county court praying for such annexation and that the procedure in the county court shall, so far as applicable, be had in accordance with Ark. Stat. Ann. § 19-101 to 19-103 (Repl. 1968).

So far as here applicable Ark. Stat. Ann. § 19-101 provides:

> ". . . When any such petition shall be presented to the court, they shall cause the same to be filed in the office of the County Clerk, to be there kept, subject to the inspection of any person or persons interested, until the time appointed for the hearing thereof; the court shall, at or before the time of such filing, fix and communicate to such petitioners or their agent, a time and place for the hearing of such petition, which time shall not be less than thirty [30] days after the filing of such petition, and thereupon the petitioners or their agent shall cause a notice to be published in some newspaper of general circulation in the county, not less than three [3] consecutive weeks; and, if there is no newspaper of general circulation in the county, a notice shall be posted at some public place within the limits of said proposed incorporated town for at least three [3] weeks before the time of such hearing which notice shall contain the substance of said petition, and state the time and place appointed for the hearing thereof."

Ark. Stat. Ann. § 19-102 provides:

> "Every such hearing shall be public, and may be adjourned from time to time, and any person interested may appear and contest the granting the prayer of said petition; and affidavits in support of or against said petition, which may be prepared and

> submitted, shall be examined by said court, and they may, in their discretion, permit the agent or agents named in the original petition to amend or change the same, except no amendment shall be permitted, whereby territory not before embraced shall be added, or the character of the proposed incorporated town changed from special to general, or from general to special, without appointing another time for hearing, and requiring new notice to be given as above provided."

There is no statutory procedure for an appeal by the city to the circuit court from the county court's denial of a petition for annexation. Its only right of appeal is that set forth in Article 7, § 33 of the Constitution which provides:

> "Appeals from all judgments of county courts. . . may be taken to the circuit court under such restrictions and regulations as may be prescribed by law."

In *Pike* v. *City of Stuttgart, supra,* we pointed out that the procedure in the circuit court would be the same as that set out in Ark. Stat. Ann. §§ 19-101 to 19-103 for the procedure in the county court. This would require the city to again comply with the notice required by Ark. Stat. Ann. § 19-101.

Under the procedure outlined above, Joe West had a right to appear at the public hearing required by Ark. Stat. Ann. § 19-102, *supra,* and without formal pleading to protest the annexation. I submit that when the county court sustained his objection and the city appealed to the circuit court under Art. 7 § 33, *supra,* Mr. West had the same right to appear and protest at the public hearing required by Ark. Stat. Ann. § 19-102. Mr. West did appear in the circuit court to register his protest and testified that by a petition circulated an overwhelming majority of the people of South Crossett opposed the annexation.

In the case of *Perkins* v. *Holman,* 43 Ark. 219, relied upon by the majority, the county court had approved

the annexation and the persons objecting to the annexation and wishing to appeal to the circuit court neither lived nor owned any land in the affected territory. This court there properly held that the objectors had no standing in the circuit court to complain of the annexation by the county court. The distinction between the Perkins case and the one at bar is that the city was the petitioner in both the county court and the circuit court and that under Ark. Stat. Ann. § 19-102, *supra,* Mr. West had a right to appear and be heard.

Another and totally different reason for sustaining the circuit court's findings is that by Ark. Stat. Ann. § 19-103, the court is required to find, as a prerequisite to annexation, that it is "right and proper" to annex the territory in question to the city. Here the testimony as to South Crossett was much the same as that on North Crossett area.

For either or both of the foregoing reasons, I dissent.

GEORGE ROSE SMITH and BROWN, JJ., join in this dissent.

JERRY DENHAM *v.* STATE OF ARKANSAS

5589 466 S. W. 2d 469

Opinion delivered May 10, 1971

Louis W. Rosteck, for appellant.

Ray Thornton, Attorney General; *Garner L. Taylor, Jr.,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. This is an appeal by Jerry Denham from an order of the Pulaski County Circuit Court denying his petition for post-conviction relief in the form of habeas corpus. The trial court record enables us to dispose of the matter without a great deal of difficulty. We affirm the judgment of the trial court.

Denham was charged with first degree rape of a little Negro girl who had been babysitting with Denham's sister-in-law's children. Competent counsel was appointed to represent him. He entered a plea of not guilty and not guilty by reason of insanity. He was found without psychosis upon examination at the State Hospital; and after a jury was empaneled and selected to

try his case, the prosecuting attorney agreed to waive the death penalty upon a plea of guilty. Denham entered his plea of guilty and was sentenced to the penitentiary for life.

Denham alleged in his petition that his constitutional rights were violated in that he was denied the assistance of counsel; that he was never given a copy of indictment, or information, or bill of particulars; that he was denied counsel at police interrogation; that trial counsel finally appointed for him was ineffective; that statements made under duress were admitted in evidence against him; and finally, that he was denied the right to appeal his conviction. The petition was signed by Denham over a jurat as follows:

> "Sworn and subscribed this 22nd day of September, 1970. /s/ Jack Jones—My Commission Expires April 23, 1974."

An evidentiary hearing on the petition was held in the trial court on the 28th day of October, 1970, at which time Denham appeared with his court-appointed counsel and was permitted to testify in support of his petition. At the outset, however, the record made at the original trial of his case was read to him, which reflected that he was charged by information filed on June 27, 1967; that on July 3, 1967, Harry Robinson and Allan Dishongh were appointed to defend and his case was passed to July 10 for arraignment; that on July 11, 1967, he entered a plea of not guilty and not guilty by reason of insanity; that he was then sent to the State Hospital for psychiatric examination; that on July 25, 1967, he was returned to the court with a certificate from the State Hospital "without psychosis"; that on July 31, 1967, a jury trial was set for October 26 and 27; that on October 23, 1967, Allan Dishongh was relieved as attorney. Under date of October 26, 1967, the record made in the trial court reveals as follows:

> "Both parties announced ready for trial; drawn and struck jury; death penalty was asked by the State; the jury was empaneled and sworn; death penalty

was waived by the State; plea of not guilty withdrawn, plea of guilty entered, jury instructed to return a verdict of guilty and assess a life sentence; verdict, by direction of Court, guilty, life, Max F. Atwood, Foreman; and time for sentencing waived and defendant sentenced and committed."

The record before us reveals that on September 25, 1970, Mr. Louis Rosteck was appointed to represent the petitioner on his petition for habeas corpus. In support of his petition Denham testified that he did not know that Mr. Dishongh was appointed to represent him; that he does not recall whether Mr. Dishongh was in the courtroom when he entered his plea of guilty to the rape charge or not; that he does not recall whether he ever talked to Mr. Dishongh but does not think that he did. He testified that he recognized Mr. Robinson as being his attorney; that he remembers that he first pleaded not guilty to the charge of rape; that he believes it was not guilty by reason of insanity as well. The pertinent answers to questions are as follows:

"Did your attorney, or attorneys, ever talk to you concerning the trial? Did you have any conferences with them, with either of them?

A. Yes. I had one or twice with Mr. Robinson, and I don't remember what it was about though.

Q. Well, did you talk about the nature of the case itself?

A. Yes, sir, I imagine we did. I just don't remember, it's been so long ago.

Q. And did you make it known to him as to what your plea would be?

A. Yes, sir.

Q. Now, I would like for you to be more specific since you are alleging here, one of the grounds here, that you were coerced into making a plea

of guilty. I wish—I don't hardly know how to ask the question, but I wish you would tell the Court here as to what you base that on?

A. What do you mean?

Q. You have alleged here that you were coerced into entering a plea of guilty.

THE COURT: Somebody forced you to enter a plea of guilty.

THE WITNESS: Well, I had to plead guilty, or get the electric chair.

Q. (Mr. Rosteck, Continuing) Tell the Court how that came about?

A. Well, anybody with any sense would say that is my point.

Q. Who came to you and told you that you had to enter a plea of guilty?

A. I don't rightly remember.

Q. Did your attorney, or court-appointed attorney, recommend to you to enter a plea of guilty?

A. I believe he did; said it would be best to plead guilty.

Q. To plead guilty?

A. Yes, sir.

Q. Are you sure about that now?

A. Yes, sir, I am sure.

Q. Was any of the officers, either the county jail or the county officers, city officers, or state

officers, did any of them threaten, coerce you in any manner?

A. No, sir.

Q. As to entering a plea of guilty to this charge?

A. No, they didn't.

Q. Did you at any time make it known to your attorney that you wanted to have a jury trial, or did not want to have a trial?

A. Yes, sir, we was going to have a trial and then we come in here, this room here, and I believe that is when he told me it would be best to plead guilty because I had all of those people in the courtroom on me, and it was in the papers and all that stuff; told myself it would be best to plead guilty instead of getting the electric chair.

Q. Or get the electric chair?

A. Right.

* * *

Q. Let me ask you this. Do you recall appearing in the courtroom with your attorney, or attorneys, and that a jury was selected?

A. Yes, sir, a jury was selected.

Q. They were selected and seated in the jury box?

A. Yes, sir.

Q. You recall that?

A. Yes, sir.

Q. After the jury was sworn in by the clerk, you recall that?

A. Yes, sir.

Q. Jury being sworn in?

A. Yes, sir.

Q. What transpired from that point on?

A. Well, I don't really remember. That's when we come in here and started talking. I don't know.

Q. Was there any indication to you at the time you went to trial that the Prosecuting Attorney's office, or the State, was asking the death penalty?

A. Yes, sir, they was to start with.

Q. You were aware of that?

A. Yes, sir.

Q. So your attorneys were ready to have a jury trial at that point?

A. Yes, sir.

Q. At some point after the jury was empaneled, you came into the Judge's Chambers? Is that correct?

A. Yes, sir.

Q. And, at that time, be specific on what you're saying now, and think carefully, what happened, if anything happened, that you can recall, either coerced, or under duress, or threatened, or anything of that nature, to make you change your plea from not guilty to guilty?

A. Well, I wasn't really, what you say threatened. Like I told you while ago, the man said it

would be best to plead guilty and I know it would be myself.

* * *

Q. (Mr. Rosteck, Continuing) Mr. Denham, you mentioned here that you did—you never received a copy of the bill of particulars. Was this requested by you?

A. No, sir.

Q. Do you know what a bill of particulars is?

A. I really don't.

Q. You alleged in here that you requested, you intimated that you didn't receive it, neither did you receive a copy of the information?

A. I didn't receive one.

Q. Did you make any formal request of your attorney for a bill of particulars?

A. No, sir.

Q. Did you ask your attorney for information to be more specific as to the crime itself?

A. I don't know.

Q. To get you any information?

A. No.

Q. Were you aware at the time that you were brought to trial what you were charged with?

A. Yes, sir.

Q. The nature of the crime?

A. Yes, sir.

Q. And also the penalty for which you could receive?

A. Yes, sir.

Q. You were aware of all that at that time?

A. Yes, sir.

Q. Now, you further allege, and this is the last point here, that you had ineffective assistance in counsel. Now, I wish you would be more specific and say why you feel that you did not have effective assistant counsel?

A. Well, really, I don't believe I could have had any court-appointed, or any other kind, the way they were all right in court and all that stuff on me. I didn't have a chance to start with.

Q. When you say ineffective assistance, what do you actually mean by that?

A. Well, I didn't even—I don't know. I didn't write that. That lawyer up there wrote it for me.

THE COURT: You got a jailhouse lawyer, or a regular lawyer?

THE WITNESS: I don't know. I guess sorta jailhouse lawyer.

Q. (Mr. Rosteck, Continuing) Well, for the matter of record here, did you receive—

THE COURT: (Interposing) How much did he charge you for writing it?

THE WITNESS: He didn't.

THE COURT: I didn't know if he was practicing law without a license, or not. Proceed.

Q. (Mr. Rosteck, Continuing) Did you receive counsel from your court-appointed attorneys? Did they counsel with you?

A. Yes, sir, Mr. Robinson did.

Q. Do you feel like there was anything they could have done which they didn't do?

A. No, sir, I don't believe they could.

Q. In other words, you feel that they were as effective as they could possibly have been under the circumstances for which you were charged?

A. Yes, sir.

Q. I will ask you one last question. Is there anything else, or any statement that you would like to make to support your petition, anything that I have not asked you and anything you want to say?

A. No, sir, not that I know of."

On cross-examination the appellant reiterated that he was afraid the jury would assess a death penalty, and that he knowingly and intentionally entered his plea of guilty with the understanding that he would get a life sentence to the penitentiary, rather than take the chance of getting a sentence of death in the electric chair. The assistant prosecuting attorney then proceeded on cross-examination to elicit the following answers to the following questions:

"Q. Now, your attorney went into a great deal of detail in explaining this to you, did he not?

A. Well, he didn't go into all that; he just told me.

Q. You agreed to it, did you not?

A. Yes, I agreed to it.

Q. You agreed to it because you had done the act that you were charged with? Is that not true?

A. No, sir, I didn't do the act."

On redirect examination Mr. Denham testified as follows:

"Q. Mr. Denham, you indicated that you did not commit this particular crime. I will ask you specifically, did you, or did you not —are you, or are you not stating that you were, or were not, guilty of the crime of rape?

A. I pleaded guilty then, yes.

Q. You plead guilty to it, and you are admitting today that you were guilty of it?

A. No, I am admitting I wasn't guilty of it, but I pleaded guilty instead of getting the electric chair, which I would have got.

Q. Now, so that I am sure I am right on this, you plead guilty because you were in fear of getting the electric chair?

A. That's right.

Q. And what induced you to plead guilty?

A. If you read the papers, the papers would tell you why."

The court reporter who participated at the original trial on the plea of guilty, as well as Mr. Harry Robinson who represented the appellant at his original trial, testified. The substance of their testimony was that after the jury was empaneled to try the defendant on a charge of first degree rape, the prosecuting attorney agreed to waive the death penalty and recommend life imprisonment if Denham desired to enter a plea of guilty rather

than risk his chances with a jury. Mr. Robinson's qualifications, as set out in the record, show that he had been an attorney for 40 years; that he had served as deputy prosecuting attorney; had served as a municipal judge as well as a circuit judge; and that he had participated in the trial of many capital cases.

Mr. Robinson testified that he discussed the case with the appellant and his family on many occasions prior to trial; that after the jury was empaneled and sworn to try the case, he discussed a plea of guilty with the prosecuting attorney; that when the prosecuting attorney agreed to waive the death penalty, he felt that it was to his client's best interest that he enter a plea of guilty and accept a sentence to life imprisonment.

The pertinent facts surrounding the original crime are only before us as referred to by Mr. Robinson in his testimony. The substance of his testimony is that the crime itself had complicated features in that the victim of the crime was a little Negro girl who was babysitting for the appellant's sister-in-law; that following the crime she was denied admittance to a local hospital because the doctor in charge did not want to become involved, and the crime itself as well as the subsequent events was attended by considerable statewide publicity. Mr. Robinson concludes as follows:

> "I just told him the facts as it was. He had a rough case, coupled with some other—rape itself was rough, but all this other hullabaloo, it was just a rough case, and Denham understood it.
>
> * * *
>
> I could have discussed it with him a hundred times and never would come up with but one conclusion —you better plead if you could. It was that kind of case to me."

Mr. Robinson testified that he filed a motion requesting a list of the witnesses the state intended to use at the trial, but that after a plea arrangement was

worked out with the prosecuting attorney, the motion became moot. As to the alleged failure to furnish a bill of particulars and to appeal, Mr. Robinson testified as follows:

"Q. Did you ever file a motion for a bill of particulars?

A. No, I didn't need it. I didn't think. Now, a bill of particulars is either to aggravate, or delay, the Prosecuting Attorney, or it's very seldom ever filed for, actually for information.

THE COURT: Let me ask you this. Did this man request you to appeal this case? He said something in there about failure to take his appeal.

THE WITNESS: No, sir, he was well satisfied under the circumstances. * * *

Q. (Mr. Rosteck, Continuing) Let me ask you you one last question. If, today, you had the same situation, would your decision be the same?

A. Absolutely."

Mr. Denham was offered the opportunity to direct questions to Mr. Robinson concerning the petition he filed, but he declined to do so.

The judgment is affirmed.

RUTH W. O'NEAL, NEXT FRIEND OF ANNE DAVIS WARMACK ET AL *v.* ED WARMACK ET UX

5-5525 466 S. W. 2d 913

Opinion delivered May 10, 1971
[Rehearing denied May 31, 1971.]

Eichenbaum, Scott & Miller and *Warner, Warner, Ragon & Smith,* for appellant.

J. W. Durden, for appellee.

CONLEY BYRD, Justice. Appellants Ruth W. O'Neal, next friend of Anne Davis Warmack, David George Warmack, John Porter Warmack and Robert Edward Warmack, minor children of appellees, and Eugene Weisenfels, guardian ad litem of James T. Warmack and Daniel D. Warmack, also minor children of appellees Ed and Jane Warmack, allege that the trial court erred in ruling that a trust instrument violated the rule against perpetuities and in the alternative that the trial court erred in ruling that the property revested in the settlors instead of the beneficiaries.

We do not reach the first point because the trust instrument, upon which the trial court ruled, has not been abstracted as required by our Rule 9(d).

The next alleged error is not supported by the record which shows that all the assets of the trust

originated with appellees Ed and Jane Warmack who made an attempted gift for the benefit of their children. The general rule is that a resulting trust arises in favor of the donor or settlor when the trust is held void for violating the rule against perpetuities. See *Hopkins* v. *Grimshaw,* 165 U. S. 342, 41 L. ed. 739, 17 S. Ct. 401 (1897); 54 Am. Jur. Trusts § 200.

Affirmed.

GEORGE ROSE SMITH, J., concurs, and FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I respectfully dissent as to point two. I find no evidence whatever to support the statement that Mr. and Mrs. Warmack made or attempted any gift to their children or that any of the assets of the trust originated with them. Ed Warmack testified that all property of the purported trust was conveyed to him as trustee for Ed Warmack Family Trust. He never owned any of the real property, nor held any title except as trustee. He borrowed the money, in his capacity as trustee, to purchase the Kansas property, the first acquisition. Later he exchanged property he personally owned for property in Louisiana conveyed to the trust, but financed the property as trustee and paid himself the fair market value of his property exchanged. There is a shopping center on the Kansas property and a Sears-Roebuck warehouse on the Louisiana property. The income from the property has been invested for the benefit of his six children. He has never claimed any of it and stated that it had always been his intention that his children have the benefit of this trust property. Neither he nor his wife has ever claimed any of the trust property personally. He testified that neither he nor his wife had ever given any money to the trust.

It seems to me that the Warmacks, as declarants of the trust, clearly intended a trust for the benefit of all children born to them during the life of the trust. This is clearly indicated by Paragraph 1 of the trust set out in appellants' brief. The invalidity of the trust

should not vest title in grantors who conveyed the property to the trustee and who have been paid full consideration for their conveyances. While a resulting trust in favor of the grantor is often declared when the trust expressed in his conveyance fails, such a result is proper and equitable when the conveyance is without consideration, but it is improper when the grantor conveys his entire estate upon a valuable consideration. *Davis* v. *Jernigan,* 71 Ark. 494, 76 S. W. 554. The father was not the grantor in any conveyance of property to him as trustee under the declaration of trust, so there would be no proper basis for a trust in his favor. Certainly there should not be a trust in favor of the grantors who have received a valuable consideration for their property. *Davis* v. *Jernigan,* supra.

The violation of the rule against perpetuities can only be based upon delayed distribution of the corpus beyond the time allowed. The conveyances themselves should not be invalid. The equitable result would be that the title to the property go to those who should certainly benefit—the children of the Warmacks—and that the title should be held in trust for their benefit, either by resulting trust of which the grantors in the conveyances are trustees, or, preferably, the named trustee in the conveyances, the father of these children. Vesting the title in the parents, or either of them, who have not contributed one cent to the purchase price of the property and who never intended to benefit from the purchases seems totally inequitable.

Neither of the parties is a donor or a settlor in the sense of the authorities stated in the majority opinion. Regardless of the very wholesome desires of these parents at the time the family trust was created and their present concern for their children, there are many, many factors, such as financial reverses, that frustrate the most noble parental concern. More than 90 years ago, Mr. Justice Eakin spoke for this court of equity's jurisdiction over the property of minors as a very high trust, involving the most delicate and important interests of a helpless class which is peculiarly the subject of the jealous and watchful care of chancery

and peculiarly liable to injury from the greed of crafty men and the carelessness of relations. *Myrick* v. *Jacks,* 33 Ark. 425.

This concern for the welfare of minors makes it our duty to take that action with regard to the title to the land which is most consonant with the best interests of these minors. The principles of equity not only permit us to do so, but direct us to do so. The rules applicable to property freed from the disposition made by the conveyor are aptly stated at 5 Powell on Real Property 686.1, § 790 (1970) as follows:

> When the special rules applicable because of the presence of a power of appointment fail to provide a destination for the property in question, and also in all cases of complete or partial invalidity produced by the rule against perpetuities in limitations involving no power of appointment, the property in question passes, either (1) in accordance with the other limitations contained in the same conveyance to the extent that such limitations would have effectively disposed of this property if the limitations found invalid had not been made; or (2) if there are no such "other limitations," then as undisposed of property of the conveyor.
>
> The determination of the ultimate recipient of what cannot go exactly as the conveyor has directed is guided by a constant judicial desire to give as full effect to the manifested desires of the conveyor as is consistent with the adequate protection of social interests. The rules above stated implement this general attitude with respect to both deeds and wills, and as to limitations involving either land or personalty or both.

The rule stated by Powell is consistent with § 424, Restatement of the Law, Trusts, Second, Chapter 12, Page 370, which reads:

> Where the owner of property transfers it upon a trust which fails, and he receives from a third

> person consideration for the transfer as an agreed exchange, there is a resulting trust in favor of the person who paid the consideration.

We have said that the fact that an express trust is invalid because of statutory inhibition will not prevent an implied trust from resulting by operation of law, if the circumstances are such as to give rise to a resulting trust. *Mortensen* v. *Ballard,* 209 Ark. 1, 188 S. W. 2d 749. Implied trusts are those deducible from a transaction as a matter of clear intention of the parties, but not expressed in words, or those superinduced on a transaction by operation of law as a matter of equity independently of the particular intention of the parties. They are raised by operation of law, either to carry out a presumed intention of the parties or to satisfy the demands of justice or protect against fraud. *Hunt* v. *Hunt,* 202 Ark. 130, 149 S. W. 2d 930. Accord, *Caldwell* v. *Matthewson,* 57 Kan. 258, 45 P. 614 (1896); *Allbert* v. *Allbert,* 148 Kan. 527, 83 P. 2d 795 (1938.)[1]

When I view all the circumstances here, among which are the stated intention of the parents and the source of the purchase money, I think equity demands that we declare Ed Warmack to hold the title to the property involved as trustee for the children now or hereafter born to appellees.

Language of § 404.1, V Scott on Trusts (Third Edition) 3213, seems clearly applicable:

> A resulting trust is to be distinguished on the one hand from an express trust and on the other from a constructive trust. An express trust is created only if the settlor manifests an intention to create it, although the manifestation may be made by conduct as well as by words. A resulting trust arises where a person makes or causes to be made

[1]Kansas cases are referred to because a part of the trust real property lies in that state. The parties have argued Kansas law in their briefs. The record before us is devoid of any suggestion that the law of any other state has any application. See Ark. Stat. Ann. § 27-2504 (Supp. 1969); *American Physicians Ins. Co.* v. *Hruska,* 244 Ark. 1176, 428 S. W. 2d 622.

a disposition of property under circumstances which raise an inference that he does not intend that the person taking or holding the property should have the beneficial interest in the property. In other words, an express trust is created if it appears that there was an affirmative intention to create it; whereas in the case of a resulting trust the circumstances indicate the absence of an intention to give the beneficial interest to the person in whom the legal title to the property is vested.

There are three situations in which the trust which arises is properly called a resulting trust: (1) where an express trust fails in whole or in part; (2) where an express trust is fully performed without exhausting the trust estate; (3) where property is purchased and the purchase price is paid by one person and at his direction the vendor conveys the property to another person. In each of these cases there is an inference that the person taking title to the property is not intended to have the beneficial interest, and in each of these cases the inference arises from the character of the transaction. In the first two cases an express trust is created, but there is no provision in the terms of the trust as to what is to happen if the trust fails or if there is a surplus. The inference is that the trustee is not to keep the property, and since no other disposition is made of it the property or the surplus should be returned to the settlor. The inference is, not that the settlor actually intended that the property or surplus should be returned to him, for there is no evidence that he contemplated the possible failure of the express trust or the possible existence of a surplus, but that he did not intend in any event that the trustee should have a beneficial interest. Since the trustee was not intended to keep the property or the surplus, and since no other disposition has been made in the event which has happened, the court will compel the trustee to return the property or the surplus to the person who created the trust. It cannot be said that the settlor actually intended this result, since

there is nothing to indicate that he had any intention with respect to the matter. At most it can be said that it is what he probably would have intended if the question had occurred to his mind.

On the other hand, where property is purchased by one person and the property is transferred at his direction to another, it is inferred that the purchaser intended that the grantee should hold the property for the benefit of the purchaser. It is arguable that the trust which arises is therefore an express trust arising out of the intention of the purchaser manifested by his conduct. The courts have always taken the view, however, that the trust can properly be considered a resulting trust, since no evidence of the purchaser's intention to create a trust is required other than the character of the transaction. The character of the transaction raises an inference that he did not intend that the grantee should have the beneficial interest in the property. Accordingly, it is held that the purchaser is not precluded by the Statute of Frauds from compelling the grantee to convey the property to him. The circumstances of the transaction make it unnecessary to prove an undertaking by the grantee to hold the property in trust for the purchaser, and certainly dispense with the necessity of a written memorandum which is required by the Statute of Frauds where an express trust of an interest in land is created.

The general rule is stated at 5 Thompson on Real Property (Permanent Edition) 48, § 2361, thus:

"Trusts" arising by operation of law are termed "implied trusts," and they divide into "constructive" or "resulting trust." They are deducible from the transactions of the parties where there is no express purpose to create a trust, or those which arise by operation of law as a result of the demands of justice and fair dealing. They result from the conduct, relation and supposed intention of the parties independent of any agreement what-

soever between them, and are construed as trusts as a matter of justice. Such trust may be created although an oral express trust fails.

In finding that the allegations of a complaint stated a resulting trust in *Allbert* v. *Allbert,* supra, the Kansas Supreme Court quoted and relied upon statements from Corpus Juris as follows:

> Implied trusts are defined in 65 C. J. 221 as follows: "Implied trusts are more frequently defined as those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are super-induced upon the transaction by operation of law as matters of equity, independently of the particular intention of the parties. However, some definitions disregard the element of intent and define these trusts to be such only as arise by operation of law. By some authorities the term 'implied trusts' is used in a sense exclusive of resulting and constructive trusts to designate a form of express trusts."
>
> On the next page, in distinguishing a resulting trust from a constructive trust, both of which are implied trusts, it is said: "* * * a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance." 65 C. J. 222.

I find that there are applicable Kansas Statutes which read:

> When a conveyance for a valuable consideration is made to one person and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections. Kan. Stat. Ann. 58-2406.

> The provisions of the section next before the last shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid; or where such alienee in violation of some trust shall have purchased the land with moneys not his own; or where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof. Kan. Stat. Ann. 58-2408.

See also *Aaron* v. *Rothrock,* 102 Kan. 272, 169 P. 1161 (1918).

On the subject of resulting trust, we find that Thompson makes these additional statements (Volume 5, Page 62, § 2370):

> A resulting trust arises by implication of law, and does not grow out of a contract, and, where there is an express trust, there can be no resulting trust. It results from the conduct, relation, and supposed intention of the parties independent of any agreement whatsoever between them. Fraud is not an essential element to the creation or existence of a resulting trust. Such trusts are raised by implication of law and presumed to have been contemplated by the parties, the intention being found in the nature of the transaction although not expressed in the deed or instrument of conveyance. They oridinarily arise either upon a failure of an express trust or where property is transferred by a grantor to a third party at the request of one who pays the purchase-price. A trust may result in favor of the donor where there is a failure of an express trust. Such trust arises where the legal estate in property is transferred, but the intent appears or is inferred from the terms of the disposition, or from the accompanying facts and cir-

> cumstances, that the beneficial interest is not to be enjoyed with the legal title, in which case, the trust is implied or results in favor of the grantor who is deemed to be the real owner. A resulting trust arises when one person's money is paid for land and the conveyance is taken in the name of another person. The trust depends upon the equitable presumption of intention, and arises the instant the legal title is taken. They are sometimes termed "presumptive trusts," or "passive trusts." Where, for any reason, the legal title to property is in one person under such circumstances as to make it inequitable for him to have the beneficial interest, equity will imply a trust in favor of the person entitled to the beneficial interest. It must appear from the entire transaction that there is an obligation on the part of the holder of the legal title to hold it for the benefit of someone else.

On the subject of resulting trusts, there is an interesting and applicable discourse in 4 Pomeroy's Equity Jurisprudence (Fifth Edition) 61, et seq., §§ 1031, et seq., as follows:

> In all species of resulting trusts, *intention* is an essential element, although that intention is never expressed by any words of direct creation. There must be a transfer, and equity infers the intention that the transferee was not to receive and hold the legal title as the beneficial owner, but that a trust was to arise in favor of the party whom equity would regard as the beneficial owner under the circumstances. The equitable theory of *consideration,* heretofore explained, is the source and underlying principle of the entire class (see § 981). Resulting trusts, therefore, are those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title. In such case a trust is implied or results in favor of the person for whom the equit-

able interest is assumed to have been intended, and whom equity deems to be the real owner. This person is the one from whom the consideration actually comes, or who represents or is identified in right with the consideration; the resulting trust follows or goes with the real consideration.

All true resulting trusts may be reduced to two general types: 1. Where there is a gift to A, but the intention appears, from the terms of the instrument, that the legal and beneficial estates are to be separated, and that he is either to enjoy no beneficial interest or only a part of it. In order that a case of this kind may arise, there must be a true *gift* so far as the immediate transferee, A, is concerned; the instrument must not even state any consideration, and no valid complete trust must be declared in favor of A or of any other person. Such trusts, therefore, generally arise from wills, although they may arise from deeds. If the conveyance be by a deed, the trust will result to the grantor; if it be by a will, the trust will result to the testator's residuary devisees or legatees, or to his heirs or personal representatives, according to the nature of the property and of the dispositions. 2. The second type includes the cases where a purchase has been made, and the legal estate is conveyed or transferred to A, but the purchase price is paid by B.

Cases supporting the rules stated in the texts are numerous. Some are particularly applicable to the facts here:

In *Skidmore* v. *Gueutal,* 143 App. Div. 407, 128 N. Y. S. 402 (1911), it was held that when a grantor conveys property absolutely for a valuable consideration paid to a trustee who executes a declaration of trust later found to be invalid for indefiniteness and for violation of the rule against perpetuities, title does not vest in the person named as trustee, but vests in the beneficiaries named in the declaration, when it is mani-

fest that the grantor did not intend to convey to the trustee in his individual capacity.

In *Smith* v. *Pratt,* 95 N. H. 337, 63 A. 2d 237 (1949), it was held that, when the trust instrument fails to disclose the intention of a declarant concerning ultimate disposition of the res, it will result to the creator of the trust in the absence of evidence of intention that the beneficial interest should pass to someone else. In that case there was no such evidence, so the one who furnished the consideration for the conveyance to the trustee who made the declaration of trust was deemed to be the creator of the trust and the beneficiary of a resulting trust in the remainder, after a life estate in the trustee specifically provided for in the property.

In *Rosenthal* v. *Miller,* 148 Md. 226, 129 A. 28 (1925), it was said that when there is consideration for a conveyance upon a void trust, or one which fails, the grantee takes the beneficial interest only when he furnishes the purchase money, but if it was paid by someone else, a resulting trust arises in favor of the party furnishing the consideration.

Graybill v. *Manheim Central School District,* 175 Pa. Super. 415, 106 A. 2d 629 (1954), is another case in which it was held that fee simple title vests in the beneficiary in a deed where full consideration has been paid to the grantor and an attempted limitation is void for violation of the rule against perpetuities.

I would reverse the decree and remand for the entry of a decree declaring that Ed Warmack holds the corpus of the trust as trustee for the use and benefit of children born to him and his wife.

DOROTHY SAUTER ET AL *v.* DICKI ATCHINSON ET AL

5-5567 466 S. W. 2d 475

Opinion delivered May 10, 1971
[Rehearing denied May 31, 1971.]

Terral, Rawlings, Matthews & Purtle; By: *Gail O. Matthews,* for appellant.

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

CONLEY BYRD, Justice. The appellant Dorothy Sauter, individually and as mother and next friend of Larry Imler, a minor, brought this action to recover for injuries received by Larry when a parked car owned by appellee Dicki Atchinson and occupied by appellee Diane Masingill suddenly rolled forward and over Larry. The jury, upon interrogatories, found that neither Larry, Dicki nor Diane was guilty of negligence. For reversal of the judgment entered on the jury's verdict, appellant contends: (1) that the trial court should have sustained her motion in limine to prohibit appellees from re-

ferring to headlighting rabbits from the car hood prior to the occurrence here involved; (2) that the trial court should have given an instruction on Res ipsa loquitur; and (3) that the findings of the jury are contrary to the law and the evidence.

The record shows that Larry, Dicki, Diane, Diane's sister Karen, Jimmy Ryburn, and Fred McMurtry decided to headlight rabbits. They obtained a shot gun from Dicki's house and took Dicki's car out Chicot Road to the end of the pavement. At this point Diane started driving with Larry and Dicki riding on the hood of the car with the shot gun. Diane turned off onto a fire lane and proceeded to the end where she parked on the crest of a hill. Not finding any rabbits to shoot, they decided to shoot some cans. Dicki got back into the car. He said that he put the gear shift in park, set the hand brake and switched the lights to bright. Diane moved to the passenger's side of the car where she remained until after Larry was injured. Dicki and Jimmy Ryburn took their turn shooting, standing in front of the headlights and shooting at cans thrown by the others. When Larry took his position to shoot, the car started rolling forward, and rolled over him, causing the injuries complained of. All during the can shooting, Diane testified, she remained on the passenger's side of the front seat and her sister Karen and Fred McMurtry remained in the back seat. The car's motor was left running and a stereo tape player was on. The automobile was in neutral when it eventually came to rest.

1. The evidence of the events leading up to parking the car on the crest of the hill was admissible to show the relationship among the parties. It follows that the trial court did not err in refusing appellant's motion in limine.

2. Appellant only asked for the Res ipsa loquitur instruction as to Dicki. When we consider that the car stood in its parked position while Dicki and Jimmie Ryburn took their turns shooting and that the car was occupied by Diane, her sister Karen and Fred McMurtry, we hold that trial court properly refused the Res ipsa

loquitur instruction as to Dicki. The doctrine of Res ipsa loquitur is grounded upon the fact that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to the defendant but inaccessible to the injured party, and also on the premise that the defendant had exclusive control. See *Ford Motor Company* v. *Fish,* 232 Ark. 270, 335 S. W. 2d 713 (1960). Here neither situation exists.

3. In her last point appellant contends that under the facts as developed Larry could not have been injured and the accident could not have happened, had not someone been negligent and thus the jury's findings to the contrary are contrary to the law and the evidence. This argument overlooks the fact that there was other testimony from which the jury could have found that Dicki acted as a reasonable and prudent person in placing the car in "park" and setting the handbrake and that Diane did nothing to cause the car to start rolling.

Affirmed.

VAN RICHIE *v.* STATE OF ARKANSAS

5583 466 S. W. 2d 462

Opinion delivered May 10, 1971

Louis W. Rosteck, for appellant.

Ray Thornton, Attorney General; *Garner L. Taylor Jr.,* Asst. Atty Gen., for appellee.

FRANK HOLT, Justice. The trial court, sitting as a jury, found appellant guilty of burglary and imposed a two-year sentence in the State Penitentiary. On appeal, the appellant contends for reversal that the evidence is insufficient to establish that a burglary had occurred, or that he had committed the alleged burglary.

In accordance with our well-established rule, we must view the evidence on appeal in the light most favorable to the appellee and sustain the verdict when

there is any substantial evidence to support it. *Crow* v. *State,* 248 Ark. 1051, 455 S. W. 2d 89; *Reynolds* v. *State,* 211 Ark. 383, 200 S. W. 2d 806 (1947); *Sanders* v. *State,* 198 Ark. 880, 131 S. W. 2d 936 (1939).

On a Sunday afternoon at approximately 5 p.m., officer Gene Johnston received information on his car radio that Teeter's car lot had been burglarized by two individuals. It appears that the officer was cruising in this neighborhood. When he observed the appellant and a codefendant seven blocks from this car lot, he stopped them and conducted a "field search" which revealed that both men were in possession of various papers belonging to Teeter's. Thereupon the officer transported the two suspects to Teeter's where he was joined by two other police officers. There the Teeter papers, consisting of four separate items, were removed from the possession of both suspects, although Officer Johnston could not say which items were removed from appellant. Officer Johnston testified that he found a window broken out beside the door leading into the office and that a person could reach through the broken window and unlock this door. Officer Yow testified that appellant and his codefendant told him they had taken a set of "master keys"; then both suspects accompanied him to a lot behind a church building near Teeter's where, according to their directions, he found the keys in the grass. This officer, after being uncertain which suspect pointed out the location of the keys, finally testified there was no doubt in his mind that appellant showed him where the keys were. The State also adduced evidence from the manager of the car lot that on the date of the burglary he responded to a call from the police to come to the place of business and identify some keys and papers. As a witness he identified the four items of papers consisting of a car sales contract between Teeter's and a customer, related papers, and the customer's $2,295.00 check payable to Teeter's. He testified that they came from Teeter's and that he remembered this particular transaction with this customer since he had to get a new contract and check. He also testified that the "master keys" belonged to the car lot and were used in the operation of the business.

In *Johnson* v. *State,* 190 Ark. 979, 82 S. W. 2d 521 (1935), we said:

> "* * * The law is that recent possession of stolen property, unexplained, is sufficient to warrant a jury in returning a verdict of guilty against one charged with burglary and larceny where a house had been broken into and property stolen."

In the case at bar, although evidence presented by the State to the effect that a burglary had occurred and that appellant had committed the alleged offense is circumstantial in nature, such evidence presents a question of fact to be determined by a jury. *Mathis* v. *State,* 249 Ark. 1088, 464 S. W. 2d 48; *Scott* v. *State,* 180 Ark. 408, 21 S. W. 2d 186 (1929).

The appellant denied complicity in the alleged offense. He testified that he was walking home about 9:30 p.m. (not 5 p.m.) when he happened to meet his codefendant and had accepted from him an invitation to walk to his house where car transportation would be available. He admits observing the officers remove the Teeter papers from the person of his codefendant. In questioning the sufficiency of the evidence, appellant also argues that Officers Johnston and Yow were uncertain which of the Teeter papers were removed from him; that Officer Yow equivocated in his testimony that appellant pointed out the location of the keys, even though he later testified there was no doubt in his mind that appellant pointed out to him the location where the keys were found. Also, that one of the papers showed Teeter's Little Rock address instead of the North Little Rock address where the alleged burglary occurred. Appellant asserts that this vague evidence, together with his denial of complicity and his explanation of being within seven blocks of the alleged burglary with his codefendant, whom he admits had possession of the Teeter papers, is insufficient to sustain his participation in the alleged burglary. In *Crow* v. *State, supra,* we said:

"* * * The weight to be given the conflicting testimony and all reasonable inferences to be drawn therefrom were questions for the jury to determine."

In the case at bar, when we view the evidence most favorably to the appellee, as we must do, we hold there was substantial evidence from which the trial court, sitting as a jury, could find that a burglary (breaking or entering with unlawful intent to commit larceny) had occurred and that appellant had participated in the alleged offense.

Affirmed.

BYRD, J., dissents.

HEIRS OF OLIVER W. MILLS *v.* CHARLES WILLIAM WYLIE ET AL

5-5548 466 S. W. 2d 937

Opinion delivered May 17, 1971

David J. Potter, for appellants.

Graves & Graves, for appellees.

CARLETON HARRIS, Chief Justice. There is an old adage "Hard cases make bad law". The circumstances of this case are such that the old adage can be understood for actually our holding in this case may not be in accord with the actual intention of the testator—existing in his mind—but certainly it is in accord with long established law that the court's finding shall be based on the intention of the testator—*as expressed by the language of the will.* Appellants are the heirs of Oliver W. Mills, consisting of six persons, but actually it appears that there are approximately ninety-three persons eligible to share in the estate of Oliver W. Mills provided appellants prevail. Mills died testate, a resident of Hempstead County on the 5th day of November, 1969. His wife had predeceased him, and the two had no children. Charles William Wylie, a nephew of decedent's wife, was named executor of the will, and it was admitted to probate. Subsequently, Wylie, also the main beneficiary, petitioned the court for a construction of the will and determination of heirship; the petition was granted, and a hearing was held by the court which included the testimony of Wylie and two persons on his behalf, and the testimony of four respondents. At the conclusion of the hearing and after submission of briefs, the court filed its opinion construing the will in favor of Mr. Wylie and Hattie Tyree, a sister of Mrs. Mills, and sister-in-law of the deceased, who was also a beneficiary. From the order so entered, appellants have brought this appeal. For reversal, four points are asserted, but all relate to the fact that the judge permitted the taking of extrinsic evidence for the purpose of determining whether there was an ambiguity, when appellants say there was no ambiguity.

The will,[1] executed by Mills on August 10, 1966,

[1]The will was prepared by Nellie Jean Webb, who was also one of the witnesses, a former legal secretary for a Hope legal firm. Following her employment by that firm, she had been employed at Red River Vocational School, but was not working at all at the time of the trial. Mrs. Webb copied the language in paragraph three, pertinent to this appeal, from a will which had been executed some years earlier, though changes were made in the beneficiaries, and the portions which were devised and bequeathed. Mrs. Webb stated that she typed it as a favor to friends and that Mrs. Mills gave her $5.00 for doing so.

after providing for the payment of debts, reads as follows:

"2. I give, devise and bequeath all my property of every kind, whether real, personal or mixed, to my beloved wife, Mary B. Mills. In the event Mary B. Mills survives me, and remarries, then I direct that my estate be divided between Mary B. Mills and Charles William Wylie, share and share alike.

3. Should Mary B. Mills and I meet death in a common disaster, then I direct that my estate go to the following:

The Snell Cemetery at Emmett $250.00;
Rose Hill Cemetery at Hope $250.00;
First Methodist Church at Hope $500.00; and
Emmett Methodist Church at Emmett $250.00.
Hattie Tyree ..... one fourth
(in the event Hattie Tyree predeceases me then I direct that the part that she would have received go back to my estate)
Charles William Wylie ..... the remainder of my estate

5.[2] In the event Charles William Wylie dies without issue, I direct that my entire estate go to my sister-in-law, Hattie Tyree.

6. If Hattie Tyree should survive me, and wants to live in one of our homes I direct that all furnishings be left in said home for her to use, and also a car, for her use during her lifetime.

7. I hereby nominate, constitute and appoint Charles William Wylie as executor of my estate under this my Last Will and Testament and, if it is possible for him to serve in this capacity, I desire that he do so without bond. In the event Charles William Wylie is unable to serve as executor of my estate for any rea-

[2]There was no item four, Mrs. Webb stating that she simply made a mistake in numbering.

son, I desire that the Court appoint some-one to serve, but that it not be either one of my brothers-in-law."

The instrument was then signed by Mills and witnessed by two persons, but there is no dispute but that Mills did execute the will, and that he was fully competent to do so, and acted without undue influence.

In his brief, counsel for appellant suggests that we first read the will without reading the testimony, and thus determine if there is any ambiguity in the written instrument. He was confident that we would find none—and his confidence was justified—for no ambiguity is discovered. It, of course, is apparent to any attorney who has read thus far that the language at issue, and which determines the outcome of this litigation, is found in item three as follows: "*Should* Mary B. Mills and I meet death in a common disaster, *then* I direct that my estate go to the following: [Emphasis supplied]"

Appellant's contention is very simple, *viz,* the disposition in items three and five is made subject to the contingency that Mills and his wife should be killed in a common disaster.

It very clearly appears from the language in the instrument that Mills had two thoughts in mind in making this will, first, he declared what would happen if his wife survived him, and secondly he provided what would happen if he and his wife were killed in a common disaster. In the first instance, the language provides that testator's wife is to receive all of his property, but that in the event she remarries, then one-half of his estate is devised and bequeathed to Wylie. This item never became effective because Mrs. Mills predeceased her husband. Likewise, item three never became effective because the testator and Mrs. Mills did not die in a common disaster. Item five can mean nothing, for Wylie was only to receive his interest in the estate under either item two or item three; otherwise, he received nothing. Since neither of the contingencies mentioned in those two items occurred, both provisions are completely ineffective.

Items six and seven are not under attack by appellants, and are thus not involved in this appeal.

It has often been loosely said that in construing a will, a court endeavors to determine the intention of the testator—but this statement is not quite true. As stated in *Park* v. *Holloman,* 210 Ark. 288, 195 S. W. 2d 546:

"The appellants are correct in the statement that the purpose of construction is to arrive at the intention of the testator; *but that intention is not that which existed in the mind of the testator, but that which is expressed in the language of the will.* [Emphasis supplied]"

In *Smith* v. *Smith,* 229 Ark. 579, 317 S. W. 2d 275, this court stated:

"It is well settled law in this state, so well settled as to require no citation of authority, that where there is no ambiguity, or no conflict or repugnance between the provisions of the will, judicial interpretation or construction is not required."

In *Quattlebaum* v. *Simmons National Bank of Pine Bluff,* 208 Ark. 66, 184 S. W. 2d 911, we held that where the meaning of the language in a will is unambiguous, testimony as to the testator's intention is inadmissible. In *Wilson* v. *Storthz,* 117 Ark. 418, 175 S. W. 45, we said:

"The testator's intention must be gathered from the will, and, while evidence may be received to explain any ambiguity in the designation of a beneficiary, yet neither the scrivener, nor anyone else, can be permitted to testify that the testator meant or intended any disposition of his property not expressed in the will."

In *Rufty* v. *Brantly,* 204 Ark. 32, 161 S. W. 2d 11, it was said:

"The rule is, however, inflexible that surrounding circumstances cannot be resorted to for the purpose of

importing into the will any intention which is not there expressed, and when a will is not ambiguous in terms it is unnecessary to resort to testimony as to the surrounding circumstances in order to ascertain its meaning."

Almost an inestimable number of cases could be cited to the same effect. We have thus said that where the meaning of the language is not ambiguous, testimony as to the testator's intention is "inadmissible", "unnecessary", "construction is not required", and no one "can be permitted to testify that the testator meant or intended any disposition of his property not expressed in his will". Perhaps these holdings can be summed up by a holding of this court in *Lavenue* v. *Lewis,* 185 Ark. 159, 46 S. W. 2d 649, wherein we quoted from one of the great United States Supreme Court Justices as follows:

"The first great rule in exposition of wills (to which all other rules must bend) said Chief Justice Marshall, in *Smith* v. *Bell,* (6 Pet.) 31 US 68, 8 L. Ed. 322, is that *the intention of the testator expressed in his will* [emphasis supplied] shall prevail, provided it be consistent with the rules of law."

Since we find that there was no ambiguity, there is no necessity to discuss the testimony. Under our decision in *Vaught* v. *Vaught,* 247 Ark. 51, 444 S. W. 2d 104, a case referred to by the chancellor, testimony on the question of why Mills placed the common disaster clause in the instrument, might have been pertinent as showing whether the contingency was the reason for making the will at the time of execution, or whether it was intended to specify the condition upon which the will was to become operative. For instance, testimony that Mills and his wife were getting ready to make a long trip within a few days by automobile or airplane might well have been pertinent to the question of whether the will was conditional. There was, of course, no such evidence. In *Vaught* v. *Vaught supra,* we were called upon to determine whether the court should have admitted a holographic will to probate. The opening

sentence of the will read, "This is my will if I should die at once". The testator then set out, "I want Marie Vaught, to have my land and personal property". The instrument was dated January 11, 1951, and Vaught died on June 5, 1966. This court stated:

"The particular question depends upon whether the contingency is referred to as the occasion of, or reason for, making the will at the time of execution, or is referred to as the reason for making the particular disposition of property which would be disposed of thereby and is intended to specify the condition upon which the will is to become operative. In the latter case, the will is contingent or conditional. In the former it is not. 1 Page on Wills (New Rev. Treatise), 418, 423, §§ 9.1, 9.5; Annot. 1 A. L. R. 3d 1048, 1050; 57 Am. Jur. 453, 456, §§ 671, 674; 94 C. J. S. 939, Wills § 152; *In re Taylor's Estate,* 119 Cal. App. 2d 574, 259 P. 2d 1014 (1953)."

The words "if I should die at once" state a contingency, and oral evidence was admissible to shed light on the reason for the use of this language. The proof reflected that the will was apparently made in contemplation of hospitalization and surgery. Accordingly, in effect, we held that the impending surgery was the occasion or reason[3] for the testator making the will at the time of execution and the will was thus not a contingent or conditional will, reversing the trial court in a four to three decision. But that situation is not present in the instant case.

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[3]In *Vaught* v. *Vaught supra,* referring to *Wilson* v. *Higgason,* 207 Ark. 32, 178 S. W. 2d 855, we said: "The writer of that letter [testator] certainly did not desire that the addressee collect his insurance and money and make the division directed unless he died 'anytime soon.' Nor did he intend for his other desires to be carried into effect except in case of his death soon. In other words, the conditions there stated could have *only* been construed as stating the conditions under which the testamentary document became operative and not as the reason for making a will. On the other hand, the language "This is my will if I die at once" *can* be construed as stating the reason for the making of the will, *i. e.,* that possibility of impending death which provokes much testamentary action. Since it can be so construed, it should be."

The chancellor, in his opinion, referred to our holding in *Vaught* v. *Vaught supra,* stating:

"If this test applies in determining if a will is unconditional it should apply in determining if it is ambiguous, more especially when as here the extrinsic evidence in the record clearly establishes what the deceased intended."

It is apparent from what we have said about the holding in *Vaught,* that we cannot agree with this statement of the chancellor, and actually if there is any ambiguity in this case, it was created by the testimony —*not* by the language.

Were we to affirm this case, no will would be immune from a possible successful attack, for while the testator might plainly state the disposition desired, there could well be numerous heirs who would go into court to prove by oral evidence that "Grandpa", or "Uncle Jim", or whoever the testator might be, really meant something else, and had numerous times, over the years, stated contrary intentions to those expressed in the will.

As we construe the English Language, the words used in the will of Oliver W. Mills are plain and clear, and entirely free from ambiguity, and it follows that all oral evidence was inadmissible.

Without any intention of being critical of the scrivener of this will, we have another clear example of a person who is untrained in the law, and totally unfamiliar with rules of construction, preparing a legal instrument. Many wills, and many deeds, have passed, and conveyed, property in a manner inconsistent with the desire that the testator, or grantor, might have had in mind, because the instrument was not prepared by one familiar with the legal effect of words used.

The order of the Hempstead County Probate Court is reversed and the cause remanded to that court for the entry of a decree consistent with this opinion.

BROWN, J., not participating.

JUANITA SINKHORN *v.* JOEL C. MEREDITH, FRANCES L. MEREDITH AND LILLIAN DENISE MEREDITH, A MINOR, BY HER NEXT FRIEND, JOEL C. MEREDITH

5-5568 466 S. W. 2d 927

Opinion delivered May 17, 1971

Shackleford & Shackleford, for appellant.

Richard E. Griffin, Ovid T. Switzer, Bruce D. Switzer and *Tom Tanner,* for appellees.

CARLETON HARRIS, Chief Justice. The only question on this appeal is whether verdicts awarded Joel C. Meredith, his wife, Frances L. Meredith, and daughter Lillian Denise Meredith, a minor, against Juanita Sinkhorn, appellant herein, were excessive. The three appellees were injured in an accident in Jefferson County on September 1, 1969, and a jury fixed damages at $5,000 for Mr. Meredith, $10,000 for his wife, and $2,500 for the daughter. After motion for a new trial had been overruled, and judgment entered in favor of appellees appellant filed this appeal. Since appellee, Frances L. Meredith, the wife, received the greater injuries, we proceed to first discuss the propriety of the amount of the judgment awarded to her. Following the accident, all three were taken to the Jefferson Hospital in Pine Bluff, where they received treatment from Dr. Nash of that city. Dr. Nash's report related that when Mrs. Meredith was brought to the emergency room, she was somewhat confused, complaining of head, chest, right leg, right and left shoulder injuries; she was admitted to the hospital for further care. His diagnosis related head injuries, left shoulder injuries with pneumothorax, and right leg abrasions. She was discharged to the care of Dr. R. L. Salb, a physician of Crossett. Dr. Salb testified that he was given a history by Dr. Nash, and primarily was to "follow up" on the pneumothorax, the doctor explaining that this was the collapse of a lung.[1] He stated that the clavicle (collarbone) was displaced at the time of the injury and probably punctured the lung and then slipped back out. He observed the fragmented edges of the clavicle, and, from his experience, presumed that was what had happened. The doctor stated that Dr. Nash had already immobilized the clavicle by brace, which was most uncomfortable to the patient. He stated that her injury was a painful one and that she had a painful healing period; that about eight weeks trans-

[1]"Well, this is a lung being punctured and air getting in between the lung and the chest wall decreasing the ability of the lung to function. As he said, it was about ten per cent expanded the last time he saw her, well, that would give her probably about a fifty per cent less function of lung on that side because as it decreases toward the cone, of course, the less the vital capacity. So, she would have a fifty per cent vital capacity, probably, with the ten per cent collapse on the left side."

pired before she was free from "quite a bit of discomfort". He said that as she wore the brace, it became loosened in some manner and this slowed the healing. The clavicle had moved out of position, and a malformation in the form of a knot on the clavical would be permanent. Dr. Salb testified that if she were to have lung surgery on the left side, she might have considerable difficulty, "Instead of the lung collapsing when you enter the pleura space, it don't and then you have to start and dissect this lung. From the word go it might be very difficult." He said that the lung was capable of function and would cause no trouble except if she needed lung surgery or another pneumothorax, or treatment for, as an example, tuberculosis; in such case it was possible that there could be grave consequences. The witness stated that this susceptibility would continue for the rest of her life. When asked about a disability evaluation, he answered "It would be somewhere between five and ten per cent, possibly".

Mrs. Meredith, 24 years of age, stated that she received a blow on the side of her head, a fractured collarbone and lung injury, and a cut on her right leg just below the knee. The witness testified to intense pain from the fractured collarbone while in the hospital, and she said the brace, which had to be worn continually, was most uncomfortable and did not help the pain; that the brace irritated a mole on her back, an infection developing. The brace was removed in order for the infection to clear and it was necessary to have the mole removed. Mrs. Meredith wore this brace during September, October, and most of November. She said that after leaving the hospital and going to her mother's home, she was only able to get up to go to the bathroom and to the table to eat. Mrs. Meredith related the difficulties with the fractured clavical, stating:

"The pain was terrible, especially riding from Pine Bluff home. When I got home, the only time I got up was to go to the bathroom and to the table to eat. I had been home about a week I guess and I got up and I went to the table and the thing—the bone moved or something and I just got sick and had to lay back down. Then that

night I was getting up and it moved or done something again and it was just like it broke all over again. I screamed and it just like to have never quit hurting. It was just like it had happened all over again. I couldn't get up or lay down or anything. I could sit down and start to lay down, but then I'd have to have support on my head to get back down. When I would get up, somebody would have to hold me because I would just be so dizzy I couldn't stand up. When I would lay back down, it would feel just like I was falling off the bed."

During this time, Mrs. Meredith also had emotional problems:

"I was nervous anyway, before the wreck. But then when I got there to Mother's, I don't know, I just cried and cried and cried and you could ask me why, I didn't know why I was crying. I was embarrassed to death, because I couldn't do anything for myself. I couldn't even go to the bathroom. I couldn't do anything. I couldn't get in or out of the bathtub myself."

She lost twenty-five pounds after the accident, and when asked her condition at the time of the trial, stated:

"I just don't have any energy. Just doing my normal housework, I'm tired before I get half through. I'm irritable, because I don't feel good."

Of course, during the three months period when she was confined, Mrs. Meredith was unable to look after her child in any way. She testified that her left arm was still weak, and that she had trouble in lifting the baby with that arm.

Mrs. Lilliam Hagood, the mother of Mrs. Meredith, testified that she stayed in the hospital with her daughter for six days, and that on leaving the hospital, the daughter was taken to the mother's home. She said that her daughter was not able to do anything without help, and could not even undress. Mrs. Hagood described the brace as being in the shape of a "figure eight and it was put around her and fastened in the back with some

kind of a buckle". The purpose of the brace was to pull and straighten the shoulder, and it was necessary that Mrs. Meredith wear it at all times. Her left arm was constantly in a sling, and, according to the witness, Mrs. Meredith could do nothing either for herself or the baby. The testimony of Mrs. Meredith and Mrs. Hagood, relative to the injuries and suffering of the wife, was verified by that of Mr. Meredith.

One of the most difficult questions to answer in tort litigation is whether or not a judgment is excessive. This is partly true because there is really no way to measure pain and suffering; actually, some people are more prone to pain than others, and some cannot adjust to it as well as others. We said flatly in *Coca-Cola Bottling Co. of Ark.* v. *Adcox,* 189 Ark. 610, 74 S. W. 2d 771, "There is no rule by which we can measure damages for pain and suffering". Further:

"Plaintiff is not limited in his recovery to specific pecuniary losses as to which there is direct proof, and it is obvious that certain of the results of a personal injury are insusceptible of pecuniary admeasurement, from which it follows that in this class of cases the amount of the award rests largely within the discretion of the jury, the exercise of which must be governed by the circumstances and be based on the evidence adduced, the controlling principle being that of securing to plaintiff a reasonable compensation for the injury which he has sustained. 17 C. J., 869, *et seq.*"

Likewise, in *Turchi* v. *Shepherd,* 230 Ark. 899, 327 S. W. 2d 553 (1959), we said:

"A comparison of awards made in other cases is a most unsatisfactory method of determining a proper award in a particular case, not only because the degree of injury is rarely the same, but also because the dollar no longer has its prior value."

If a dollar no longer had its prior value in 1959, obviously we may use our common knowledge, and courts may take judicial notice of the fact, that the dollar

has considerable less purchasing power today than it did even in 1959. See *Missouri Pacific Railroad Co.* v. *Elwins,* 176 Ark. 737, 4 S. W. 2d 528. When all of the circumstances are considered, we cannot agree that this judgment was excessive.

The amount of $5,000 awarded to Mr. Meredith is also questioned. Mr. Meredith is an employee at the paper mill in Crossett, and is also an ordained minister, having pastored a church in Newport for over a year. Meredith received a bad bruise on his forearm, and was unable for some time to move the hand because of the bruise and swelling. Dr. Nash took x-rays and a splint was placed on it. He was not able to work during the week and sustained lost wages of $96.64. His x-ray services amounted to $36.95; there was also a bill for $46.00 from the Children's Clinic for the care of the daughter. The hospital bill for Mrs. Meredith was $196.75, and laboratory and radiology bills amounted to $121.25. Dr. Nash charged $100.00 for his services to Meredith and his wife and Dr. Salb charged $83.00. The damage to the automobile was covered by insurance except for a $50.00 deductible. Since Mrs. Meredith was unable to care for herself, arrangements were made with her parents for Meredith to pay them the sum of $50.00 per week during the three months period that they lived with her parents; this amount, of course, took care of their meals during this three months period. The testimony revealed rather a close relationship between Meredith and his wife. The two always went together when he would preach a sermon at some church to which he had been invited; she helpfully criticized his sermons and made suggestions for improvement. They read and studied the Bible together, enjoyed going to the park with the baby, and hunted and fished together. Of course, these pleasures had to be held in abeyance during the period of time that Mrs. Meredith was being looked after by her mother. In other words, the normal husband-wife relationship did not exist during that time. In effect, what was said relative to the award given Mrs. Meredith, can also be made applicable to the award given to her husband, and though it was liberal,

we cannot say that it was in such an amount as to demonstrate prejudice and passion on the part of the jury.

We do agree that the award to the child was somewhat excessive, principally because any sort of finding of a serious or lengthy injury would had to have been based on speculation. Dr. Townsend, a Pine Bluff pediatrician, prepared a report which was read into evidence, as follows:

"I saw this seven month old infant for the first time on September 1, 1969. She was involved in an automobile accident and was seen by me in the Jefferson Hospital emergency room. Examination revealed abrasions of her left nostril and face. She was admitted for observation and did quite well. X-rays failed to reveal any fracture. She was discharged on September 4, 1969, to be followed by her physician in Crossett."

It developed that another report had been submitted by Dr. Townsend and it too was read into evidence as follows:

"This seven month old infant was involved in an automobile accident on September 1, 1969. She was seen in the emergency room at which time it was noted that she had an abrasion and contusion to her left face. There was some evidence of bruise on the left foot. Other than this the infant was completely normal. It was felt that due to the fact that the Mother was injured and admitted, it was best to admit the infant for observation. The infant did have a URI on admission and developed a low grade fever. Procaine penicillin was given for this. Skull x-rays and chest x-rays and laboratory work were all within normal limits. It was felt that the only thing that this infant sustained out of the accident was a bruise and abrasion of the left face. She was discharged on September 4, 1969, to be followed at Crossett by her local physician."

The child was never again treated by a physician as a result of the accident, and the testimony offered reflected only that the child cried, mainly because her

mother was unable to pick her up. The grandmother testified "I just can't satisfy her, it took her own mother to do that". Mrs. Hogood stated that the child would awaken in the middle of the night "screaming", which she (Mrs. Hagood) interpreted as caused by fear. Of course, many babies awaken during the night—and the day—crying, and this, in itself, establishes very little. It is quite apparent from the report of Dr. Townsend, and the fact that no further medical services were necessary, that the crying was not caused by physical injury. And the child would certainly seem to be too young (at seven months) for it to be said that emotional, or psychiatric, damage had occurred. At any rate, there was no medical testimony to that effect. We are of the view that $1,500.00 would constitute a generous award.

In accordance with what has been said, the judgments in favor of Frances L. Meredith and Joel C. Meredith are affirmed; the judgment in favor of Lilliam Denise Meredith is affirmed on condition that remittitur is entered as indicated within seventeen calendar days; otherwise, this last judgment will be reversed and the case remanded for a new trial.

FOGLEMAN, J., dissents in part.

JOHN A. FOGLEMAN, Justice, dissenting. I dissent from the remittitur. I can agree that the award is liberal, but I cannot arrive at the conclusion that the lack of medical testimony as to pain and suffering or emotional shock left the jury to speculation only in fixing damages. If this be the case, then most verdicts for this element of damages are based upon speculation, for there are few objective symptoms of this result from an injury and the "pain barrier" of individuals differs as much as any personality trait or element of physical makeup can possibly vary. A seven-month-old baby has only one means of evidencing pain and suffering and emotional upset. That is by crying. She could not communicate internal pain to her physician or to a jury as an adult might. All of us know that many internal injuries are undetected until the injured person can describe pain and its location to a physician. This baby

was entitled to be compensated for the nature, extent and duration of her injury, and any pain, suffering or mental anguish experienced and reasonably certain to be experienced in the future, and not just for visible results of her injury, putting aside the question whether a child should have a cause of action against a third person negligently injuring his parent.[1] A perfectly normal baby, who had previously cried little, would for six or eight weeks awaken screaming, jerking all over and crying hysterically, first in the hospital, later in her grandmother's home and then after she was returned to her own home. Crying spells lasted as long as 30 minutes at a time. She was apparently left with a fear of being alone. On the day of the trial she still required the constant attendance of one or the other of her parents. Her grandmother testified that the baby was sick and that she sometimes called the doctor at night about the child's illness. She admitted that not all of the sickness was directly related to the automobile accident. She told of one occasion in the hospital shortly after the child's injury when the pediatrician gave the baby two shots to quiet her.

I would affirm the judgment in favor of all the appellees.

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[1]See arguments, pro and con, Annot., 59 A. L. R. 2d 454 (1958). We have held that a minor is entitled to recover compensation for the loss of parental love, care, supervision and training in wrongful death actions. This loss is considered to be a "pecuniary injury" under the wrongful death statute. See *Bridges* v. *Stephens,* 238 Ark. 801, 384 S. W. 2d 490.

ERNEST GLOVER AND THELMA E. GLOVER *v.* FRED R. STOTTS

5-5569 466 S. W. 2d 932

Opinion delivered May 17, 1971

H. M. Ellis & Frank Lady, for appellants.

Barrett, Wheatley, Smith & Deacon, for appellee.

CARLETON HARRIS, Chief Justice. Appellants, Ernest Glover[1] and Thelma E. Glover, instituted suit against appellee, Fred R. Stotts, seeking damages for personal injuries and property damage, allegedly sustained in an automobile accident occurring at an uncontrolled intersection of two county roads. Stotts filed a cross-complaint for damage to his pick-up truck. On trial, the

[1]The original complaint reflected that Mr. Glover was the owner of the truck, and he sought recovery for property damage. Subsequently, the pleadings were amended to reflect that he was a joint owner with Mrs. Glover.

court instructed as to comparative negligence, but no interrogatories were submitted, and a general verdict was returned, the jury finding, "We, the jury, find for the plaintiffs, Ernest Glover and Thelma Glover, on the counterclaim of the defendant, Fred Stotts, and find in favor of Fred Stotts on the complaint of plaintiffs, Ernest Glover and Thelma Glover".

It is thus not clear whether the jury found both parties equally negligent. or whether they found no negligence on the part of either, the jury having been instructed that in either of these instances, there could be no recovery. From the judgment entered denying recovery to either party, appellants bring this appeal.

In oral argument, counsel for appellants first contended that his clients were free from negligence, but subsequently admitted that he did not ask for a directed verdict, and, in fact, he stated that he did not think that he was entitled to a directed verdict; this would seem to indicate that appellant's contention is simply that Stotts was much more negligent than Mrs. Glover.

In determining this litigation, it is not necessary to set out all of the evidence that was offered; it is only necessary that it be shown that there was evidence from which the jury could have found Mrs. Glover, driver of appellants' vehicle, guilty of some degree of negligence. The proof reflects that Mrs. Glover was driving east on County Road 84 and came to the point where this road intersects County Road 1275, the location being known as Catfish Lane Road. According to her testimony, this appellant intended to turn left for the purpose of traveling to Lake City, and she had used the road many times previously. Mrs. Glover stated that to the left of the intersection, there was a considerable growth of underbrush that interfered with one's vision, and she could not see to the left until pulling out into Road 1275. Appellant testified that she first stopped at the intersection, and, as stated, could not see to the left toward Lake City due to the brush and weeds, but did not hear any traffic coming, and accordingly shifted into low gear and eased forward three or four feet. She said that

she then observed Stott's vehicle approaching from the north, some 75 or 100 feet away, traveling at 50 or more miles per hour. "He was flying." Upon observing the approaching car, she slammed on her brakes, and her vehicle was stopped at the time she was struck. Mrs. Glover testified that on some previous trips, she had sounded her horn when reaching this blind spot, and before entering into the intersection, though she did not do so on this particular occasion. Testimony was given by a police officer indicating that she was nearer to seven or eight feet into the north-south country road than the three or four feet to which she had testified, and the officer stated that the position of her car denoted that she was in the act of making a left turn at the time of the collision.

Actually, we need not discuss further any of the evidence, for it is apparent that the jury could have found that Mrs. Glover was negligent in proceeding "blindly" into the intersection. Certainly, she was not entitled to a directed verdict, even had she made such a motion. In *Spink* v. *Mourton,* 235 Ark. 919, 362 S. W. 2d 665, this court said:

"Owing to the fact that the plaintiff has the burden of proof— that is, the burden of persuading the jury that he is entitled to win the case—a directed verdict for the plaintiff is a rarity. As we said in *Woodmen of the World Life Ins. Soc.* v. *Reese,* 206 Ark. 530, 176 S. W. 2d 708: 'A verdict upon an issue of fact should not be directed in favor of the party who has the burden of proof with respect thereto, unless such fact is admitted, or is established by the undisputed testimony of one or more disinterested witnesses and different minds cannot reasonably draw different conclusions from such testimony.'

The problem is especially acute in negligence cases, for the standard of care—that of a reasonably careful person—is apt in almost every case to become an issue of fact for the jury. In one of the few cases that have discussed this exact point the Court of Appeals for our circuit had this to say: 'Negligence and proximate cause

will become transformed from questions of fact into questions of law rather on probative deficiency than on probative abundance. Thus, no matter how strong the evidence of a party, who has the burden of establishing negligence and proximate cause as facts, may comparatively seem to be, he is not entitled to have those facts declared to have reality as a matter of law, unless there is utterly no rational basis in the situation, testimonially, circumstantially, or inferentially, for a jury to believe otherwise. (Citing case)"

Though there was evidence from which the jury could have found that Stotts was not keeping a proper lookout, and was perhaps driving too fast, and though we might feel that appellee was the more negligent of the two parties, these were fact questions, and as such, were questions for jury determination. We are not permitted to determine percentages of negligence. On this appeal, there is no relief that this court could grant other than to find there was no substantial evidence to support the jury verdict; from what has been said, it is obvious that we could not make such a determination.

Affirmed.

CONTINENTAL INSURANCE COMPANIES *v.* ESTATE OF ANDREW DAVID ROWAN, JR., A MINOR

5-5571 466 S. W. 2d 942

Opinion delivered May 17, 1971

Dickey, Dickey & Drake, for appellant.

George Howard, Jr., for appellee.

GEORGE ROSE SMITH, Justice. On June 6, 1968, Florida Rowan was appointed guardian of the estate of her minor son, Andrew David Rowan, Jr. Mrs. Rowan's $9,000 guardian's bond was signed by the appellant, Continental Insurance Companies, as surety. Thereafter the probate court, on its motion, removed Mrs. Rowan as guardian, because of her failure to file an inventory of the assets of the estate. The court appointed L. E. Henson as guardian in succession.

In April, 1970, the guardian in succession filed a motion for judgment against Continental in the amount of whatever funds Mrs. Rowan had received as guardian and had failed to report or account for. Continental resisted that motion on the ground that the principal's

liability should first be determined before the entry of any judgment against the surety. Thereafter, at a hearing at which Mrs. Rowan appeared merely as a witness and not as a party, the court found that Mrs. Rowan had collected $2,731.40 as the proceeds of a life insurance policy upon the life of the ward's father, of which the ward was the beneficiary. The court further found that Mrs. Rowan should have deposited the money in a guardianship account and should not have expended it without a court order. Upon those findings the court entered judgment against the surety for $2,731.40. In appealing from that order Continental renews its contention that the guardian's primary liability should have been determined before the entry of any judgment against the surety.

We are of the opinion that Continental's position is well taken. Apparently Mrs. Rowan had collected and expended the life insurance proceeds before she was removed by the court upon its own motion. For some time the court was unable to find out just what assets the guardian had received or what disposition she had made of them. Finally the court, on June 12, 1970, entered an order directing Mrs. Rowan "to appear as a witness" at a hearing set for June 17.

At that hearing the guardian in succession and the surety appeared through their attorneys. Mrs. Rowan, without counsel, appeared as a witness and explained that she had collected the insurance money and has used it to discharge liens against the house in which she and her ward were living and against certain other real property in which Mrs. Rowan claimed some interest. Whether any or all of the expenditures benefited the ward is a point about which the testimony is not conclusive and upon which the probate judge made no finding. The court merely found that the money had not been deposited in a guardianship account and had been spent without a court order. Upon that finding the court entered judgment for $2,731.40 against the surety only.

Before the adoption of the Probate Code it was our rule that "an administrator in succession must proceed

in the probate court against the former executor or administrator for a settlement or accounting and an order to pay over the sum found due to him before he can sue the bondsmen of the former executor or administrator." *Statham* v. *Brooke,* 140 Ark. 187, 215 S. W. 581 (1919). That rule is sound, for the surety's liability is derivative and ordinarily does not exceed that of the principal. *Fausett Builders* v. *Globe Indemnity Co.,* 220 Ark. 301, 247 S. W. 2d 469 (1952). The Probate Code recognizes the court's authority to proceed against the "obligors" in the bond, Ark. Stat. Ann. § 62-2221 (Supp. 1969), but we find nothing in the Code that changes the orderly and logical procedure by which the guardian's primary liability is to be ascertained before the entry of judgment against the surety. Consequently we adhere to our former cases upon the point.

Reversed and remanded for further proceedings.

THE FIRST PYRAMID LIFE INS. CO. OF AMERICA *v.* MARY HOLT THORNTON

5-5574 467 S. W. 2d 381

Opinion delivered May 17, 1971
[Rehearing denied June 21, 1971.]

W. B. Brady, for appellant.

Allen, Young & Bogard, for appellee.

LYLE BROWN, Justice. Appellant issued a group life insurance policy in favor of the employees of Associated Grocers of Arkansas. Appellee's husband was an insured under the policy and appellee was the beneficiary. The policy provided for an $8,000 ordinary life benefit and

an additional $8,000 accidental death benefit. The insured, who was an accountant for Associated Wholesale Grocers of Arkansas, fell from the steps of his place of employment while on his way home after work. The injuries sustained proved fatal. Appellant paid the standard $8,000 ordinary life benefit but refused to pay the accidental death benefit by reason of the following policy exclusion:

> Limitations Applicable to Accidental Death and Dismemberment Insurance. Benefits shall not be payable for any loss to which a contributing cause is: . . . (f) injury arising out of or in the course of any employment for wage or profit.

Appellee filed suit for the accidental death benefit. Appellant answered and appellee filed a motion for summary judgment. Both parties submitted affidavits and attached letters for the trial court's consideration. (An affidavit and attached letter from the workmen's compensation carrier of Associated Wholesale Grocers of Arkansas indicated that the carrier had voluntarily paid compensation to appellee for the death of her husband.) The trial court granted the motion for summary judgment and awarded appellee the $8,000 accidental death benefit together with 12% statutory penalty and attorney's fees.

It should be noted at the outset that appellant does not contend that this is not a proper case for summary judgment. "We have many times held that points not argued in the brief are waived." *Gordon* v. *Street Imp. Dist. No. 1 of Gillett,* 242 Ark. 599, 414 S. W. 2d 628 (1967).

Appellant argues *first* that the insured's death arose out of or in the course of his employment for wages and that the accidental death benefit is therefore excluded under the terms of the policy, *second* that appellee is estopped by her own and her attorney's actions (with respect to workmen's compensation) from denying that the insured died from an injury arising out of or in the course of his employment for wages, and *third*

that the policy exclusion in question is not ambiguous. Each of appellant's points for reversal is bottomed on the premise that the life insurance policy was provided to supplement workmen's compensation and therefore we should apply our workmen's compensation decisions in interpreting the exclusionary clause. We do not take that view of the life policy. The exclusion does not specifically state that an accidental death which is covered by workmen's compensation is excluded, which could easily have been done. Neither does the exclusion use the language of the workmen's compensation statute. That statute makes compensable an accidental death which arises out of *and* in the course of employment while the exclusion in question excludes coverage on an accidental death which either arises out of *or* in the course of employment. Obviously, a situation might occur in which the employee might meet only one of the requirements needed to come under workmen's compensation and yet because he met that one requirement he would be excluded from coverage under the accidental death policy exclusion in question. Because the exclusion neither specifically states that it is dependent on workmen's compensation coverage nor uses the language of the workmen's compensation statute, we must view the exclusion in question as we view other exclusions to coverage provided in insurance contracts. *Brinkmann* v. *Liberty Mutual Fire Ins. Co.,* 403 P. 2d 136 (Calif. 1965).

The standards of interpretation require us to strictly interpret the exclusion to the coverage and resolve reasonable doubts in favor of the insured who had no part in the preparation of the contract. *Benham* v. *American Central Life Ins. Co.,* 140 Ark. 612, 217 S. W. 462 (1919). "Liability for accidental death will not be destroyed by the language of an exception unless clear and free from reasonable doubt, and an ambiguity contained in an exception must be resolved against the insurer." 13 Appleman, Insurance Law and Practice, § 7427 (1943). "A condition tending to defeat a policy must be expressed or so clearly implied that it cannot be misconstrued." 1 Couch on Insurance, § 15:92 (2d ed. 1959).

Applying the recited standards of interpretation to the exclusion in question, we find that the trial court was correct in finding that the insured was covered by the policy and not excluded by the attempted limitation to the principal accidental death coverage. When we strictly construe exclusion (f), we believe that it is a reasonable interpretation to put upon the language that the insured's injury and subsequent death did not arise out of or in the course of any employment for wage or profit. When the injury occurred the insured had finished his work for the day. He was on the steps of his place of employment and on his way to the parking lot to drive his automobile home. Under those undisputed facts, the trial court was correct in finding that the injury did not arise out of the employment and was not in the course of his employment for wages or profit.

The question as to whether appellee was estopped by accepting the workmen's compensation benefits is not involved in light of our view of the exclusion in question.

Affirmed.

WILLIAM F. SAMPLE *v.* LENA MAE SAMPLE

5-5542 466 S. W. 2d 935

Opinion delivered May 17, 1971

C. E. Blackburn, for appellant.

Lightle & Tedder, for appellee.

JOHN A. FOGLEMAN, Justice. The parties to this appeal separated after 27 years of marriage. They had two children at home—a daughter, Sandra, 18 years of age at the time of the trial, and a son, Billy, 20 years

of age at that time. Both of the children were attending college at the time of the separation and the trial and residing at the family home on an 80-acre farm, which was held by the parties as a tenancy by the entirety.

The wife, appellee herein, sued for an absolute divorce on the ground of indignities to the person. By amendment to her original complaint, she prayed, in the alternative, for separate maintenance. At the time of the final hearing, she abandoned her prayer for absolute divorce, and a decree was entered granting her $350 per month support money, sole possession of the farm and the residence that contained all personalty, and an attorney's fee of $100 and requiring the husband to pay all debts incurred by the parties up to the date of the separation in the amount of $7,096.95. Appellee's complaint had asked that appellant be required to account for the proceeds of cattle sold by him. The final decree relieved him of making an accounting, and allowed him to retain the net proceeds of this sale.

The first point relied upon by appellant for reversal is his contention that appellee should not have been granted relief because she did not come into court with clean hands. He argues that her conduct in abandoning her prayer for absolute divorce and seeking separate maintenance constituted a failure to do equity because it resulted in her being permitted to retain the home and farm in her sole possession, along with the personalty of the parties, rendering it impossible for the court to order a sale of the realty for the discharge of the joint obligations of the parties. Appellant makes this argument in spite of the fact that he filed no counterclaim, failed to answer or otherwise respond to the amendment to appellee's complaint, and made no objection when she abandoned her claim for absolute divorce and proceeded on her suit for separate maintenance. We do not understand appellant's argument in this respect, and find no basis for saying that appellee should not have been granted relief because she came into court with unclean hands or because she failed to do equity. The doctrine of unclean hands means no more than that one, who has defrauded his adversary

in the subject matter of the action, will not be heard to assert a right in equity. *Batesville Truck Line* v. *Martin,* 219 Ark. 603, 243 S. W. 2d 729. The practical meaning of the maxim that "he who seeks equity must do equity" is that, whatever the nature of the remedy sought, the court will not give equitable relief to one seeking it unless he will admit and provide for all of the equitable rights, claims and demands of his adversary growing out of, or necessarily involved in, the subject matter of the controversy. *McMillan* v. *Brookfield,* 150 Ark. 518, 234 S. W. 621. Appellant also asserts that the court abused its discretion in the award of alimony, division of personalty and award of possession of realty. Appellant is totally disabled, and received $726 per month from social security, the Veterans' Administration and disability insurance. Each of the two children receives an additional $126 per month from social security and the Veterans' Administration because of their father's disability. Both children were in the first year of college. Appellee testified that appellant sold 13 head of cattle for $1,000 on the day of the separation. She claimed an interest in the cattle, and testified that they were worth more than twice as much as the purchase price he received. There is an FHA loan of $5,200 on the farm, payable in installments of $40 a month, which Mrs. Sample claims to have been making in the past. She testified that she had worked during most of their married life and received exceptionally high earnings, which she said she applied to payment of bills and the family living cost. Each of the parties now has one of the two family automobiles. Appellant testified that the parties owned their furniture, had four horses, 10 or 12 saddles and equipment, all valued at a minimum of $700, in addition to farm and garden tools, a tractor and wagon, which he valued at $500. He valued sporting goods equipment at $550, tools at $300, antique glassware at $1,000. He also valued a demolished Dodge truck at $300, and testified that there were 500 bales of hay in the barn. Mrs. Sample testified that appellant's income was nontaxable. She listed monthly financial needs of $600. She stated that the minimum she could live on was between $350 and $400. She has income of $60 per month as pay for caring for two houses on

Eden Isle. Although she testified that she was physically unable to work, it seems that her children assist her in this employment. Mrs. Sample testified that she had undergone chronic mastitis surgery on her breast and was under the care of the University Medical Center where she received outpatient treatment for which she paid $7.50 per call. She was scheduled to return for a checkup in May, 1971. She had also consulted Dr. McClanahan of Heber Springs, and had seen four other doctors.

Dr. McClanahan examined Mrs. Sample on October 16, 1969, and found a tumor of the right breast, a rupture and a tumor of the uterus. He referred her to the University of Arkansas Medical Center at her request. He examined her again on June 6, 1970, and found the same condition. He stated that Mrs. Sample had a fibroma or rupture of the birth canal, technically called a cystocele and rectocele, which he said would cause discomfort in the pelvis and difficulty in controlling urination and bowel movements. Dr. McClanahan said this was a condition that would develop over a period of years. Mr. Sample testified that Mrs. Sample had had her same physical condition for 23 years of their married life.

Sample claims that he cannot live on the balance of his income. He pays $80 rent for an apartment and $85 as a monthly car payment. He is unable to prepare his meals and eats out a great deal of the time. He stated that he did not claim any of the property to be wholly his except for six guns, various hand tools, some personal things and 14 liquor bottles. He testified that the residence is in need of maintenance and upkeep, and the barn is in bad condition. Mrs. Sample had been allowed $250 per month temporary alimony. She, her daughter and Mr. Sample's mother all testified that this amount proved inadequate and that Mrs. Sample had to borrow money to pay living expenses and even then some bills went unpaid. On the other hand, Sample testified that appellee was extravagant and indulged her children's wants extravagantly.

In view of the testimony as to appellee's physical condition, her needs and the necessity for maintaining a home for the children of the parties while they are attending school, together with evidence as to Mrs. Sample's contributions to the acquisition of property by the parties, the absence of any testimony as to income to be anticipated from the farm, one-half of which is woodland, and admitted needs for maintenance on the residence and barn, we are unable to say that the chancellor abused his discretion or that the seemingly liberal allowances made were excessive under existing conditions.

The decree is affirmed.

BOB MOSLEY *v.* G. M. McDAVID ET UX

5-5565 466 S. W. 2d 922

Opinion delivered May 17, 1971

Don Gillaspie, for appellant.

J. G. Ragsdale, for appellees.

J. FRED JONES, Justice. This is an appeal by Bob Mosley from an order decreed by the Union County Chancery Court restraining him from constructing a proposed building on property he leased from G. M. McDavid and wife; and requiring Mosley to restore a metal canopy which he had removed in preparation for the erection of the proposed building.

On the 16th day of October, 1969, Mr. and Mrs. McDavid entered into a written lease agreement with Mosley under which they let to Mosley a plot of ground approximately 80 x 200 feet for a term of five years beginning on November 1, 1969, with option of renewal for two additional five year terms. This lease contained the following paragraphs:

> "4. Lessee has the right, at his sole cost and expense, to erect a building on the above described property for his use as an office. At the expiration of this lease, or any renewal thereof, Lessee shall have the right to remove said building from the premises described in this lease.
>
> 5. Lessee agrees that at the expiration of the primary term of this lease, or any extension or renewal thereof, he will return to Lessor the land and the building now located thereon, which is the subject of this lease, in as good condition as it now is, the usual wear and tear excepted.
>
> Lessee agrees that he will not commit waste, nor permit waste to be done to or upon the aforesaid property or premises; that he will not conduct nor permit to be conducted any beer or liquor business thereon; that he will not permit the sale or repair of televisions or household appliances thereon, nor will Lessee operate or permit to be operated or to be located thereon any structure or activity which will constitute a public nuisance; that he will keep said property and the premises about the same in a clean, orderly and sanitary condition; that he will not permit trash or debris of any nature to collect or accumulate in and about said premises, and will,

> at all times, keep the same in an orderly manner. The parties hereto further mutually agree that Lessee shall not have the right to sublet the premises or any portion thereof at any time to any third party without the consent of Lessor. Lessor agrees that his consent to subletting will not be unreasonably withheld; provided, however, that such assignment or subletting shall not in any way relieve Lessee of any responsibility or liability pursuant to the terms of this agreement."

Prior to the lease, McDavid had used the premises in connection with a Buick automobile agency, and a metal building, now under lease to other parties, had been constructed on one corner of the lot adjacent to that portion leased to Mosley. The area leased to Mosley was surfaced with asphalt and had a metal canopy, or carport, constructed on galvanized steel posts set in concrete beneath the asphalt surface. The canopy had been built and previously used in connection with the Buick agency. It was approximately 20 feet wide and extended approximately 80 feet along the front, then approximately 40 feet into the depth of the leased property. The canopy was the only structure erected on the area leased to Mosley and constituted "the building now located thereon" as referred to in paragraph five of the lease.

Mosley was in the used automobile business when the lease was entered into. He subsequently acquired a franchise, or dealership, for new Toyota automobiles and under his franchise agreement, he was required to provide a 20 x 45 foot showroom with a glass front for the display of new Toyota automobiles. Mosley advised McDavid of the franchise and the building requirements, and he sought McDavid's permission to erect the required building on the leased premises. McDavid advised Mosley that he did not want a permanent structure of this nature built on the leased premises. Relying on paragraph four of his lease, Mosley proceeded oward the construction of a steel building to be supported on eight concrete piers two feet square and sunk 16 inches into the ground. The floor of the building was to be

a concrete slab four inches thick, 20 feet wide and 45 feet long, and was to be poured on top of the asphalt surface of the lot.

In order to erect the building on the leased area in the position he wanted it, Mosley found it necessary to remove approximately 40 feet of the metal canopy. He accomplished this by cutting the steel posts at their base with an acetylene torch, and he had removed this portion of the canopy to the rear of the leased premises when Mr. McDavid stopped the work by a temporary restraining order and filed his petition to make it permanent. In his answer to the petition for a restraining order, Mr. Mosley alleged that the building he proposed to construct was for use as an office building as permitted in his lease agreement, and that he had been damaged because of delay in construction by reason of the temporary restraining order. He prayed judgment against McDavid for $1,500. McDavid countered by an allegation of waste committed in connection with removal of the canopy and prayed judgment for $2,500.

After reciting his findings as above set out, the chancellor found that the cutting of the posts and removal of the decking and beams supporting the canopy constituted waste, and that Mosley should be permanently enjoined from building the office, showroom and salesroom, on that portion of the lot where the canopy had been removed, and that he should be ordered to replace the canopy and to restore the premises to the condition they were in prior to the removal of the canopy. The chancellor further found that a small portable building which Mosley had placed on the lot, and had been using as an office, did not amount to erection of an office building as contemplated in the lease, and that Mosley, under the lease, had a right to erect a building for an office. The chancellor then decreed, in part, as follows:

> "Defendant is hereby permanently enjoined from constructing the building as depicted by Exhibits 2, 3 and 4 on the leased premises, defendant shall restore the property to the same condition it was prior

> to the removal of the canopy, that defendant has the right under the lease to erect a building on the property for use as an office, defendant shall pay all costs."

On appeal to this court Mosley seeks reversal on the following point:

> "The order and findings of the chancellor are contrary to the preponderance of the evidence and to the law."

Simple contract law is the only law involved in this case. The chancellor's duty was to determine the rights of the parties under the terms of their agreement and while we try cases de novo on appeals from chancery, it is our duty and practice to affirm the chancellor's decree if it is not against the preponderance of the evidence.

Mr. McDavid contends that Mosley leased the premises for a used car lot and was only entitled to erect a small office on the premises, such as is usually found on used car lots. It is his contention that the parties contemplated such office building that could be erected and removed without damage to the leasehold.

It is Mosley's contention that the parties contemplated such office building as he might desire and find necessary in connection with any unrestricted business he might desire to conduct on the lot, so long as he surrendered the property at the end of the lease term in as good condition as when the lease agreement was entered into. Mosley contends that a showroom is included within the dictionary definition of "office" and as generally used in connection with an automobile agency.

Mr. McDavid supported his contention with evidence to the effect that Mosley was in the used car business when the lease was entered into and it was within the contemplation of the parties that the office referred to in the lease was to be a small office to be used in connection with the used car business; that the canopy

permanently constructed on the premises was intended to remain as it was and available to Mosley in connection with his used car business. McDavid also submitted evidence to the effect that he had gone to considerable expense in paving the entire leased lot with asphalt; that he had considerable difficulty with underground water seepage and had gone to considerable expense in sealing the asphalt against water seepage from the ground underneath the asphalt; that the erection of the proposed building would disturb the seal placed on the asphalt and would result in additional damage from seepage. He also produced evidence tending to show that the metal canopy could not be removed and replaced in its original place and condition.

The evidence submitted by Mosley tended to show that the canopy could be replaced at the termination of the lease in as good condition as it was prior to removal; that the concrete slab for the building could be broken up and removed without damage to the asphalt surface; that the piers on which the building was to rest could be removed from the asphalt surface and ground; that the holes could be filled and the surface repaired in as good condition as at the time of the lease. He contended that the building he proposed to construct only constituted an "office building" within the meaning of the automobile industry and within the meaning and terms of the lease agreement. He offered some evidence tending to prove that in the automobile industry a showroom and office are synonymous terms.

Mr. McDavid testified, in part, as follows:

> ". . . some time prior to October 16, the date of the lease, Mr. Mosley came to me and talked to me about renting that part of the lot, 80 by 220, and I told him I was looking for a renter and he said he wanted to, he was in the used car business with his brother or on the same lot and he wanted to get a lot to handle his used cars and so after some conversation we agreed on the lease."

Mr. McDavid testified that there had originally been a spring branch through the property and that he had

previously had considerable trouble with potholes forming in the blacktop paving because of water coming up from the ground; that to eliminate this situation he had spent upward of $9,000 for new asphalt paving and about $3,000 for additional sealer to keep water from breaking up through the pavement. He says that the carport or awning consisted of metal beams on galvanized metal posts and covered with sheets of metal extending 80 feet across the front of the property with a wing extending back approximately 40 feet into the lot. Then Mr. McDavid continued:

> "Mr. Mosley . . . told me . . . 'I am talking about taking a franchise for a car and I need a showroom,' and he said, 'What I planned is to show the cars under this carport.' I said, 'Now, Mr. Mosley, I don't want that carport bothered because it's a permanent structure and when you dig it out of the ground you're going to have some trouble with water seepage.' He said, 'I will assure you we won't do that, we will put this glass in there and won't take up any of the posts, just frame in that part of the carport with glass.' I said, 'Well, that sounds like a funny construction but you go ahead with it but you are not to tear any of the carport nor the surface of the lot."

Questions by the chancellor were answered by Mr. McDavid as follows:

> "Q. Mr. McDavid, if I understood your testimony that you prepared the lease and then the Defendant came back and wanted permission to build a building, was that then added to the lease?
>
> A. We rewrote the lease. I took that lease and destroyed it and wrote a new lease and added in a building in there and to me a building means one building.
>
> Q. Did you all have any discussion as to what type of building he wanted and what it was to be used for?

A. Yes, sir, an office building only.

Q. What type office building?

A. He said he wanted it large enough where he could have a table and some chairs and his telephone and some filing cabinets.

Q. Now, does the lease specify for what purpose he was leasing it?

A. No, sir.

Q. Did you know the purpose he was leasing it for, although it wasn't put in the lease?

A. I think at the time it was leased he had no idea of anything except used cars. I think this Toyota building came up considerably later.

Q. At the time you leased it to him, the carport, is that what you call the structure on the lot now?

A. Yes, sir.

Q. That was on there at the time he leased it?

A. Yes, sir.

Q. And had been there for a good many years?

A. Yes, sir.

Q. And was its primary purpose or why it was put there, what was the primary purpose?

A. Just to protect the cars in rainy weather and keep them out of the hot sun.

Q. Does it have any other purpose?

A. No, sir . . ."

Mr. Dan Shelton, a salesman for Ace Supply Company, testified that he was dealing with Mr. Mosely for the sale of the building which Mr. Mosley proposed to erect on the lot; that the building contemplated was a "20 by 45 steel building with a concrete foundation, showroom and office." He testified that the building was designed to be built on a four inch thick concrete slab to be laid on the asphalt surface of the lot, and that eight piers for the support of the building would be set on concrete pads two feet square and about 16 inches deep, going through the asphalt surface and into the ground.

Mr. Bob Mosley testified, in part, as follows:

> ". . . in October of 1969, I needed a lot to use for automobiles sales and I contacted Mr. McDavid about leasing this lot and we entered into an agreement.

Q. Did you have any general discussion about the use that was to be made of the property?

A. Yes, he leased the property for five years with two five year options and I told him that I would need to build me an office there to go with my business and I talked to him about that and I had Paul Jones come over and figure with me on building a concrete slab and brick building there where I later moved in a portable building. I had Mr. McDavid's approval to do that and I decided after talking to Paul Jones to buy a Jimmy Goad building and move it there temporarily until I decided I would go ahead with the other type building.

* * *

Q. Did he object to your building a building on the premises at that time?

A. No, the only thing he cautioned me about was this sealer that has been discussed, anywhere

I had to break the asphalt, to be sure to get it sealed back good.

Q. That is what Mr. McDavid told you?

A. That is the way we discussed it.

Q. I gather Paul Jones did not build a building for you at that time?

A. No.

Q. Why?

A. I bought a portable building and moved it in there.

Q. That portable building, you can move it from place to place?

A. Yes.

Q. Is it connected at all to the real estate?

A. No, it's on skids.

* * *

Q. And when you first thought about this thing you told him you wanted it for a used car place of business?

A. That is what we discussed. I also told him I might use it for something else.

* * *

A. . . . when I was talking to Toyota, I called Mr. McDavid and told him what I planned to do and that I would have to have a little showroom and I planned to enclose part of that canopy the same size of the building, in order to qualify for the Toyota franchise. I felt it

would be simpler to use the roof that was there, I had his full agreement on that. I had a builder come out and give me an estimate on doing this and the cost of doing this was too close to what a complete new building was. I decided to go ahead with a new building because the builder said the building wouldn't look near as nice because this canopy had a lower roof than the normal type they were building, so then I decided, in the meantime I had already signed up with Toyota, thinking we were going through with this thing under the canopy, and after the builder came out and pointed this out to me I called Mr. McDavid back and told him what I needed to do then."

Mr. Mosely testified that Mr. McDavid first prepared a lease which did not contain a provision for building an office, and that a second lease was prepared which did contain such provision and in this connection, under questions by the chancellor, Mr. Mosley testified as follows:

"Q. What business were you in then and why did you insist on a building?

A. I was in the automobile business and I had to have a building for an office.

Q. You were in the used car business and you don't have showrooms in that business?

A. Normally, no.

Q. And what was your intention at that time and Mr. McDavid's understanding of what kind of building you wanted to put on the property?

A. I originally planned to put a concrete slab and brick building on there.

Q. This was before the lease was signed or after?

A. Before.

Q. Did you all discuss as to where it would be located?

A. Yes, we discussed it would be located where my office building is now."

We are of the opinion that the chancellor's decree is not against the preponderance of the evidence and that it should be affirmed.

The decree is affirmed.

FIRST HERITAGE LIFE ASSURANCE CO. *v.* STATE OF ARKANSAS, EX REL ALLAN W. HORNE, INSURANCE COMMISSIONER, AND IN RE EXAMINATION REPORT, FIRST HERITAGE LIFE ASSURANCE CO.

5-5528 467 S. W. 2d 383

Opinion delivered May 17, 1971
[Rehearing denied June 21, 1971.]

Allen, Young & Bogard, for appellant.

Kemp & Whitmore, for appellee.

FRANK HOLT, Justice. These two cases were consolidated for trial and on appeal. Appellant, First Heritage Life Assurance Company, initiated the first suit by an appeal to the circuit court from the failure of the appellee, Insurance Commissioner, to enter an order after the Commissioner's hearing concerning appellant's financial instability. A few days later, the second suit was instituted by the appellee directly in the circuit court alleging the delinquency or insolvency of the appellant and praying for a receivership and liquidation of appellant.

In 1969 an examination of appellant's business affairs was authorized by the appellee. According to the

Examination Report, appellant appeared to be insolvent by $353,359.87. In accordance with appellant's request, appellee conducted a hearing to determine the accuracy of this Report. Thereafter, the appellant filed a notice of appeal from the Commissioner's failure to enter an order based upon the hearing which he had conducted. A few days subsequent to the filing of appellant's suit, the appellee Commissioner responded by filing its order based upon the hearing wherein he found appellant to have a capital impairment of $124,954.84 (after deducting $228,405.03 from the examiner's figure); revoked its certificate of authority; and ordered that no further business be conducted. At the same time, the appellee instituted the delinquency proceeding (the second suit) by an original action in the circuit court. At a hearing based on the delinquency proceeding, both parties agreed to the consolidation of the cases and to making the transcript of the Commissioner's hearing the record for both cases in order to avoid duplication of testimony. The court found that the Commissioner's findings were supported by substantial evidence and, therefore, affirmed. The court then entered an order appointing the Commissioner as receiver of appellant for the purpose of liquidation. From this order favorable to the Commissioner in both cases comes this appeal.

Appellant first contends for reversal that the lower court erred in not ruling the order of the Commissioner to be untimely and void. Ark. Stat. Ann. § 66-2126 (Repl. 1966) provides that the Commissioner shall issue his order within thirty days after the formal hearing. The Commissioner did not issue the order within the thirty-day time period and appellant initiated suit in the circuit court under authority granted in § 66-2127. Under this statute appellant is accorded the right to appeal from the Commissioner's failure to enter an order; however, this authority does not preclude the Commissioner from taking further action, it merely provides appellant a remedy when a delay exceeds the statutory time limitation. The statute also grants the circuit court authority to require the Commissioner to deposit with the court a complete transcript of all pro-

ceedings conducted before him in order that the court may review the findings of the Commissioner and affirm such findings if supported by substantial evidence. Appellant could not, by instituting its appeal for a failure of the Commissioner to act, preclude the Commissioner from entering a final order setting out his findings. The Commissioner's order was not void and the lower court did not err in affirming such order.

Appellant does not assail the circuit court's authority to uphold the Commissioner's findings as to the Examination Report if the report is supported by substantial evidence. Appellant, however, asserts that when the separate question of delinquency or insolvency was put in issue by the original action in the circuit court, the delinquency and receivership issue must be determined by a preponderance of the evidence. Appellant contends for reversal that the court applied the lesser quantum of proof, the substantial evidence rule, to the separate delinquency proceeding.

We first review the evidence to determine if there is substantial evidence to support the lower court's affirmance of the Commissioner's Order. Appellee Commissioner agrees that prior to January 1, 1968, appellant was not required by statute to maintain any reserve based on life insurance policies since it issues stipulated premium policies. He determined, however, that appellant had contractually obligated itself to maintain such reserves by issuing policies containing standard non-forfeiture tables and cash values with language stating that the reserves would be calculated according to certain agreed computations. Appellee Commissioner contends that appellant is contractually obligated to maintain life policy reserves in the amount of $101,-826.00 which constitute a liability. The accuracy of this amount is not controverted by appellant if it is required to maintain this item as a reserve. Appellant merely argues that it was not contractually obligated to maintain any reserves on life insurance policies issued prior to January 6, 1968 since it is a stipulated premium company. We do not agree. A copy of the insurance policy was submitted as an exhibit. A reading

of the policy clearly shows that the Commissioner's determination was supported by the policy which contains a table entitled "TABLE OF CASH, LOAN AND NON-FORFEITURE VALUES." It further states:

> "* * * and the legal reserves for this policy, shall be computed according to the Commissioner's 1941 Standard Ordinary Table of Mortality with interest at the rate of three and one-half per cent per annum and on the assumption that deaths during any policy year occur at the end of such year, with the exception that the net single premiums used for the calculation of the periods of extended term insurance are based on rates of mortality equal to one hundred and thirty per cent (130%) of the said mortality table. The policy reserves shall be computed in accordance with the Commissioners Reserve Valuation Method."

Also, the policy on its face states it is issued on a "legal reserve basis." As previously indicated, appellant agrees that the figure of $101,826.00, representing life policy reserves, is correct if it was proper to allocate it as a liability. We think there is ample substantial evidence to support the Commissioner's finding that this figure is properly a liability item.

Another significant item is $88,566.78 which was established as a claim reserve and allocated as a liability by the Commissioner. This sum represents expected future payments to policy holders based upon their disability claims. Each of the disability claims had been processed and approved for payment by appellant. In fact, payments had been made periodically by the appellant on these disability claims. This figure was determined by actuaries, one representing appellant and one the Commissioner, based upon disability tables. Their testimony appears uncontradicted. Appellant's witness acknowledged that disability income claims are generally considered reserves by actuaries. We agree that substantial evidence supports classifying this item as a liability. Nor do we find the court erred in holding that substantial evidence supports the Commissioner's

finding that the sum of $12,155.37 is a liability item. This is a reserve for disability claims in controversy or in progress. We are of the same view with reference to $4,188.16 being classified as a liability item. This represents prepaid premiums on several policies.

Appellant also asserts the court erroneously affirmed the Commissioner's exclusion of certain assets claimed by appellant. It is contended that the court should have restored $5,657.25 to the value of appellant's real estate; that $2,493.00 additional should be allowed on the value of appellant's common stock; and that $1,790.34, representing accrued interest on certificates of bank deposits, was improperly disallowed as an asset. Even if appellant be correct and these amounts be restored as assets, we cannot say that the court erred in holding that the appellee Commissioner's finding of capital impairment is not supported by substantial evidence.

Now we turn to appellant's assertion that the court erred in the insolvency or delinquency proceeding (the original action filed in the circuit court) by failing to make that determination by a preponderance of the evidence. It is true that in an action originally initiated in the circuit court, the court's determination of a fact issue must be based upon a preponderance of the evidence. In oral argument appellee Commissioner agreed as to the correctness of this rule. An insolvency proceeding brought by a Commissioner is no exception to the above stated rule. In this instance, however, the parties agreed to consolidate the cases and use the transcript developed at the Commissioner's hearing as the record in both cases. No additional evidence was adduced before the trial court. In the circumstances, it certainly must be said that since the findings of the Commissioner as to capital impairment are based upon substantial evidence, as held by the trial court, the Commissioner's findings, therefore, constitute an unrebutted prima facie case and preponderate in the separate delinquency proceeding. Even if we disregard the Commissioner's findings, in our view the record in the delinquency proceeding is

amply sufficient to sustain the trial court's judgment as a matter of law.

The trial court did not err in holding in the first case there was substantial evidence to support the Commissioner's finding that appellant was insolvent; nor did the court err in holding that the appellant was subject to receivership in the second or the original action instituted by appellee in the circuit court.

Affirmed.

MARTIN L. STOUFFER ET AL *v.* THE CITY OF FORT SMITH ET AL

5-5538 467 S. W. 2d 175

Opinion delivered May 24, 1971

Garner & Parker, for appellants.

Shaw, Ledbetter & Dailey and *West, Core & Coffman,* for appellees.

CARLETON HARRIS, Chief Justice. Appellants, Martin L. Stouffer and his wife, Agnes Stouffer, instituted suit in the Sebastian County Chancery Court against the

City of Fort Smith,[1] and the appropriate officers of the city, seeking an order requiring appellees to re-zone certain property owned by the Stouffers, as commercial property. The complaint alleged that the property sought to be re-zoned had been used for commercial purposes at or prior to the time of the adoption of Act 108 of 1929, and had been used for such purposes since that time. It was further asserted that a petition had been filed with the appellees seeking the re-zoning and that appellants had appeared before the City Planning Board, which had refused to act upon the petition; that appellants had asked the City Commission of Fort Smith to grant the petition, but that said commission had refused the request. Appellants prayed that the court require appellees to approve the petition and to re-zone the property for commercial uses pursuant to the statutes of Arkansas. Affidavits in support of the complaint were offered as provided by Ark. Stat. Ann. § 19-2832 (Repl. 1968). After the filing of an answer denying the pertinent portions of the complaint, the case proceeded to trial, and following the taking of evidence, the court found that appellants' claim rested solely on their proof of compliance with § 19-2832; that under the evidence and testimony, appellants had failed to discharge the burden imposed upon them "to show by clear, convincing and a preponderance of the evidence, that they and/or their predecessors in title have used the property concerned 'at or prior to March 9, 1929,' and, 'continuously since that time for commercial purposes' ". The complaint was dismissed, and from the decree so entered, appellants bring this appeal. For reversal, it is simply urged that the trial court erred in finding that appellants failed to prove commercial usage since 1929.

The claim of appellants that the property should be re-zoned is based on the provisions of Section 19-2832 (Act 115 of 1961), which reads as follows:

"Any property used for commercial purposes at or prior to the time of adoption of Act 108 of the Acts of the General Assembly of the State of Arkansas for

[1]The city was added as a party defendant after the original complaint had been filed.

the year 1929 [§§ 19-2811—19-2818], [2] and which has been used continuously since that time for commercial purposes, together with any other contiguous property used for rental or commercial purposes regardless of the period of such use, upon application to the planning commission and/or governing body in a city of the first class, accompanied by affidavit in support thereof, shall be zoned for commercial use."

Accordingly, the question in this litigation is whether it has been established that the property sought to be re-zoned has been used for commercial purposes continuously since March 9, 1929, (the date of the approval of Act 108 of 1929).

It might first be mentioned that the property is located in a residential zone, but was permitted as a non-conforming use when the property was zoned as residential. Appellants' effort to re-zone the property to commercial commenced in November 1966. The testimony of ten witnesses, including appellants, was offered on behalf of the Stouffers, but only four[3] of these, including Mr. Stouffer, testified relative to the length of time the property had been used for commercial purposes. This appellant, 45 years of age, stated that he and his wife had owned the property sought to be re-zoned, (the East Half of Lot 11 and all of Lot 12 in Oakland Heights Addition to the City of Fort Smith) for about five years; that prior to that time he and his brother had owned it as a partnership for three or four years; preceding that period, they had bought it from his mother, and before that, the property was owned by his father. He testified that it had never been used for residential purposes, but, to the contrary had been used to make a livelihood for the family. Stouffer is in the automotive parts business, and has three buildings on the land, an office building, a shop building, and a warehouse building. He said that he was seven or

[2] These eight sections were repealed by Act 186 of 1957.

[3] The other witnesses testified to such matters as the traffic count; that commercial property was located something like a quarter of a mile away; some who had land nearby testified that they had no objections to the Stouffer property being zoned commercial.

eight years old when he became familiar with the property and he could vaguely remember that the office building was constructed either in the latter part of 1929 or the first part of 1930. The witness stated that the first use of the property was as a service station and that he thought his oldest brother operated the service station for two or three years. He said that he thought it was next used as a sandwich shop until approximately 1932 or 1933; next, it was used as a grocery store from 1933 to 1938 or 1939. Stouffer testified that during that period the building was used for a number of different things, for parts, and machinery, "The building was being used as just a bunch of different things". He stated that he was in military service from the latter part of 1941 through 1945, and that the brick (shop) building was built after the war, being completed in 1947. Apparently, from his testimony, two types of businesses were being operated for a portion of the same time, since it will be remembered that he stated the building was used (by a man named Obre) for a grocery store from about 1933 until 1938 or 1939, and further stated that an excelsior plant operated between the years 1933 and 1935, "maybe 1936. There is some argument in the family about that". The witness said that he operates a rebuilder's supply business, not rebuilding; that nothing is rebuilt, but he only supplies rebuilders with rebuildable automobile parts.

Gus Bauer testified that he was familiar with the property in 1928 and 1929, and at that time there was a car repair shop located there; that the corner had never been used for residential purposes. Bauer then testified that Martin Stouffer had been working there all the time from 1929, "all the time, absolutely". The witness mentioned several types of businesses that were operated on the premises, and attempted to approximate the length of time these businesses were in operation; however, on cross-examination, he was unable to state the type of business that was operated during a particular number of years, and the only fact that Mr. Bauer was emphatic about was that the property had never been used as residential property.

Fred Goebel testified that he had been familiar with the Stouffer property since the early thirties. "They worked on cars, and they had an excelsior plant, had a junkyard, had some kind of a little business place, a little rock building. I don't know what it was. But they have had something there; there has just been something there going on all the time. * * * Yes, sir, somebody has been making money doing something." When asked if Martin Stouffer had used the property a lot, he replied, "They were just a bunch of kids at that time. Yes, since then, Mr. Stouffer passed away, you know, and the boys have maintained some kind of a business there, to a great extent connected with the automotive end of the trade". He said there was a building on the property now used in the car parts business which used to be an excelsior plant; however, other proof offered reflected that this building burned in about 1936.

Charles Yutterman testified that he had been familiar with the property since 1928 or 1929, and that there had never been any residential use of the land. When asked about the types of businesses that had been operated on the property, he replied, "There was a little restaurant, filling station of some kind, then there was some kind of a garage, they had some kind of a mill deal there, and then it has been a salvage, rebuilding thing for several years". The witness was unable to give the periods of time when these several businesses had operated, or the order in which they occurred.

Julius Hogrefe testified on behalf of appellees that he had been familiar with the Stouffer property since 1935, and at that time there was nothing but a stone building on the premises, and there was no business activity in the building, it being vacant. He said that he saw it practically every day on his way to pick up the mail, and the building was vacant for a period of about five years. The witness stated that during that time there was no other business activity, *i. e.*, buying or selling, except that a shed was being built to house the excelsior plant. Hogrefe said that he visited Stouffer (apparently Martin's father) in the middle forties, prior to the construction of the brick building, and that

Stouffer was working on a boat (for personal use), but the boat was not completed, and that no other activity was going on. Twelve other persons testified on behalf of appellees, but their testimony actually amounted only to objections to the re-zoning, and their evidence was not pertinent to whether Section 19-2832 had been complied with.

We agree with the chancellor that appellants have not shown compliance with the provisions of the required section by a preponderance of the evidence. It might be here stated that we do not take the court's finding, earlier quoted, to mean that it was holding that the required burden of proof was clear and convincing evidence; such a finding would be erroneous, but it appears that when he stated, "Plaintiffs have failed to discharge the burden imposed upon them to show the clear, convincing and a preponderance of the evidence, * * *", that the property had been used continuously since March 9, 1929, for commercial purposes, that he was simply saying that the evidence offered by appellants was not sufficiently clear and convincing to constitute a preponderance. In other words, the witnesses would frequently make a general statement, but on cross-examination could not testify as to the specific facts in support of such a general statement. Of course, Stouffer himself was away for a four year period during the war, and there is actually no testimony covering this specific period. The testimony of Bauer is bound to be incorrect, at least in one respect, for he stated that Martin Stouffer had been working "all the time, absolutely" since 1929, and in fact stated that Marty "took over in 1929". Yet, the evidence clearly shows that Stouffer was only seven or eight years of age at that time. Be that as it may, it is easy to see why the chancellor considered that the proof lacked a convincing quality; the evidence was simply too vague to establish continuous commercial use since 1929. Also, there was affirmative evidence, heretofore mentioned, that there was a five year period when the property was not used at all. Let it be remembered that the statute does not simply require that it be shown that property has not been used for residential purposes; to the contrary, there

is a positive requirement, *viz,* that it be shown that it has been *continuously used for commercial purposes.*

In addition, the statute has been attacked as unconstitutional, it being asserted that it is in conflict with the prohibition contained in the Fourteenth Amendment to the Constitution of the State of Arkansas, same providing that the General Assembly shall not pass any local or special act. Under the view that we take, expressed in this opinion, there is no occasion to discuss that contention.

Since we are unable to say that the Chancellor's findings are against the preponderance of the evidence, it follows that the decree should be affirmed.

It is so ordered.

JOY D. ROCHESTER *v.* STATE OF ARKANSAS

5587 467 S. W. 2d 182

Opinion delivered May 24, 1971

Lohnos T. Tiner, for appellant.

Ray Thornton, Attorney General; *Garner L. Taylor, Jr.,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Joy D. Rochester, appellant herein, was convicted of Negligent Homicide and the jury imposed a fine of $1,000 as punishment. From the judgment entered in accordance with the jury verdict, appellant brings this appeal. The proof on the part of the state reflects that Officers Brown and Comstock of the Marked Tree City Police Department, observed appellant on the evening of October 10, 1969, driving a blue Cadillac automobile, the car hitting a divider, and then running a stop sign. The officers followed appellant, who was traveling west, and turned on the emergency light. The car was clocked at 95 miles per hour and, as it went into a curve "went off the highway and seemed to have went into the air; flipped over". Upon arriving at the scene, appellant was found lying on the back seat unconscious and Vickie Jones, 18 years of age, who was riding in the front seat with appellant and Ray Dean Atchley, was found under the automobile. She was unconscious, but not dead, and an

ambulance was called. This testimony was given by Officer Brown and it was stipulated that Officer Comstock, if called to testify, would testify substantially the same as Brown.

Ray Dean Atchley, 18 years of age, testified that he was with appellant and Vickie Jones at the Riverside Tavern prior to the wreck, for about twenty minutes, and that appellant was intoxicated. He observed the blue light on the police car behind the Rochester automobile and told appellant that she had better stop the car. But she replied that "she was going to outrun them". He also testified that the automobile was traveling at 95 miles per hour just prior to the accident. Atchley received a cut on his leg. He further stated that he attended the funeral for Vickie.

Dorothy Jones, mother of Vickie, testified that she last saw her daughter alive on October 10, 1969, at about 6 p.m. "The first time I saw her after the accident, after she was dead, she was already dressed and ready. You couldn't tell how badly hurt she was."

Lowell Lewis, Trooper with the Arkansas State Police, testified that he received a call concerning the accident and went to the scene, observed Vickie Jones on a stretcher, stating that she was still alive, but was removed a short time after his arrival. The state rested and appellant moved for a directed verdict for the reason that the state had failed to prove the *corpus delicti, i. e.,* it had not been established that death resulted from injuries sustained in the accident. The court denied the motion and stated that it would reopen the case for the purpose of going into that particular matter further, if the state desired. After objections and exceptions by appellant, Mrs. Jones was recalled, at which time she reiterated her testimony about last seeing her daughter alive at 6 p.m. o'clock on October 10, 1969, and added that the daughter was in good health and was not injured in any manner. Officer Comstock then testified that, upon arriving at the scene, he found Vickie Jones under the car; that part of her body from the chest down was extending out beyond the car. He, Brown,

and Atchley, then removed her from under the automobile and Comstock, when questioned as to her condition, replied "Well, all I could see, a lot of blood coming out of her mouth. She was just laying there and this blood running out of her mouth". He said that it was fresh blood, and that there was a "gurgling" sound from her mouth. Comstock stated that the ambulance took her away. The state then again rested, and the appellant again moved for a directed verdict for the same reason as mentioned originally, said motion being denied. No evidence at all was offered by appellant.

It is asserted that the court erred in permitting the state to reopen its case after the state had rested. We do not agree. In the first place Ark. Stat. Ann. § 43-2114 (Repl. 1964) provides that the court for good reason, in furtherance of justice, may permit the parties (after having rested) to offer evidence upon the original case. We have likewise so held numerous times, stating that it is within the trial court's sound discretion and furtherance of justice, to permit the state to present witnesses after resting, where the circumstances are such as not to prejudice defendant through surprise or otherwise when the disadvantage cannot be overcome. *Wimberly* v. *State,* 240 Ark. 345, 399 S. W. 2d 274, and *Shepherd* v. *State,* 221 Ark. 191, 252 S. W. 2d 621. Certainly, there was here no surprise that could have resulted in prejudice.

It is next asserted that the motion for directed verdict following the additional testimony should have been granted because the state still had not proved the *corpus delicti.* Again, we disagree. In *Edmonds* v. *State,* 34 Ark. 720 (1879), the requisites for proving *corpus delicti* in a homicide case were set out by Chief Justice English. To establish same, the fact of death must first be shown, second, the identification of the body, or remains, as those of the person said to have been killed, and finally, the criminal agency of another, as the cause of the death. As to the last, the opinion states:

"A dead body, or its remains, having been discovered and identified as that of the person charged to have been slain and the basis, of a *corpus delicti* being thus fully established, the next step in the process, and the one which serves to complete the proof of that indispensable preliminary fact is, to show that the death has been occasioned by the criminal act or agency of another person. This may always be done by circumstantial evidence, including that of the presumptive kind; and for this purpose a much wider range of inquiry is allowed than in regard to the fundamental fact of death, and all the circumstances of the case, including facts of conduct on the part of the accused, may be taken into consideration."

In *Outler* v. *State,* 154 Ark. 598, 243 S. W. 851, Buck Outler was convicted of the crime of Murder in the First Degree, it being charged that he had murdered Will Blackburn by striking Blackburn with a gun. The proof reflected that Outler struck Blackburn a violent blow across the head with a gun, knocking the latter down. A number of people witnessed what happened thereafter, the opinion reflecting the following:

"Blackburn walked into the room with blood streaming down from his head and face, and was engaged in wiping his face with a cloth. The testimony tends to show that it was not thought, either by Blackburn himself or those present, that Blackburn was seriously hurt, at least there is no testimony directly on this subject, some of the witnesses merely stating that Blackburn was wiping blood from his face and seemed to be conscious. None of the witnesses detailed the circumstances under which Blackburn left the house, or what occurred after that time, but it was proved that Blackburn went home and died early the next morning."

We then stated:

"It is earnestly contended that the evidence is insufficient to warrant the conviction, for the reason that it was not proved that death resulted from the blow delivered by appellant. There is nothing, however, in the

record to show that there was any other cause for the death which resulted so soon after the infliction of the blow, and the jury were authorized, we think, in drawing the inference, even in the absence of direct proof on the subject, that death resulted from the blow."

It is at once apparent that there is a good deal more evidence to establish the *corpus delicti* in the present case than in *Outler.* Here, Miss Jones was observed pinned under a Cadillac automobile which had been traveling at 95 miles per hour at the time of the crash; she was unconscious; blood was coming from her mouth, together with "gurgling" sounds. The ambulance came and took her away, (rather than her leaving the scene of her own volition, as did Blackburn). Here was a woman, who from appearances, was evidently, at least, critically injured (unlike *Outler,* where it was not thought by those present that Blackburn was seriously hurt). The language used by this court in rejecting Outler's contention is entirely *apropos* here, *viz,* "There is nothing, however, in the record to show that there was any other cause for the death which resulted so soon after the infliction of the blow [injury] and the jury were authorized, we think, in drawing the inference, even in the absence of direct proof on the subject, that death resulted from the blow [injury]". It will be remembered that Mrs. Jones testified that her daughter was in good health and had no injuries just a short time prior to her death.

Appellant asserts that error was committed in permitting Officer Comstock to testify since it had already been stipulated that Comstock, if called, would testify substantially the same as Officer Brown, but that when called, Comstock did not testify the same. We find no merit in this argument. A stipulation that the testimony would be substantially the same certainly does not mean word for word; such a stipulation really means that there will be no conflict in the testimony between those who have testified and those whose testimony is stipulated to be the same. Here, there was no conflict. The evidence complained of was simply *additional* facts not covered in the examination of Officer Brown. Appellant

says that this could have meant to the jury that Officer Brown would have testified to these facts, and appellant had no opportunity to again cross-examine Brown. We do not agree with the basis of the objection since it is certainly reasonable to assume that after both witnesses testified, the jury would consider their testimony separately, and as to having no further opportunity to cross-examine Brown, there is nothing in the record to indicate that any effort was made to get Officer Brown back on the stand, or that he would have been unavailable for further examination. More noticeable than that is the fact that counsel did not cross-examine either Comstock or Brown when they were on the stand.

It is also asserted that it was error for the court to permit Mrs. Jones, the mother of the deceased, to take the stand the second time for the reason that the rule had been asked and the witness advised the court, prior to testifying, that she had been present in court and had heard the testimony of other witnesses, "The appellant had no way of knowing how much of the testimony this witness had heard and was therefore unable to effectively cross-examine her".[1] We are unable to see how permitting Mrs. Jones to take the stand the second time resulted in prejudice to the defendant. Actually, her testimony was almost identical to that given the first time; she only added that her daughter was in good health and not suffering from any injury when she left home on the evening of the accident. Of course, this last was not information which Mrs. Jones would have acquired from witnesses who had already testified.

No prejudicial error being shown, and it appearing that appellant received a fair trial, the judgment is affirmed.

It is so ordered.

BYRD, J., dissents.

FOGLEMAN, J., not participating.

[1]Defense counsel did not cross-examine Mrs. Jones at all on either occasion when she was on the witness stand.

CONLEY BYRD, Justice, dissenting. Arkansas Stat. Ann. § 75-1001 (Repl. 1957) provides:

> "(a) When the death of any person ensues within one [1] year as a proximate result of injury received by the driving of any vehicle in reckless or wanton disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide. . . ."

Proximate cause is defined as a cause which, in a natural and continuous sequence, produces damage and without which the damage would not have occurred. A. M. I. (civil) 501.

If someone in the future should assert that Vicki Jones died from drowning when the ambulance in which she was riding was blown into Black Fish Lake, not one member of the majority can point to the record before us and say that there was evidence before the jury from which it could find to the contrary. The fact that jurors may have been permitted in the past to speculate as to the cause of death does not seem to me to be a sufficient license to perpetuate such speculation. Even the Outler case, 154 Ark. 598, upon which the majority relies contained more proof of proximate cause than that shown in the case at bar. In the Outler case the proof showed the injury sufficient to cause a brain concussion, the fact that the deceased walked home and went to bed without other apparent injury and that the deceased was found dead in his bed the next morning after the attack upon him sometime between dark and the breakup of the party at which the attack occurred. Here the proof shows nothing as to what happened to Vicki Jones from the time she was put in the ambulance until she was seen by her mother at the morgue in West Memphis sometime the next day.

For the reasons herein stated, I dissent as to the affirmance.

NAOMI LITTLE, ADMINISTRATRIX *v.* HAROLD McGRAW

5-5575 467 S. W. 2d 163

Opinion delivered May 24, 1971

Butler & Hickey, for appellant.

Daggett & Daggett, for appellee.

GEORGE ROSE SMITH, Justice. This action for the wrongful death of Sam Little was brought by the appellant, his administratrix, against three defendants, Darrell Riddell, Carl Riddell, and the appellee, Harold McGraw. All three defendants filed motions for summary judgment. The court denied the Riddells' motions but sustained that of McGraw. This appeal is from a summary judgment in favor of McGraw.

Our summary judgment statute, Ark. Stat. Ann. § 29-211 (Repl. 1962 and Supp. 1969), was copied from Rule 56 of the Federal Rules of Civil Procedure. Under Federal Rules 54 and 56 there would be some doubt about the finality and appealability of a summary judgment in the federal court in favor of only one of several defendants. Barron & Holtzoff, Federal Practice and Procedure, § 1241 (Wright's ed., 1958). Our legislature, however, has not adopted Federal Rule 54, which has to do with the finality of a partial judgment. Hence the finality and appealability of a summary judgment dismissing only one of several defendants must be determined under our general statutes governing appellate procedure. We are of the opinion that such a judgment is final and appealable. *Safeway Stores* v. *Shwayder Bros.,* 238 Ark. 768, 384 S. W. 2d 473 (1964); *Seitz* v. *Meriwether,* 114 Ark. 289, 169 S. W. 1175 (1914).

The facts, as developed in the depositions accompanying the motions for summary judgment, are not entirely without dispute. Sam Little, the decedent, was employed by McGraw, a farmer. On May 20, 1968, McGraw telephoned Riddell Flying Service, which was engaged in cropdusting, to arrange for the spraying of a rice field. McGraw says that in the course of his conversation with Darrell Riddell he asked if the flying service was qualified to spread 2, 4-D, which requires

a special license. According to McGraw, Darrell said that he was so qualified, though in fact he was not. Darrell denies that he was asked about his license. Darrell, who was then 22 years old, had only a student pilot's license and was not qualified to do any kind of cropdusting, for which a commercial pilot's license is required.

Late the next day Darrell flew a small single-seated plane to a landing strip about four miles from the rice field that was to be sprayed. There McGraw helped Darrell mix and load the chemical. Darrell then began spraying the field. McGraw had stationed Sam Little and another man at opposite ends of the field, to guide the flier as he made passes over the area. After every pass the two men would each move 14 steps in the same direction and take a new position to guide the plane upon its next passage over the field. At one point in the operation the plane was flown so near the ground that its landing gear struck Little and fatally injured him.

We are not here concerned with the liability of either Darrell Riddell or his father, who are not parties to this appeal. The issue before us is the existence of supporting evidence for the four separate theories upon which the appellant administratrix asserts a cause of action against McGraw. In considering that evidence we must view it in the light most favorable to the appellant. *Russell* v. *City of Rogers,* 236 Ark. 713, 368 S. W. 2d 89 (1963).

First, the appellant invokes the doctrine of respondeat superior, on the theory that Darrell Riddell was an employee of McGraw. There is no merit in this contention. According to the undisputed evidence, Darrell was an independent contractor over whom McGraw had no right of control.

Secondly, the appellant contends that McGraw failed to exercise ordinary care to furnish Little with a reasonably safe place to work. This contention, too, is without merit. Little's death was due not to a dangerously de-

fective condition of the field where he was standing but to Darrell Riddell's asserted negligence in flying too low. See, by analogy, our opinions in *Tatum* v. *Rester,* 241 Ark. 1059, 242 Ark. 271, 412 S. W. 2d 293 (1967), where, as here, the condition of the landowner's premises had no causal connection with the plaintiff's injury, which was caused by the landowner's negligence in backing his car out of his carport.

Thirdly, the appellant insists that the spraying of a crop by airplane is so inherently dangerous that the negligence of Darrell, as an independent contractor, is chargeable to his employer. AMI 708, Civil. There is actually no proof to sustain this argument. Many years ago aviation was considered to be an ultrahazardous activity. Restatement of the Law, Torts, § 520, Comment *b* (1938). Although the spreading of 2,4-D by air is unduly hazardous to nearby crops, *Chapman Chem. Co.* v. *Taylor,* 215 Ark. 630, 222 S. W. 2d 820 (1949), it does not follow that an airplane in flight is inherently dangerous to a person standing on the ground. Aviation is now so commonplace that it cannot be considered to be either inherently dangerous or ultrahazardous. For a full discussion of this fact see *Boyd* v. *White,* 276 P. 2d 92 (Cal. App., 1954).

Fourthly, the appellant asserts that McGraw failed to use ordinary care to select a competent independent contractor to do the work. AMI 709, Civil. Upon that issue the proof made a question of fact for a jury. McGraw admittedly knew that a flier must have a special license to engage in cropdusting. McGraw remembered that about a year earlier Darrell had said that "he hoped in another year he would be qualified to do that type of work himself." Although McGraw testified that he asked Darrell during the telephone conversation if the flying service was qualified to disperse 2, 4-D, Darrell testified that he was never asked if he was properly licensed. Finally, Mrs. Little testified that when McGraw came to tell her that her husband was dead, McGraw "said that the boy said that he had hit Sam, and he said that he didn't think the boy had a license, and that he thought that it was his father's business." We are unable

to say that the record is devoid of substantial evidence to support the appellant's fourth theory of liability.

Thus the court erred in entering a summary judgment in favor of McGraw. The statute provides that a defendant may move for a summary judgment "upon all or any part" of the plaintiff's claim. Ark. Stat. Ann. § 29-211 (b). Here the court should have entered an interlocutory order, which the federal decisions liken to a pretrial order, finding that there was a disputed issue of fact only with respect to the fourth asserted ground of liability.

Reversed and remanded for further proceedings.

BERTHA GREGORY *v.* NATIONAL LIFE AND INSURANCE COMPANY

5-5582 467 S. W. 2d 181

Opinion delivered May 24, 1971

Reinberger, Eilbott, Smith & Staten, for appellant.

Bridges, Young, Matthews & Davis, for appellee.

LYLE BROWN, Justice. Appellant Bertha Gregory was the plaintiff below and appeals from a summary judgment in appellee's favor. She was the beneficiary in an insurance policy on the life of her son, Daniel Eans, covering death by accidental means. The policy excluded payment in case of death resulting "from the insured's commission of, or attempt to commit, an assault or felony." Appellee moved for summary judgment and attached the affidavit of the wife of Daniel Eans, she being the only eyewitness to the fatal event. Appellant contends that her cross motion for summary judgment should have been granted, and alternatively, that the case presented fact questions for the jury.

In November 1968 Daniel Eans and his wife, Bessie Mae, resided in Michigan. Her affidavit recited that the couple engaged in a quarrel on November 11 and it culminated in his striking her, knocking her to the floor and then stomping her; that she locked herself in the bathroom and he opened the door with a clothes hanger; that he again attacked her; that she succeded a second

time in getting in the bathroom and fastened the latch; and that he opened the door with an ice pick. Then she recited, as gleaned from the abstract, these events:

> When he entered the bathroom he had the ice pick in his hand and I grabbed for the ice pick and we wrestled over it. I got it from him and we fell into the bathtub when we were wrestling and he got up first with the ice pick in his chest. . . . I don't know how the ice pick got lodged in his chest. I was scared because he was fighting me and when he opened the door I saw the ice pick and the first thing I thought about was getting it from him. When he came in we were sort of wrestling and I ended up with the ice pick in my hand. . . . After he came in the bathroom the second time with the ice pick in his hand he didn't strike me then because I think my main concern was getting the ice pick and I know he didn't hit me after he got in the bathroom. When he came in he had the ice pick in his hand and holding it so that the pick part was facing his body towards his upper arm. He didn't make any gesture with the ice pick towards me. . . . The only struggle we had after he came in was for the ice pick itself. I wanted to get it away from him and we accidentally stumbled into the bathtub.

Our unhesitating conclusion is that this was not a case for summary judgment. That judgment is appropriate only when "there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law." Ark. Stat. Ann. § 29-211(c) (Repl. 1962). In determining whether there was a genuine issue of fact on such a motion we view the proof in the same light as if it were a motion for a directed verdict. *McClain* v. *Anderson,* 246 Ark. 638, 439 S. W. 2d 296 (1969). The evidence is viewed in the light most favorable to the party resisting the motion, with all doubts and inferences resolved against the moving party. *Deam* v. *Puryear,* 244 Ark. 18, 423 S. W. 2d 554 (1968). "[I]n a case where fairminded men may honestly differ about the conclusions to be drawn from the testimony, a summary judgment should be denied." *Mason* v. *Funder-*

burk, 247 Ark. 521, 446 S. W. 2d 543 (1969). Additionally, the policy being one of insurance against death by accidental means, there was a presumption of death by accident. *Mutual of Omaha* v. *George,* 245 Ark. 670, 434 S. W. 2d 307 (1968). The character of the assault contemplated by the exclusion means more than a simple assault; it must have been of such severity "as would have justified the assaultee in inflicting death or serious injury by way of self-defense." The severity of an assault is ordinarily a question for the jury. *Lincoln Income Life Insurance Co.* v. *Alexander,* 231 Ark. 63, 328 S. W. 2d 266 (1959). Such a reservation as is before us is to be construed strictly against the party for whose benefit the reservation was made. *Harrison* v. *Interstate Business Men's Accident Ass'n.,* 133 Ark. 163, 202 S. W. 34 (1918).

In order to reach the conclusion that no justiciable issue existed the trial court necessarily had to weigh the facts set forth in the affidavit and in light of the numerous principles we have recited. The court had to determine whether the acts of the insured unquestionably constituted a severe assault, whether the presumption of death by accident was overcome, and the credibility of affiant's testimony had to be evaluated. Those were factual questions which addressed themselves to a jury.

Reversed and remanded with directions to set aside the summary judgment.

HARRIS, C. J., not participating.

OUITA MARTIN *v.* SIMMONS FIRST NATIONAL BANK, TRUSTEE ET AL

5-5448 467 S. W. 2d 165

Opinion delivered May 24, 1971

Brockman, Brockman & Gunti, for appellant.

Coleman, Gantt, Ramsay & Cox, for appellees.

JOHN A. FOGLEMAN, Justice. The chancery court held that the separate assets and income of Ouita Martin should be taken into consideration before the trustee of a trust for her benefit, created by the will of her sister, Elizabeth Nichol, could invade the corpus of the trust for Miss Martin's hospital, medical, drug and nursing expenses. Appellant contends that, under the circumstances existing here, she is not required to exhaust all her resources, or even her income, before these expenses are paid for by the trustee.

Determination of the principal questions involved on this appeal depends upon construction of a clause in

the will of Elizabeth Nichol, who died in 1963. That clause reads:

> In the event the said income is not sufficient to provide for the needs of my said sister by reason of her illness or by reason of accident or other calamity [a]ffecting her, the trustee shall sell such part of any of the shares of stock held by it as trustee and as shall be reasonably necessary to provide for the needs of my said sister and use the proceeds for that purpose.

The corpus held by the trustee at the time of the institution of this action were 3,711 shares of the stock of Simmons First National Corporation, a one-bank holding company, and 110 shares of Arkansas Oak Flooring Company. At the time of Mrs. Nichol's death the flooring company stock and 2,475 shares of Simmons First National Bank were designated by her as the trust corpus. The trustee converted the bank stock into holding company stock at the time of the organization of the company, whose principal corporate purpose was ownership of the stock of the bank. The increase in number of shares was attributable to stock dividends.

The bank has been paying the income from the trust to Miss Martin at the rate of $490 per month, with appropriate adjustment annually, so that she has received all income from the trust. The total annual disbursements ranged from $5,767.20 to $7,792.19 during the years from 1964 to 1969.

The present action was precipitated by reason of an injury and an illness suffered by Miss Martin, requiring unusual medical expenses, but she also contended that current inflation has caused an increase in her cost of living and constituted "a calamity affecting her" under the terms of the pertinent clause. She filed her petition in September 1969 asking judgment against the trustee for medical expenses incurred by her and directions to the trustee to pay all medical, hospital, surgical, and nursing expenses accrued to the date of hearing, and to pay all future medical, hospital, surgical and nursing

expenses. She prayed that the trustee be directed to sell shares of stock held by it for these purposes. Her petition was opposed by the trustee, as it had ascertained before the filing of appellant's petition that there would be objection on the part of some of the residuary beneficiaries of the trust. The petition was also opposed by these residuary beneficiaries. Both the trustee and these beneficiaries are appellees here.

The chancellor made an exhaustive review of authorities and concluded that it was the intention of the testator that the corpus of the trust be invaded only in case the "needs" of appellant required when her private means were taken into consideration, and that there should be no invasion of the corpus until appellant's expenses because of illness, accident or calamity were in excess of all her means consisting of her own private resources as well as the net income of the trust. The decree incorporated the chancellor's findings, and defined the resources and assets of appellant which must be exhausted before invasion of the corpus as the principal, dividends, interest and any other income from investments in land, stocks, bonds, savings and checking accounts in banks and savings and loan institutions, including any accounts standing in the joint names of appellant and others and other investments of a similar nature and type.

On trial de novo, we reach a different result in some respects. Our different conclusions do not result so much from a disagreement with the chancellor on the law involved as from its application to the facts in this case. Of course the paramount and overriding rule of construction is to ascertain the intent of the maker, preferably from the four corners of the instrument itself. *Clay* v. *Benton,* 248 Ark. 691, 453 S. W. 2d 405. The courts should give a will that construction which accomplishes the purposes and objectives of the testator. In order to determine the intentions of the testator consideration must be given to every part of her will. *Carroll* v. *Robinson,* 248 Ark. 904, 454 S. W. 2d 329.

Mrs. Nichol's will, made April 16, 1962, makes the following provisions:

First: Usual provisions for payment of debts and funeral expenses.

Second: Devise of life estate in home of testatrix to appellant, with remainder to First Presbyterian Church of Pine Bluff.

Third: Outright bequest to appellant of all furniture, furnishings, silverware, chinaware, and other articles of household and domestic use in the home, together with all clothing, jewelry and other personal effects not otherwise disposed of by the will, any automobile owned by testatrix and $20,000 in cash.

Fourth: Establishment of trust here involved, requiring distribution of income from stocks to appellant. Direction for termination of trust upon death of appellant by sale of stock then in possession of trustee and payment of net proceeds to six named nieces and nephews.

Fifth: Bequest to a nephew of husband.

Sixth and Seventh: Bequests to charitable institutions.

Eighth: Bequest of watch and bracelet to a niece who is one of the residuary beneficiaries of the trust.

Ninth: Bequest of diamond bar pin to a niece who was not a residuary beneficiary of the trust.

Tenth: Bequest of diamond engagement ring to another niece who was residuary beneficiary of the trust.

Eleventh: Bequest of diamond solitaire ring.

Twelfth: Bequest of diamond dinner ring to niece who was still another residuary beneficiary.

Thirteenth: Bequests of cash to relatives in varying amounts, including the six residuary beneficiaries, who were to receive amounts varying from $1,000 to $6,000.

Fourteenth: Bequests to cousins.

Fifteenth: Bequest to First Presbyterian Church, Pine Bluff.

Sixteenth: Division of residue with one-half to go to appellant and other one-half in equal shares to six nieces and nephews who were named as residuary beneficiaries of the trust.

Seventeenth: Direction that estate taxes be paid out of residuary estate.

Eighteenth: Nomination of executor.

Examination of the will can only lead to the conclusion that appellant was intended to be the primary object of Mrs. Nichol's bounty. Others were given consideration secondarily or incidentally. Except for specific bequests, the residuary beneficiaries were to share in the estate only after all debts, taxes and expenses of administration had been paid, all other specific bequests had been distributed and the trust established. They are then to benefit from the trust only to the extent that it has not been exhausted in providing for appellant in the eventualities mentioned in the clause in question. This preference standing alone, however, is not of sufficient significance to control the construction of the clause according to appellant's contention. Furthermore, we cannot say that the meaning of the words in the pertinent clause is so clear and unmistakable that we can determine the testator's intention from the language of the will alone. We agree with the chancellor that similar clauses have led to much litigation and considerable disagreement by the courts as to their meaning. We also agree with the chancellor that the sole decision of this court shedding any light upon the subject is *Cross* v. *Pharr,* 215 Ark. 463, 221 S. W. 2d 24, where we said:

> Unless something appears in the will indicating a different purpose, it is ordinarily presumed that the trustor intended the beneficiary to be supported and maintained from estate income, or as is sometimes the case, from sale of a part of the corpus. See 101 A. L. R., 1461 et seq.; Restatement of the Law of Trusts, § 128, Comment "e"; Scott on Trusts, p. 672.

In that case, the clause in question required the payment of net income from a trust estate to the beneficiary "when and as the same may be needed" by her. The chancellor correctly pointed out that corpus was not involved there. Authorities cited for our statement in *Cross,* ultimately lead to the fundamental proposition in any such case—that the intent of the trustor must be determined from the language of the trust interpreted in the light of the circumstances.

Whenever there is uncertainty as to the intention of a testator which cannot be clearly ascertained when the words of his will are considered in their ordinary sense, the court must read the language employed by the testator in the light of the circumstances existing when the will was written and, in order to put itself in the place of the testator as nearly as possible, may consider all surrounding facts and circumstances known to him, including the condition, nature and extent of the testator's property, his relations with his family and other beneficiaries named, the motives which may reasonably be supposed to influence him, the subject matter of the gift, the financial condition of the beneficiary and other such matters. *Murphy* v. *Morris, Executor,* 200 Ark. 932, 141 S. W. 2d 518; *Rufty* v. *Brantly,* 204 Ark. 32, 161 S. W. 2d 11; *Thompson* v. *Arkansas Nat. Bank of Hot Springs, Trustee,* 220 Ark. 802, 249 S. W. 2d 958; *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176, 1199.

A review of the pertinent circumstances reveals the following:

> Miss Martin had lived in her sister's home since 1921. When she came there she was employed at the

local school cafeteria, but she had not been employed for 45 years. Appellant was 80 years of age on August 26, 1969.

The dwelling house is a very old two-story building consisting of seven rooms and a sleeping porch, located upon a large lot. Appellant testified that she had cared for Mrs. Nichol who was in poor health during the last few years of her life. She also said that she looked after the housekeeping during that time.

Appellant's physician testified that he had seen Miss Martin as a patient since 1946, that she suffered grand mal epileptic seizures as early as 1961 and that she then gave a history of such seizures early in life. He had also treated Mr. and Mrs. Nichol and the mother of Mrs. Nichol. This physician had an intimate relationship with the family. He had discussed appellant's condition with her sister and brother-in-law, and testified positively that the testatrix was aware of appellant's condition on the date of execution of the will. The doctor related that he had treated both Mr. and Mrs. Nichol during illnesses in their home and that being cared for in the home was a way of life in the family.

Appellant had little in the way of financial resources when Mrs. Nichol died. They consisted largely of approximately 62 shares of Arkansas Power & Light Company stock, $4,000 on deposit in Southern Federal Savings & Loan Association and 90 shares of the stock of Container Corporation, which she inherited from her mother.

Our view of these circumstances and the terms of the will leads us to the conclusion that it was the intention of the testatrix that appellant be enabled to spend the rest of her life in the home where she had lived for 50 years and in the style of life to which she had become accustomed. There is little room for doubting that Mrs. Nichol was fully aware of her sister's physical and financial condition. There is little likeli-

hood that the income from the trust would have been expected to maintain the dwelling house and grounds and support Miss Martin in her customary style and still provide full medical, hospital and nursing care to her in case of illness, without encroachment upon the corpus. The testatrix's apparent desire that the particular stocks constituting the trust be held intact except for authorized invasion until Miss Martin's death seems to indicate that she was more concerned with security than quantity of income.

As the life tenant, Miss Martin pays property taxes on the home and contents. The real estate taxes amount to $291.58 annually. She also maintains insurance thereon at a cost of $71 per year. Her expenses for maintaining the large yard are great, approximating $100 per month, which includes necessary annual tree surgery. She averages general house maintenance at $35 per month. She had paid $750 for replacing the roof and $650 for replacing the furnace. Shortly after Mrs. Nichol died, Miss Martin paid $3,000 to put sheetrock on the interior walls. Appellant said that the plumbing and water tank were constantly in need of repair. She pays $22 per week to a cook who has been in the employment of the family for 25 years. This cook works five days per week, preparing only the noon meal each day. Miss Martin is unable to drive a car, so she pays a driver employed some 25 years, on an occasional basis. Her grocery bill averages approximately $90 per month. Utility bills run to $50 per month, and the telephone bill costs her a little less than $20 per month. Miss Martin estimates that she spends only $30 per month for clothing and $15 for laundry and cleaning. She pays $8 per month for insurance on the automobile left her by Mrs. Nichol.

While she is eligible for Medicare benefits, she pays $7.20 per month for Blue Cross-Blue Shield Medi-Pak insurance providing excess coverage over Medicare payments. She averaged her real and personal property and income tax payments at $66 per month. Miss Martin's annual income from sources other than the trust consists of the following:

Social Security	$612.00
Dividends from AT&T stock	48.00
Dividends from First Federal Savings & Loan Association	285.00
Dividends from Guaranty Federal Savings & Loan Association.	294.39

At the time of the trial she had $5,770.74 on deposit with First Federal Savings & Loan Association and $6,196.13 with Guaranty Federal Savings & Loan. She valued her corporate stock at $1,000. All these assets came from the specific cash bequests to appellant, with the possible exception of the AT&T stock which may have been purchased from the proceeds of AP&L stock she surrendered to the company. It appears that she received nothing as a residuary legatee and devisee.

Appellant gave the stock in Container Corporation inherited from her mother to relatives other than those who are appellees. She testified that she gave 52 shares of AP&L stock she owned to appellee Frances M. Bailey. She had also given the money she had in the bank to relatives and to charity. All these gifts were made before she suffered the shoulder injury.

Subsequent to Mrs. Nichol's death, Miss Martin has suffered two illnesses which required hospital confinement. She spent seven weeks in a hospital when she suffered a broken shoulder in August 1968, and two weeks in 1969 as the result of a stroke. She now walks around the house only with the aid of a cane and by holding onto some other support. She can hardly walk outside the house. She testified that it was necessary that she have nursing care at night since July 11, 1969. The nurse she employed is paid $50 per week for spending the night with her, applying hot packs, dressing and bathing her, measuring her medicines, helping her downstairs and taking her places she must go. The nurse comes on duty about 9:00 p.m. Appellant states that her drug bill runs $25 per month.

A friend by the name of Lucille Mason has lived with appellant since 1963. She pays no rent but contributes

to the payment of the telephone bill. Miss Mason is employed, but attends to getting breakfast and supper and Saturday meals for both herself and Miss Martin. Appellant testified that her friend brings her own food for meals that she does not eat at the school where she is employed and that its value exceeds the cost of any of appellant's groceries consumed by the guest.

Appellant's charitable contributions amount to approximately $60 per month. Her estimate of her cost of living, without considering the contributions, and without allowing any amount for medical and hospital bills is $773.85 per month.

Dr. Talbot has treated appellant for arteriosclerosis, recurrent migraine headaches, osteoarthritis, and osteoporosis of the spine in addition to her epilepsy, her stroke and her injury. He suspected that her shoulder injury resulted from a seizure. He was of the opinion that appellant's condition requires the presence of a nurse or someone else because of the constant hazard of accident, which is intensified by the possibility of seizures which cause her to lose consciousness. He characterized these as "breakthrough" seizures because they occurred in spite of preventive medication. The doctor felt that, considering the presence of the cook and appellant's friend, the nursing service she had was adequate and reasonable, and predicted that more care would probably be needed in the future. In his opinion, Miss Martin will respond better both physically and mentally to treatment in her familiar surroundings, and her removal from the home to a nursing home or hospital would be demoralizing in the utmost. He felt that the estimate of $25 per month was a reasonable amount for necessary drugs and medicines.

There was evidence showing that the bank stock was "low-income" stock and that an investment of its present value in other securities would produce a substantially larger income. Yet it seems clear that the testatrix intended that the corpus of the trust consist of the shares of stocks designated by her throughout its existence, because the trust clause limits the trustee's

power to sell to the eventualities named in the particular clause we are considering, until the death of Miss Martin, when all the remaining stock is to be sold. Directions as to reinvestment are also lacking. The duties of the trustee with reference to the stock are directed toward its preservation. We can only assume that Mrs. Nichol had knowledge of the characteristics of the stock placed in trust. Her husband was formerly president of the Simmons bank. It is not unreasonable to infer that one reason for inserting the provision for invasion of corpus was because of these relatively low dividends.

It is certain that the gift of the trust income is absolute and unrestricted as to use. The fact that the testatrix used the words "in the event the said income is not sufficient to provide for the needs of my sister by reason of illness, or by reason of accident or other calamity affecting her" is significant to us. If she had intended that appellant first exhaust her own resources before there was any encroachment it would have been quite easy for her to have used the words "in the event my sister's income is not sufficient" or "in the event my sister's resources are not sufficient." But she did not even say "in the event that the income from the trust and my other bequests to my sister are not sufficient." We conclude that it was the intention of the testatrix that the expenses of her sister because of illness or accident be provided from the trust, without regard to any resources that Miss Martin might have, and that she did not have in mind the very narrow and restricted definition of "need" as indicative of destitution. The word "need" is also defined as "The lack of anything requisite, desired or useful; . . . anything needed or felt to be needed, as our daily needs." Webster's New International Dictionary, Second Edition; see also Third Edition.

We do not mean to suggest that unbridled discretion is vested in Miss Martin as to expenditures for her living costs or that she may incur any expense she chooses for medical and nursing care. We do not think that it has been shown that her present expenditures are excessive in view of the standard of living she has enjoyed

for 50 years and in view of care rendered necessary because of illness. Nor do we feel that the corpus of the trust was intended to support Miss Martin's charities, beyond those which might have been anticipated by the testatrix at the time of the execution of the will. We do feel that the testatrix intended that the corpus be invaded to pay any additional expense to Miss Martin arising by reason of illness, accident or other calamity, if the income from the trust proved inadequate for that purpose after her payment of usual and customary living expenses from the income from the trust. In this respect it is to be noted that the trustee is directed to sell such part of the shares of stock as shall be "reasonably necessary to provide for the needs" of appellant and to use the proceeds for that purpose. Consequently, the trustee is charged with the exercise of discretion as to what is "reasonably necessary."

Miss Martin first requested payment by the trustee of expenses attributable to her illness on or about July 11, 1969. At that time it appears that the following items had accrued:

Jefferson Hospital (This amount was charged to Miss Martin over and above Medicare and Blue Cross Medi-Pak)	$ 102.00
Mrs. Clara Phillips—special nursing at hospital	28.00
Mrs. Clara Phillips—14 weeks nursing at home, $50 per week	700.00
Consumers Drug Co.—3/15/69 to 6/27/69	89.55
The Doctors Clinic—4/10/69 $15.00 and 5/8/69 $151.00	166.00
Total	$1,085.55

Of these items, Miss Martin had paid and was seeking reimbursement for the hospital bill, the clinic item and the drug bill. While she had paid the nurse, it is not clear from the record whether the payment was made

before or after her request that these items be paid by the trustee. Miss Martin testified that she continued to pay the nurse after her request was refused and that she incurred additional drug expenses of $258.79 after July 11, 1969.

The fact that the trustee is not required to look to other means of Miss Martin before encroaching upon the corpus for her needs arising out of illness or accident does not mean that the trustee is required to invade the corpus to reimburse appellant for moneys voluntarily spent by her prior to any demand for payment from the trust principal. If the trustee were required to reimburse appellant for such expenditures, which may or may not have been made from income from the trust, she would be enabled to exercise her discretion as to the number of shares of stock to be sold. This would deprive the trustee of discretion vested in it, and permit the life beneficiary to dissipate the trust to the detriment of the residuary beneficiaries. The fact that she paid these expenses without any demand on the trustee is at least some evidence that the income paid to her was then sufficient for those purposes.

We hold that appellant is not entitled to reimbursement for any expenses paid by her before her demand upon the trustee for the payment thereof in July 1969. See *In re Hoepner's Estate,* 176 Misc. 47, 27 N. Y. S. 2d 398 (1941); *Clark* v. *Mississippi Valley Trust Co.,* 360 Mo. 452, 228 S. W. 2d 808 (1950); *Green* v. *Cleveland Bank & Trust Co.,* 6 Tenn. App. 685 (1928). The trustee should, however, investigate all expenses of Miss Martin attributable to her illness or accident which are now unpaid and all incurred after demand made upon it by Miss Martin to determine the number of shares of stock reasonably necessary to be sold to properly provide for all such expenses reasonably incurred taking into consideration any income of the trust remaining after the payment of Miss Martin's usual and customary cost of living, but without considering Miss Martin's income from other sources or her other assets.

Appellant also contends that the chancery court erred in denying her prayer that the trustee be required

to sell the stocks held in the trust and to invest the proceeds so as to provide an increase in the income to the trust. We do not agree. Her argument here is based almost entirely upon the fact that the trustee, without court authority, exchanged the bank stock for stock in the holding company. While we express no opinion upon the authority of the trustee to make such exchange, that question is not before us. No one has sought to require the trustee to account for its action in converting the bank stock to holding company stock. Appellant brought out the fact that the conversion of the stock pertained to a reorganization relating to the ownership of the bank.

We agree with the chancellor that the evidence does not justify a sale for reinvestment. It was the apparent intention of the testatrix that the corpus of the trust be preserved in the form of the stocks which constituted it when the trust came into existence. There is no express authority to sell except to provide for the needs of appellant for the purposes stated, and to permit distribution to the residuary beneficiaries upon the death of appellant. While there are circumstances under which a trustee may sell stock held in trust in the absence of specific authority in the trust instrument, they were not shown to exist here. The fact that the proceeds of sale of the stock could be invested to produce a greater income is not itself sufficient. It may well be that the testatrix expected the residuary beneficiaries to profit by the obvious growth potential of these stocks, even if she disregarded any sentimental reasons she might have for their being held during the lifetime of the sister who lived with her and her husband for many years. A trust officer of the bank estimated the present value of the holding company stock at $371,000. The trust officer did not know the value of the flooring company stock. The former was valued at $139,218 at the time of the creation of the trust and the latter at $42,350. A sale, he pointed out, would require payment of income taxes on the gain. He felt that putting all the Simmons stock on the market at once would depress the per share price. The interests of the residuary beneficiaries are not to be ignored. Furthermore, there has been no evidence to

show that there has been any decline in the value of the new stock or that it produces less income than the bank stock.

Appellant argued in the lower court that continuing inflation causing a rise in the cost of living is a calamity which also justifies encroachment upon the corpus. The chancellor found it unnecessary to decide this question. Appellant seems to have abandoned that argument here. At any rate, we do not find the evidence sufficient to support such a finding at this time.

The cause is remanded with directions to the chancery court to enter its decree instructing the trustee to proceed in accordance with this opinion.

THE EMPLOYER'S LIABILITY ASSURANCE CORPORATION, LTD. *v.* MID-STATE HOMES, INC., AND ETHEENE PETERSON

5-5588 467 S. W. 2d 386

Opinion delivered May 24, 1971
[Rehearing denied June 21, 1971.]

Tackett, Young, Patton & Harrelson, for appellant.

Robinson & Robinson, for appellees.

J. FRED JONES, Justice. Mid-State Homes, Inc. filed suit against Etheene Peterson in the Lafayette County Chancery Court to foreclose a mortgage on a house previously damaged by fire. The Employer's Liability Assurance Corporation, Ltd. intervened and paid $2,-647.04 into the registry of the court as the total amount it owed under a fire insurance policy issued to Etheene Peterson.

This is an appeal by The Employer's Liability Assurance Corporation, Ltd., hereinafter called "Employer's", from a decree in favor of Etheene Peterson for the amount of $7,100 plus statutory penalties and attorney's fee. On appeal to this court Employer's has designated the following point on which it relies for reversal:

> "The court erred in allowing, over appellant's continuous objection, testimony regarding total loss, the testimony relating to whether or not the insured premises was a total loss at the time of the trial, rather than immediately following the fire."

The facts, as near as we can determine from the record, appear as follows: Etheene Peterson owned a lot in the town of Lewisville in Lafayette County, Arkan-

sas, and contracted with the Jim Walter Corporation to construct a residential building on the lot. She paid $500 down on the building and on March 2, 1962, she executed her promissory note secured by a mortgage to Jim Walter Corporation in the amount of $7,027.20, payable in 144 monthly installments of $48.80 each, commencing on May 5, 1962. Of this amount $4,095 represented principal balance of the purchase price, and $2,932.20 represented interest over the life of the note. The house was completed within about two or three weeks and Miss Peterson started renting it to her sister for $40 per month. On March 12, 1962, the note and mortgage were assigned to Mid-State Homes, Inc.

On March 30, 1965, Employer's insured the property against loss by fire under a policy in the face amount of $7,100, with Etheene Peterson as the primary beneficiary and with a loss payable clause in favor of Mid-State Homes, Inc. or its assignee, as their interest might appear. The record is not clear as to insurance on the property prior to 1965 but it appears that there was additional insurance not germane to the issues in this case.

Etheene Peterson collected the rents from her sister and made the regular monthly payments on the mortgage indebtedness until the house was severely damaged by fire on April 6, 1966. All payments were made to Mid-State through June, 1966, but no payments were made on the note after that date. On July 12, 1967, Etheene Peterson signed a proof of loss directed to Employer's setting out that the actual cash value of the property at the time of the loss was $7,100; that the whole loss and damage amounted to $3,392.68, and that the amount of the claim (apparently because of other insurance) was $2,647.04.

The record is very vague as to the cause for the delays in the collection and payment of the insurance which is the primary subject of this litigation, but it would appear from the overall record that negotiations were going on between Mid-State Homes, Inc. and Jim Walter Corporation on the one side, and Employer's on

the other side, and that Etheene Peterson knew very little about what was going on between the companies. The record indicates that $1,000 or $2,000 in insurance was paid on the fire loss by a company not involved in this litigation, but the record is not clear as to whom the amount was paid, or whether any of it was credited on the note. In any event, according to computation of balance due, filed as exhibit by Mid-State Homes, Inc., Miss Peterson had paid $2,342.40 on the mortgage indebtedness as of July 5, 1966, and still owed as of February 17, 1969, accrued payments in the amount of $1,561.60 and unaccrued principal in the amount of $3,123.20, all of which, together with an insurance premium advanced by Mid-State on July 5, 1965, amounted to a total balance of $4,214.63.

The record indicates that sometime after July 12, 1967, when the proof of loss was signed by Miss Peterson, Employer's sent its draft in the amount of $2,647.04 to the attorney for Mid-State Homes, Inc. By letter dated September 8, 1967, the draft was returned to Employer's with demand for additional amount, two paragraphs of the letter being as follows:

> "Even though the house was covered by more than one (1) policy, under the Mann case, 196 F. Supp. 604, where a home was covered by two (2) policies, the Court in construing the statute found that the total recoverable is the aggregate of the face value of both policies.
>
> We therefore request that you forward your check for $3,606.87, representing the amount of the mortgagee's interest in the property, to us as attorneys for Mid-State Homes, Inc., the mortgagee of the property."[1]

In any event, Employer's refused to pay any additional amount above the $2,647.04 indicated in the original proof of loss, and this was the amount they subsequently paid into the registry of the court.

[1]This letter would indicate that the proceeds of other insurance were credited to the mortgage indebtedness.

On October 23, 1967, Mid-State Homes, Inc. filed its suit against Etheene Peterson for the amount of $4,006.87 it alleged was due and owing on the aforesaid note and prayed a foreclosure of the mortgage against the property. On November 10, 1967, Etheene Peterson filed her answer admitting nonpayment as alleged and setting up usury as a defense. On December 7, 1967, Employer's filed its intervention setting out its receipt of proof of loss signed on July 12, 1967, and alleging that it stood ready, willing and able to pay according to the proof of loss and it tendered into the registry of the court the sum of $2,647.04. On January 10, 1968, Etheene Peterson filed an answer to the intervention and a cross-complaint against Employer's. She admitted that she signed the proof of loss as alleged by Employer's, but alleged that the actual cash value of the property at the time of the fire was $7,000, and that the total damage because of the fire was $6,000. She alleged that the total amount of insurance in effect on the property was $9,000, $7,000 of which was the obligation of Employer's. She prayed judgment against Employer's for 7/9 of $7,000 or $5,444.44, together with interest, penalties and attorney's fee.

The only testimony offered at the trial was that of Etheene Peterson, Mary Lee Peterson, Casey Jones, Bob Burns, Tom Roberts and Jim Fuller. Etheene Peterson testified that she is unable to read and write except that she is able to sign her name. She testified that she purchased a lot for $550 and had a house erected thereon by Jim Walter Corporation paying $500 down on the house. She testified that the house was completed in two or three weeks and that her sister lived in the house. She testified that the house was damaged by fire on April 6, 1966, and had not been lived in since that date. She admitted the execution of the note and mortgage and that she made no further payments after the one she made in June, 1966. She testified that she reported the fire to the "Jim Walter people" the next morning after the fire occurred, and that some of the "Jim Walter people" came out from Texarkana in about a month. She says that some insurance adjusters came to see her about three months after the fire. She says

that the "Jim Walter people" made several trips and that men she thought to be insurance adjusters came with them. This witness testified that she assumed that she had insurance on the property because she was paying premiums along with her regular monthly payments. She says that the "Jim Walter people" finally insisted that she pay up the arrears on her note and that if she did not do so, "they would foreclose me out if I don't pay up." This witness then testified on direct examination as follows:

"Q. Did you understand about the foreclosure?

A. I reckon they meant they wouldn't pay me anything. I thought they would pay off if I would send in the payments but I didn't have anything to pay.

Q. The insurance company hadn't paid you anything and you had no money to pay Mid-State Homes, is that correct?

A. Yes sir, that's right.

Q. When you sent this paper off, when if ever have you been advised or offered any money?

A. They never have offered me any money.

Q. I want you to be clear on this. The Employer's Liability Assurance Corporation was carrying your insurance. After you signed the Proof Of Loss there, when if ever have you been tendered any money on that?

A. I never have been.

Q. When is the first time that you know they had deposited some money in the Court here.

A. I never have known.

Q. Do you remember when I talked with you? They served papers on you when they filed the

foreclosure suit. The Sheriff served papers on you and you brought that to me and you don't know what happened since then in the proceedings in Court?

A. No sir, I don't know.

Q. How far did you go in school, Etheene?

A. Fourth grade.

Q. Can you read and write?

A. No sir.

Q. Can you sign your name?

A. Yes sir, I can sign my name."

On cross-examination this witness testified that she signed the proof of loss in her attorney's office and that it was witnessed by her attorney. She says that she did not know how much she owed on her home at the time of the fire, and that she does not know how much longer she would be required to pay on her house before it was paid out. Under questioning by the attorney for Employer's, this witness testified as follows:

"Q. Did you ever talk to Mr. Robinson about this fire loss?

A. Yes sir, I talked to him about it.

Q. After the fire, did you ever have anyone to go look at the house to deterimine how badly it was damaged?

A. Yes sir.

Q. Did you hire him yourself?

A. No sir.

Q. You never did hire anyone to go down and determine the damage?

A. No sir, but you asked someone else to come.

Q. Did you know how much you owed Mid-State Homes when this fire occurred?

A. No sir.

Q. Did you have a payment book?

A. No sir, I had some cards and I mailed them in.

Q. And you didn't know how much you owed on the house when the fire took place?

A. No sir.

Q. Did you know how much longer it was to go, before the house was paid for?

A. No sir.

Q. You are claiming you signed this piece of paper because they threatened to foreclose your mortgage, is that right?

A. Yes sir.

Q. On your Insurance Policy, do you know first whether or not you had any fire insurance?

A. When I signed it, it was supposed to be so much insurance on it.

Q. And you were to pay so much by the month, is that right?

A. He said it was included in my payments.

Q. So you assumed you had fire insurance on this house, didn't you?

A. Yes sir.

Q. Did you know the company that held the mortgage on your house, Mid-State, was also on the Policy?

A. I didn't know who was on there.

Q. Do you know on the policy that any loss was to be sent or mailed to the person on the mortgage?

A. No sir.

* * *

Q. This paper you signed was signed in your attorney's office, isn't that correct?

A. Yes sir.

Q. Did you talk to Mr. Robinson about it, or to Miss Patsy Robinson?

A. Yes sir, I talked to them about the fire.

Q. You did sign the Proof Of Loss in their office, did you not?

A. Yes sir, I signed it.

Q. You are claiming the only reason you signed it is that you were afraid they would foreclose, is that correct?

A. Yes sir."

Mary Lee Peterson only testified that she lived in her sister's house and paid $40 per month rent; that she lived there until the fire on April 6, 1966.

Casey Jones testified that he is 50 years of age and in the construction and builder's supply business in

Lewisville; that he has been engaged in the construction business for 31 years. He testified that he looked at the property involved on three different occasions. The first time being 1967, the second time being October, 1968, and then again a few days before the trial. He testified that a new house could be built on the lot cheaper than the damaged one could be repaired, and that he would consider the house a total loss. He testified that the first time he looked at the house it would have cost $5,300 to repair it.

On cross-examination this witness testified that the first time he looked at the house was in August, 1967, over a year after the fire had occurred. He testified that the windows were out and that rain had blown in during the intervening time and that there was some apparent water damage which occurred in putting out the fire. He testified, however, that while the roof looked good from outside, it was charred on the inside and the shingles were brittle. This witness then testified as follows:

"Q. If the house had been repaired shortly after the fire, it could have been done for somewhat less than $5,300.00. Isn't that true?

A. Very little less.

Q. Had building costs gone up in 1967, Mr. Jones?

A. Yes, building costs go up every year. It goes up about fifteen percent.

Q. Would that have knocked fifteen percent off the cost, if the house had been repaired right after the fire?

A. Yes, about that."

Bob Burns testified that he is captain of the local fire department and is also in the business of remodeling and building homes. He testified that he saw the build-

ing involved in this case the morning after the fire; that he had inspected the house during the year prior to trial and that in his opinion at that time, the house was a total loss. On cross-examination this witness testified that he thought the house could have been repaired the morning after the fire but that he does not think it could be now.

Tom Roberts, a building contractor, testified that he looked at the house two different times within the past week and that in his opinion the house is a total loss.

Jim Fuller testified that he is connected with "Homestead Homes, Inc." and that his company constructs, builds, sells and assigns new residences in Arkansas, Louisiana and Texas, and that the homes he deals in are very similar to the Jim Walter homes. He testified that he inspected the damaged property about two or three weeks after the fire and again four days prior to the date of trial. He testified that he first looked at the house in early May, 1966, and made a thorough inspection of it as his company was involved in a comparable lawsuit at that time. He testified that at that time, it was his opinion the house could have been repaired for between $2,500 and $3,000.

On recross-examination this witness testified that he spent about 15 minutes examining the house and did not make an itemized list of the necessary repairs.

The chancellor found that on the 6th day of April, 1966, the home located on the property involved was destroyed by fire to such extent that no part of the house was capable of being utilized in restoring the building to the condition to which it was before the fire and therefore was a total loss; that there is due Mid-State Homes, Inc. the sum of $4,339.50, together with an attorney's fee of 10% on the past due note owed by Etheene Peterson. The chancellor awarded judgment for Mid-State Homes, Inc. against the defendant, Etheene Peterson, and Employer's in the amount of $4,773.45, together with interest from date with all cost in the

action to be paid by Employer's. The chancellor decreed a foreclosure of the mortgage on the property involved and ordered sale thereof if the judgment be not paid within 60 days. The chancellor further decreed judgment for Etheene Peterson against Employer's in the amount of $7,100 plus 12% statutory penalties in the amount of $852, together with attorney's fee in the amount of $1,000, to bear interest at the legal rate until paid, with a proviso that the $4,773.45 should first be paid by the insurance company to Mid-State Homes, Inc. with balance together with penalties and attorney's fee to Etheene Peterson.

On trial de novo we are of the opinion that the chancellor's findings and decree are against the preponderance of the evidence. Proofs of loss are primarily intended for securing an adjustment between the insured and the insurer, and the statements contained in a proof of loss as to the amount and circumstances of the loss do not, as a matter of law, preclude the insured from proving and recovering the actual amount of his loss. The proof of loss is merely an estimate of the party, and where a settlement is not made upon it, it is not conclusive of the amount due by the insurance company to the insured, but the insured may recover in a suit upon the policy the amount established by the evidence as the true amount of his loss. *Fidelity-Phenix Fire Ins. Co.* v. *Friedman,* 117 Ark. 71, 174 S. W. 215.

The policy issued by Employer's insured the property against loss by fire "to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss." The policy further provided: "This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not." The policy then provided for immediate notice of any loss and provided that the insured protect the property from further damage.

Approximately 15 months elapsed between the date of the fire and the proof of loss. There was an additional delay of approximately 14 months between the date of Employer's intervention and the trial, and there was a total delay of three years four months between the date of the fire and the entry of the decree. The evidence seems clear to us that there was only a partial loss at the time of the fire, but the evidence is equally clear that the loss was total by the time of the trial. It is Employer's contention that it is only liable for damage immediately following the fire, and it is the insured's contention that Employer's is liable for the damage at the time of trial.

In *Connecticut Fire Ins. Co.* v. *Boydston,* 173 Ark. 437, 293 S. W. 730, we stated:

> "It is elementary that any competent evidence is admissible to prove the extent or amount of the loss for which the defendant is liable which tends to prove that fact."

We conclude, therefore, that the chancellor did not err in admitting evidence of damage from the date of the fire to the date of the trial. See also *Nat. Union Fire Ins. Co.* v. *Sch. Dist No. 60,* 131 Ark. 547 (at page 554), 199 S. W. 924.

There is no evidence in the record that the insured took any steps whatever to protect the property against additional damage for a period of three years following the fire, and there was ample evidence that additional damage was sustained following the fire. We conclude, therefore, that Employer's was not liable for the total loss of the building at the time of trial, but was only liable, under its contract, for the amount it would cost to repair the building within a reasonable time after the fire as provided in the insurance contract.

Aside from the proof of loss, we only have the testimony of contractor Casey Jones and Jim Fuller as to the cost of repairing the fire damage. Fuller was employed by a competitor of the Jim Walter Corporation

and only looked at the house some 15 minutes because his employer was involved in a similar lawsuit. He testified that the house could have been repaired for $2,500 to $3,000. We are of the opinion, therefore, that the preponderance of the evidence lies in the testimony of Casey Jones. While he saw the house for the first time more than a year after the fire, he estimated that at that time the cost of repair would amount to $5,300, and that it would have cost very near that much to have repaired it immediately following the fire.

It is obvious from the record before us that this house was overinsured; that the named beneficiary insureds, Etheene Peterson as well as Mid-State Homes, Inc., were negligent in not reporting and following up on their claim against Employer's, and that Employer's was also negligent in its failure to ascertain the amount of damage to the building and in its handling of the claim even after it had notice of the loss. We conclude, therefore, that the equities are evenly balanced between the parties and that the preponderance of the evidence as to the cost of repairs within a reasonable time following the damage caused by the fire, rested in the testimony of Casey Jones and that the insureds are only entitled to judgment for his maximum estimate of $5,300. As a matter of fact Etheene Peterson only prayed judgment for $5,444.44, and the chancellor's decree in favor of Mid-State against Etheene Peterson and Employer's included interest as well as premium advanced on the insurance policy. Etheene Peterson has not appealed from that part of the decree.

This cause is reversed and remanded to the chancery court for the entry of a decree against Employer's in favor of Etheene Peterson and Mid-State Homes, Inc. as their interest may appear, in the total sum of $5,300 without penalty or attorney's fee.

Reversed and remanded.

BYRD, J., would affirm.

S. FENTON SMITH, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF LLOYD E. SMITH, DECEASED *v.* GEORGE HANKINS AND MILTON MOORE

5-5610 467 S. W. 2d 159

Opinion delivered May 24, 1971

N. J. Henley and *Terral, Rawlings, Matthews & Purtle,* for appellant.

Wright, Lindsey & Jennings, for appellees.

J. FRED JONES, Justice. This is an appeal by Mrs. S. Fenton Smith, individually, and as administratrix of the estate of her deceased husband Lloyd E. Smith, from a directed verdict in favor of George Hankins and Milton Moore in the Searcy County Circuit Court wherein Mrs. Smith had filed a wrongful death action against Hankins and Moore. We conclude that the trial court did not err in directing a verdict for the appellees-defendants.

The collision out of which this litigation arose occurred on Cantrell Road in Little Rock on June 12, 1970. The decedent, Lloyd Smith, was riding in the rear seat of an automobile being driven by his sister-in-law, Mrs. Joe Mays, in a westerly direction on Cantrell Road, and Milton Moore, an employee of George Hankins, was driving a loaded milk truck in an easterly direction on the same road. As the two vehicles ap-

proached each other at a curve, the Mays' vehicle, in which Smith was riding, skidded out of control and across the highway into the path of the oncoming truck driven by Moore.

The only evidence offered at the trial as to how the accident occurred, consisted of testimony given by and photographs made under the directions of the investigating police officer, S. R. McKinney, and the deposition of the milk truck driver, Milton Moore. The photographs offered in evidence clearly reveal very heavy damage to the entire front and left side of the Mays vehicle, with considerably less, but extensive, damage to the left front of the milk truck. The photographs as well as the testimony reveal that where the impact occurred, Cantrell Road is a four lane thoroughfare with a double stripe painted between the east and westbound traffic lanes and with a single white stripe separating the two westbound traffic lanes and also a single white stripe separating the two eastbound traffic lanes. The curve in which the collision occurred is upgrade and bears to the north for the westbound traffic and is downgrade for eastbound traffic.

Police Officer S. R. McKinney testified that the collision occurred about 6:35 a.m. and that the weather was cloudy and damp. He testified that the collision occurred on the center line between the two eastbound traffic lanes, and that there was no evidence that the eastbound truck was ever on the wrong side of the four lane highway. Officer McKinney testified that when he reached the scene of the collision, he found debris on the pavement on the center line between the eastbound lanes and about nine feet from the east curb on Cantrell Road. He says the milk truck was sitting at an angle across the division line of the eastbound lanes with its right front wheel within about five feet of the curb. He says the entire highway at this point is about 45 feet wide. Officer McKinney testified that the pavement at the time was wet and that he found no skid marks behind either vehicle. He testified that the blacktop pavement at this point is very slick when wet.

Mr. Milton Moore testified by deposition that he was driving his employer's milk truck generally east down Cantrell hill in Little Rock; that it had been raining and the pavement was wet. He testified that he was driving 20 to 25 miles an hour and that he first observed the Mays vehicle when it was 30 or 40 yards from him. He testified that when he first saw the Mays vehicle it was on its proper side of the four lane highway, but that in attempting to negotiate the curve the automobile did not respond; that he saw the automobile "turn up sideways and then it started sliding, started slipping sideways across the road." He testified that he was driving under 20 miles an hour when the collision occurred. Mr. Moore then testified as follows:

"Q. You applied your brakes, I assume?

A. I already had my foot on the brake; and was holding the truck back with the brakes.

Q. Did you skid this full distance until you all collided?

A. No, I don't know whether I did or not, really.

Q. Traveling at 25 miles an hour, how long would it take you to stop that truck?

A. It would depend on the condition of the road.

Q. On that particular date, were you not able to stop it within 120 feet?

A. No, I wasn't.

Q. You were not able to stop it within 120 feet?

A. No, I wasn't completely stopped.

Q. As I understand it, you were not able to stop this truck within 120 feet on this particular date because of the wet streets, is that correct?

A. Yes.

Q. If you said at that time you saw the Mays vehicle when it was 50 yards away and it started to cross the road in front of you, you wouldn't dispute that now, would you?

A. No.

Q. As you are coming down Cantrell hill there, there are quite a few speed limit signs and curve signs there, aren't there?

A. Yes, there are.

Q. As a matter of fact within 20 or 30 yards of where this accident happened there is a big curve sign with a speed limit of 25 miles an hour, is there not?

A. Yes, there is."

Mr. Moore testified that the truck as well as the automobile sustained heavy damage. He says that the Mays vehicle was demolished; that both doors of his truck were jammed; that the windshield was broken and that he had to climb through the broken windshield in getting out of the truck. He says that he had approximately 5,000 pounds of milk on his truck; that after he saw the automobile cross the center line and go into a skid, he tried to completely stop his truck but was unable to do so. He says that he had his foot on the brake and had been holding the truck back with the brake; that he thinks he applied more pressure when he saw the automobile skid towards him, but in the short time involved he is not sure whether he applied more pressure on the brakes or not.

On redirect examination Mr. Moore testified that the Mays vehicle was traveling probably 50 miles an hour when he first observed it and that he was probably 30 yards from it when it started skidding across to his side of the highway. He says that when he saw the automobile coming to his side of the highway, he immediately applied his brakes and started cutting to his right. He

testified that he is not sure whether the automobile turned sideways or not because it happened so fast, but that he knew it was skidding. He testified that his truck was at a slight angle to his right when the collision occurred and that the automobile slid straight into his truck.

The other evidence submitted in the case had to do with the elements of damage and is not germane to the issue on this appeal. In granting the motion for a directed verdict, the court first took the motion under advisement and his reasoning is set out as follows:

> "THE COURT: The Court understands there is no attempt to prove, as far as the Plaintiff is concerned, who was the more negligent. The question is, is there any negligence, and of course, the question the Court has more trouble with than that is probable cause. Assuming that the actions of the defendant could be interpreted by the jury as being some negligence, was it the proximate cause. * * *"

We agree with the trial court that if the jury could have found any negligence at all on the part of Moore in the operation of his truck, the record would still be void of any evidence of causal connection between any negligence that could have been attributed to Moore and the collision resulting in the death of Mr. Smith.

The facts in the case at bar are very similar to those encountered in the case of *Steinberg* v. *Ray,* 236 Ark. 569, 367 S. W. 2d 445. In that case the McCarty and Steinberg automobiles collided on Highway 67 with the Steinberg automobile traveling north and the McCarty automobile traveling south. McCarty's wife was killed in the collision and both McCarty and his wife's estate sued and obtained judgments against Steinberg. Steinberg, as did Moore in the case at bar, testified that he first noticed the McCarty automobile in its proper or southbound lane as it was meeting him and that McCarty pulled from his southbound lane across and into the northbound lane in front of him, whereupon he, Steinberg, applied his brakes and swerved to his right in an

unsuccessful effort to avoid the collision. According to the physical facts the Steinberg vehicle left 90 feet of skid marks leading up the point of impact, and both vehicles came to rest in the northbound lane. The trial court overruled Steinberg's motion for a directed verdict and upon appeal by Steinberg to this court, in reversing the judgment, we said:

> "According to the evidence in this case there is no proof of facts, nor can any reasonable inferences be drawn from the evidence, that establishes any substantial evidence that the appellant, Steinberg, was negligent or that any negligence on his part was the proximate cause of this collision resulting in injuries to the appellees."

The judgment is affirmed.

H. GORDON GREGSON *v.* GREAT AMERICAN INSURANCE CO.

5-5551 467 S. W. 2d 173

Opinion delivered May 24, 1971

Gannaway, Darrow & Hanshaw, for appellant.

John M. Lofton Jr., for appellee.

CONLEY BYRD, Justice. Appellant H. Gordon Gregson brought suit pursuant to Ark. Stat. Ann. § 66-3240 (Repl.

1966) directly against appellee Great American Ins. Co. to recover damages for bodily injuries sustained on April 20, 1968, when he slipped and fell in a completed portion of the Rebsamen Park Golf Club House owned by the City of Little Rock. After our mandate in the previous appeal, *Gregson* v. *Great American Ins. Co.*, (May 4, 1970), 453 S. W. 2d 28, the trial court sustained appellee's motion to dismiss appellant's complaint as to it because its policy did not cover any bodily injury arising out of the operation of the premises when the portion of the work out of which the injury arose had been put to its intended use.

The policy here issued, number 1-25-36-02, is entitled "GENERAL-AUTOMOBILE LIABILITY POLICY". Under item No. 1, the NAMED INSURED is designated as "City of Little Rock, Ark. and Horace A. Piazza, Architect, 1515 Building, Little Rock, Ark." The policy period is from 8/24/67 to 8/24/68. Under item No. 3 on insurance afforded, the blocks on the form are not checked but typed in on the form is the notation "See Endorsement 6153b attached."

Endorsement 6153b is entitled "OWNERS', LANDLORDS' AND TENANTS' LIABILITY INSURANCE COVERAGE FOR DESIGNATED PREMISES AND RELATED OPERATIONS IN PROGRESS INCLUDING STRUCTURAL ALTERATIONS, NEW CONSTRUCTION AND DEMOLITION." In the blank portion of the form entitled "Premises-Operations" appears the typed notation: "Coverage operations: Construction of Club House and remodeling at Rebsamen Park in accordance with the plans and specifications of Horace A. Piazza, Architect." Under "Coverage" form 6153b provides:

> "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of. . . bodily injury. . . to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental thereto. . . ."

Under "Exclusions" the endorsement provides:

> "This insurance does not apply: (a) . . . (m) to bodily injury . . . included within the COMPLETED OPERATIONS HAZARD. . . ."

The policy, as distinguished from the endorsement, provides under the heading "Definitions" as follows:

> "When used in this policy . . . "COMPLETED OPERATIONS HAZARD" includes bodily injury . . . arising out of operations. . . , but only if the bodily injury . . . occurs after such operations have been completed . . . and occurs away from premises owned by . . . the NAMED INSURED. . . . Operations shall be deemed completed at the earliest of the following times:
>
> . . .
>
> "(3) When the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project."

To sustain the dismissal by the trial court, Great American only relies upon the exclusion that: "This insurance does not apply (a) . . . (m) to bodily injury . . . included within the COMPLETED OPERATIONS HAZARD. . .".." It then points out that under the definition of "COMPLETED OPERATIONS HAZARD" an operation is deemed to be completed when the portion of the work out of which the injury arises has been put to its intended use.

We disagree with Great American's argument because, as we understand the Exclusion, the "Owners', Landlords' and Tenants' Liability Coverage" applies unless the injury is one that is included in the definition "Completed Operations Hazard". The injury here admittedly occurred upon the policy-designated premises

owned by the City of Little Rock, the NAMED INSURED. As we read the definition of "Completed Operations Hazard", it is required that the injury must occur away from the premises of the City of Little Rock, as well as occur after the operations have been completed. As thus read the definition provides: "Completed Operations Hazard includes bodily injury . . . arising out of operations . . . but only if the bodily injury . . . (1) occurs after such operations have been completed . . . and (2) occurs away from premises owned by the City of Little Rock (the named insured)."

Since the injury here admittedly occurred upon premises owned by the named insured, it follows that the trial court improperly ruled that the coverage provided under the "Owners', Landlords' and Tenants' Liability Insurance Coverage" was excluded.

Reversed and remanded.

PLUTARCHO C. HILL *v.* STATE OF ARKANSAS

5593 467 S. W. 2d 179

Opinion delivered May 24, 1971

Louis W. Rosteck, for appellant.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty. Gen., for appellee.

FRANK HOLT Justice. Appellant was convicted of robbery by a jury which assessed a penalty of twelve years' imprisonment in the State Penitentiary. From a judgment entered on that verdict appellant brings this

appeal. Appellant's present counsel, who did not participate in the trial, was then appointed for appeal purposes.

Appellant first contends that the lower court erred in failing to hear evidence concerning the admissibility and voluntariness of his confession out of the presence of the jury. Appellant cites Ark. Stat. Ann. § 43-2105 (Supp. 1969) which provides that the trial court shall determine by a preponderance of the evidence the admissibility and voluntariness of a confession out of the jury's presence "when the issue is raised by the defendant." A hearing on the voluntariness of appellant's confession was conducted in the presence of the jury. The court determined the confession to be voluntary before admitting the confession into evidence. Appellant did not object nor request a hearing out of the jury's presence. In fact, appellant acquiesced in the procedure and cross-examined the proffered witness in the jury's presence with respect to the circumstances surrounding the confession. The issue was not "raised by the defendant." This is in accord with *Pinto* v. *Pierce,* 389 U. S. 31 (1967). There the court said: "Since trial counsel consented to the evidence on voluntariness being taken in the presence of the jury, and the judge found the statement voluntary, respondent was deprived of no constitutional right." Therefore, we find no merit in appellant's contention.

Appellant next contends that the lower court erred in admitting the testimony of an F. B. I. agent concerning a purported confession while appellant was in custody. We find no error. An F. B. I agent questioned appellant in a New Orleans jail for the purpose of identifying him in connection with a federal warrant for his arrest. The agent testified that he advised appellant of his constitutional rights as is required by *Miranda* v. *Arizona,* 384 U. S. 436 (1966) and that after the Miranda warnings had been read and fully explained to him, appellant signed the "advice of rights" and "waiver of rights" form and voluntarily confessed to having committed this alleged robbery. Further, that appellant was not threatened or abused by him or anyone else to his

knowledge. Appellant admits signing the statement to the effect that proper warnings had been given; he denies, however, that the warnings were explained to him and says that he signed the statement without reading it. He further stated that the confession made to the agent was involuntary. According to him, it was made because he had been physically abused by the New Orleans police and he concocted the confession in order to avoid possible prosecution in Louisiana. He denied the alleged offense. Reconciling discrepancies and conflicting testimony and weighing the evidence are within the exclusive province of the jury and it is the jury's prerogative to believe or disbelieve the witnesses. *Houpt* v. *State,* (Ark. Nov. 16, 1970) 459 S. W. 2d 565. A full review of the record convinces us that the court was correct in permitting the officer to orally recite his version of appellant's confession which was restricted to this alleged offense.

Appellant's next contention is that the court erred "in failing to have a witness requested by the defendant appear to testify in his behalf."

On the morning of the trial, appellant made a motion for a ten-day continuance for the purpose of obtaining a witness (in the Tennessee Penitentiary) to testify in his behalf. At the time this motion was made, appellant did not offer proof of the testimony to be adduced by the absent witness. This court has often said that the granting of continuances is within the sound discretion of the trial court and its action will not be reversed on appeal without a showing of an abuse of discretion. *Nash* v. *State,* (Ark. Mar. 23, 1970) 451 S. W. 2d 869. Furthermore, we held in *Davis* v. *State,* 95 Ark. 555, 129 S. W. 530 (1910) that the refusal to grant a continuance is not an abuse of discretion where there is no proof of the testimony to be offered by the absent witness. Appellant's contention is, therefore, without merit.

Affirmed.

JAMES E. HOLST ET AL *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION ET AL

5-5573 467 S. W. 2d 397

Opinion delivered May 31, 1971

William Gilliam, for appellants.

Chowning, Mitchell, Hamilton & Chowning, for appellees.

CARLETON HARRIS, Chief Justice. Appellee, Bank of America National Trust & Savings Association is a national banking association located and established in San Francisco, California. Appellants, James E. Holst and Charlotte C. Holst, financed a Buick automobile in California by security agreement which was assigned to appellee. With permission from appellee, appellants brought the automobile to Hot Spring County, Arkansas. Approximately a year later, appellants became de-

linquent in their monthly payments and the bank employed Arkansas Automobile Recovery of Pulaski County to repossess the Buick from appellants. According to a complaint subsequently filed by the Holsts, they entered into an agreement with Arkansas Automobile Recovery that that company would take the car and store it until appellants could "redeem" it. According to a further allegation, they received a notice of intent to sell the vehicle from the Bank of America National Trust and Savings Association, and thereupon contacted H. G. Kelley, the General Manager of Arkansas Automobile Recovery, who assured them that the automobile would be held for twenty days in this state. It is asserted that within that period of time, appellants obtained the money but were told by Kelley that the car was on its way to California. The complaint then asserted that the bank assured appellants that the vehicle would be returned if the Holsts would deliver the total balance to Arkansas Automobile Recovery. It is then alleged that this was done but there was a refusal to return the Buick and the check given by appellants was returned. Following this act, the suit, allegations of which have just been set forth, was filed in the Hot Spring Circuit Court. Judgment was sought against the Bank of America National Trust and Savings Association, Arkansas Automobile Recovery and H. G. Kelley jointly and severally for their conversion of the vehicle in the amount of $4,964 plus attorney fees and court costs. Thereafter the Bank of America National Trust and Savings Association appeared specially and exclusively for the purpose of seeking an order quashing the summons issued against it for the reason that it is a national banking corporation located in San Francisco, California, and has no location or establishment in Hot Spring County, Arkansas. This appellee asserted that the court had no jurisdiction of the cause of action because of the fact that 12 U. S. C. Sec. 94 provides the proper venue for the action against a national bank and is the sole, exclusive, and applicable provision of law in that regard. The other defendant, Arkansas Automobile Recovery, and H. G. Kelley, likewise appeared specially and exclusively for the purpose of moving that service be quashed against them, asserting that they were not served in the proper

county under the provisions of Ark. Stat. Ann. §§ 27-605 and 27-613 (Repl. 1962). The court sustained the motion of appellee, quashed the service and dismissed the bank as a party defendant, but the record does not reflect what action was taken on the other two motions. From the judgment entered dismissing the bank as a party, appellants bring this appeal. For reversal, it is simply asserted that the appellee is subject to suit in Arkansas.

Of course, a national banking association is a creature of federal law, and the question of where it can be sued is governed by federal law. Proper venue against such an association is determined by 12 U. S. C. Sec. 94, which provides:

"Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

Appellants say this section is permissive, calling attention to the use of the word "may", but it has been flatly held that the requirements of Section 94 are mandatory. In *Mercantile National Bank at Dallas* v. *Langdeau,* 371 U. S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523, the United States Supreme Court, in an opinion by Justice White, stated that the court found "nothing in the statute, its history or the cases in this court to support appellee's construction of this statute. On the contrary, all these sources convince us that the statute must be given a mandatory reading." The opinion cited that the phrase "may be had" [referring to service on defendant national banks] was, "in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit and we believe Congress intended that in those courts alone could a national bank be sued against its will". This holding was reaffirmed in the case of *Michigan National Bank* v. *Robertson,* 372 U. S. 591, 9 L. Ed. 2d 961, 83 S. Ct. 914, in a *Per Curiam*

opinion. It might be mentioned in connection with the latter case that the strongest authority cited by appellants is the concurring opinion of Mr. Justice Black—but, of course, it was just a concurring opinion, and not the opinion of the court. In addition, the original transaction there had originated in Nebraska, the home of the debtors to the bank. In the 1969 case of *Ebeling* v. *Continental Illinois Nat. B. & T. Co. of Chicago, etc. et al,* 77 Cal. Rptr. 612, the California court rendered the same holding, citing a number of cases including *Langdeau* and *Robertson.*

We are somewhat inclined to agree with appellants that simply because a bank is nationally chartered, it should not be immune from this type of litigation, but this is a matter that should be directed to the attention of the Congress. Under the holdings cited, we have no choice but to affirm.

It is so ordered.

ARLO CAMP *v.* MABEL E. NOKES ET AL

5-5579 467 S. W. 2d 730

Opinion delivered May 31, 1971
[Rehearing denied June 28, 1971.]

Jeff Duty, for appellant.

J. Wesley Sampier, for appellees.

GEORGE ROSE SMITH, Justice. In this action by the appellees to recover seven separate loans made by one or more of the appellees to the appellant in 1962, 1964, and 1965, the defendant pleaded the three-year statute of limitations applicable to oral promises. Ark. Stat. Ann. § 37-206 (Repl. 1962). The trial court, sitting without a jury, sustained the plea with respect to only two of the loans. For reversal the appellant contends that the

other five loans were also barred when suit was filed on November 22, 1968.

The four oldest loans were made in 1962 and were already barred by the statute when Camp made, in 1967, what the trial court found to have been a part payment of $350. Mrs. Nokes, who had made all those loans, testified that she had applied $100 of the payment to each of three loans and $50 to the fourth. The trial court held that those payments interrupted the running of the statute.

The court's finding cannot be sustained, for either of two reasons. First, the applications of the payment were apparently made only in Mrs. Nokes's mind, for there is no testimony that she made any notation upon her canceled checks to Camp, which she had kept, or took any other outward action to indicate how the payment was being applied. Effect cannot be given to a mere secret intent to apply a payment in a certain way. *Schoonover* v. *Osborne,* 117 Iowa 427, 90 N. W. 844 (1902). Although the asserted applications were set forth in the complaint, that was too late, for the controversy had already arisen. *Lazarus* v. *Freidheim,* 51 Ark. 371, 11 S. W. 518 (1888). Secondly, when a creditor has two or more claims, one of which is barred by the statute, he may apply a payment to the older debt, but his action does not revive that debt. The reason is that a new promise to pay may be inferred from the *debtor's* direction that a payment be applied to an outlawed obligation, but that inference cannot be drawn from the *creditor's* decision to apply the payment to a debt already barred. *Armistead* v. *Brooke,* 18 Ark. 521 (1857); Williston, Contracts, § 178 (3d ed., 1957). Here there is no indication that Camp directed any application of the payment. To the contrary, Mrs. Nokes testified that "There was not anything said between Camp and I what it was to be applied on."

The fifth loan in controversy was made on May 20, 1965, by all three of the appellees—Mrs. Nokes and her son and daughter-in-law. Mrs. Nokes and her son raised the money by borrowing it from a Missouri bank.

Their note to the bank bore interest at 8% per annum and was payable on November 20, 1965, which proved to be three years and two days before the filing of this action. Mrs. Nokes was not able to repay the bank until November 19, 1966. The trial court fixed that date as the beginning point for the running of the statute of limitations. The court reasoned that since Camp had promised to repay whatever interest Mrs. Nokes might pay the bank, the statute was not set in motion until the amount of that interest payment was known.

We are unable to approve that conclusion. Camp was not a party to the bank loan. There is no testimony that he promised to repay the loan to him only when the appellees had repaid the bank. The only testimony upon the point is David Nokes's statement that Camp said that "he would have the money in approximately thirty days" after the loan to Camp was made. Moreover, 8% interest upon the note to the bank could readily have been calculated to the penny at any time. We find no substantial evidence in the record to support the conclusion that the statute had not run upon the fifth loan when this action was filed.

It is with reluctance that we hold these loans to be uncollectible, for it is clear from the record that Mrs. Nokes was shamefully duped by Camp. Upon the proof, however, the statutes leave us with no choice in the matter.

Reversed and dismissed.

MICHAEL MORROW *v.* RUSSELL C. ROBERTS, JUDGE

5-5569 467 S. W. 2d 393

Opinion delivered May 31, 1971

Rose, Barron, Nash, Williamson, Carroll & Clay, for petitioner.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty. Gen., for respondent.

LYLE BROWN, Justice. Petitioner Michael Morrow was found in contempt of the Faulkner Circuit Court on two separate counts. He was sentenced to fifteen days in jail and fined thirty dollars for failure to respond to a subpoena. When Morrow was brought before the court on that charge he was instructed to permit his hair to be cut. He declined and was sentenced to thirty days on the county penal farm. The sentences were to run consecutively and it was provided that he could purge himself of the second sentence if during the first fifteen day period he permitted his hair to be cut. The following day this court ordered Morrow released under bond based on his petition for a writ of habeas corpus. On appeal Morrow contends that he was not guilty of contempt on either charge and, alternatively, that the punishment was excessive.

We have before us a complete transcript of the record and proceedings incident to petitioner's conviction. "Consequently, we must review the record to determine the propriety of the trial court's action." *Widmer* v. *State,* 243 Ark. 952, 422 S. W. 2d 881 (1968). In making that review we begin with the proposition that this is a procedure for criminal contempt and the proof of guilt must be shown beyond a reasonable doubt. *Blackard* v. *State,* 217 Ark. 661, 232 S. W. 2d 977 (1950). We examine the record for substantial evidence.

1. *Response to the Subpoena.* Morrow, a resident of Little Rock, was served with a subpoena on December 2, 1970, to appear in the Faulkner Circuit Court, Conway, on December 7 to testify on behalf of the plaintiff in the case of State v. Pruitt. Morrow did not report on the date ordered. He was brought before the court on December 10 and punishment was imposed. Morrow challenges the punishment for failure to report on two grounds. First, he says he called the office of the deputy prosecuting attorney on the morning of December 7 and advised his secretary that he, Morrow, had

no transportation; that he was told by the prosecutor's secretary to stand by for further instructions; and that he waited at home for some four hours and heard nothing. The first weakness in petitioner's position is that he waited some four days and until the day of court when he was to report at 9:00 a.m. before explaining his transportation problem. Additionally, the court may have correctly concluded that other modes of travel were available for the short distance of some twenty-five miles from Little Rock to Conway. Secondly, petitioner contends that because of a stipulation between the parties his testimony was not needed. We do not so interpret the record.

Mr. Pruitt was being tried for alleged embezzlement while employed in the business office of State College of Arkansas. Scores of students had been subpoenaed (Morrow was a former student) by the State to testify that they paid stated amounts as entrance fees, whether they paid in person or by mail, whether they received a receipt, and whether they could identify the college official with whom they dealt. Counsel for both parties interviewed all the students and former students who were present and stipulated what their answers would be to the enumerated questions. Thereupon those students were released. They could not stipulate as to petitioner's testimony because he was not present. His absence was reported to the court and an officer was sent to Little Rock with an attachment. Shortly after noon counsel for the State and for Pruitt went to the jail where petitioner had in the meantime been incarcerated and obtained from him all information which answered the recited questions. It was at that time that a stipulation was made as to petitioner's testimony which eliminated the necessity for his taking the witness stand. It must be noted that petitioner's presence was needed on December 7, the opening day of the trial, and again on the morning of December 10. Furthermore, the prosecutor testified that petitioner's presence was necessary to obtain the answers to enumerated questions before his presence on the witness stand could be waived. We are unable to say the court was in error in imposing punishment for failure to respond to the subpoena.

This brings us to a consideration of the amount of punishment imposed. It constitutes criminal contempt for one to willfully disobey any process or order of the court. Ark. Stat. Ann. § 34-901 (Repl. 1962). Section 34-902 fixes a maximum fine of fifty dollars and imprisonment not to exceed ten days. However, that section has been held not to be a limitation on the power of the court to inflict punishment for disobedience of process. *Spight* v. *State,* 155 Ark. 26, 243 S. W. 860 (1922). Be that as it may, petitioner was nineteen years of age at the time, and according to his unrefuted testimony, he did make some effort to notify the authorities of his transportation problem. Further, his failure to respond caused no delay in the trial. Under the circumstances we think a fine of thirty dollars and twenty-four hours in jail (which he has already served) constitute sufficient punishment.

2. *Refusal to Have Hair Cut.* When the court imposed penalty on the first count appellant was ordered committed and the sheriff was directed to get appellant a haircut. Later in the day petitioner was brought before the court for a hearing. With regard to failure to get a haircut this colloquy occurred:

> COURT: And when you were brought before the court earlier in the day it was an order of this court that you have a haircut. It is my understanding that you refused, is that correct?
>
> MORROW: Yes, sir. May I state the grounds, or would there be objections?
>
> COURT: I care not. Go ahead.
>
> MORROW: Your honor, I am employed as a musician, and I find it more or less a requirement to have my hair like I wear it.

Thereupon petitioner was found guilty of contempt and received a second sentence. The law of contempt is discussed at length in *Freeman* v. *State,* 188 Ark. 1058,

69 S. W. 2d 267 (1934). There, in a unanimous opinion, our court set out these principles as encompassing the rules of contempt:

> (1) That the power of punishment for contempt is independent of statutory authority, being inherent in and an immemorial incident of judicial power, its conclusions to be reached and judgments found without the intervention of a jury;[1] (2) that, because of this extraordinary and inherent power, the administration of which is entrusted to the conscience of the court alone, the power should never be exercised except in those cases where the necessity is plain and unavoidable if the authority of the courts is to continue; (3) that courts entertain proceedings for contempt for two purposes, one to preserve the power and dignity of the court and to punish for disobedience of orders, and the other to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found the parties to be entitled.

The record before us is devoid of any showing that the appearance of the petitioner created a "plain and unavoidable necessity" that he be punished in order to protect the authority of the court. Nor is there any evidence of an affront to the dignity of the court. If his appearance created any disturbance whatsoever it is not revealed in the record.

A court rule prohibiting the appearance of parties and witnesses appearing in court in other than the ordinary short haircuts has never been litigated in any of the appellate courts. At least no such case has come to our attention. However, there have been a number of so-called "haircut cases" in the inferior federal courts involving school attendance. Those cases, although not controlling here, are indicative of a definite legal trend. A typical case, and one much publicized, is that of

[1]A jury trial is now required in serious (as opposed to petty). criminal contempts. *Bloom* v. *Illinois,* 391 U. S. 194 (1968).

Richards v. *Thurston,* 424 F. 2d 1281 (First Circuit, Mass. 1970). That case held that the suspension of a high school student whose hair fell "loosely about the shoulders" violated the student's personal liberty guaranteed him by the due process clause of the Fourteenth Amendment. There we find this statement:

> We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty" assurance of the Due Process Clause, requiring a "compelling" showing by the state before it may be impaired. Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty. As the court stated in *Union Pacific Railway Co.* v. *Botsford,* 141 U. S. 250 (1891):
>
> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone.' "
>
> Indeed, a narrower view of liberty in a free society might, among other things, allow a state to require a conventional coiffure of all its citizens, a governmental power not unknown in European history.

The cause is affirmed in part and reversed in part with directions to modify the punishment for failure to respond to the subpoena and to quash the contempt finding on the second count we have discussed.

O. M. (OLIN) HELMS AND DOVIE HELMS *v.* JACK C. VAUGHN

5-5599 467 S. W. 2d 399

Opinion delivered May 31, 1971

Chambers & Chambers, for appellants.

W. D. McKay, for appellee.

JOHN A. FOGLEMAN, Justice. This is a suit to quiet title in the appellee, Jack C. Vaughn, against any right, title, claim or interest of appellants. O. M. Helms and Dovie Helms and others, in an undivided one-eighth interest in the oil, gas and mineral royalty in, upon and under a 40-acre tract of land in Lafayette County, Arkansas. The facts are not disputed.

On April 21, 1947, O. M. Helms and wife, Dovie Helms, owners in fee simple of the land, conveyed an undivided one-fourth royalty interest in and to all oil and gas and other minerals in the land to H. Steckol. Spartan Drilling Company, a partnership composed of G. H. Vaughn, Jr., and Jack C. Vaughn, purchased the interest of H. Steckol and his wife, Ethel Wheeler Steckol, on July 5, 1947. When the Spartan Drilling Company was dissolved on December 31, 1958, each of the partners was declared to be one-half owner of all the interest owned by the partnership. On December 27, 1963, Jack C. Vaughn and wife, Mary Josephine McCorkle Vaughn, executed an instrument, describing the 40-acre tract, which, in pertinent part, reads:

RELEASE

KNOW ALL MEN BY THESE PRESENTS:

> THAT, JACK C. VAUGHN, for and in consideration of the sum of One Dollar ($1.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, does hereby release, remise, relinquish and surrender all of his right, title and interest in and to the oil royalty, gas royalty and royalty in casinghead gas, gasoline and royalty mined from the following described lands in Lafayette County, Arkansas, to-wit: . . .

This appeal was taken by the Helmses only. Steckol and his wife filed a disclaimer and asked the court to dismiss the cause as to them.

The chancellor held the "release" void and of no effect for the reason that it did not have a grantee and was not a proper conveyance and that Vaughn was not estopped because there was no showing that any of the defendants relied on the "release" to their detriment. Title to the royalty interest in the land was quieted and confirmed in Jack C. Vaughn, appellee, as against the defendants.

The appellants contend that the release executed by the appellee is a valid conveyance that divested title from appellee and vested it in appellants, that the release constituted an abandonment of the royalty interest, and that a royalty estate once abandoned should merge with the surface estate and be considered as a single interest.

The law is well settled in this state that a conveyance of oil or gas in its natural state is a conveyance of an interest in land. *Osborn* v. *Arkansas Territorial Oil & Gas Co.,* 103 Ark. 175, 146 S. W. 122; *Watts* v. *England,* 168 Ark. 213, 269 S. W. 585; *Arrington* v. *United Royalty Company,* 188 Ark. 270, 65 S. W. 2d 36, 90 A. L. R. 765; *Hanson* v. *Ware,* 224 Ark. 430, 274 S. W. 2d 359, 46 A. L. R. 2d 1262. Since an oil and gas deed conveys an interest in land, all the formalities of a conveyance of any other interest are required. *Osborn* v. *Arkansas Territorial Oil & Gas Co.,* supra. The release executed by Jack Vaughn and his wife could not operate as a conveyance to anyone since no grantee was named or otherwise identified in the instrument. *Adamson* v. *Hartman,* 40 Ark. 58; *Williams* v. *Courton,* 172 Ark. 129, 287 S. W. 745; *Curlee* v. *Morris,* 196 Ark. 779, 120 S. W. 2d 10. Thompson on Real Property, Perm. Ed., Vol. 6, 347, § 3006 states:

> Unless a grantee is named in some part of the deed, title does not pass, and the deed is void; but this rule cannot be invoked to affect the equitable rights of the parties growing out of the transaction. The principle of implied authority to fill in blanks is not applicable to deeds. A deed which failed to name a grantee and was not acknowledged at the

time of its execution was void in the absence of circumstances showing the application of the doctrine of estoppel.

In *Nall* v. *Scott,* 233 Ark. 21, 342 S. W. 2d 418, we said that no particular form was necessary to constitute a release, so long as the contract is complete, the intention to release manifest and the parties sufficiently described to identify them. Here, elements of a complete contract are lacking, and the parties in whose favor the release should operate are not identified. This release could have been to Jack Vaughn's partner or to Steckol as well as to the Helmses.

Appellants contend that appellee abandoned the property. Appellee asserts that this argument was not raised in the trial court and cannot be raised here for the first time. In their answer to the appellee's complaint the appellants alleged among other things that the release executed by the appellee surrendered all his rights, title and interest and that the title to the royalty interest should be quieted in them. We construe pleadings liberally in favor of the pleader, and every reasonable inference and intendment are indulged in his favor. *American Underwriters* v. *Shook,* 247 Ark. 1082, 449 S. W. 2d 402; *Dickerson* v. *Hamby & Haynie,* 96 Ark. 163, 131 S. W. 674. See Ark. Stat. Ann. § 27-1150 (Repl. 1962). Since the appellants alleged that the appellee surrendered the land, we cannot say that abandonment was not an issue in the trial court.

We do not agree, however, that the elements necessary for abandonment are present in this case. One cannot divest himself of title to real property by abandonment alone. There must not only be an intent on the owner's part to relinquish his claim, it must be accompanied by circumstances of estoppel and limitation, if the abandonment is not by a legal deed of conveyance. *Carmical* v. *Ark. Lbr. Co.,* 105 Ark. 663, 152 S. W. 286; *Sharpp* v. *Stodgill,* 191 Ark. 500, 86 S. W. 2d 934, 87 S. W. 2d 577; *C. W. Lewis Lumber Co.* v. *Fletcher,* 224 Ark. 464, 274 S. W. 2d 472. There was no evidence of

any reliance on Vaughn's alleged abandonment or of any other condition which would create an estoppel or bring limitations into play.

Appellants' third point is based upon a finding of abandonment. Since we find that an abandonment was not shown, we do not reach the question of a merger of royalty rights with the surface estate.

The decree is affirmed.

NINETEEN CORPORATION *v.* GUARANTY FINANCIAL CORP.

5-5577 467 S. W. 2d 728

Opinion delivered May 31, 1971
[Rehearing denied June 28, 1971.]

John Harris Jones, for appellant.

Coleman, Gantt, Ramsay & Cox, for appellee.

FRANK HOLT, Justice. This is the second appeal in this action. The first appeal resulted from a breach of

contract action brought by appellee, Guaranty Financial Corporation, against appellant, Nineteen Corporation. *Nineteen Corporation* v. *Guaranty Financial Corp.*, (Ark. Mar. 17, 1969) 438 S. W. 2d 685. There we affirmed the chancellor's findings that appellant had mortgaged to appellee 150,000 shares of Universal Insurance stock and certain real property located in Oklahoma as security for the purchase price of the 150,000 shares purchased from appellee; that appellant had defaulted on the sales contract; that it was not a usurious transaction; and that appellee was entitled to a judgment of $293,329.51. We reversed and remanded, however, because the chancellor's decree ordered a judicial sale for cash of the 150,000 shares of stock contrary to Ark. Stat. Ann. § 51-1109 (1947). This statute requires a judicial sale to be on a three months' credit basis. The decree also erroneously attempted to fix a lien on the Oklahoma lands, the additional collateral.

Upon remand, appellee was ordered to tender back to the commissioner the 150,000 shares of Universal Insurance Company stock which it, as the secured party, had purchased at the void cash sale in order that a sale on a three months' credit basis could be properly effected. Appellee, however, was unable to deliver the shares of stock to the commissioner. During the pendency of the first appeal, it had purchased the stock at the void judicial sale for $230,000 cash and a month later sold the stock to a third party, Arkansas Best, for $251,574.07. Also, during the first appeal, appellee had obtained a foreclosure against the Oklahoma lands and had purchased these lands at a judicial sale.

In the present proceeding the chancellor found a $41,755.44 deficiency judgment (after applying the $251,-574.07 to the original $293,329.51 judgment) plus the interest and attorney's fees. However, the chancellor ordered appellee to reconvey the Oklahoma property to appellant upon payment by appellant of this deficiency judgment plus the interest and attorney's fees, all of which totaled $65,546.79. Appellant brings this second appeal asserting that the chancellor erred by refusing to apply the presumption that the stock sold at the void

sale was worth at least the amount of the debt and erred further in accepting the testimony of Guaranty's president as to the price received upon the resale of the stock as being the amount that should reasonably have been obtained through a sale conducted according to law.

In support of its contention, appellant relies upon *Norton* v. *National Bank of Commerce,* 240 Ark. 143, 398 S. W. 2d 538 (1966); *Barker* v. *Horn,* 245 Ark. 315, 432 S. W. 2d 21 (1968), and related cases. In *Norton* we said: "We think the just solution is to indulge the presumption in the first instance that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law." In *Barker* the only evidence adduced to show the value of the collateral was the selling price and this court refused to accept that evidence as being sufficient to support a judgment in favor of the secured party. In both *Norton* and *Barker,* and related cases, the secured party brought an action for a deficiency judgment after the collateral had been sold at a private sale without any notice to the defaulting debtor.

In the case at bar there is no question of notice. The appellant was given notice and, in fact, made objections to the sale. Appellant merely relies upon the presumption established in *Norton* to prevent a deficiency judgment being rendered against him. Even if we agree with appellant's contention that *Norton* is applicable, which we do not decide, we think appellee has sufficiently met the presumption.

We hold that Guaranty's president was a competent witness to rebut the *Norton* presumption. He was president of the corporate organization during the entire litigation and testified that he had ten years' experience in such business affairs and in acquiring and selling mortgages; and that he had placed ten million dollars in mortgage loans. He said that the partial liquidation of Universal plus the sale price of certain assets to Arkansas

Best totaled $251,574.07. He testified as to the value of Universal's assets as of the date of the sale transaction. He stated that the mortgages were valued at $139,841.65; that the total cash owned by the company was $45,732.42; that the company had $50,000 in certificates of deposit and the value of the company's charter was $16,000. We think that his testimony about the resale to Arkansas Best shows that it was conducted similarly to the original sale nine months earlier to appellant and, therefore, establishes that the resale was a negotiated and an arms-length transaction. In our view this evidence, which is unrebutted, is sufficient to establish the reasonable value of the assets which "would have been obtained through a sale conducted according to law" as required by *Norton.*

Appellant further contends that the testimony of Guaranty's president as to the price received upon resale of the stock was refuted by his earlier testimony. At the first trial the president testified as to the value of Universal's assets in October 1967, the date of the sale to appellant who defaulted. He testified that as of this sale date appellee owned mortgages valued at $148,620.37; $72,663 in cash, $50,000 in saving's accounts, and the charter was valued at $22,000. At the second trial, the same witness testified that in July 1968, the date of the resale, the mortgages were valued at $139,841.65; the company had $45,732 in cash, $50,000 in saving's accounts, and its charter was valued at $16,000.

Appellant asserts that it only had control of Universal for four days during the nine-month period between the sale by appellee to appellant and the resale by appellee, after appellant's default, to Arkansas Best, during which interim Universal's assets diminished at least $41,000. Even though such a variance existed, the president of appellee testified without contradiction that no expenditures were paid from Universal to appellee or any of its management during this nine months or until the resale occurred. He also testified that withdrawals from Universal were used to pay obligations which appellant's management had incurred during the time it

had control of Universal. Other expenditures were for reinsurance and other normal expenses. From a review of his testimony and the entire record, we cannot say that the asserted discrepancies were not sufficiently explained.

Affirmed.

FOGLEMAN, J., not participating.

KENNETH W. LAZENBY, D/B/A KEN LAZENBY REAL ESTATE CO. *v.* JAMES H. NEWELL AND SALLY RAYLENE NEWELL, HIS WIFE

5-5593 467 S. W. 2d 734

Opinion delivered June 7, 1971

Estes & Storey, for appellant.

Murphy, Carlisle & Taylor, for appellees.

CARLETON HARRIS, Chief Justice. This appeal relates to whether Kenneth W. Lazenby, appellant herein, is entitled to a commission for the sale of certain real estate in Washington County, Arkansas. Lazenby, d/b/a, Ken Lazenby Real Estate Company was contacted in September, 1968, by appellees, James H. Newell and wife, Sally Raylene Newell, for the purpose of employing appellant to sell their property located at Farmington, Arkansas. An "Exclusive Listing Contract" was executed by the parties, Lazenby retaining the original, and the Newells keeping a yellow copy. The contract provided for a 6% commission. Lazenby immediately went to the Newell property, inspected it, and placed a "For Sale" sign in the front yard, the sign reciting "For Sale, Ken Lazenby Real Estate Company, 927 North College Avenue, Fayetteville, Arkansas". Appellant prepared an ad describing the property and placed it in the Northwest Arkansas Times. The testimony reflects that two parties were shown the property, but no sale was made; however, according to Lazenby, he talked with numerous people who responded to the ad, and also others by telephone who noticed the "For Sale" sign in the yard. It appears that in October of 1968, on a Sunday night, after Lazenby had retired, a party called and said that he had been driving in Farmington and noticed the sign advertising the Newell property, was interested in it, and would like to have the details. The caller then identified himself as a man named Niccum. According to Lazenby, he had very recently had a problem with a man by the same name, and he thought he was talking with the same party. He was irritated—for two reasons, one because it was late at night, and the other, because he thought Niccum was the same person with whom he had had prior difficulties. Thereafter he discovered that the Niccum who called was an entirely different person, Mr. Newell coming to the office the last of November, and being quite upset about the possible loss of a sale of his property. Lazenby said he admitted that he was wrong, and apologized. Lazenby also called on the Niccums and apologized, and was told that in the event they

could arrange to buy the property, he would be contacted. According to appellant, he reported this conversation to the Newells the first week in December, offering to cancel the listing in the event they thought he had rendered a disservice, but he said they told him to go ahead and continue to try to sell the realty. Newell testified however, that Lazenby said, "We could go ahead and continue with him and he would sell the house for us or if we sold the house, we didn't owe him a commission". Thereafter, the testimony reflects that on January 27, 1969, Newell went to Lazenby's office, bringing his yellow copy with him; the evidence is in dispute as to what happened. Newell says that he told Lazenby "Your contract says you need a seven-day written notice" and he inquired if that was necessary, Lazenby replying "No, come in and I will cancel it out". Newell said that he told appellant that appellees were going to apply for a loan to build a house on some property they had acquired, and if they could get a loan, they would keep the property as rental property. He also stated that they had applied twice for loans but had been unsuccessful. Lazenby gave the following version, "At the time Mr. Newell came into the office to—he brought his yellow copy in and he wanted me to cancel it because he didn't want to go ahead and sell. It has been my policy that in the event there is illness or some tragedy in the family, or in the event they decided not to sell and to rent the property, then I forego charging a commission. * * * I assumed the man was going to rent his property but I subsequently found out he actually had it sold the day he came in and wanted me to cancel it." Subsequently, Lazenby testified that "they wanted to build a house on this particular property and that they wanted to use their equity from this subject property to build the new one with. So, we discussed this matter when Mr. Newell came in to cancel the listing and, as I understand it, he told me that he found the cost of building was quite high now and he thought he would just sit back and maybe even rent the property that he had for a while until things settled down where he felt he could afford to build it. Had I known the man had already made a sale on the property, naturally I wouldn't have entertained any thought of cancelling

the listing because he and his wife employed me to make the sale and I used my best efforts to make this sale by spending money on advertising and time to introduce prospective purchasers to it."

Lazenby then wrote on Newell's yellow copy, "Owner requested a cancellation on this property so he may rent the property. Therefore, no broker's fee is charged." He signed it and handed the copy to Newell.

Tillman Tabor and his wife, Dora Lee Tabor, who live near Farmington, learned that the house was for sale in January, 1969, when passing by and observing the "For Sale Sign" that Lazenby had placed in the yard. They talked with the Newells, who priced it at $13,600, the price that Lazenby had listed. In early March, Tabor again met with the Newells offering to purchase the house for $12,400, and this offer was accepted. The purchase was made on March 13, 1969. Thereafter, Lazenby, learning of the sale, instituted suit for his commission. After the filing of an answer, and the denial of a motion for summary judgment, the case proceeded to trial, and at the conclusion of the evidence, the court, sitting as a jury, entered judgment finding that the contract between the parties had been cancelled after differences between the parties, and that in the month of January, 1969, Lazenby had, in writing, cancelled his contract. From the opinion:

"That the cancellation in writing of this exclusive listing contract by the plaintiff with the specific wording, 'Therefore no broker's fee is charged' effectively ended any obligation on the part of the defendants to pay a broker's fee to the plaintiff even though there was a subsequent sale of the pertinent property."

Appellant's complaint was dismissed, and from the judgment so entered, appellant brings this appeal. For reversal, it is first asserted that the trial court erred in permitting appellee to introduce oral testimony of an alleged cancellation of the written contract. It actually is not necessary to discuss this point since the court's finding of cancellation was based on the written nota-

tion made by Lazenby on the copy of the contract, and we determine the litigation on that basis. It might be stated however that appellant's assertion is in error. See *Nance* v. *McDougald,* 211 Ark. 800, 202 S. W. 2d 583, where we upheld the cancellation of a written contract by an oral revocation.

It is next contended that the trial court erred in failing to hold as a matter of law that appellant was entitled to a judgment for his real estate commission. This argument is largely based on the fact that the Tabors were made aware of the fact that the Newell property was for sale by virtue of having seen appellant's sign in the front yard. We disagree with the contention. In *Bodine* v. *Penn Lumber Co.,* 128 Ark. 347, 194 S. W. 226, a similar argument was made, but in holding contrary to such a contention, this court said:

"Now, the cases just cited declare the law to be that an owner who has given authority to a party to sell his property has a right to withdraw the offer if done in good faith, and the mere fact that the agent has been instrumental in the introduction of a proposed purchaser does not necessarily give him the right to a commission on a sale subsequently made by negotiations between the owner and the purchaser. Of course, the owner has no right to withdraw the authority for the purpose of preventing the agent from making a sale, but if a reasonable opportunity has been given to the agent to make a sale and he has failed to produce a purchaser who is ready, willing and able to purchase on the terms specified, then the owner has the right to withdraw, and if he subsequently makes a sale he is not liable for a commission, even though it be a purchaser who was originally introduced by the agent."

Finally, it is asserted that there is no evidence of a substantial nature in the record to support the findings of the trial court. Again, we are unable to agree with appellant. As found by the trial court, the cancellation of the contract, with the words, "therefore no broker's fee is charged" effectively severed the contractual relationship between the parties. From a legal standpoint, under

the pleadings in this case, it makes no difference why Lazenby cancelled the contract, the pertinent fact being that it was unquestionably cancelled. Appellant seems to be arguing that a fraud was practiced upon him; that he was induced to cancel the agreement through false representations made by appellee, and that he would not have cancelled except for those false representations. But a careful search of the complaint reveals no such allegations; it is simply asserted that the sale from the Newells to the Tabors was made due to the efforts of Lazenby. If appellant felt that he had been overreached, and caused to cancel the contract through misrepresentations, he should have so alleged in the complaint that he instituted. While Lazenby stated he subsequently learned that the Newells had already sold the property on January 27, 1969, (date of the cancellation of the contract) there is no evidence in the record substantiating this statement. It will also be observed from the testimony of appellant, heretofore quoted, that he did not say Newell stated he wanted to cancel the listing so that he could rent the property; rather, appellant testified, "I *assumed* the man was going to rent his property . . ."; also "he thought he would just sit back and *maybe* even rent the property . . .".

As stated, we cannot agree there was no substantial evidence to support the finding of the trial court.

Affirmed.

LARRY GRAY *v.* STATE OF ARKANSAS

5586 469 S. W. 2d 123

Opinion delivered June 7, 1971
[Rehearing denied August 9, 1971.]

Nance, Nance, Fleming & Hatfield, for appellant.

Ray Thornton, Attorney General; *Garner L. Taylor, Jr.,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, aged nineteen, was convicted of having robbed a filling station operator, at pistol point, of $250. The jury fixed his punishment at confinement for eighteen years. He now asserts two points for reversal.

First, we find no merit in his contention that a confession which he made after his arrest was not voluntary. Two officers testified that Gray voluntarily signed a confession after he had first been properly informed of his constitutional rights. Gray, at an in-chambers hearing, contradicted the officers' testimony by stating that he was not allowed to make a telephone call to arrange for the services of an attorney. We cannot say from the record that the trial judge was wrong in finding the confession to have been voluntarily made.

Secondly, the court erred, however, in allowing the State to introduce proof of other armed robberies com-

mitted by Gray, the offenses extending over a period of about three months. The other robberies were detailed by Gray in his confession and were also proved by the testimony of the persons whom Gray robbed, each of whom identified him in the courtroom as the guilty person. The court instructed the jury that the proof of similar crimes was introduced only to show guilty knowledge, criminal intent, and a common scheme. We discussed the matter of proving intent in *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804 (1954), and the matter of proving a scheme or design in *Moore* v. *State,* 227 Ark. 544, 299 S. W. 2d 838 (1957). For the reasons stated in those opinions the testimony introduced in the case at bar was clearly inadmissible and should not have been allowed to go to the jury.

Reversed.

FOGLEMAN, J., not participating.

EUGENE JARVIS AND NOBLE JARVIS D/B/A JARVIS LIQUOR STORE *v.* ALCOHOLIC BEVERAGE CONTROL BOARD AND DAVID HODGES

5-5586 467 S. W. 2d 733

Opinion delivered June 7, 1971

Pickens, Pickens & Boyce, for appellant.

David Hodges, Prosecuting Attorney, Third District, for appellees.

LYLE BROWN, Justice. Appellants own and operate a retail liquor store and a beer outlet at Newport, Jackson County. Appellee, Alcoholic Beverage Control Board, issues retail licenses and polices the business establishments possessing those licenses. Appellee David Hodges is the prosecuting attorney and was granted leave to intervene in his official capacity. The director of ABC found appellants guilty of selling liquor and beer to minors and invoked a thirty day suspension of appellants' licenses. That order was affirmed on appeal to the ABC. An appeal was lodged with the circuit court of Jackson County and the trial court ordered that a transcript of the evidence before the ABC be lodged with that court. Before the scheduled hearing date was reached appellants filed a motion asking for leave to "introduce new evidence before this court in said appeal." That motion was denied and appellants immediately appealed to this court. The single issue advanced is that the court erred in not permitting the introduction of new evidence.

The order denying permission to introduce new evidence was interlocutory and therefore not appealable. We have no jurisdiction irrespective of whether the issue is raised by the parties. *Johnson* v. *Johnson,* 243 Ark. 656, 421 S. W. 2d 605 (1967); *Allred* v. *National Old Line Ins. Co.,* 245 Ark. 893, 435 S. W. 2d 104 (1968); *Gaines* v. *Patton,* 8 Ark. 67 (1847).

Appeal dismissed.

GUY R. GRIFFITH ET UX *v.* MARY K. GRIFFITH

5-5595 467 S. W. 2d 737

Opinion delivered June 7, 1971

N. J. Henley, for appellants.

Ivan Williamson, for appellee.

JOHN A. FOGLEMAN, Justice. Appellee is the mother of appellant Guy R. Griffith. Appellant Charlene Griffith is his wife and cotenant by the entirety in a tract of land in Stone County. Their appeal comes from a decree holding that the mother was the assignee of a note executed by her son and daughter-in-law in favor of one P. S. Hunt. The chancery court, however, refused to declare appellants delinquent on their payments and refused acceleration, judgment and foreclosure. Appellee appealed from that part of the decree denying foreclosure. Appellants urge two points for reversal, namely: that the chancery court erred in holding that appellee held the note as assignee of Hunt, and that there is no legal basis upon which appellee can be said to have a lien on appellants' lands. We find no merit in either contention.

The note for $2,163.92, payable to the order of P. S. Hunt, was dated July 16, 1969. It was payable in quarter-

ly installments of $200 beginning October 16, 1969, and continuing until the entire principal and interest at 10% per annum had been paid. Appellants paid the first installment. The debt was secured by a mortgage on the lands. Appellants, appellee and a daughter of appellee went to the home of Hunt on February 3, 1970. They did not find Hunt at home, but his wife was there. Appellee wrote a check payable to Hunt for the balance then due him. Mrs. Hunt marked the note paid in full, signing her husband's name.

Appellee's complaint contained allegations that she was a holder in due course of the note, that the transaction amounted to an equitable assignment of the note and mortgage to her and that Hunt inadvertently failed to formally assign them to her. Appellants defended on the ground that the payment of the debt by appellee was a voluntary gift to them by her. The chancellor made a finding of fact that the transaction was, in effect, an assignment to appellee and that the "paid in full" endorsement was in reality an assignment of the debt carrying with it the lien of the mortgage. We agree.

There was the usual and expected conflict in the testimony of the parties. Appellee testified that she paid Hunt at the request of her son, who had told her on the day before they went to Hunt's home that he would lose the place if he did not pay Hunt within two days. She said that appellants promised her, before she went to Hunt's to pay the debt, that they would start paying her in monthly payments as soon as Mrs. Charlene Griffith went to work, but that they had failed to make any payment. Appellee testified that "they gave me all those papers." She presented the note, mortgage and an abstract of title, and when she testified upon being examined as to whether her son promised to secure her by mortgage, she said that her son reiterated on the way home from Hunt's that appellants would pay her as soon as his wife went to work, and she added that she had "everything else they had on it" naming the mortgage and abstract specifically. When asked if Mrs. Hunt did not turn the note and mortgage over to "you all," appellee responded that she had every paper that the

Hunts had possessed. She said that they were turned over to her the day she paid the debt and that Mr. Hunt had not complained about his wife delivering the note and mortgage to her. She denied that she made a gift to appellants by this transaction.

A 16-year-old son of appellee, brother of Guy, testified that Guy tried to borrow $500 from him to apply on the mortgage to Hunt and that he was present on one occasion when Guy asked their mother for money to pay Hunt. A daughter of appellee, sister of Guy, testified that she knew that Guy came and asked their mother to pay the debt to keep Hunt from taking the land and promised that appellants would repay her in monthly payments as soon as Charlene Griffith went back to work. This witness was present when the payment was made, and her car was used to transport the family to Hunt's house. She quoted appellant Guy Griffith as having said that if he lost the place, he would prefer his mother would get it rather than Hunt.

Guy Griffith testified that he had the money to make the second payment when his mother got some insurance money and volunteered to pay off the debt, without any agreement on the part of appellants to repay her. He also said that his mother never indicated that she expected repayment until other difficulties arose between them, after which she filed the present action. He denied that he had been having any financial difficulties. He also denied any attempt to borrow from his younger brother. He said that his wife was not working at the time of the payment but was employed at the time of the trial. He claimed that Mrs. Hunt had given him the note and mortgage and that he had left them on the dashboard of his mother's car. He stated that he asked his mother for the instruments on the following Saturday night, but that she refused to give them to him, saying that they were in a safety deposit box in Louisiana. She responded to a later demand on his part, he said, by saying that a Little Rock attorney was holding the papers.

Charlene Griffith testified that she never agreed to pay any money to appellee on this debt. She said that her mother-in-law refused to let Guy have the papers when he decided to go into the hog business and wanted to borrow more money from Hunt. Another child of appellee testified that she went along when the payment was made but stayed in the car. She said that her mother had given her $825 of the insurance money and had said that she wanted to help her children pay their bills. One Lela Rushing testified that appellee told the witness that she had helped the children to the extent of $3,000 and was very sorry for Guy because he was so much in debt.

We are unable to say that the chancellor's holding as to the agreement between the parties here was clearly against the preponderance of the evidence. That being the case, we agree with appellee that Ark. Stat. Ann. § 85-3-603 (2) (Add. 1961) controls. That section reads:

> Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee (Section 3-201 [§ 85-3-201]). [Acts 1961, No. 185, § 3-603.]

The committee comment on this subsection of the UCC makes its application to the facts here quite clear. See comments 4 and 5. Under Ark. Stat. Ann. § 85-3-201 (Add. 1961), appellee, as a transferee, became vested with all rights of Hunt in the note. She had accounted for her possession of the unendorsed note by proving the transaction through which she acquired it. Rights of the transferor (Hunt) which passed to appellee included the mortgage securing the note. *Ragge* v. *Bryan,* 249 Ark. 164, 458 S. W. 2d 403.

The chancellor refused to find appellants delinquent and extended their time for payment, giving them until October 16, 1970, to pay an installment of $200 with interest and requiring subsequent payments to be

made as they came due under the note. This action was taken in spite of the fact that the chancellor found that at least two payments were past due. We feel the chancellor erred in denying foreclosure under the circumstances.

The decree is affirmed on appeal and reversed on cross-appeal. The cause is remanded with directions to enter a decree in favor of appellee giving judgment for all unpaid principal and interest on the debt and foreclosing the lien of the mortgage but allowing appellants a reasonable time to pay the judgment before sale of the lands may be had.

HUDSON CHEVROLET COMPANY, INC. *v.* DONALD R. SPARROW

5-5585 467 S. W. 2d 751

Opinion delivered June 7, 1971
[Rehearing denied June 28, 1971.]

Robinson & Robinson, for appellant.

Smith, Stroud, McClerkin & Conway, for appellee.

JOHN A. FOGLEMAN, Justice. Hudson Chevrolet Company, Inc., seeks reversal of a $7,500 judgment in favor of Donald Sparrow. It contends that this judgment was erroneous for want of a jury question on liability, because of erroneous admission of photographs into evidence, and because the amount of the jury verdict was excessive. We find that the judgment must be affirmed.

We will review the evidence favoring appellee in the light most favorable to him, as we must. Appellee Sparrow rented a garage apartment from appellant. His occupancy commenced on March 2, 1969, when he and his bride of a few days moved in. On the following day they returned after being away from the apartment and found their towels singed, and shower curtain and window shades burned as a result of a fire of some sort which had obviously occurred in the bathroom during their absence. The gas stove was burning in the bathroom both when the Sparrows left and when they returned. It was the only stove burning in the apartment on that day. Sparrow said that he reported the incident to his landlord on the next day and requested of the gas company that a check be made for gas leaks. Sparrow testified that he had smelled a "dirty" odor in the apartment prior to the first fire, which he had then thought was attributable to natural gas. Mrs. Sparrow had also detected an unpleasant odor while she was showering on that day. She said that it caused her eyes to burn and that she had told her husband she was not going to take further showers. Walter Hudson, president of appellant, testified he had suggested that the heaters might be bad and in need of adjusting when Sparrow told him of the odor in the apartment and that Sparrow replied that this was about what the gas company employees had indicated. After Sparrow discovered the results of fire in the apartment, he changed the gas heaters in the living room and in the bathroom using the gas outlets which he said were already provided. He installed the new heaters, which he had bought. After the installation was complete, Sparrow and his father, an employee of the Arkansas Power & Light Company, made a check for escaping gas, and found none.

According to Sparrow, he arose at 6:00 a.m. on the day after he installed the new heaters, went to the bathroom and returned to bed where he remained until 6:30. He stated that he had not smoked a cigarette or ignited a match on this trip to the bathroom. He testified that both he and his wife then arose and that she went into the kitchen to prepare a pot of coffee, and he went

into the bathroom to light the heater. He was then wearing only his underwear. He said that he struck a match, lighted the heater and took a step toward the commode when the "whole room just blew up." He related that his hair, the shower curtain and the contents of the waste basket caught fire. Mrs. Sparrow testified that she heard an explosion and ran to the bathroom where she found her husband standing in the doorway trying to extinguish the fire in his hair and calling for help. She left but returned with a neighbor, who helped extinguish the fire in the apartment and take Sparrow to the hospital. Appellee's principal burns were on his left side, which would have been nearest the shower, according to his version of his position and movements between the time he entered the bathroom and the time of the fire or explosion. His wife described his left hand as badly burned.

Joe DeFatta, a licensed plumbing contractor, inspected all the gas lines in the building for a natural gas leak during March, at Hudson's request, and found none. He went back to the building later the same day with a gas company representative. A pressure test they conducted revealed no leak, but DeFatta then detected the odor of sewer gas in the bathroom. After determining that the gas came from the shower, DeFatta found that the drain from the shower was not equipped with a trap to prevent the backup of sewer gas, but was a vertical line connecting directly with the city sewer system. He said that the shower plumbing was not in compliance with the Arkansas Code. He was familiar with the characteristics of sewer gas and had seen it burn on several occasions. He described it as highly explosive, and said that it would just "flare off," make "one big flare" and then quit. He described this phenomenon as a "kind of an explosion."

The city fire marshall and an Arkansas Power & Light Company employee also inspected the apartment after Sparrow was burned, and both detected sewer gas arising from the shower drain. Neither the power company employee nor a gas company employee, who

also went to the apartment after the incident, found any gas leaks. A previous occupant, who testified on behalf of appellant, admitted that she kept a rubber stopper over the shower drain at all times.

Expert witnesses called by appellant admitted that natural gas will explode when mixed with air in sufficient concentration, that sewer gas may be of the same chemical composition as natural gas and that, if sewer gas is of sufficient concentration, it will burn, and within certain limits, explode.

Appellant argues that its motions for directed verdict should have been granted because this evidence left the jury to speculate as to the cause of the fire. It relies upon our opinions in *Glidewell, Admr.* v. *Arkhola Sand & Gravel Co.,* 212 Ark. 838, 208 S. W. 2d 4, and *Williams, Admr.* v. *Lauderdale,* 209 Ark. 418, 191 S. W. 2d 455. The opinion in the first case was principally predicated upon lack of evidence of negligence to remove the question from the realm of speculation. There was direct evidence of negligence here.

In *Williams* v. *Lauderdale,* the plaintiff sought to prove by the chief of the fire department that a fire which he reached shortly after the alarm was given, was caused by defective electrical wiring. Although he said that the "probable result" of the wiring "would cause a fire," the chief named a number of things which might have caused that fire—such as a match, a lighted cigarette, a pilot light or a hot water heater. Although it was his opinion that the bad wiring caused the fire, he stated that he did not know what caused the fire and did not testify as to any physical condition found in the damaged building that would indicate that the fire was caused by bad wiring and eliminate other possible causes, without speculation. When the evidence here is viewed in the light most favorable to appellee, the jury was not left with as little evidentiary basis for exclusion of speculation as was the case in *Williams.* While no witness in this case expressed an opinion as to the cause of the fire, and Sparrow admitted he did not know

what caused it, there was ample evidence that gas escaping into the room from the city sewer could have caused it and no evidence that anything else did. Appellant argues that appellee might have turned on the gas heater without lighting it when he first went into the bathroom so that enough gas escaped into the room to explode when he struck a match, and that this possibility is supported by the hospital emergency room report showing that the bathroom heater exploded. This result would depend upon sheer speculation. There is no evidence that the bathroom heater was turned on before Sparrow's second expedition into the room, and there is no indication whatever as to the hospital employee's source of information as to the cause of Sparrow's injury. There is no evidence here, as there was in *Williams,* of any other possible cause of the fire. Furthermore, the physical conditions found on the two occasions when there were burned linens and burned curtains in the apartment tend to support appellee's theory and supply an element which was lacking in *Williams.* Substantial support is further indicated by reason of the fact that there was testimony that the gas heater was burning both before and after the first fire and was not burning before the second.

We do not interpret *Williams* as requiring direct testimony as to the cause of the fire, or that the injured party state the cause. See *Fidelity Phenix Ins. Co.* v. *Lynch,* 248 Ark. 923, 455 S. W. 2d 79. Neither do we interpret *Williams* to require that in order to present a fact question a plaintiff must produce evidence to eliminate any possible cause which might be conceived, as distinguished from causes suggested by evidence in the case. In *Hill* v. *Maxwell,* 247 Ark. 811, 448 S. W. 2d 9, we recently said:

> On the element of causation, the authorities, Prosser, Torts § 41 (3d ed. 1964), point out that the burden of proof is upon the plaintiff and that he must sustain his proof of causation by more than speculation and conjecture. However it is not necessary that the plaintiff negative entirely the

possibility that the defendant's conduct was not a cause. It is enough that the plaintiff introduce evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. Stated another way, it is not required that the proof eliminate every possible cause other than the one on which plaintiff relies, but only such other causes, if any, as fairly arise from the evidence. See *Williams* v. *Reading Co.* (3d Cir. 1949) 175 F. 2d 32.

Appellant says that since appellee lost only $345 in wages and had only a $75 doctor bill and $396.85 in hospital expense, the remaining $6,683.15 awarded by the jury is attributable to pain and suffering, and is grossly excessive. While we feel that the jury award of damages was very liberal, we cannot say that it was so excessive as to require reversal or reduction. Sparrow had first and second degree burns on his face and about 35% of his body. His hair, eyebrows and eyelashes were burned. The burns on his left hand were the worst. Butter which his wife applied to his body immediately after the incident melted, and she said that he was black wherever the skin was burned. When his wife went to him in the bathroom, she found him crying and shaking very badly and terrified that he would be scarred and marred like an acquaintance who had been burned. He was still shaking badly when he was in the emergency room at the hospital. He was kept in the hospital for 11 days on sterile sheets. During that time he was given intravenous fluids and pain medication, principally non-narcotic, and his body sprayed with medication at regular intervals. Hospital records indicated administration of pain medication at least 20 times. He ran fever, and edema from the burns did not begin to subside until two days after he entered the hospital. Blebs on his hand had to be opened and blisters in several areas debrided. His physician gave him permission to return to work 10 days after his release from the hospital. Sparrow said he had a burned spot on his forehead and was burned on both hands and the left side of his body. He said the pain was like a burning

for four or five days, when it lessened. He did return to his work as a rug and carpet dyer at the time the doctor advised, but was unable to perform his full duties for five or six weeks. He just supervised the weighing and application of the chemicals because of the danger of infection. He testified that he suffered pain intermittently for a week or ten days after he left the hospital, but only took aspirin for relief. Photographs (about which we will comment later) indicate that Sparrow's burns were more than superficial.

Measurement of pain and suffering and translating it into dollar compensation is an exercise of extreme difficulty. Generally, it is best left to jurors who are called upon to apply their own observations, common knowledge and everyday experience in the affairs of life to the evidence. See AMI 102, Civil. No court has yet provided a yardstick for a jury's use in meeting this portion of its responsibility. The human mind has not yet been able to devise any better gauge than the verdict of a jury based upon the collective judgment of its members. Appellate courts are naturally and appropriately extremely reluctant to reverse or reduce a jury's verdict on such an element of damages. We do not feel that we would be justified in doing so here. We acknowledged in *Breitenberg* v. *Parker,* 237 Ark. 261, 372 S. W. 2d 828, that we could not constitutionally reduce a verdict if there was *any* substantial evidence, when given its highest probative force, to support it. We also reiterated the bases upon which a verdict will be set aside as excessive as: (1) the absence of any evidence on which the amount allowed could properly have been awarded; (2) where the verdict must of necessity be for a smaller sum than that awarded; (3) where the testimony most favorable to the successful party will not sustain the inference of fact on which the damages are estimated; (4) where the amount awarded is so excessive as to lead to the conclusion that the verdict was the result of passion and prejudice or of some error or mistake of principle, or to warrant the conclusion that the jury was not governed by the evidence. We could not, in good conscience, say that any of these bases existed in this case.

The most difficult question posed by appellant relates to the introduction of photographs offered by appellee to demonstrate the location and extent of the burns on his body. The pictures exhibited were apparently taken after Sparrow left the hospital. They appear in the record with rather vivid coloration on certain parts of Sparrow's body, most of which is due to medication placed upon the burns for the purpose of more clearly delineating them for the camera. Their potential effect is best demonstrated by appellee's concession that the pictures would have been such an unfair representation as to require their exclusion if they could have misled the jury to believe that the appearance of the medication reflected the true appearance of the burns. We agree and would not hesitate to hold that the circuit judge abused his discretion in admitting the pictures were it not for the fact that it was made perfectly clear at the time the pictures were offered and before they were exhibited to the jury that the burned portions of appellee's body shown in the pictures were covered with medication used to help form a crust and develop scabs over the burns. With this fact made clear, we do not believe that the jury could have been misled, as appellee points out, and surely the jury observed that a picture taken to show the burned area on the back of appellee's left hand discloses a burned area on his left leg without the medication. Yet when a picture showing only the outside of appellee's left leg was taken, medication had been placed on the leg. There is no reversible error in the trial court's admission of pictures showing injuries to a party into evidence, even though they are inflammatory, if the picture is an aid to make the testimony of witnesses more easily understood. *Reed* v. *McGibboney,* 243 Ark. 789, 422 S. W. 2d 115. We find no error in this respect.

The judgment is affirmed.

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

CARLETON HARRIS, Chief Justice, dissenting. I would reverse this case since it is my view that the trial court

abused its discretion in permitting exhibits 5, 6, 7, and 8 to be offered into evidence. It is difficult for me to see any burns at all, though it is easy to see the reddish-orange medication on the body. This medication appears to be generously applied, and since the photographs are in natural color (rather than black and white) it is my opinion that the pictures are misleading in their portrayal of the extent of the burned portions. In fact, though not implying that it was done in the present situation, the photographs of the reddish medication are so striking to the eye, that I am of the opinion that a perfectly normal part of the body could be painted with this medication and the impression be left that serious injury had occurred.

I am also of the view that the verdict was excessive, Mr. Sparrow receiving an award, after the payment of all expenses, of $6,683.15. While I recognize that burns are very painful, it does not appear that there was unusual suffering in this instance since a non-narcotic pain reliever was sufficient, and Sparrow only remained in the hospital for eleven days. Dr. Lee testified that no permanent disability was suffered, and Sparrow was permitted to return to work three weeks after the occurrence. This means that he received better than $2,200 per week for pain and suffering. It is my view that this amount was excessive; however, since I would reverse on the first point, there is no necessity to go into this last matter.

I respectfully dissent.

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

Jones, J., joins in this dissent as to the reversal on the first point discussed.

RICHARD NEAL WILLIAMS *v.* STATE OF ARKANSAS

5556 467 S. W. 2d 740

Opinion delivered June 7, 1971

H. Allan Dishongh and *James L. Sloan,* for appellant.

Ray Thornton, Attorney General; *Milton Lueken,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. Richard Neal Williams was convicted of first degree murder in the Hempstead County Circuit Court and sentenced to life in the Arkansas Penitentiary. On appeal to this court he relies on the following points for reversal:

"I. The circuit court abused its discretion in admitting State's Exhibit 33 insofar as it consisted of a collection of contraceptive rubbers.

II. The circuit court erred in receiving in evidence State's Exhibit 36, the bloody panties of Carolyn Cassidy.

III. There was no legitimate ground for letting in State's Exhibit 39, a letter of 'Jeannie Day.'

IV. Under the circumstances the Black Orchid Club card was more prejudicial than relevant.

V. State's Exhibit 3 and 4, the photographs of the corpses, were gruesome, morbid, and shocking in the extreme, but barely relevant if at all. They should have been excluded.

VI. It was the duty of the circuit court to instruct the jury as to the limited purposes for which the evidence of other crimes could be considered.

VII. A manslaughter instruction should have been given.

VIII. Severe prejudice resulted from the circuit court's omission of an instruction on the effect of drunkenness."

The revolting facts of this case are not greatly in dispute except as to details; and as to whether the 15 year old defendant, Williams, or his 12 year old female companion, Carolyn Cassidy, fired the shots that killed her mother, Lou Dean Cassidy, and her mother's companion and paramour, Paul Parsons.

On Monday morning, March 30, 1970, the bodies of Parsons and Mrs. Cassidy were found within about four feet of each other beside a dirt and gravel road near Nashville in Hempstead County. Parsons had been shot through the right eye and Mrs. Cassidy had been shot through the left eye. Both bodies appeared to have been dragged feet first a short distance from some automobile tracks in the road to where the bodies were found. About

the same time the bodies were discovered, Williams was apprehended while driving Parsons' automobile near Mt. Pleasant, Texas.

The undisputed background facts as gleaned from the testimony of Carolyn as well as that of Williams, appear as follows: Parsons was 40 years of age (according to his driver's license) and Williams was 15 years of age and they both lived at Delight, Arkansas. Williams knew and liked Parsons, but had been warned by his mother against associating with him. On Sunday evening, March 29, 1970, Williams had planned to go fox hunting with some young friends but the plans miscarried and he came upon Parsons parked in his automobile at his favorite parking place on a street in Delight. In the course of conversation Parsons told Williams that he had a .22 caliber pistol that had been misfiring and Williams suggested that he might be able to fix it. They drove to Parsons' home where they obtained the pistol, then drove to a lumber company building where Williams fired the pistol several times and where they drank some wine furnished by Parsons. After driving around and drinking some beer, Parsons suggested that they drive to Nashville where he knew a woman he could have a date with and Williams agreed to go along. Upon arrival at Nashville, they drove to the Cassidy home where Lou Dean Cassidy got into the automobile with them. They drove around Nashville for a short period of time and then returned to the Cassidy home where they picked up Mrs. Cassidy's 12 year old daughter, Carolyn Susan Cassidy.

Parsons had placed the pistol under the front seat of the automobile and after Mrs. Cassidy and her daughter got into the automobile, they drove to a drive-in cafe where they purchased some cokes; and with Williams and Carolyn in the rear seat, and with Mrs. Cassidy beside him in the front seat, Parsons drove out into the country about 9:30 P.M. and parked the automobile on a dirt and gravel road. Parsons obtained a bottle of whisky from the trunk of the automobile and he and Mrs. Cassidy and Williams drank some whisky mixed

with cokes. Parsons and Mrs. Cassidy then got into the rear seat of the automobile and Williams and Carolyn got into the front seat. Parsons and Mrs. Cassidy had sexual relations in the back seat but Carolyn refused to have sexual relations with Williams in the front seat. From this point on Carolyn and Williams differ in their versions of the events that transpired.

Carolyn testified that after her repeated refusals to have sexual relations with Williams, her mother as well as Parsons told Williams to leave her alone. She says Williams started crying and talking about a girl who had refused to marry him. She says that he got out of the automobile, fell to the ground, and complained that something was wrong with his legs and that he could not walk. She says that she got into the back seat of the automobile and her mother and Parsons picked Williams up from the ground and laid him on the front seat of the automobile. She says that her mother then put a handkerchief in Williams' mouth to keep him from biting his tongue. She says that she was sitting on the left side of the back seat next to her mother, who was then sitting next to Parsons and partially on his lap. She admits that she was turning the dome light on in the car and that Parsons was insisting that she leave it off. She says that after Williams had lain on the front seat for about 20 minutes, he sat up, pulled her toward him, and demanded that she get back into the front seat with him. She says that when she refused, Williams showed her a pistol which he held in his hand and told her that if she did not get into the front seat with him he would kill her and her mother. She says that she told her mother what Williams had said but that her mother didn't believe her. She says that her mother suggested to Williams that he turn the car radio on and that after attempting to do so, Williams told Parsons that the radio was broken and he should get it fixed. She says that Parsons answered that he would get it fixed the following day and that Williams told him he would not live long enough to get it fixed. She says Williams then shot Parsons in the face with the pistol; that Parsons fell over on her mother and that Williams then turned the pistol

on her mother. She says that her mother said "please don't shoot me," but that Williams shot her mother. She says that Williams then demanded that she get into the front seat with him and that she did so. She says that when she moved from her position in the back seat, her mother fell over toward the left door. She says that Williams then removed all her clothing, except her brassiere, and that he jerked it from her body and that he then raped her. She says that after Williams raped her, he forced her to commit an act of sodomy and then ordered her to get dressed. She says that she put her clothes back on, except the brassiere which she threw out of the car, and that after Williams got dressed, he first dragged Parsons' body out of the car by the legs and then dragged her mother's body from the car in like manner. She says that Williams then removed articles, including her mother's panties and shoes, from the car and threw them near the bodies; that he then cut the bloody seat covers from the rear seat of the automobile with his pocket knife and threw the seat covers and a bloody floor mat on the ground near the bodies. She testified that Williams then drove the car forward and turned it around; that he then drove back slowly past the bodies to the main highway and then drove south toward Texarkana. She says that Williams ordered her to take everything out of the glove compartment and examine for Parsons' name. She says he made her throw Parsons' wallet out of the car but that Williams altered Parsons' driver's license and kept it. She says that Williams did not drive through Texarkana but after driving around Texarkana, he stopped near a lake where he fired the pistol out of the automobile window to show her it would still shoot, and that after raping her again he drove on toward Redwater, Texas. She says that they stopped for gas and that Williams left without paying for the gas after telling the attendant that he had been in a fight in order to explain the blood in the car. She says that when they reached Maud, Texas, Williams told her he did not want her with him in the event he should be stopped by police; that he gave her 15 cents with which to place a collect phone call to her uncle in Mineral Springs, Arkansas, and that after admonishing her to say she didn't know anything if ques-

tioned by the police, he then let her out of the automobile. She testified that she went to a nearby washateria where she reported what had happened; called her uncle collect and was soon picked up by police officers.

Officer David Ward, who apprehended Williams in Mt. Pleasant, Texas, testified that he was in Mt. Pleasant when he received a radio call describing an automobile which had left a filling station without paying for gas; that he was parked on the side of the highway waiting for the automobile when it arrived at about 80 miles an hour. He testified that he pursued the automobile and it failed to slow down or stop when he turned his red lights on. He says that he then turned on his siren and the automobile stopped at one of the turn-throughs at a highway intersection. He says that as he approached the automobile, the door opened and he saw a pistol in the armrest inside the door and that he took possession of it. He testified that Williams was driving the automobile and that before he had said anything to him, Williams said, "My God man, help me, I've just murdered two people." He says that Williams then told him that he had been with a girl and that she had forced him to shoot two people.

Mr. George Oosterhous, special agent for the FBI, testified that he interviewed Williams at the office of the chief of police in Mt. Pleasant, Texas, about 1:30 p.m. on March 30. His testimony was to the effect that Williams related to him that Carolyn took a gun from under the front seat of the automobile and shot Parsons outside the car and then shot her mother; that she forced him to drag Mrs. Cassidy's body from the car and then told him to leave the area; that she stated she would kill him if he tried to escape and that they drove for several hours while Carolyn was holding a gun on him. He says that Williams told him that at some time about midnight, Carolyn forced him to stop and have sexual relations with her; and that Williams stated that after this happened he was completely exhausted and went to sleep; that when he awoke it was nearly morning; that he did not know where he was but that he continued driving; that Carolyn told him to pull into a filling station and

have the tank filled and then speed away which he did; that they continued to drive for about one-half hour when he finally talked Carolyn into letting him go, and that she asked to be let out at Maud, Texas. He says that Williams told him that after Carolyn let him go, he began searching for a law officer so that he could report what had happened during that long evening, and that he was finally able to find an officer at the Mt. Pleasant Police Station. He says that Williams told him that as they left Nashville, Carolyn made some excuse to go back into the house and that she brought out a pistol and put it under the front seat of Parsons' automobile.

Mr. Sam Johnson testified that on March 30 about 6:00 a.m. he started to a nearby hay field and found the two bodies at the side of a gravel road at a place called Propps Creek; that after determining that the bodies were dead, he immediately called the sheriff.

Captain Milton Mosier, of the Arkansas State Police, testified that he arrived at the scene of the crime about 7:20 a.m. on March 30. He says that the two bodies were lying on the righthand side of the road partially in the ditch. He says that the bodies were lying side by side about four feet apart with their arms outstretched above their heads and with their heads and hands partially in the road and with their feet resting in the ditch and on the shoulder of the road. He testified that Parsons' shirt was unbuttoned and that he had on a T-shirt under his other shirt. He says that Parsons had mud on the T-shirt and under his belt; that Parsons had his socks on and that one shoe was on and one off. He says that Parsons' arms were over his head and his legs were pretty straight out. He testified that marks on the road indicated that Parsons' body had been dragged to where it was lying. He testified that Mrs. Cassidy's dress was bloody and up around her waist; that there was a brassier on the body and that another brassiere was found at the scene. He testified that a pair of lady's panties were found hanging on some briers near the bodies; that Mrs. Cassidy's body was lying on its back

with the feet outstretched and that the body was naked from the waist down. He says that Mrs. Cassidy's shoes were off and lying beside her body; that there was a pocket of blood under her left eye and that there was blood on her face and dress. He testified that the body had been dragged to where it was lying.

On cross-examination this witness testified that Parsons' body was lying flat on its back with his face up and that Mrs. Cassidy's body was lying about four feet from Parsons' body with her face turned toward her left. He says that a ridge of dirt had washed down the hill filling the ditch where the bodies were found, and that the bodies had been dragged through the ridge of dirt. He testified that there was at least an inch of dirt wedged under Parsons' belt. He says that the ground where the bodies were found was damp and that Parsons' shirt was pulled out and up around his waist. He says the shirt was clean up under the arms but there was mud on the shirt up between the shoulders. He says there was mud on the left hip and side of Mrs. Cassidy but that her shoes were free of mud. He testified there was no indication of movement of the bodies while they were on the ground.

Dr. Rodney Carlton, state medical examiner, testified that Parsons was shot through the right eye and the brain, and that Mrs. Cassidy was shot through the left eye and the brain. He removed the bullets later identified as having been fired from Parsons' gun.

Sergeant Carroll Page of the Arkansas State Police testified that he interviewed Williams at Mt. Pleasant, Texas, and that Williams told him practically the same story as testified to by the other officers. He testified that he examined the automobile and that there was a lot of blood under the cushion in the righthand corner and in the center of the back seat.

Williams testified in his own defense and his version of what took place at the scene of the crime and subsequent thereto, differs considerably from Carolyn's version. Williams readily admitted that he tried to per-

suade Carolyn into sexual relations with him while her mother and Parsons were so engaged in the rear seat of the automobile, but he says he gave up when she refused. He denied that anyone told him to leave Carolyn alone and he denied that he fell outside the automobile and that Parsons and Mrs. Cassidy placed him in the front seat. He denied that he had sexual relations with Carolyn at all, and he denied giving the police any different version than that to which he testified. Williams testified that Carolyn kept turning the dome light on in the automobile and that Parsons told her in a rough manner to turn it off and leave it turned off. He says that Parsons then stepped out of the automobile "to use the bathroom" and that Carolyn stepped out of the automobile also. He says he heard a gunshot and that Carolyn then pointed the gun into the car at her mother. He says that Mrs. Cassidy exclaimed, "What are you doing with that gun! Give it to me," and as she reached toward the gun, Carolyn shot her mother. He says that Carolyn then ordered him to drag Mrs. Cassidy's body from the automobile and that he did so by holding her under the arms. He says that he laid the body beside the road and that Carolyn then handed him his own knife and ordered him to remove the bloody seat covers from the car which he did. He says that she then ordered him at gunpoint to drive toward Texas. He says that sometime in the morning hours he became completely exhausted and pulled the automobile over to the side of the road and stopped. He says that when he stopped Carolyn said, "come here" and as he scooted over toward her, he passed out and didn't awake until 5 o'clock in the morning. He says that as soon as he awoke, Carolyn said "Let's go." He says that when they stopped for gas Carolyn ordered him to leave without paying for it. He says that she released and left him at Maud, Texas, and told him not to try contacting the police. He testified that prior to his release he had been driving about 80 miles per hour hoping that he would be stopped by police for speeding, and that after Carolyn left him at Maud, Texas, he continued driving at about 75 or 80 miles per hour in search of a police officer or a house where he could report what had happened. He testified that as he was entering Mt. Pleasant, Texas, he saw a

police car and was slowing down to stop when the police car overtook him. He says that he said to the police officer, "My God, man, help me. I think I just helped kill two people." He testified that he was quite sure Mrs. Cassidy was dead when he removed her body from the automobile, but that he thought Parsons might still be alive. According to Williams' version, he was anxious to tell his story to the police officers so they could catch the girl.

Williams is represented on this appeal by different attorneys from the one who represented him at the trial. On oral argument they contend that under Act 333 of 1971 we are required to search the record for any error by the trial court, whether called to the trial court's attention by objections made and saved or not; and that we should only concern ourselves with whether Williams received a fair and impartial trial. Act 333 is entitled: "AN ACT to Simplify the Procedure for Appeals From the Circuit Courts to the Supreme Court of Arkansas in Criminal Cases; and for Other Purposes." Section 11 of the Act is the one most emphasized in oral argument and is as follows:

> "*Matters to be Considered on Appeal.* The Supreme Court need only review those matters briefed and argued by the appellant provided that where either a sentence for life imprisonment or death, the Supreme Court shall review all errors prejudicial to the rights of the appellant."

Act 333 became effective on March 22, 1971, approximately nine months after Williams was tried, but Williams' attorneys argue that § 11 of the Act is procedural as applied to cases on appeal to this court and is retroactive to cases tried prior to the effective date of the Act. We do not pass on the application of Act 333 to the case at bar, for the reason that due to Williams' tender age; and due to the absence of evidence of prior offenses or criminal tendencies, we have examined the record without regard to exceptions, and we find no reversible error therein.

The purpose of a criminal trial is to determine the guilt or innocence of the accused, and the primary function of a jury is to determine whether the accused did or did not commit the crime with which he is accused. A jury panel is composed of adult citizens and a fair and impartial jury is selected in a given case by the process of elimination through peremptory challenges and challenges for cause. A jury is charged with the responsibility and sworn duty to acquit an accused if found innocent, and to convict and fix punishment within the bounds of the law when the accused is found guilty. The burden rests on the state to prove the accused guilty beyond a reasonable doubt. As a practical matter, when the accused is found guilty, a jury may, and does, consider mitigating circumstances in assessing the penalty within the range fixed by law for the offense.

Under the evidence in the case at bar the jury had to choose between Carolyn's version and Williams' version of what occurred at the scene of the crime. The jury apparently believed Carolyn's version rather than Williams' and returned a verdict of guilty of murder in the first degree. There is no indication in the record before us that the jury's task in reaching its verdict, was not as unpleasant as is our own in affirming it.

We have not attempted to retry this case under the different trial strategies the separate members of this court might have adopted had we been representing Williams; consequently, we have not examined the record for every possible objection that might have been made to the evidence that was submitted at the trial; and we have not attempted to weigh the effects such possible objections might have had on the verdict of the jury if they had been made and sustained or overruled. We have, however, concerned ourselves with whether Williams received a fair trial and we are of the opinion that he did.

It was the state's theory that Williams killed Parsons and Mrs. Cassidy in order to force sexual relations on Carolyn without interference from her mother or Par-

sons. We now proceed to the errors assigned by Williams in the points he relies on and in the order they are presented.

As to Williams' first point, Carolyn testified that the second time Williams raped her, he first attempted to use a contraceptive rubber. The contraceptives introduced into evidence were admittedly taken by the officers from the glove compartment of Parsons' automobile. There is no evidence that Carolyn knew they were in the automobile and the state had a right to introduce the exhibits in support of the credibility of Carolyn's testimony that Williams twice raped her and in doing so, attempted to use a contraceptive device the second time. In *Glover* v. *State,* 194 Ark. 66, 105 S. W. 2d 82, we said:

> "It is an accepted rule that a relevant fact will not be rejected because not sufficient in itself to establish the whole or any definite portion of a party's connection, 'but all that is required is that the fact must legitimately tend to prove some matter in issue, or to make a proposition in issue more or less probable. Indeed, it is sufficient if the fact may be expected to become relevant in connection with other facts, or if it forms a link in the chain of evidence necessary to support a party's contention, although requiring other evidence to supplement it.' 22 C. J. § 91, p. 164."

Williams testified that the contraceptives belonged to Parsons and he denied that he attempted to use one. We find no prejudicial error in their acceptance in evidence.

The same rule applies to Williams' second point. Carolyn testified that she got no blood on her clothing from her mother or Parsons. She testified that she was only 12 years of age; that she was raped twice, and that she had never experienced sexual intercourse before. Again this exhibit supported the credibility of Carolyn's testimony that Williams raped her and in fact, supported

the credibility of her testimony to the effect that Williams' sexual lust was his motive for the crime of murder. The state had the right to offer the exhibit and Williams had a right to deny knowledge of the blood on Carolyn's undergarment, or he had a right to attempt to explain it; he did both. He testified that he did not know how the blood got on the garment but that Carolyn could have been menstruating. Williams' attorneys vigorously point out that no objections were made to the introduction of this exhibit, but we hold that the exhibit was admissible; therefore, if an objection had been made it should have been overruled.

Williams' third point has to do with a vulgarly worded letter addressed to no one but simply beginning with the salutation "Hi." This letter was picked up with other articles at the scene of the crime. The front of the one page letter complains that when the sender attempted to call, the intended recipient was always in Nashville cutting up cars. The front of the page concludes as follows: "By-by. P. S. Tell Wayne I said Hi. Carolyn said Hi! too." Some vulgar language is written on the back of the page and is signed, "Love, Jeannie Day." This letter was among other items apparently thrown out of the automobile at the scene of the crime, and it was not connected in any manner with Williams. There is no evidence that the letter was read to or by the jury, and if its contents could have reflected on the character of anyone involved, it could only have reflected on the character of the prosecuting witness, Carolyn Cassidy, by association; assuming of course that she was the Carolyn referred to in the letter. There was no evidence that Williams was ever engaged in "cutting up cars" in Nashville or any where else. Both Carolyn and Williams testified that they were not acquainted with each other prior to the date of the homicides and if the acceptance of the letter in evidence was error, it was harmless error.

We are of the same opinion concerning the appellant's fourth point. The Black Orchid Club card made out to Williams was found at the scene of the crime. It

was irrelevant in the light of the testimony but it could not have prejudiced Williams. At the time of its introduction, Williams had not testified and the state had no way of knowing whether Williams would admit or deny that he was ever at the scene of the crime. It was explained in the testimony that the Black Orchid is a club in Hot Springs. Williams testified that someone had given the card to his mother; that he had come into possession of it and had inserted his own name as member guest. His testimony was to the effect that he had exhibited the card to his young friends to impress them with his adult status and prestige. This exhibit could have only been some evidence that Williams was at the scene where the card was found, and this was admitted by Williams.

We likewise find no merit in Williams' fifth point. The two pictures of the victims were first ruled inadmissible by the trial court in light of the investigating officers' testimony as to the position of the bodies when found. The officers testified that *both* bodies had been dragged, feet first, to where they were found. Carolyn testified that Williams first dragged Parsons' body and then her mother's body from the automobile feet first. The officers testified that Williams had told them that Carolyn shot Parsons outside the automobile and that he only dragged Mrs. Cassidy's body from the automobile as ordered by Carolyn. The pictures were only admitted after this conflict in the testimony developed and they definitely supported the testimony of Carolyn and the officers that *both* victims had been dragged to their positions *feet first.*

The admission and relevancy of photographs must necessarily rest largely in the discretion of the trial judge. Admissibility of photographs does not depend upon whether the objects they portray could be described in words, but rather on whether it would be useful to enable the witness better to describe and the jury better to understand, the testimony concerned. Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence

should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible. *Oliver* v. *State,* 225 Ark. 809, 286 S. W. 2d 17; *Smith* v. *State,* 216 Ark. 1, 223 S. W. 2d 1011 (cert. den. 339 U. S. 916); *Jones* v. *State,* 213 Ark. 863, 213 S. W. 2d 974.

Photographs are admissible for the purpose of describing and identifying the premises which were the scene of the crime, and may also be admitted to establish the corpus delicti of the crime charged, to disclose the environment and to *corroborate testimony. Stewart* v. *State,* 233 Ark. 458, 345 S. W. 2d 472 (cert. den. 368 U. S. 935).

We find no merit in Williams' sixth point. There was no evidence submitted to the jury of *previous* crimes committed by Williams. As a matter of fact Williams testified that he had never been in trouble before except that he got one ticket for failure to have a driver's license. His mother also testified that he had never been in trouble before and that he had always been a good boy. Williams also put his character in issue through a number of witnesses whose testimony was not impeached or even questioned. It developed from the oral argument on appeal that the "other crimes" referred to in the sixth assignment were the crimes of rape testified to by Carolyn, and the probable crimes of grand larceny and violation of the Dyer Act in connection with the automobile; and the probable crime of kidnapping and violation of the Mann Act in taking Carolyn across the state line of Arkansas and Texas. We find no merit in this argument. Williams was accused of first degree murder. Sexual intercourse with Carolyn against her will and without interference from her mother or Parsons was the only motive shown for the commission of the homicides. The other crimes, if they all were crimes, were incidental to crimes of murder, and Williams' flight from the scene of the crimes with which he was charged and for which he was being tried

In *Banks* v. *State,* 187 Ark. 962, 63 S. W. 2d 518, the appellant was convicted of first degree murder in the

killing of Mark Goodson. Mrs. May was with Mark Goodson and witnessed the homicide and so testified at the trial. She further testified that after the murder the appellant then raped her. It was insisted on appeal that this evidence was inadmissible because the appellant was not on trial for the crime of rape. In rejecting the contention this court said:

> "It is always entirely proper for the State to show, if it can, motive for the commission of the crime, and the evidence of Mrs. May, in reference to appellant forcing her to have sexual intercourse with him was entirely proper for this purpose. We understand the rule to be that the fact that evidence introduced to prove the motive of the crime for which the accused is on trial points him out as guilty of an independent and totally dissimilar offense is not sufficient grounds upon which to reject the testimony.
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> Moreover, the testimony of Mrs. May was competent for another reason, that is to say, if several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others, evidence of any or all of them is admissible against a defendant on trial for any offense, which is itself a detail of the whole criminal scheme." (*Dunn* v. *State,* 2 Ark. 229; *Renfroe* v. *State,* 84 Ark. 16, 104 S. W. 542).

Under the trial court's instructions on first and second degree murder, there is no question that the jury knew that Williams was being tried on the charge of murder and not on other crimes incidental thereto. There is no evidence that the jury was not an intelligent one and capable of understanding the issues under the instructions given.

We likewise find no merit in Williams' seventh point. Manslaughter is defined as the unlawful killing of a human being, without malice express or implied, and without deliberation. Ark. Stat. Ann. § 41-2207 (Repl. 1964). The appellant has correctly stated that *voluntary* manslaughter must be voluntary upon a sudden heat of passion, caused by a provocation, apparently sufficient to make the passion irresistible. Ark. Stat. Ann. § 41-2208 (Repl. 1964). But, there was no such evidence in the case at bar. The only evidence in the record of provocation at all, is Carolyn's testimony that her mother and Parsons told Williams to leave her alone. Williams denies this, but if he was provoked by such admonition, it fell far short of being legally sufficient for the creation of an irresistible passion to commit homicide in any degree. The jury was instructed on second degree murder as well as first degree, and it found Williams guilty of first degree murder.

It is well settled that in order to justify the court in giving an instruction on a lesser degree of homicide than that upon which the accused is being tried, there must be some substantial evidence to support such instruction. (*Hearn* v. *State,* 212 Ark. 360, 205 S. W. 2d 477).

In *Walker* v. *State,* 241 Ark. 300, 408 S. W. 2d 905, Walker was convicted of murder in the first degree. One of his assigned errors on appeal to this court was that the court refused to instruct the jury on manslaughter, and in that case we said:

> "The court refused to grant appellant's request for an instruction on manslaughter, and this ruling is assigned as error. The same circumstances were presented to this court in *Outler* v. *State,* 154 Ark. 598, 243 S. W. 851 (1922), where it was said: 'At any rate, the verdict of the jury under this instruction (of first degree and second degree murder) necessarily implied a finding that the killing was not done under circumstances which would reduce the degree of the offense to manslaughter, and no prejudice resulted from the failure of the court to instruct

on the subject of manslaughter.' See *Newsome* v. *State,* 214 Ark. 48, 214 S. W. 2d 778 (1948), and also *Talley* v. *State,* 236 Ark. 911, 370 S. W. 2d 604 (1963), where again the refusal to instruct on manslaughter was considered harmless error in view of the fact that the appellant was found guilty of first or second degree murder."

As to Williams' last point, he would have known, perhaps better than anyone, whether he was drunk or sober. He did not interpose the defense of drunkenness in any degree, but in fact denied the implications that he was under the influence of alcohol. If Williams was "crying drunk," as argued in his brief, when Carolyn says he fell outside the automobile, his rapid recovery in the course of about 20 minutes, as also testified by Carolyn, would defy sound reasoning based on common knowledge. According to Carolyn's version, there is no question that Williams had the presence of mind and physical ability to remove the body of Parsons as well as that of Mrs. Cassidy from the automobile; cut and remove the plastic seat cover as well as the blood stained floor mat from the rear of the automobile; remove the other articles that would tend to incriminate him if he should be apprehended in flight, even to the extent of altering the age of Parsons on his driver's license with the intent (that could be logically assumed) of assuming Parsons' identity if he found it convenient and necessary to do so. According to Williams' own testimony, he did not fall outside the automobile and was perfectly aware of everything that took place, including his ability to follow Carolyn's orders and instructions explicitly. The nearest Williams' own evidence comes to indicating that he might have been under the influence of alcohol at all, was his testimony that he had no idea how Carolyn obtained possession of his knife when he says that she gave it to him and ordered him to cut the seat covers from the automobile.

In *Newsome* v. *State,* 214 Ark. 48, 214 S. W. 2d 778, the appellant was tried for first degree murder and convicted of murder in the second degree. The court instructed the jury on first degree murder, second degree

and voluntary manslaughter. The appellant assigned as error the court's refusal to instruct on involuntary manslaughter on the theory of intoxication. In that case this court said:

> "In *Weakley* v. *State,* 168 Ark. 1087, 273 S. W. 374, Mr. Justice Wood, speaking for this court, quoted Bishop on Criminal Law: 'The intention to drink may fully supply the place of malice aforethought so that, if one voluntarily becomes too drunk to know what he is about and then with a deadly weapon kills another, he does murder the same as if he were sober. In other words, the mere fact of drunkenness will not reduce to manslaughter a homicide which would otherwise be murder.' Bishop's New Criminal Law, p. 296, § 401. See, also, *Ballentine* v. *State,* 198 Ark. 1037, 132 S. W. 2d 384, and other cases cited in West's Arkansas Digest, 'Homicide,' § 28.
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> Furthermore, the verdict of guilty of murder in the second degree shows that the jury viewed the homicide as more than voluntary manslaughter. Any supposed error for failure to charge as to involuntary manslaughter was rendered harmless by the fact that the jury convicted Newsome of second degree murder. See *Farris* v. *State,* 54 Ark. 4, 14 S. W. 924; *Nash* v. *State,* 73 Ark. 399, 84 S. W. 497; *Jones* v. *State,* 102 Ark. 195, 143 S. W. 907; and *Outler* v. *State,* 154 Ark. 598, 243 S. W. 851."

We have no authority to determine whether Williams was guilty or innocent or to delve into possible reasons or motives for such heinous crimes. That was the duty of the jury who heard the evidence and observed the witnesses, including the appellant, as they testified. As much as we might wish we could do so, the trial judge and jury, as well as this court, are powerless to convert the stark reality of a senseless double homicide into merely a child's bad dream. The suffi-

ciency of the evidence to sustain the conviction is beyond question in this case, and we find no error, assigned or otherwise, that would legally require, logically permit, or morally justify us in reversing the judgment of the trial court.

The judgment is affirmed.

BYRD, J., concurs.

WILLIAM H. MOORE *v.* ALMA M. MOORE

5-5529 467 S. W. 2d 732

Opinion delivered June 7, 1971

Burl C. Rotenberry, for appellant.

Van H. Albertson, for appellee.

CONLEY BYRD, Justice. Appellant William H. Moore appeals from a Pulaski Chancery divorce decree awarding appellee Alma M. Moore possession of virtually all of the parties' jointly owned real property. A prior action, in which appellee was awarded a divorce a mensa et thoro and possession of the parties' 137 acre farm in Madison County, was before this court in *Moore* v. *Moore,* 241 Ark. 675, 409 S. W. 2d 830 (1966). Appellant thereafter moved to Little Rock and in due time filed suit for absolute divorce based on a three-year separation. For reversal of the Chancellor's adjudication of property rights, appellant urges that "The court erred

in awarding appellee exclusive use and possession of the parties' jointly owned 137 acre farm together with all personal property located thereon while awarding appellant only the jointly owned two unimproved lots in New Mexico because of the grossly disparate value of the respective properties awarded each party."

Reviewing the record, as we do on trial de novo, we find the evidence is sufficient to support the chancellor's award.

When the parties married in 1949, appellee owned a home worth $9,000 and a bank account of $8,000. Appellant had no assets at that time. After their marriage, the parties moved several times, each time and place buying property and then selling when they moved elsewhere. Both parties worked steadily with substantially equal earnings until appellant suddenly retired in 1958, with a very small pension. Appellant has not worked since. After about 6 months, appellant prevailed on appellee to quit her job and they traveled for about two years. During that time they bought the two lots in New Mexico awarded appellant. Then they moved to Denver where appellee worked for two years while appellant drank to excess. Property they bought there was sold when appellant wanted to move to Florida in 1962. They got as far as St. Paul (Madison County), Arkansas, where they purchased the 137 acre farm on which appellee now lives. The parties assumed one mortgage when they purchased the property and obtained another mortgage with which they built a home on the property. Since 1965 appellee had made the mortgage and tax payments and maintained and improved the farm, either from farm earnings or outside employment when farming was not profitable. All in all, we find nothing in the record to require us to disturb the chancellor's decree.

Affirmed.

SHIRLEY COWART, ADM'X *v.* CASEY JONES, CONTRACTOR, INC.

5-5549 467 S. W. 2d 710

Opinion delivered June 7, 1971

Carl Langston and *Gene Worsham,* for appellant.

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

FRANK HOLT, Justice. The appellant brought this action against the appellee to recover damages for the death of Gerald Cowart, appellant's husband, allegedly caused by the negligence of the appellee. The deceased

was fatally injured when a crane, rented from appellee, struck the decedent and caused him to fall from a building under construction. When the appellant concluded the evidence in her case, the trial court directed a verdict for the appellee on the basis that the continued use of the crane by Bechtel (decedent's employer), with the knowledge that it lacked certain safety devices, constituted a separate and intervening cause.

For reversal of the judgment appellant contends that the trial court erred in directing a verdict for the appellee, the lessor, because the crane was a dangerous instrumentality without the necessary safety devices and that the appellee, lessor, being a bailor for hire, owed a duty to furnish a safe appliance to those expected to use it and, further, that the appellee, lessor, is not relieved of liability even though the decedent's employer was also negligent in continuing to use the dangerous instrumentality after detecting the dangerous condition.

The decedent, an iron worker, was part of a "raising gang" employed by Bechtel Corporation at a construction of facilities for Union Carbide Corporation. On the date of the accident, he and his crew were transferred by his superior to a "preheater building" from an adjoining building where they had been erecting steel with the use of a small crane. The decedent and his coworkers had not previously used the particular crane which was at the "preheater" site. This was a large, heavy-duty crane with a load capacity of 100 tons and a 170-foot boom. Decedent's employer had two large cranes of this type, as well as smaller ones, on the job site. This large type crane was necessary at the "preheater" site because of the weight of the steel and the height required to set it in place. The fatal accident happened when the first steel column was raised by the crane and placed at the top of the "preheater" building. After decedent had unhooked his "choker" from the steel column, his co-worker had difficulty in disconnecting his side of the "choker." Decedent assisted his coworker and when the "choker" was released, the "headache ball," a steel ball weighing approximately fifty

pounds and approximately fourteen inches in diameter, began spinning at a rapid rate with great force, knocking decedent from his position on top of the building and causing him to fall seventy-five feet to his death.

This crane, designed and customarily used for steel construction work at high elevations, was not equipped nor supplied with a non-spin swivel or a non-spin cable. Following the accident, a safety consultant for the Arkansas Labor Department investigated and testified that: "It didn't have a swivel on it which would have prevented this (the accident)." He recommended "a non-rotating cable which tends to not twist up or swivel on this cable and they were putting that on there when I left." According to him, the use of the swivel is "standard knowledge or standard procedure, it goes on there to prevent the cable from getting twisted up."

The decedent's co-worker testified that it is standard procedure that cranes of this type engaged in "hanging iron" be equipped both with a non-spin swivel and non-rotating cable. This witness denied any knowledge before the accident that the crane was not equipped with these two safety devices. According to him, this crane was very dangerous without this equipment. The decedent's foreman testified that: "A swivel headache ball is standard equipment" and the swivel is an absolute necessity. Further, there was no tag line on the steel column being set. Another witness, an iron worker for 21 years, stated that in the absence of these devices this large crane, a utility rig used for heavy equipment such as "hanging iron," was certainly "unsafe."

The construction superintendent testified that this crane was multi-purpose in its nature and was used primarily for "setting structural steel" and "hanging iron;" that it was equipped with a long boom "to reach high places" in steel erection jobs; that the crane, rented from appellee, had been received from the appellee three to four weeks before the accident; that he and the particular crew which assembled this crane after its receipt were aware that it was not equipped with these safety

devices. According to him, appellee was contacted about the lack of these safety features. He testified that he had used this and other cranes without the safety features and that this crane had not been used to set heavy iron, although it had been used every day to set "little stuff." He testified that he had set the rig "in operation" knowing that it was not safety equipped and the foreman on the job knew the crane was not so equipped. Further, he stated that customarily a "tag line" was used to take the slack out of the line when the crane was not equipped with a swivel.

Appellant correctly states the rules of law which apply in determining whether a directed verdict is correct. In *Shearer* v. *Morgan,* 240 Ark. 616, 401 S. W. 2d 21 (1966) we said:

> "It is the long-established rule of this court that, in determining the correctness of the trial court's action in directing a verdict for either party, 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 favor of the party against whom the verdict is directed, it is error for the court to take the case from the jury." [citing cases]

Also, in *Harkrider* v. *Cox,* 230 Ark. 155, 321 S. W. 2d 226 (1959) we said:

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

Even though we hold, which we do not, as contended by appellant, that the crane was an inherently dangerous instrumentality and that the appellee was negligent in furnishing or supplying decedent's employer with unsafe equipment, the appellant cannot prevail. This is true because, in directing a verdict for appellee, the court was correct in stating:

> "The most important and persuasive reason why this court is directing a verdict for the defendant Casey Jones is that there can be no question, I rule as a matter of law that representatives in high capacity in Bechtel Corporation admittedly knew that this crane was received from whatever source without the safety devices. That they used it for a period of time. * * * But in any event, charged with that knowledge, in my opinion the law is clear that there was a very definite intervening cause that we cannot attribute to Casey Jones."

In *Collier* v. *Citizens Coach Co.,* 231 Ark. 489, 330 S. W. 2d 74 (1959) we defined proximate cause as being:

> "That which is a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."

See, also, *Hartsock* v. *Forsgren, Inc.,* 236 Ark. 167, 365 S. W. 2d 117 (1963); *Pittsburg Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647 (1908); AMI 503.

In the case at bar it is undisputed that the crane had been on the job site and out of the appellee lessor's control for at least three to four weeks; that the crane was assembled on the job site and operated by the decedent's employer, during which time the appellee exercised no control over the crane's operation. Further, that decedent's employer was aware during this three to four weeks of use that the two safety devices were not on this crane; that, knowing this, decedent's employer directed him to work with or about this crane in the lifting of heavy structural steel which, according to the record, is the only time during the three to four weeks it had been so used; and that decedent's employer admitted that it was customary, in the absence of these safety devices, to take "the back lay out of the cable" before it is sent up. In the circumstances we are of the view that the acts of decedent's employer constituted an efficient, independent, and intervening proximate cause

which superseded or broke the causal connection of the negligence, if any, of appellee.

Affirmed.

BYRD, J., concurs.

DACUS CASKET COMPANY *v.* MILDRED LOUISE HARDY

5-5561 467 S. W. 2d 713

Opinion delivered June 7, 1971

Jimason J. Daggett, for appellant.

Rieves & Rieves, for appellee.

FRANK HOLT, Justice. This is a workmen's compensation case. Appellee fell and sustained a compensable back injury on January 26, 1968, while lifting a casket. After a spinal disc operation, she returned to work on June 24, 1968, and on February 6, 1969, sustained a second injury by a fall. A referee determined that as a result of the first injury, appellee had sustained a 15% permanent partial impairment of the body as a whole and that her second injury did not result in any permanent disability. On appeal the full commission increased the award for the first injury to 25% permanent partial disability to the body as a whole, and also awarded 10% permanent partial disability to the body as a whole as a result of the second injury. The circuit court affirmed the commission and from that adverse ruling comes this appeal.

For reversal the only issue presented questions the sufficiency of the evidence to support the commission's findings. Appellant argues that the commission completely ignored the basis of the referee's finding, based upon the medical evidence that appellee's permanent partial disability was only 15%, and that no competent testimony, except her own, was offered to support a finding of greater disability.

We reiterate our well-established rule that in a workmen's compensation case, the findings of the referee are without significance on appeal to the circuit court or to this court. *Lane Poultry Farms* v. *Wagoner,* 248

Ark. 661, 453 S. W. 2d 43; *Moss* v. *El Dorado Drilling Co.,* 237 Ark. 80, 371 S. W. 2d 528 (1963). Also, we have often said that the degree of disputed disability incurred by a claimant as a result of an injury is a question of fact to be determined by the commission and we will affirm its finding if there is any substantial evidence to support it. *Potlatch Forest, Inc.* v. *Smith,* 237 Ark. 468, 374 S. W. 2d 166 (1964); *Pearson* v. *Faulkner Radio Serv. Co.,* 220 Ark. 368, 247 S. W. 2d 964 (1952). We thus review the evidence.

Appellant concedes that appellee incurred a 15% permanent partial disability as a result of the first injury. However, it asserts that after the first injury, appellee returned to work and accomplished her tasks until her second fall which resulted in an injury temporary in nature and totally unrelated to the original injury.

Dr. Canale testified to having seen appellee on February 15, 1968, for the injury she had received on January 26, 1968, and diagnosing her injury as a herniated L-5 disc. He performed an operation and removed the disc. He recommended that appellee should not return to work until June 22, 1968, and that upon her return she should not perform work requiring her to lift over 35 to 40 pounds. He did not see appellee after June 6 until the first of July when she again visited his office, after returning to her work, and complained of low back pain. He recommended that she continue to work. Dr. Canale next saw appellee after her second injury. He stated that in his opinion appellee had a lumbosacral strain as the result of her second fall, but that she had not suffered any additional permanent disability. However, he also testified to having written a letter to Dr. Deneke (appellee's treating physician subsequent to her second injury) recommending that appellee give up her present employment since it was causing her difficulty.

Dr. Deneke stated in a report to the Arkansas Rehabilitation Service that appellee should avoid walking, standing, pushing and pulling; and that she should be trained for work which could be accomplished "in a

sitting position" and should not engage in an occupation requiring standing for a whole work period. Dr. Deneke, along with Dr. Tooms (another examining orthopedic specialist), felt that appellee had a 10-15% permanent partial disability based on her first injury and none on her second one. The three doctors appear to agree about appellee's inability to continue her previous employment with appellant as a result of her second injury.

Appellee is 43 years of age, has completed one-half of the ninth grade, and is without any special training. At the time of both injuries, she sewed linings in caskets for the appellant. This job required her to reach, bend, walk, stoop, and to lift the foot part of caskets. After her first injury she returned to this work for approximately seven months, missing only six and three-quarter days which included days she saw a doctor. About a month after the second injury she again returned to this work. Her back hurt her so much, however, that she was irregular in her work attendance. About two months after appellee returned to her work, appellant terminated her employment because of sporadic absenteeism. It appears that some of the days she missed (12½ in two months) "were days when she was hospitalized" or undergoing a doctor's examination. Since then she has been unable to find other work. Her other work history consists of being a waitress and shoe store clerk. She applied for a position which was available through the Employment Security Division but was advised by Dr. Deneke not to take it because the position involved stooping, lifting, bending, and standing.

We have held that permanent partial disability can consist of functional disability or loss in earning capacity or a combination of both. *Wilson & Co.* v. *Christman,* 244 Ark. 132, 424 S. W. 2d 863 (1968). There we said:

> "The opinions of attending physicians and medical experts are admissible as competent evidence when properly presented in a compensation case, but such opinions are not conclusive. They are only

> to be considered by the commission along with all other competent evidence, medical and otherwise, in arriving at the degree of permanent partial disability in a compensation case.
>
> Appellant argues that there is no evidence to sustain the commission's award of 60% permanent partial disability. It is true that no one testified that claimant has a 60% permanent partial disability. Neither did any witness, including the appellee's own testimony, fix his partial disability at 50% or 70%, but there is substantial evidence in the record that appellee has suffered a disability both in the loss of use of his body as a whole, and in loss of capacity to earn in the same or any other employment, the same wages he was receiving at the time of the injury."

In that case 30% was the highest amount of permanent partial disability that existed, according to the medical evidence; however, we affirmed the commission's award of 60%.

Likewise, in the case at bar the medical evidence would limit appellee's recovery to 15%; however, the commission awarded a total of 35% permanent partial disability as a result of the two injuries. Following the second injury the doctors advised that appellee would be restricted on the labor market to performing tasks only in a sitting position. Dr. Deneke testified:

> "* * * she made an honest effort to work, and I felt like that it was proper to recommend that she not continue in this capacity that she was working under at the Dacus Casket Company and recommended that she seek help from the Vocational Rehabilitation Service to learn a new trade and secure a job that would enable her to work in a sitting position rather than in a standing position lifting ten to fifteen pounds of weight in a position that necessitated her back to be in a flexed position."

Following her second injury appellee applied to Vocational Rehabilitation but that agency did not have any available position allowing her to work in a sitting position. Appellee testified that she sought work with a former employer who had a cashier's position open but was unacceptable because of her condition. She was refused work as a shoe clerk when the manager received a doctor's report about her limited physical condition. Appellee also testified that after the second injury she had unsuccessfully tried to sew. She takes pain and sleeping pills provided by Dr. Deneke to alleviate her back pain; otherwise, she can only sleep two to three hours. Her dependent children do her housework.

The question presented in this case is one of credibility and, thus, a matter within the exclusive province of the commission. *Kivett* v. *Redmond Co.,* 234 Ark. 855, 355 S. W. 2d 172 (1962). The commission reviewed the testimony adduced by the appellant and the appellee, and evaluated the conflicting evidence. Its finding has the same verity as that of a jury. Appellant's attack upon appellee's testimony as to the extent of her injuries, being in excess of the medical testimony, and her attempts to obtain employment, even if uncorroborated, is pertinent only to appellee's credibility.

In the case at bar the appellee suffered two separate injuries in the employment of the same employer. After the first injury she returned to work for about seven months and apparently performed her duties satisfactorily. After the second injury she was terminated a short time after returning to work because of sporadic absenteeism occasioned by the disabling effects of this injury. She was then restricted by her doctors to work that could be performed only in a sitting position. Further, she was handicapped by her age, lack of education, and limited work experience. As in *Christman,* her former employers and prospective employers refused her employment due to doctors' reports. Certainly it must be said that when we view the evidence most favorably

to the commission's finding, as we must do, and then apply the long-established substantial evidence rule, the total award of 35% to the claimant for both injuries is justified. In the circumstances, we deem it unnecessary, and think it only academic, that we approve the allocation of a separate percentage of disability to either injury.

Affirmed.

FOGLEMAN and JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting in part. I agree that there is substantial evidence to sustain the award pertaining to appellee's first injury. I find no substantial evidence to support the award as to the second injury. The finding of any permanent disability arising out of the injury seems to me to be in defiance of the medical testimony and to have required the commission to accept its own medical conclusions. In order to affirm as to this portion of the disability, it must be assumed that the commission's knowledge was substantial evidence.

The burden was upon appellee to establish the extent of her injury. *Taylor* v. *Plastics Research,* 245 Ark. 638, 433 S. W. 2d 830. The claimant testified that she went back to work after her first injury, but she could hardly do the work and her back hurt all the time. She took Bufferin and went to the doctor on account of pain. She did not work full time more than four weeks, because she was unable to do so. She did not return to the doctor because he had told her to take Bufferin when she had pain, but she had found this did not help. She stated that she was not really able to work after the first injury, but she had to work. She expressed her opinion that the second injury did more than just strain her, but stated that she was not a doctor and anyway she didn't know. She was still having difficulty at the time of the hearing.

Appellee offered medical reports in support of her claim. Dr. D. J. Canale saw her on March 1, 1969, and

expressed the opinion that the claimant was exaggerating her symptoms. He advised her to go to work whenever she felt like it. On April 10, 1969, Campbell's Clinic evaluated her condition. In their opinion her then present symptoms represented an acute low back strain, primarily musculoligamentous in origin, superimposed upon a back which had not completely recovered from her surgery resulting from the first injury. They further were of the opinion that these symptoms would subside upon conservative treatment and that claimant would eventually have no permanent impairment, beyond that which she sustained as a result of her first injury, because of her most recent injury. On May 1 Dr. Robert E. Tooms of that clinic advised that claimant had a permanent partial impairment to the body as a whole from her previous injury, that her acute low back strain was a temporary condition, that she was unable to do the work required by her job on April 10, 1969, and that she would be unable to consistently perform heavy work because of her previous ruptured disc. On June 13, 1969, Dr. Milton Deneke expressed the opinion that claimant no longer had any disability resulting from her injury of February 9, 1969. On June 18, 1969, in reporting that he had discharged claimant from further treatment, Dr. Canale said that he did not feel that she suffered any permanent disability from this second injury. On July 9, 1969, Dr. Canale stated that he did not feel that appellee had suffered any permanent disability as a result of her February 9, 1969, injury, but said that he did not think she should return to her previous employment.

On August 13, 1969, Dr. Deneke's deposition was taken on behalf of respondent. He restated his opinion that the second injury was temporary and that it did not lead to any permanent disability. His deposition is epitomized in the following answer:

> I feel this lady has a permanent disability because of the previous injury but that I do not feel that this has been aggravated by this second injury and that I feel that because of my examination

> and because of the opinion of the two specialists agreeing with my opinion, we all feel that she has reached maximum benefit from this and that anything residual is really related to the first injury.

Dr. Deneke stated that he would not have recommended that Mrs. Hardy return to the work she had been doing if he had seen her after her back surgery.

In a deposition on August 20, 1969, Dr. Canale testified that he could not find any evidence of any serious injury to claimant at all after her fall on February 9, 1969, but felt that she did have a permanent partial disability from her original ruptured disc. Dr. Tooms anticipated a gradual and complete recovery from the second injury by Mrs. Hardy when he gave his deposition on August 22, 1969.

Appellee relies upon our decisions in *Glass* v. *Edens,* 233 Ark. 786, 346 S. W. 2d 685, and *Wilson & Co.* v. *Christman,* 244 Ark. 132, 424 S. W. 2d 863, to justify a finding by the commission contrary to all medical evidence in this case. I submit that neither case supports the theory. In *Glass* v. *Edens,* we said that, along with the medical evidence as to percentage of disability, consideration should be given appellee's age, education, experience and other matters affecting wage loss. In *Christman,* we simply held, as in *Glass,* that the commission was not *limited* to medical evidence only in arriving at the *amount or extent of permanent partial disability*. We said that medical opinions are not conclusive as to the *degree* of permanent partial disability. In both of those cases there was medical evidence establishing that permanent partial disability was caused by an injury. I cannot find where we have said that a claimant's testimony, contrary to medical evidence adduced by him, is substantial evidence that permanent disability resulted from an injury. Certainly we have not said so where the claimant sought to establish permanent disability from an injury following a prior permanently disabling injury.

We have held that where questions before the commission address themselves peculiarly to the realm of scientific knowledge, the commission cannot reach its own independent medical conclusions in defiance of all medical testimony in the record. *W. Shanhouse & Sons* v. *Simms,* 224 Ark. 86, 272 S. W. 2d 68. Even if it could be said that the question whether the claimant's back injury caused any permanent disability was not peculiarly within the realm of scientific knowledge, I do not see how the existence of causal connection of a permanent partial disability as between two back injuries can be taken out of that field.

If we say that claimant's increased rate of absenteeism after the second injury is sufficient evidence to support the commission's finding, in spite of her testimony that she was really unable to do the work after the first injury and in spite of all the medical testimony in the record, we have not only abandoned the rule of *Shanhouse,* we have discarded the substantial evidence rule in favor of something less than a scintilla.

I understand the majority opinion to imply that there is sufficient doubt about evidentiary support for permanent disability arising from the second injury that an outright affirmance of the commission's findings would be inappropriate. The commission's action is approved on the basis that it found a total of 35% disability, that there is overall substantial evidence to support that total percentage of disability and that the matter of allocation of the disability to any particular injury somehow becomes unnecessary. I cannot agree to this approach. I feel that the court is making a factual determination as to the award and usurping the function of the Workmen's Compensation Commission.

The findings of fact made by the commission are *conclusive* and *binding* upon the courts. Ark. Stat. Ann. § 81-1325 (b) (Repl. 1960); *John Bishop Construction Co.* v. *Orlicek,* 224 Ark. 182, 272 S. W. 2d 820.

The commission did not find that appellee had suffered a 35% disability from the first injury or that

allocation to the separate injuries was unnecessary. The commission specifically found that the claimant suffered a 25% permanent partial disability to the body as a whole as a result of the first injury and an additional 10% as a result of the second injury and based its award on these findings. Those percentages of disability are binding upon us upon review, which is limited to questions of law. The courts may modify, reverse, remand for rehearing or set aside the order or award, if:

1. The commission acted without or in excess of its powers.

2. The order or award was procured by fraud.

3. The facts found by the commission do not support the order or award.

4. There was not sufficient competent evidence in the record to warrant the making of the order or award.

See *Solid Steel Scissors Co.* v. *Kennedy,* 205 Ark. 958, 171 S. W. 2d 929.

The question whether there is substantial evidence to support the commission's findings of fact is one of law. *Eddington* v. *City Electric Co.,* 237 Ark. 804, 376 S. W. 2d 550. If properly supported they have the force and effect of a jury verdict. *John Bishop Construction Co.* v. *Orlicek,* supra. We cannot affirm, in spite of an unsupported fact finding, on trial de novo, as we might in a chancery case. See *Solid Steel Scissors Co.* v. *Kennedy,* supra. We are left, I submit, with a finding of fact supported by substantial evidence that appellee suffered only 25% permanent partial disability to the body as a whole due to her first injury. Appellee did not appeal from that finding. If the finding that a 10% disability attributable to the second injury was not supported by substantial evidence, then there is no basis for an award based on a 35% permanent partial disability on the first injury. The only modification we

could make would be to reduce the amount awarded to that amount due for a 25% permanent partial disability.

I have been unable to find any precedent for this court's action in this case. As a matter of fact, we have said that the courts exceed their authority when they attempt to determine the amount of an award. *W. C Burrow Construction Co.* v. *Langley,* 238 Ark. 992, 386 S. W. 2d 484. In that case the commission had awarded the claimant 15% permanent partial disability due to injuries to his back. The claimant's disabilities increased, but the commission found the increase to be unrelated to his injury. We agreed with the circuit court that appellee was entitled to an additional disability award, but held that the amount of the award was the function of the commission and that the courts were without authority in the matter. The case was remanded for determination of a proper award by the commission.

In *Moss* v. *El Dorado Drilling Co.,* 237 Ark. 80, 371 S. W. 2d 528, we were confronted with a case involving two separate back injuries, wherein there was a question whether the claimant's disability was attributable to the first or the second injury. While two employers were involved there, we said that there was substantial evidence to prove that the claimant's disability was due to the first injury and no substantial evidence to the contrary. The case was remanded to the commission for further proceedings not inconsistent with our opinion.

In *Long-Bell Lumber Co.* v. *Mitchell,* 206 Ark. 854, 177 S. W. 2d 920, even though the commission made an award, there was no specific finding of temporary partial disability. The commission had made a finding that there was no permanent partial disability, but stated that the claimant was suffering from the effects of the injury. Its award was for an operation and for temporary partial compensation. While we said that the commission had evidently found that there

was a temporary partial disability, in spite of its failure to specifically say so, we remanded the case for further proceedings without expression of our opinion on the facts, saying that this was the correct procedure on the matter of a definite finding on temporary partial disability.

Neither of these cases is exactly parallel with the present one. All are indicative, however, that the commission should make the fact findings as to the extent of disability attributable to a particular injury. The most that could be said is that they would indicate the possibility of a remand of this case. In my opinion, we cannot affirm, but must either reduce the award to the amount proper for a 25% permanent partial disability or remand to the commission for further proceedings.

J. FRED JONES, Justice, dissenting. I concur in the results reached by the majority in this case, but I disagree with the manner in which the Commission arrived at the results and as affirmed by the majority opinion.

This case concerns *permanent partial* disability and not temporary total disability.[1] Permanent partial disability may consist of functional disability, loss in earning capacity, or it may consist of a combination of both functional disability and loss in earning capacity. *Wilson & Co., Inc.* v. *Christman,* 244 Ark. 132, 424 S. W. 2d 863.

In the case at bar Mrs. Hardy sustained an injury to her back in 1968 which resulted in the surgical removal of a large herniated disc, and even though she returned to work following her recovery from the surgery, there is no question that she still had some disability resulting from her injury. Her doctors advised her that she was not to do any heavy lifting and she testified that she was unable to do so. She testified that she was not actually able to work following her 1968 injury but that she attempted to do so because she felt that she had to

[1]For a case lacking substantial evidence to separate disabilities in a *temporary total* disability case, see *Hollifield* v. *Bird & Son, Inc.,* 227 Ark. 703, 301 S. W. 2d 27.

work. As a matter of fact the employer, who was self-insured, recognized that Mrs. Hardy had sustained some permanent partial disability as a result of her 1968 injury, and on the basis of medical reports paid her for a 10% permanent partial disability to the body as a whole.

Mrs. Hardy admittedly sustained a subsequent accidental injury while working for the same employer when she slipped on the floor and fell in 1969. Following this second injury her previous symptoms were revived and aggravated; she admittedly suffered some temporary total disability for which she was paid compensation due to this second injury. She was given rather extensive medical examinations following the second injury and none of the doctors who examined her were able to find any physical impairment that she did not have following her first injury and surgery, so they concluded that whatever disability she had resulted from the first injury. This being the situation, the Commission had available all the evidence in making a judicial determination of the full extent of Mrs. Hardy's overall disability as a result of the two injuries, but was left with only the testimony of Mrs. Hardy in attempting to arrive at how much of her disability was occasioned by the first injury and how much was occasioned by the second injury. As a matter of fact Mrs. Hardy made no claim for permanent injury resulting from the second injury. Mrs. Hardy's contentions were stated by her attorney at the hearing before the referee as follows:

> "On behalf of the claimant, Mildred Hardy, it is her contention that she suffered an injury to her back on January 26, 1968, in the course of her employment with Dacus Casket Company. That this injury necessitated the herniated L-4 disc and as a result of this injury and subsequent surgery she has been permanently disabled. That her permanent disability has been fixed by her attending physician 10 to 15% to the body as a whole. This percentage fixed by the physician related to functional disability only and that due to other factors claimant is

permanently disabled to a greater degree than 10 to 15% to the body as a whole. Secondly, the claimant, on February 6th, 1969, fell while at work for Dacus Casket Company and received a new injury to her back. That as a result of the new injury she was hospitalized by Doctors Canale and Deneke for the purpose of performing a myelogram on May 26, 1969. That she was not released as able to perform any duties by Dr. Canale until June 14, 1969, and she is entitled to additional compensation for this period of time—that is May 26th of '69 through June 14th of '69 and also that the respondent, Dacus, is liable for the payment of all of the doctors, hospital and drug bills relating to both injuries."

Mrs. Hardy's testimony, pertinent to the issue, is as follows:

"A. When I first went back to work Buddy put me on lining panels and I thought I could line out panels.

Q. Buddy is the foreman?

A. Yes and I told him that I just could not lift those panels that I would like to try lining out—of course he takes his time about putting anybody anywhere.

Q. At any rate, did he let you?

A. He finally put me back over there lining out.

Q. Were you able to perform that work?

A. I did.

Q. And you were doing all right until you fell the second time?

A. I was working.

Q. Did you miss any time regularly?

A. Certainly I missed some work.

Q. I think you said you had three full weeks and that is all?

A. I am not sure—it might have been four weeks —full checks that I drew—from June 24th until I was hurt again in February of this year.

Q. You were able to perform your work after you went back after your first injury?

A. Well I worked—I wasn't able, no, but I had to work.

Q. Do you feel that you are in worse shape now than you were after your first injury?

A. Well I was not really able to do that after my first injury but as I said I had to work.

Q. Do you think that you are now back to the point that you were after your first injury when you returned to work?

A. I think the second injury more than just strained—well I am not a doctor but anyway I don't know—I still have difficulty.

Q. What I am trying to find out—are you having any more difficulty now after the second accident than you did after the first accident?

A. Yes—I guess it is about—

Q. Do you think you have gotten back to the point that you were immediately before your second fall?

A. No."

It is apparent to me from the record before us that following her injury and surgery in 1968, Mrs. Hardy was not able to do the work she had previously been doing but did it anyway because she felt that she had to, and because her employer finally permitted her to more or less select the type of work she did. After Mrs. Hardy was terminated following her second injury, and after she was released from medical treatment following that injury, she was for the first time since either injury, forced into the open labor market and because of the disability she had sustained she was unable to obtain available employment which she had previously done without difficulty.

In my opinion there is substantial evidence to sustain the Commission's findings that the claimant has suffered 35% permanent partial disability to her body as a whole, but I find no evidence in the record whereby 25% of the disability can be attributed to the first injury and 10% to the second injury. It is my view that the second injury and resulting disability only evidenced and emphasized the *permanent partial* disability the claimant already had; and it is my opinion that under all the evidence pertaining to the second injury, one could reasonably assume that Mrs. Hardy could and would have returned to work without disability or complaint following her release by the doctors following her second injury, had she never had the first injury and disability resulting therefrom. By the same token, the evidence of record convinces me that if Mrs. Hardy had never sustained her second injury, she would have experienced the same difficulty in finding employment as she did experience following her termination from "lining out" caskets.

I would remand for a simple determination of the nature and extent of the disability and an award of benefits.

RUDY LEE SUTHERLAND *v.* ARKANSAS DEPARTMENT OF INSURANCE

5-5609 467 S. W. 2d 724

Opinion delivered June 14, 1971

Glenn F. Walther, for appellant.

Thomas S. Stone, Early R. Wiseman and Stephen E. Safly, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Rudy Lee Sutherland, is a licensed insurance agent under the laws of Arkansas, having been licensed in April, 1968. Sutherland, in December, 1969, was convicted in California of a felony, such felony being equivalent to embezzlement in this state.[1] On April 6, 1970, the Insurance Commis-

[1]According to the statement of the case, Sutherland is a former Arkansan who had moved to California, and operated an insurance agency for several years; his California license was revoked on April 11, 1968, and the Arkansas license granted within a few days thereafter, the revocation being unknown to the Arkansas Insurance Commissioner.

sioner of the State of Arkansas conducted a hearing for the purpose of determining whether Sutherland's license should be cancelled, and after taking evidence, issued an order revoking the license of Sutherland on the basis of Sub-Paragraph (e) of Paragraph 1 of Ark. Stat. Ann. § 66-2835 (Repl. 1966), which gives as one of the grounds for revocation the following: "Conviction, by final judgment, of a felony involving moral turpitude." Thereupon the commissioner ordered appellant's license to sell insurance cancelled. In the meantime, Sutherland had appealed the conviction in the California court to the appellate courts, and he appealed the cancellation order to the Pulaski County Circuit Court, asserting that he had not been convicted by a "final judgment" since his case was on appeal; that final conviction would not occur until the highest state appellate court handling this type of case had affirmed the conviction. Thereafter, the Circuit Court, (Second Division) of Pulaski County, not agreeing with this contention, affirmed the order of the commissioner revoking the license of the appellant, and from the judgment so entered, Sutherland brings this Appeal. Three points are argued for reversal, but all relate to whether the judgment of the California trial court was a "final judgment", the judgement of conviction now pending on appeal.

At the outset, it might be stated that it is argued by appellant, that under California law, Sutherland has not been convicted by final judgment,[2] a point not raised in the trial court, but even had this question been timely raised, there would be no point in discussing the California law, for the matter is controlled by Arkansas law, *i. e.*, the judgment entered by the California trial court, insofar as it relates to the question at hand, is governed by whether the judgment was final under Arkansas law. This is true because of the ancient principle

[2]It would appear from the California statute that appellant's argument would be erroneous. Pen. C. A. § 1237 provides that an appeal may be taken by a defendant: 1. "From a final judgment of conviction; an order granting probation shall be deemed to be a final judgment within the meaning of this section. . . ." The cases are not entirely clear as they do not relate to circumstances similar to those in the present judgment.

of law that where the enforcement of the foreign law would contravene the established policy of the state of the forum, the law of the forum governs. See *Beauchamp* v. *Bertig*, 90 Ark. 351, 119 S. W. 75. See also Leflar, American Conflicts Law (1968) § 109 p. 251. The Arkansas view of the question presented was set forth in 1917 in the case of *Huddleston* v. *Craighead County*, 128 Ark. 287, 194 S. W. 17. In 1935 this case was cited and relied upon by this court in its holding in *State Medical Board* v. *Rodgers*, 190 Ark. 266, 79 S. W. 2d 83, a case involving the revocation of a medical license. As recently as June 15, 1970, the holdings in *Huddleston* and *Rodgers* were reiterated in *Tucker* v. *State*, 248 Ark. 979, 455 S. W. 2d 888.[3] Of course, the General Assembly, in enacting legislation, is presumed to be familiar with the holdings of the Arkansas Supreme Court, *Lumbermen's Mut. Cas. Co.* v. *Moses*, 224 Ark. 67, 271 S. W. 2d 780, and accordingly was presumed to be familiar with the cases just cited, when passing the statute, now codified as Section 66-2835.

Before discussing the application of these cases to the instant question, we must first examine the proceedings in California. The record reflects that on December 9, 1969, the jury returned the following verdict:

"IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE The People of the State of California, Plaintiff, vs. RUDY LEE SUTHERLAND, Defendant. No. C-21263 VERDICT We, the Jury in the above entitled action find the Defendant, RUDY LEE SUTHERLAND, Guilty of the crime of Felony, to-wit: Violation of Sections 484-487 of the Penal Code of the State of California (Grand Theft) as charged in the In-

[3]All of these cases contain the language that an "accused does not become a *convict* until there has been a judgment and sentence by the court". Actually, this language was not pertinent in *Rodgers* and *Tucker*, and was only copied from *Huddleston* where it was pertinent, the statute there in question providing that a county would not be liable for costs where the defendant was convicted until execution should have been issued against the property of the "convict". The court then used the language heretofore quoted.

formation. Roma L. Marx, Foreman Dated: Dec. 9, 1969."

Thereupon, the court excused the jurors and set for hearing a "Motion for New Trial and Probation and Sentencing set for January 9, 1970 at 1:45 P. M. in Department 13". On that date, the record reveals the following:

"Defendant having been arraigned for Judgment and it appearing that there is no legal cause why judgment should not be pronounced and the Court having read and considered the probation report, it is the judgment of the Court that imposition of sentence be suspended for three (3) years and that the defendant shall be placed on probation, subject to the following terms and conditions:

(1) serve nine (9) months in the Orange County Jail;

(2) obey all the rules and regulations of the Orange County Sheriff with regard to prisoners;

(3) violate no laws;

(4) obey the usual terms and conditions of probation of the State supervising the probation;

(5) on release from Orange County Jail, defendant shall not leave this State without the approval of his probation officer, who is hereby authorized to arrange and provide out-of-state supervision;

(6) not to engage in any occupation or business without the prior approval of his probation officer;

(7) manage his business or occupation in accordance with the supervision of his probation officer, and in the event defendant is employed as an agent of any principal in any business,

> defendant shall not accept funds from parties dealing with the principal, unless such funds are in the form of check or money order and made payable to the principal, and then defendant shall transfer such funds immediately to the principal, and further, defendant shall not maintain a trust account of his own for holding such funds, regardless of the nature of his activity, and if he is paid by his principal, the payment to him shall be forwarded by the principal to him and he shall not take his "percentage" or commission out of the funds he obtains from customers or clients.

The Court further decreed that it is the present intent of the Court that this offense may be reduced to a misdemeanor if the defendant leads an exemplary life during the period of the probation. Defendant remanded to the custody of the Orange County Sheriff. Notice of Appeal having been filed, bail pending appeal is set at $5,000.00 plus penalty assessment."

In *State Medical Board* v. *Rodgers supra,* this court squarely passed upon this question. Rodgers entered a plea of guilty to a charge of possessing counterfeit money in the Federal District Court, and on November 10, 1933, was ordered confined in the United States Reformatory for a period of three years. Subsequently however, on March 1, 1934, the court ordered that Rodgers be held on probation for the term and period of five years. In the meantime, the State Medical Board, on January 10, 1934, had entered an order revoking his license to practice medicine in the State of Arkansas, from which order Rodgers appealed. The circuit court rendered judgment vacating and setting aside the order of revocation, and this court affirmed the circuit court, stating:

"In view of the fact that appellee has not been required to suffer the punishment prescribed in the judgment and sentence abovementioned, the question naturally arises as to whether he has been convicted within the meaning of § 8242, Crawford & Moses' Digest. It is

true that he pleaded guilty to a crime involving moral turpitude, and that he was sentenced to serve three years in the reformatory, but the court before whom that case was tried saw proper to set aside the sentence and put him on probation for a period of five years. On November 21, 1933, the execution of the sentence imposed was suspended until March 1, 1934, and on the latter date it was further suspended for five years; therefore at the time appellant held its meeting and revoked appellee's license, January 10, 1934, the sentence theretofore imposed had been suspended and something still remained to be done before he could be said to have been convicted within the meaning of the statute. * * * * *The judgment rendered is not a final one.* [Our emphasis] Evidently it was in the contemplation of the court that some further order might be entered. * * * * There has been no final judgment entered because the sentence has been suspended, and the appellee has not been required to surrender himself in execution of such judgment. There not being a final judgment of conviction, appellant board was without authority, under this provision of the statute and under the charge made, to revoke his license, and the circuit court correctly quashed said order."

Very clearly the California court judgment suspended the imposition of the felony sentence for three years and placed appellant on probation. Likewise, as stated in *Rodgers*, the court contemplated that some further order might be entered for the judgment recites:

"The Court further decreed that it is the present intent of the Court that this offense may be reduced to a misdemeanor if the defendant leads an exemplary life during the period of the probation."

It is thus apparent that, under Arkansas holdings, Sutherland has not been convicted "by final judgment".

Of course, this does not necessarily mean that the Commissioner may not revoke Sutherland's license, for other causes for revocation of license are listed in Ark.

Stat. Ann. (Repl. 1966) § 66-2835.[4] But it is clear that there can be no revocation based upon the California conviction as it presently stands.

Reversed.

[redacted]

J. L. FREEMAN, INCOMPETENT, BY HIS GUARDIAN *v.* CARMIE F. FREEMAN ET UX

5-5612 467 S. W. 2d 703

Opinion delivered June 14, 1971

[redacted]

William H. Arnold, for appellant.

James C. Cole, for appellees.

GEORGE ROSE SMITH, Justice. The appellant J. L. Freeman, now an incompetent person acting through his guardian, brought this suit to cancel a deed by which Freeman and his wife, who died before the suit was filed, purportedly conveyed a farm to their son, the appellee

[4]For instance, it might well be that the facts, upon which the conviction was obtained in California, if presented to the commissioner, would support a revocation under sub-section (d).

Carmie F. Freeman. The complaint asserted that the signatures of both grantors were forgeries. The chancellor found Mrs. Freeman's signature to be a forgery, but he found Freeman's signature to be genuine. The correctness of the latter finding is the main issue now before us.

Trying the case *de novo,* we cannot say that the decree is against the weight of the evidence. It was rather natural for Carmie's parents to convey the farm to him. He returned from military service in 1947 and thereafter lived on the property with his parents and with his own family. He farmed the land in partnership with his father. The elder Freeman was too old to farm the property actively when he and his wife first conveyed the land to Carmie on November 14, 1966. The validity of that deed is not questioned.

On August 19, 1968, the older couple conveyed the rest of their real property to their other two children. Those two children then learned for the first time about the earlier deed to Carmie. A family dispute arose, but it ended when Carmie and his wife voluntarily conveyed the farm back to Carmie's parents on September 4, 1968. Only twenty-two days later, however, the elder Freemans ostensibly again deeded the farm to Carmie and his wife. That is the deed now challenged as a forgery.

A handwriting expert testified for the plaintiff that both the grantors' signatures were forgeries. It was that witness's opinion that Mrs. Freeman's signature was a traced forgery while that of her husband was a simulated forgery.

There is cogent proof to the contrary. As we have said, the parents' conveyance of the farm to the son who had lived and worked with them for almost twenty years was a natural disposition of the property. Carmie testified that his parents signed the deed now in controversy. J. E. Still, the attorney who prepared the deed and took the acknowledgment, testified positively that Freeman signed the instrument in his presence, though Still was not equally certain about Mrs. Freeman's signature. The

deed was kept in a lock box to which the elder Freeman had access—hardly a likely place for Carmie to keep a forged instrument. Upon the record as a whole we do not find the preponderance of the evidence to be contrary to the chancellor's conclusion that Freeman's signature was genuine.

That conclusion also disposes of the appellant's remaining contentions. It is argued that since a quitclaim deed does not convey an after-acquired title, Freeman's deed as a tenant by the entirety did not convey any interest passing to Freeman upon his wife's subsequent death. That argument is unsound. A deed executed by the husband alone carries his survivorship interest as a present estate, so that the entire title vests in the grantee if the husband does survive the wife. "The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him; but, if he survive, the conveyance becomes as effective to pass the whole estate as it would had he been sole seized at the time of the conveyance." *Davies* v. *Johnson,* 124 Ark. 390, 187 S. W. 323 (1916).

It is also argued that the deed was invalid if Mrs. Freeman's signature was forged, because a conveyance of the homestead by the husband alone is void. *Hall* v. *Mitchell,* 175 Ark. 641, 1 S. W. 2d 59 (1927). No such contention was made in the plaintiff's complaint. Moreover, the Freemans relinquished their homestead right by their valid deed to Carmie in 1966, and there is no showing that they occupied the land or otherwise reestablished a homestead right during their twenty-two days of ownership in 1968.

Affirmed.

LELAND HENLEY, CHAIRMAN *v.* W. L. GOGGINS ET AL

5-5605 467 S. W. 2d 697

Opinion delivered June 14, 1971

John B. Driver, for appellant.

N. J. Henley, for appellees.

LYLE BROWN, Justice. The appellant and the two appellees constitute the Searcy County Board of Election Commissioners. The commissioners met twenty days prior to the March 9, 1971, school election, to select judges and clerks. Appellant, a Republican and the minority member of the commission, insisted that he was entitled to select one judge and one clerk for each voting precinct. Appellees contended that such a provision in the general election laws does not apply to school elections, those elections being nonpartisan. The circuit court agreed with appellees and denied appellant's petition for a writ of mandamus, which was heard on February 22. Appellant's only issue is that, as the representative of the minority party in Searcy County, he was entitled to appoint one judge and one clerk in the St. Joe School District 69 election. Appellees suggest that the appeal should be dismissed. That is on the ground

that the election was held on March 9 and the issue is therefore moot.

The only explicit provision in our law for the selection of election judges and clerks on a partisan basis is found in Act 465 of 1969. Section 6(d) of that Act provides that for a *general* election three judges and two clerks shall be selected for each ballot box. It provides that two judges and one clerk shall be chosen by those two members of the County Board of Election Commissioners who represent the majority party, and that the other judge and clerk shall be chosen by the third member of the board who represents the minority party. See Ark. Stat. Ann. § 3-506(d) (Supp. 1969).

To sustain his contention that § 3-506(d) applies to school elections, appellant cites us to Ark. Stat. Ann. § 80-317 (Repl. 1960):

> Hereafter the County Board of Election Commissioners shall be charged with the responsibility of selecting judges and clerks of all school elections held in the several counties of this State. Said County Board of Election Commissioners shall also be authorized and empowered to make all necessary arrangements for conducting school elections *and the general election laws, insofar as applicable, shall apply to school elections.* (Emphasis added.)

Section 80-317 comes from Acts 1949, No. 56. Section 80-318 also provides that the election commissioners shall provide the election supplies and appoint the judges and clerks. That section was enacted in 1951.

Appellant points up the clause in § 80-317, "the general election laws, insofar as applicable, shall apply to school elections." Hence, appellant says, the selection of judges and clerks on a partisan basis, as provided in Section 6(d) of Act 465, is applicable. But there is another provision in Act 465 which runs contrary to appellant's argument. That provision is codified in Ark. Stat. Ann. § 3-101(c) as follows:

> "General or special election" shall mean the regular biennial or annual elections for election of United States, State, District, County, Township, and Municipal officials, and the special elections to fill vacancies therein. *Such term, as used in this Act, shall not apply to school elections or officials of school districts.* (Emphasis added.)

We therefore conclude that when Act 465 provides for partisan judges and clerks it refers only to "general or special elections" as the term is defined in the Act and that its application to school elections is specifically excluded in the section just cited. That conclusion is still more plausible when we consider the fact that school elections are nonpartisan; candidates run as independents, their names being placed on the ballot by the requisite number of signatures on a petition. Furthermore, in providing for the selection of judges and clerks in §§ 80-317 and 318, the Legislature could have easily inserted the partisan selection provision had it so desired.

Appellees' argument that this case is moot and should therefore be dismissed is without merit. We have many times decided election cases that actually had become moot because "controversies about the election laws present issues of public interest that ought to be set at rest." *Rockefeller* v. *Purcell,* 245 Ark. 536, 434 S. W. 2d 72 (1968).

Affirmed.

J. Q. FLOYD *v.* HOME INSURANCE COMPANY

5-5614 467 S. W. 2d 698

Opinion delivered June 14, 1971

W. G. Dinning, Jr., for appellant.

Schieffler & Murray and *Terral, Rawlings, Matthews & Purtle,* for appellee.

JOHN A. FOGLEMAN, Justice. This appeal is a satellite of *Home Insurance Company* v. *Dearing,* 248 Ark. 574, 452 S. W. 2d 852. It comes from a summary judgment for the recovery by appellee Home Insurance Company of $2,348.83 paid appellant Floyd as its insured on a policy of automobile insurance which included collision

coverage. Appellant and Mrs. P. M. Dearing were involved in an automobile collision on May 14, 1967. As pointed out in *Dearing,* appellant's suit against her for damages was concluded by an order of dismissal with prejudice entered on November 28, 1967.

It is admitted that appellee paid Floyd the above amount for collision damage on January 8, 1968, on the basis of a loan receipt and proof of loss executed by Floyd. The loan receipt recites that appellee made the payment as a loan, payable only to the extent of Floyd's net recovery from anyone on account of the collision. In the receipt, Floyd pledged his recovery as security for repayment and agreed to prosecute suit for said loss with due diligence, at the expense and under the exclusive direction and control of appellee. In the proof of loss, Floyd made the following assertions:

> Nothing has been done by, or with, the privity or consent of the insured or this affiant to violate the terms and conditions of this policy or render it void . . . No attempt has been made to deceive the insurer in any manner as to the cause and the extent of said loss or otherwise.

It is also admitted that before making said payment the supervising adjuster of appellee addressed a letter dated December 18, 1967, to appellant's attorney acknowledging receipt of all copies of the pleadings in appellant's case against Mrs. Dearing, forwarded by the local representative of the General Adjustment Bureau which had represented appellee in the investigation and processing of matters pertaining to the collision. This letter contained the following paragraph:

> Before making payment on this claim, we would like to have your assurance that our subrogation claim has been protected in the settlement of this claim. We note that you did delete the property damage prayer from the pleadings but would just like to have your assurance that our claim will be protected.

Reply was made by appellant's attorney on January 2, 1968, as follows:

> I have furnished you copies of the proceedings, and the Farm Bureau Insurance Company and Mr. Jimason Daggett of Marianna, its attorney, are completely advised that the settlement made with them covered personal injuries only.

On August 20, 1968, appellant filed the suit against Mrs. Dearing which is the action that culminated as *Home Insurance Company* v. *Dearing,* supra. When Mrs. Dearing entered her plea of res judicata based on the order of dismissal, appellee filed an amendment to its complaint making Floyd a party to the action. In this amendment appellee alleged that, if defense of res judicata were sustained, it would then be entitled to recover the amount it paid to appellant Floyd for breach of his proof of loss and loan receipt upon the basis of which he was paid. To this pleading Floyd filed an answer and cross-complaint, alleging that he included the property damage claim in his suit against Mrs. Dearing at the insistence of, and with the knowledge of, the adjustment bureau, with the understanding that, if he did not recover from Mrs. Dearing, recovery would be had under his policy with appellee. His cross-complaint was based upon his assertion that appellee had breached its contract of insurance by filing suit against him.

After our decision in *Dearing,* appellee moved for summary judgment upon the basis of the correspondence between its supervising adjuster and appellant's attorney. Appellant responded and filed the affidavit of his attorney. This affiant stated that he was in constant contact with the adjustment bureau and its Helena manager whose office adjoined the attorney's, that this manager investigated the accident, interviewed witnesses and delivered all information gathered to the affiant for the purpose of attempting to collect the vehicle damage from Mrs. Dearing, and obtained a replacement vehicle for appellant at a discount. He further stated that there was a complete understanding with the adjustment bureau manager that Floyd would withhold his

claim under appellee's insurance policy until the settlement of the Dearing litigation but that appellant received nothing from Mrs. Dearing or her insurance carrier for his vehicle damage by reason of the amendment to the complaint and the dismissal of the action. He also deposed that the loan receipt was filed by Floyd in his presence and in the presence of the adjustment bureau manager with full knowledge of the facts set out in the affidavit.

We have clearly recognized that a cause of action in tort may be split upon settlement with the tort-feasor by specific agreement of the parties. *St. Paul Fire and Marine Insurance Company* v. *Wood,* 242 Ark. 879, 416 S. W. 2d 322. There is no suggestion that there was any agreement between Floyd and Mrs. Dearing to this effect, as we pointed out in *Dearing*. We have also said that no act of an insured releasing a tort-feasor from liability could defeat the insurer's rights when it was done without knowledge or consent of the insurer and with the tort-feasor's full knowledge of the insurer's right of subrogation. *Sentry Ins. Co.* v. *Stuart,* 246 Ark. 680, 439 S. W. 2d 797. In that case, we held that a settlement made by the tort-feasor under those circumstances constituted consent to the splitting of an otherwise indivisible cause of action. In *Dearing* we pointed out that the appellee had no subrogation rights in this case prior to the recovery by Floyd from Mrs. Dearing or her insurance carrier and that there had been no court judgment or even any suit filed in *Sentry*.

The only reasonable inference to be drawn from the inquiry by appellant's supervising adjuster is that the insurance company was aware of our holdings that settlement could be accomplished in a manner which split a cause of action in tort and which would protect the rights of appellee. Appellee's response through his attorney did not put the company on notice that a dismissal with prejudice of the *Floyd* v. *Dearing* case had been entered, and there is nothing else in the record which would have indicated to either the company or the adjustment bureau employed by it that this was the manner in which the case was being terminated. Ap-

pellee's statement that the agent of the adjustment bureau had full knowledge of all the facts set out in his affidavit falls far short of controverting the only reasonable inference to be drawn from appellant's statements in the proof of loss and loan receipt and the cited correspondence, *i. e.,* that appellant assured appellee that the Floyd-Dearing litigation had been settled without impairment of the right of recovery of the vehicle damage from Mrs. Dearing. As we said in *Dearing,* the order of dismissal constituted a complete defense against this recovery under the principle applied in *Motors Ins. Corp.* v. *Coker,* 218 Ark. 653, 238 S. W. 2d 491, and nothing was done which amounted to a splitting of the cause of action. Appellant cannot be heard to say that he was not aware of the effect of this order, as the rule of law has been well established in this state. Since the admissions upon which appellee relied for its motion showed a prima facie right to recover, and appellee's controverting affidavit did not set forth specific facts showing that there was a genuine fact issue for trial, we affirm the summary judgment.

The judgment might also have been affirmed for appellant's failure to abstract the subrogation agreement and loan receipt in compliance with Rule 9, had the appellee not cured the defect by abstracting both. *Wells* v. *Smith,* 198 Ark. 476, 129 S. W. 2d 251; *Gardner* v. *Farmers Electric Co-op. Corp.,* 232 Ark. 435, 338 S. W. 2d 206; *DeSoto Hotel & Baths* v. *Luth,* 239 Ark. 424, 389 S. W. 2d 897.

HARRIS, C. J., dissents.

TOMMY LYONS *v.* STATE OF ARKANSAS

5598 467 S. W. 2d 701

Opinion delivered June 14, 1971

Odell C. Carter, for appellant.

Ray Thornton, Attorney General; *Milton R. Lueken,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was convicted of escape from the Arkansas State Penitentiary. His oral demurrer to the information, based upon the contention that the venue was not in Lincoln County, made after a jury was empaneled, but before any evidence was heard, was overruled. His attorney argued that, since he had been granted a five-day furlough to go to Pulaski County, the venue of any alleged crime of escape would be in that county. The attorney also asked that the case be transferred to Pulaski County, but this motion was denied.

The trial proceeded and the state's witnesses, all officials of the Arkansas Department of Correction, testified that: under the terms of his furlough, Lyons was

supposed to go directly to Pulaski County; appellant did not return from his furlough on April 1, 1970, when he was scheduled to do so; none of them knew of his being in Lincoln County on that date; he was apprehended in Missouri on November 20, 1970.

Although appellant's attorney had stated during the in camera hearing on his original demurrer that the evidence would show that appellant reached Pulaski County, and left from that county, rather than Lincoln County, no witness testified that Lyons ever reached the county to which he was authorized to go. After the state rested, appellant renewed his demurrer and rested. He had also renewed his demurrer after the testimony of the first witness called by the state.

He asserts two points for reversal, but both are based upon the same argument, *i.e.,* that the proper venue was in Pulaski County, and that the state failed to prove venue in Lincoln County, relying upon *Thetstone* v. *State,* 32 Ark. 179, and *Jenks* v. *State,* 63 Ark. 312, 39 S. W. 361. The sufficiency of the evidence to otherwise show the crime of escape is not questioned.

Both of the above cases were decided long before the adoption of Initiated Act No. 3 in 1936. One section of that act [Ark. Stat. Ann. § 43-1426 (Repl. 1964)] provides:

> It shall be presumed upon trial that the offense charged in the indictment was committed within the jurisdiction of the court and the court may pronounce the proper judgment accordingly, unless the evidence affirmatively shows otherwise.

In considering this section of the statute in *Meador* v. *State,* 201 Ark. 1083, 148 S. W. 2d 653, we stated that an allegation in an information filed in Grant County that a crime was committed in Hot Spring County would have been a fatal variance were it not for this section, stating that it was the obvious purpose of this act to prevent miscarriages of justice for such reasons. We also stated that the evidence did not affirmatively

show that the larceny charge was committed outside the jurisdiction of the trial court.

In *Wise* v. *State,* 204 Ark. 743, 164 S. W. 2d 896, we held against a similar contention in a case where the charge was carnal abuse, because there was no evidence showing that the offense, if committed at all, was at another place in another jurisdiction. In *Stewart* v. *State,* 214 Ark. 497, 216 S. W. 2d 873, we held that the contention that the state failed to establish the venue was untenable by reason of the statutory presumption, because we found no affirmative evidence to show that the crime of larceny was not committed in the district and county alleged in the information. In *Cecil* v. *State,* 234 Ark. 129, 350 S. W. 2d 614, we held that the trial court correctly refused to instruct the jury that the state was required to prove the venue, in reliance on this statutory provision.

We find nothing in our statute which offends Article 2, Section 10, of the Arkansas Constitution providing that the accused is entitled to trial by impartial jury of the county in which the crime shall have been committed. There is no evidence that the crime was committed in any place other than Lincoln County, or that Lyons ever reached Pulaski County.

Because there was no affirmative evidence to show that the offense was committed outside Lincoln County, we affirm the judgment.

BYRD, J., dissents.

MELBA ANN JACKSON *v.* F. B. SMITH

5-5540 467 S. W. 2d 704

Opinion delivered June 14, 1971

House, Holmes & Jewell, for appellant.

Moore & Logan; By: *Roger V. Logan, Jr.,* for appellee.

J. FRED JONES, Justice. Melba Ann Jackson and F. B. Smith are the parents of a nine year old son, Tracy Lynn Smith. In September, 1967, they were divorced in the state of Texas and the custody of the minor child was awarded to the mother with the rights of visitation in the father. The mother married Mr. Jackson in 1968 and in 1970 they moved to Fairfield Bay in Van Buren County, Arkansas, where both Mr. and Mrs. Jackson are employed. Mr. Smith also remarried and on June 1, 1970, he filed a petition in the Van Buren County Chancery Court for a change in custody of the child.

The chancellor awarded a change in custody vesting the exclusive custody of said child in the father, F. B. Smith, subject to the rights of the mother to have the child visit her during Christmas school vacation each year, and from the second Sunday in June to the second Sunday of August of each year, with child support payments to continue at $20 per week during the period the child is with his mother.

On appeal to this court Mrs. Jackson relies on the following points for reversal:

> "The court erred in talking with the child privately in chambers.
>
> The court erred in granting permanent custody of the nine year old son to the father."

It is well settled that in child custody cases between divorced parents, the courts are primarily concerned with the welfare of the child. *Stephenson* v. *Stephenson,* 237 Ark. 724, 375 S. W. 2d 659. While chancery cases are tried de novo on appeal, (*Fye* v. *Tubbs,* 240 Ark. 634, 401 S. W. 2d 752) the rule is well established that a decree of the chancery court will not be disturbed on appeal unless it is against the preponderance of the evidence. *Lynn* v. *Quillen,* 178 Ark. 1150, 13 S. W. 2d 624; *Henry* v. *Irby,* 175 Ark. 614, 1 S. W. 2d 49; *Bornhoft* v. *Thompson,* 237 Ark. 256, 372 S. W. 2d 616. This rule is especially applicable in child custody cases where the chancellor is in a position to observe the parties as well as to hear their testimony. *Wilson* v. *Wilson,* 228 Ark. 789. 310 S. W. 2d 500; *Cheek* v. *Cheek,* 232 Ark. 1, 334 S. W. 2d 669.

As to the points relied on, it seems to be universally held that an interview with children in child custody cases is permissible with the consent or acquiescence of the parties. See 24 Am. Jur., Divorce and Separation, § 794. The child involved in the case at bar was a nine year old boy, and when interviewed by the chancellor, with the consent or acquiescence of the parents, we are unwilling to say that his *attitude* and *wishes* should not

have been considered by the chancellor, along with the other evidence in the case, in arriving at his decision as to the child's best welfare and resulting in the decree rendered. The case of *Grumlin* v. *Gray, et ux,* 246 Ark. 622, 439 S. W. 2d 290, cited and relied on by Mrs. Jackson in her brief, is distinguishable from the case at bar. In *Grumlin* the chancellor not only talked with the children in chambers, but he reviewed a welfare department report which was not in the record. In that case we expressed our handicap in having no information about the reasoning that led the chancellor to deny Mrs. Grumlin's petition, but we are not so handicapped in the case at bar.

In the case at bar the chancellor set out in his decree that there had been substantial changes in the circumstances of the parties growing out of the remarriage of both parties since the entry of the decree in Texas. He based his decree on the "oral evidence adduced in court, both parties having agreed that the court should be allowed to talk privately with Tracy Lynn Smith." The chancellor is sustained by the record as to the agreement that he should talk with the child. The record reveals that the solicitor for Mr. Smith requested the chancellor to talk with the child privately and the chancellor stated as follows: "The court would advise or visit with the boy only by the consent of both parties." Whereupon the solicitor for Mrs. Jackson stated: "Your Honor, my client has the child downstairs and for the purpose here if the court wanted to confer with him."

Both Mr. Smith and his present wife testified in the case. Mr. Smith testified as to difficulty he had experienced in exercising his visitation rights under the Texas decree, and as usual, in cases of this nature, there is some conflict in the testimony as to the reason for the difficulty experienced by Smith. The mother of the child had been married twice since she and Smith were divorced, and she had been married to Jackson for approximately two years. As to a part of Smith's difficulty, he testified as follows:

"Q. Since she has been married to this last husband have you ever gone to their home and been ordered away?

A. Yes.

Q. Have you ever been ordered away with a gun?

A. I was told the next time I come there I would be blowed off of the front porch, in those words.

Q. That is quote of what was said?

A. Yes."

Mr. Jackson did not testify in the case and the above testimony of Smith was not contradicted. Mr. Smith's testimony was also to the effect that the mother drinks intoxicants in the presence of the child and is neglectful of him. The evidence also indicates however, that a part of the difficulty was occasioned by Mr. Smith's objection to the way the child's mother was spending the $20 per week child support he was sending to her. Mr. Smith also testified that the child sustained an injury to his arm from the discharge of a sawed-off shotgun loaded with .00 buckshot kept in a a closet of his mother's home.

Mrs. Smith testified that she was anxious to have the child in their home in Texas; that neither she nor Mr. Smith drink intoxicants; that her marriage to Mr. Smith was her first marriage and that they have no children of their own. She testified that her husband had been married to the child's mother twice; that she has come to love the child very much and is anxious to assist in rearing him.

Mrs. Jackson testified that she is presently employed at Fairfield Bay and was also employed in Fort Worth, Texas, before coming to Arkansas. She testified that she attended church with the child in Texas, but

has been unable to do so since coming to Arkansas because of work habits; she says her husband works seven days a week and that she works six and sometimes seven days a week. As to the shotgun accident, Mrs. Jackson testified that she purchased a double-barreled modified (sawed-off) shotgun for protection when she was in Fort Worth; that she usually kept the gun locked up but that she and her husband had been awakened two previous nights before the accident by their dog barking in the backyard,

> "and we could tell that someone was in the alley way and my husband got up and went and got the gun and went outside, and naturally, he couldn't find anything and he brought the gun back and he locked it back up the first night and the second night he didn't lock it up and that is when the accident happened."

Under questioning by the court, Mrs. Jackson testified that the child comes to a playground near the office where she works, and that she is with him off and on during the day. As already stated, Mrs. Smith testified that she is willing and anxious to have the child in their home. Mrs. Jackson testified that she has been married to her present husband for approximately two years and, as already stated, Mr. Jackson did not testify at all in this case.

We are of the opinion that the chancellor's decree is not against the preponderance of the evidence and that it should be affirmed.

The decree is affirmed.

MODERN AMERICAN MORTGAGE CORP. *v.* WILLIAM R. NELSON ET UX

5-5592 469 S. W. 2d 124

Opinion delivered June 14, 1971
[Rehearing denied August 9, 1971.]

Wright, Lindsey & Jennings; By: *Isaac A. Scott, Jr.,* for appellant.

Shackleford & Shackleford, for appellees.

CONLEY BYRD, Justice. The trial court cancelled a deed from appellees William R. and Doris Nelson to Jimmy Ray Jones and voided a mortgage from Jones to appellant Modern American Mortgage Corporation. For reversal, appellant contends:

"I. The evidence failed to establish fraud or misrepresentation in the procurement of the warranty deed.

II. The failure of either Mr. or Mrs. Nelson to read the warranty deed estops them from denying the conveyance.

III. Modern American Mortgage Corporation is a bona fide purchaser of a mortgage without notice of defects, and the claim of fraud cannot be asserted against it."

The undisputed facts show that for some time prior to June 20, 1969, the Nelsons were in possession of and living on a small plot of land on Kenova Road in Smackover, Arkansas. After negotiations with R. W. Miller, Jr., agent of Jimmy Ray Jones d/b/a Imperial Builders Inc., the Nelsons on June 20, 1969, entered into a contract for construction of a new house on the same plot. The printed contract referred to Imperial Builders as "Contractor" and the Nelsons as "Purchasers." After stating that the contractor was to provide all labor, materials and things necessary for the proper construction, the contract recited:

"In consideration of the performance of the Contract, the Purchasers agree to pay the Contractor in current funds as compensation for his services hereunder the sum of $10,300.00 (for house only) to be paid on closing of FHA insured loan of $10,300.00. Buyer to furnish lot valued at $600.00. Builder to pay all closing cost. It is further agreed that said Purchasers will execute a note in the sum of $10,300.00 to Imperial Builders Inc., and also execute a mortgage upon said property to Imperial Builders Inc. as security herein, said property to be mortgaged is described as follows: (Legal description same as above.) It is further agreed that the note is to be returned and said mortgage removed and released upon closing of the loan and full payment thereof in the sum of $10,300.00 to Imperial Builders Inc. It is further agreed that this Contract is contingent upon the approval of Purchasers' loan from Modern American Mortgage Co. and Purchasers providing satisfactory proof of title to said land to Imperial Builders Inc."

Imperial Builders through R. W. Miller, Jr., again contacted the Nelsons sometime in July and had them execute another contract explaining that either the description or the wording was not right.

Thereafter Imperial Builders (Jones) through appellant obtained an FHA loan commitment on August 26, 1969, to insure a loan by appellant to the Nelsons when Imperial Builders completed the house.

On September 15, 1969, Jones and his wife executed a construction money mortgage on the same plot of ground to appellant. Appellant in making the loan relied upon a title insurance binder showing Jones to be the owner of the property. Neither appellant nor any of its agents inspected the property prior to the mortgage. Based upon FHA appraisals, appellant advanced a total of $6,310.00 to Jones.

Before the house was completed, Jones d/b/a Imperial Builders went bankrupt. After numerous labor and materialmen's liens had been filed, Mrs. Nelson contacted appellant and for the first time learned that she and her husband had conveyed the land on which they lived to Jones by a deed dated September 4, 1969.

Mrs. Nelson testified that they had never built a house before this one; that after they arrived at the terms of the June 20th contract, Miller again contacted them about the July contract; that the house was commenced in the latter part of August; and that Miller and Jones again contacted them about September 4th. At that time Miller had two or three papers clipped together—one of which was shorter than the other. At the same meeting she and her husband were to pick out the paneling. At this meeting Miller told them (the Nelsons) these additional papers had to be signed to get on with the building. Admittedly, Mrs. Nelson and her husband signed the papers without reading them. She concluded that one of these papers was the deed dated September 4th bearing her signature. She also testified that she would not have signed the deed had she known that it was a deed.

Mr. Nelson's testimony is similar to Mrs. Nelson's except that he thought that at one time he signed an application for an FHA commitment and also an authorization for a credit check.

John Kooistra, senior vice president of appellant, testified that a copy of the June 20th contract was in appellant's files; that appellant obtained the FHA commitment at the instance of Imperial Builders for the loan to be made to the Nelsons; that in making the construction money mortgage, appellant did not check to see who was in possession of the premises but relied solely upon the title insurance binder as to the fee title; and that disbursements had been made in the total amount of $6,310.00 based upon the FHA inspections. Mr. Kooistra stated that before appellant would make a construction money mortgage to a builder, appellant required a take-out letter from a lender and a copy of the builder's contract.

Jimmy Ray Jones denied that he was present when any documents were signed by the Nelsons. He admitted that Miller had been his salesman and that he had been unable to reach Miller.

POINT I. Appellant argues that this was a normal business transaction and that the circumstances of the execution of the warranty deed as related by the Nelsons cannot be construed as an attempt on the part of the builder to deceive. We disagree. It appears from the testimony that the Nelsons were ignorant of the papers necessary to secure the FHA commitments required to comply with the contract and that these details were gratuitously undertaken by the builder who apparently had had some experience in the matter. The representation that the execution of the papers was necessary to get on with the building was a misrepresentation, for by the express terms of the bargained contract a conveyance of the premises to the builder was not necessary to get on with the building.

POINT II. In arguing that the Nelsons are estopped to deny the conveyance to Jones, appellant relies upon

Upton v. *Tribilcock,* 91 U. S. 45 (1875) and *Stewart* v. *Fleming,* 105 Ark. 37, 150 S. W. 128 (1912).

In *Upton* it was pointed out that "a contractor must stand by the words of his contract, and, if he will not read what he signs, he alone is responsible for his omission." The same rule was applied in *Stewart* v. *Fleming, supra,* but in doing so the court pointed out that there was no misrepresentation as to any matter of inducement to the making of the lease, which, from the relative position of the parties, the one could be presumed to contract upon the faith and trust reposed in the other party. However, in the first appeal of *Stewart* v. *Fleming,* 96 Ark. 371 (1910), the applicable law was stated in this manner:

> " 'It is true that when the means of information are open to both parties alike, so that with ordinary prudence and vigilance each may be informed of the facts and rely upon his own judgment in regard to the thing to be performed or the subject-matter of the contract, if either fails to avail himself of his opportunities, he will not be heard to say he has been deceived. * * * But when the representation is made of a fact that has nothing to do with opinion, and is peculiarly within the knowledge of the person making it, the one receiving it has the absolute right to rely upon its truthfulness, though the means of ascertaining its falsity were fully open to him. It does not lie in the mouth of the declarant to say it was folly in the other party to believe him.' "

Thus it can be seen from the record that Jones was an experienced builder. The Nelsons who were building their first house had no knowledge of the papers necessary to be signed to get on with the construction. While it may have been folly for the Nelsons to sign without reading whatever Jones or his agent stuck in front of them, we cannot agree that as between them and Jones, Jones is in a position to argue that the Nelsons are estopped to say that they believed the representations made by Jones' agent. Of course appellant as assignee

of Jones stands in no better position than Jones, unless it stands in the position of a bona fide purchaser for value without notice.

POINT III. The question of whether a subsequent purchaser or mortgagee can be a purchaser for value and without notice as against a grantor continuing in possession after the execution of a conveyance has been before us a number of times. See *Turman* v. *Bell,* 54 Ark. 273 (1891); *Morgan* v. *McCuin,* 96 Ark. 512, 132 S. W. 459 (1910); *American Bldg. & Loan Assn.* v. *Warren,* 101 Ark. 163, 141 S. W. 765 (1911); and *Temple* v. *Tobias,* 186 Ark. 851, 56 S. W. 2d 585 (1933).

In *American Bldg. & Loan Assn.* v. *Warren, supra,* the applicable rule was stated:

> "Ordinarily, possession by a person under a contract of purchase, though unrecorded, is notice of his equitable rights and interests in the property. Actual possession is evidence of some title in the possessor, and puts the subsequent purchaser or mortgagee on notice as to the title which the occupant holds or claims in the property. Generally, actual, visible and exclusive possession is notice to the world of the title and interest of the possessor in the property, and it is incumbent upon the subsequent purchaser or mortgagee to make diligent inquiry to learn the nature of the interest and claim of such possessor; and if he does not do so, notice thereof will be imputed to him. (Citing cases.)
>
> "But it is urged that this rule does not obtain in cases where the grantor continues in possession of the property at the time of the grant and after the execution of the conveyance. It is urged that in such cases the law presumes that the grantor holds in subordination to the title which he has conveyed, and not in opposition to it; and that third persons dealing with property may presume that the possession of the grantor is only by sufferance of the grantee."

Here appellant had obtained an FHA commitment insuring a loan to be made by appellant to the Nelsons upon completion of the building. Appellant, as a prerequisite to making the construction loan, required not only the FHA commitment but also a copy of the builder's contract with the Nelsons. The contract showed that the Nelsons owned the lot upon which the house was to be built. Furthermore appellant relied upon the FHA inspections on the commitment to the Nelsons to advance the construction money to Jones. It would be illogical to say that appellant under the circumstances could presume that the possession of the Nelsons was at the sufferance of Jones. Since appellant cannot come within the exception to the rule that possession is notice to the world, it follows that appellant was not a purchaser for value without notice as against the Nelsons.

For the reasons herein stated, the decree is affirmed.

GEORGE ROSE SMITH AND FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot agree with the decree canceling Modern American Mortgage Company's mortgage and its affirmance here. If ever there was a case where the principle that, as between two innocent parties, the one whose negligence made a loss possible should bear it and be estopped to set up his prior right against the party without fault, this is one. See *Turman* v. *Bell,* 54 Ark. 273, 15 S. W. 886, 26 Am. St. R. 35. This rule applies in favor of a subsequent purchaser for value even where the maker of a deed carelessly executes it in reliance upon the false representations of a person in whom he placed confidence and trust. *Davidson* v. *Davidson,* 42 Ark. 362.

Bypassing the extremely doubtful proposition that appellees could possibly contend that their failure to read the deed they signed, and which they admit they had every opportunity to read, was justified by any express or implied representation by persons in whom the Nelsons had no specific reason to place trust and confidence, this record falls far short of showing that appellant was not a bona fide purchaser, as mortgagee,

without notice, actual or constructive, of defects in the title of Jimmy Ray Jones or unknown equities in the Nelsons and the claim of fraud should be unavailing against it.

The only contract of which Modern American can be charged with either notice or knowledge is that of June 20, 1969. In that contract, the Nelsons were called "purchasers." That contract specified that the "buyer" was to furnish a lot valued at $600. The completed house was to be mortgaged to appellant when completed to secure a loan to be insured by the Federal Housing Authority pursuant to its commitment issued to appellant. In making the construction loan, appellant relied upon the record title held by Jimmy Ray Jones d/b/a Imperial Builders and placed in him by the Nelsons, intentionally or negligently. Mr. Kooistra testified that, in every case in which there is an FHA commitment and the builder has title to the property, there is an assumption that the property will be conveyed to the person to whom the commitment runs upon termination of construction. He also said that the FHA does not insure construction loans on single family units. This testimony was undisputed. The construction by Jones was commenced in August and ceased in December. There were several inspections by the FHA upon the basis of which appellant made advances on the construction loan. The porch of the house in which the Nelsons lived was torn off to make room for the new one. The Nelsons themselves constructed a carport on the new house.

There can be no doubt that appellant gave valuable consideration for the mortgage executed by Jones. Consequently, the burden was upon the Nelsons to show that Modern American had actual or constructive notice of their rights and that appellant was not acting in good faith. *Ellis* v. *Nickle,* 193 Ark. 657, 101 S. W. 2d 958; *Scott* v. *Carnes,* 183 Ark. 650, 37 S. W. 2d 876; *Story* v. *Grayson,* 208 Ark. 1029, 185 S. W. 2d 287; *Smith* v. *Olin Industries,* 224 Ark. 606, 275 S. W. 2d 439. Appellees do not contend that there was actual notice or that Modern American did not act in good faith. Good faith is presumed unless notice to the alleged bona fide

purchaser is shown. *Ellis* v. *Nickle,* supra. Unless it was shown that the fact that the Nelsons were residing on the tract on which the house was being built constituted constructive notice that they claimed the property adversely to Jones, the mortgage must be held valid.

Before possession can constitute constructive notice, the occupancy must be apparently exclusive, otherwise possession is presumed to follow the title and those dealing with the owner of the record title are warranted in treating him as the exclusive owner. *Walden* v. *Williams,* 128 Ark. 5, 193 S. W. 71. Possession cannot be exclusive, when it might be referable to possession of another. *Alphin* v. *Blackmon,* 180 Ark. 260, 21 S. W. 2d 426. There can be no constructive notice where occupancy is joint or referable to the record title or in connection with the occupancy of another. *Walden* v. *Williams,* supra; *Ellis* v. *Nickle,* supra; *Story* v. *Grayson,* supra. If the possession of the claimant is referable to the possession of the holder of the record title, it is not such as would require a subsequent purchaser to make inquiry as to the nature of the possession or any hidden equities which might exist in favor of the claimant. *Ellis* v. *Nickle,* supra; *Story* v. *Grayson,* supra. The claimant's possession must be adverse, exclusive, unequivocal and inconsistent with the claims of any other person in order to constitute constructive notice. If it is to put a purchaser on his guard, it must be sufficiently distinct and unequivocal that it is not likely to be misunderstood or misconstrued. *Scott* v. *Carnes,* 183 Ark. 650, 37 S. W. 2d 876.

Possession of a grantor after execution of a deed is deemed to be subordinate to the rights of his grantee, if not long continued. *Turman* v. *Bell,* 54 Ark. 273, 15 S. W. 886, 26 Am. St. R. 35. If the possession of the grantor is continued but a short time, it may reasonably be referred to the sufferance of the grantee. *Turman* v. *Bell,* supra; *Morgan* v. *McCuin,* 96 Ark. 512, 132 S. W. 459.

In this case, the deed to Jones was executed by the Nelsons on September 4. The mortgage to Modern

American was executed on September 15, 1969. Construction was underway. In view of the designation of the Nelsons as "purchasers" in the contract with Jones, the obligation of the Nelsons to furnish the lot upon which the house was built, the short lapse of time between the execution of the deed and appellant's acceptance of the mortgage, and the natural association of their continued occupancy of the old dwelling house on the property with the construction contract and the occupancy by Jones, the holder of the record title by deed of the Nelsons, it seems to me that appellant was not put to any inquiry more than that which it made. The possession of the Nelsons was equivocal and subject to misunderstanding and misconstruction. It was certainly not so inconsistent with the Jones title, under the circumstances, as to put appellant on guard. It was certainly not exclusive.

I would reverse the decree and direct a foreclosure of the mortgage.

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

H. C. AHRENS, JR. *v.* MONNIE RUTH HARRIS ET AL

5-5594 468 S. W. 2d 236

Opinion delivered June 14, 1971

Clark, Clark & Clark, for appellant.

Robert W. Henry, for appellees.

CONLEY BYRD, Justice. Appellant H. C. Ahrens, Jr., the owner of lands in sections 30, 31 and 32, T. 6 N., R. 12 W., brought this action against appellees Monnie Ruth Harris and Jim and Peggy Harris, husband and wife, to lay off a private road pursuant to Ark. Stat. Ann. § 76-110 (Repl. 1957), across a seven acre tract owned by Jim Harris, subject to the homestead and dower rights of his mother. The county court denied appellant's application for lack of necessity. A circuit court jury also found adversely to appellant on the issue of necessity. For reversal appellant here contends that the trial court erred in permitting the introduction of evidence showing a unity of use between the 7 acre tract and a 172 acre adjoining tract owned only by Jim Harris and his wife Peggy, and that there was no substantial evidence to support the verdict.

Appellant purchased his property in 1959. At that time the access across Palarm Creek to his property from Highway No. 36 was by way of a low-water bridge which is still in existence. There is also a public mail route road along the western half of his south property line. In 1959 there was a three-way trade of some property between Ahrens and Jim Harris' father and grandfather whereby appellant acquired some right-of-way out to Highway No. 36. In 1961 the Highway No. 36 bridge across Palarm Creek washed out. When the bridge was rebuilt the highway dump was raised approximately 3 feet and the bridge reconstructed so as to permit a greater flow of water.

Mr. Ahrens testified about the difficulty in crossing the low-water bridge following heavy rains. With reference to the access available along the public mail road along the western part of his southern boundary, he stated that to build a private road from his house back to where the public road leaves his property would require the building of a road approximately three-quarters of a mile or more. There being a steep grade in the area, he rejected this possibility because of the cost of the initial construction of the road plus maintenance problems. Another alternative would be to move down Palarm Creek a short distance from the low-water bridge and construct an all-weather bridge at an estimated cost of $11,000.00. The third alternate, which he asked the court to lay out, would be to cross 600 feet of the seven acre tract to intersect Highway No. 36 at a point north of where the highway crosses Palarm Creek. This latter alternative would only require a bridge across the Westfork of Palarm Creek and according to appellant's estimate would cost around $4,000.00 plus the cost for acquisition of the easement. On cross-examination appellant testified that there was no roadway on the south and west portion of his property which is passable with a vehicle but admitted that there had been a logging road in that area.

Monnie Ruth Harris testified about the title to the 7 acre tract and the title to the 172 acre tract owned by her son and his wife, both of which are used in a part-

nership cattle operation. All of the improvements relating to the cattle operation, consisting of a barn, silage pits and feeders, are located on the 7 acre tract. According to her, appellant's proposed route across her property would create great inconveience to their cattle operation and also possible damage to the silage pit. In addition she pointed out that there was a mail route that touched appellant's property on the west which is frequently used. She testified that when Willis Smith, one of the appellant's tenants, lived on the property, he used the so-called logroad to get in and out of the property when water would not permit crossing the low-water bridge to Highway No. 36.

Jim Harris testified about the difficulty that appellant's proposed road would have with their cattle operation and also that it would run water into their silage pits. He too testified that there was a road across appellant's farm going toward the south and that appellant's tenant Willis Smith had used it when Palarm Creek was up.

Both parties recognize that the applicable law is well stated in *Pippin* v. *May,* 78 Ark. 18, 93 S. W. 64 (1906), wherein it is said:

> "In determining whether such a road is necessary, the court must, of course, take into consideration not only the convenience and benefit it will be to the limited number of people it serves, but the injury and inconvenience it will occasion the defendant through whose place it is proposed to extend. After considering all these matters, it is for the court to determine whether the road is, within the meaning of the law, necessary or not."

From a review of the record we find that there is substantial evidence to support the jury's finding that there was no necessity for a private roadway on the property of the appellees.

Furthermore, we think that the evidence with reference to the inconvenience that the roadway would

cause the appellees was properly admissible. The record title to the 7 acre tract stood in the name of Jim Harris subject to the homestead and dower rights of his mother, Monnie Ruth Harris. The record also shows that this 7 acre tract was used through a partnership arrangement between Jim Harris and his mother with an additional 172 acre tract owned by Jim Harris and his wife Peggy. Of course the issue here was the inconvenience that it would cause the landowners and not necessarily the unity of use for condemnation purposes. However, the authorities do no necessarily support appellant's contention that such evidence is not admissible for condemnation purposes. See *I. I. & I. R. R. Company* v. *Conness,* 184 Ill. 178, 56 N. E. 402 (1900).

Affirmed.

CLAUDIA H. AHRENS ET AL *v.* WILLIAM T. MCNUTT, INDIVIDUALLY AND AS BEST FRIEND OF WILLIAM MICHAEL MCNUTT ET AL

5-5604 467 S. W. 2d 721

Opinion delivered June 14, 1971

Botts & Jenkins, for appellants.

Allen, Young & Bogard, for appellees.

FRANK HOLT, Justice. This is an appeal from a decree holding that the will of Claude L. McNutt gave Inez H. McNutt, his second wife, a life estate only in a parcel of real property and that upon her death, appellee William T. McNutt (the testator's son and her stepson) became vested with the title to be held in trust for his children, the other appellees. The will in pertinent part provides:

> "[I] BEQUEATH to my wife and companion, Inex[z] H. McNutt, for her, love, affection and happy companionship, all of my personal property, including all the cash on hand and in the bank, also all notes, bonds, corporation stocks, Building and Loan savings, also any and all personal property not listed herein.
>
> I hereby further DEVISE, UNTO MY WIFE Inex[z] H. McNutt, all the real estate, including all real estate notes and mortgages, held in my name at the time of my demise, at which time this document shall become effective.
>
> *CODICIL;*
>
> Upon the demise of the Testator, Claude L. McNutt and the demise of the Legatee, Inez H. McNutt, all property, both personal and real, remaining in the estate of the Testator, Claude L. McNutt, I do hereby Devise and Bequeath to my son William T. McNutt, to be used by him, at his own discretion, for the education of his Children. The said William T.

> McNutt, shall serve as Executor of the Estate and shall serve without bond.
>
> Read considered and signed in the presence of two witnesses, on the 17 day of Feb. 1961."

About five years later an "Appendix" to this will provided that his wife would receive a fee simple title to his equity and interest in certain lands situated in another county.

Following the death of the testator in 1968, the will was duly probated and the estate distributed to Inez McNutt. The estate was closed on September 29, 1969. On September 25, 1969, Inez McNutt conveyed the house and lots by quitclaim deed to appellants (Claudia H. Ahrens, Elloise H. Jones and Ralph C. Haller), who are her nieces and nephew. Inez died on December 2, 1969 and thereupon appellees filed a petition asking the court to construe the will and asserting that by the terms of the will Mrs. McNutt was devised only a life estate, and that appellees now own the property as trustee and remaindermen. No testimony was taken and the case was submitted to the chancellor upon oral argument and memorandum briefs, together with the stipulations that the only property involved was a house and two lots, and that the deed executed by Inez McNutt and placed of record is true and correct.

For reversal of the decree which upheld appellees' contention, appellants assert that the will of Claude L. McNutt, on its face, showed no intention to limit the fee simple estate granted to Inez McNutt therein; that the wording of the so-called codicil provision of the will was not sufficient to limit the fee simple devise to Inez H. McNutt. In support of their contention, appellants argue that the wording of the codicil was not an attempt to limit the estate granted to Inez McNutt, but merely provided for the disposition of the testator's estate in the event his wife predeceased him or died simultaneously with him. Appellants cite the first sentence of the codicil:

> "Upon the demise of the testator, Claude L. McNutt and the demise of the Legatee, Inez H. McNutt, all property, both personal and real, remaining in the estate of the Testator, Claude L. McNutt, I do hereby Devise and Bequeath to my son William T. McNutt, * * * ."

The appellants assert that had the testator not intended this provision to provide only for disposition of his estate in the event his wife predeceased him or died with him, there would have been no reason for him to include his name along with his wife's in the codicil portion of the will. Appellants also assert that the language in the codicil and the appendix, subsequent to the devise of a fee simple estate, did not clearly indicate an intention to diminish this devise to a life estate.

Appellees agree that if the grant to Inez McNutt is set forth in "clear language sufficient to convey an absolute fee" [*Gist* v. *Pettus,* 115 Ark. 400, 171 S. W. 480 (1914)] or there was an "unmistakable direction that it should be absolutely hers," [*Collie* v. *Tucker,* 229 Ark. 606, 317 S. W. 2d 137 (1958)] then there would be no controversy. In support of their contention that the will devised only a life estate to Inez with a remainder to appellees, the appellees forcefully argue that the use of the word "*Codicil*" as a caption to the paragraph pertaining to the asserted limitation, and the "Appendix" to the will, written five years afterwards, which granted to Inez the fee title to his equity and interest in property located in another county without mentioning any other property, are sufficient indicia of the testator's intent to give Inez only a life estate in the house and two lots.

We hold that the testator conveyed a fee simple estate to his wife and that the subsequent paragraph, or "Codicil," and the later "Appendix" did not diminish or reduce the fee simple estate to a life estate. This is in accord with the general rule of law which we recognized as controlling in *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682 (1907):

> "* * * It is the rule that where property is given in clear language *sufficient to convey an absolute fee,* the interest thus given shall not be taken away, cut down or diminished by any subsequent vague and general expressions. * * * If it is clearly the intention of the testator that the devisee *shall own the fee simple,* his subsequent language, directing that what remains of the property at the death of that devisee shall devolve upon a particular person or class of persons, will not cut down the fee to a life estate. The fee, being vested by express and appropriate words, will not be diminished by subsequent words of a vague and general character which are absolutely repugnant to the estate granted."

Further, in *Ollar* v. *Roy,* 212 Ark. 682, 207 S. W. 2d 313 (1948) we also recognized that: "* * * whenever an estate in lands is created by a will, it will be deemed to be an estate in fee simple, if a less estate is not clearly indicated."

Appellees rely upon that part of *Baum* v. *Fox,* 192 Ark. 406, 91 S. W. 2d 601 (1936), wherein this court cited with approval 28 R. C. L. 215, 216:

> "The intention of a testator is to be collected from the whole will, and from a consideration of all the provisions of the instrument, taken together, rather than from any particular form of words. The intention is not to be gathered from detached portions alone, and the court should not consider merely the particular clause of the will which is in dispute."

Also cited is *McLaren* v. *Cross,* 236 Ark. 648, 370 S. W. 2d 59 (1963). However, in *Baum* v. *Fox, supra,* relied upon by appellees, the will read in part as follows:

> "I wish to bequeath to my beloved wife, Sarah H. Wright, my house and three lots, * * * Also my liberty bonds * * * and my other moneys that may be received after all debts are paid. If she needs any assistance in managing the property, I appoint

> my son, W. J. Wright, to assist to the best of his ability. After death of said Sarah H. Wright after the debts are paid all property and moneys are to be equally divided among my four children."

We held there that Sarah received the fee.

In *Collie* v. *Tucker,* 229 Ark. 606, 317 S. W. 2d 137 (1958), after devising his estate in fee simple to his wife, the testator then provided that:

> "Fourth. It is my will in case my wife should not use and dispose of all my property during her lifetime, that whatever she may leave undisposed of, shall be equally divided between her heirs and my heirs."

There we held that the limitation over was void and the fee simple estate was undiminished. In doing so we aptly said: "We are not willing to set aside the rule of property that was announced in the *Bernstein* case and that has been adhered to ever since."

In our view there was an intent clearly shown by the testator to give a fee simple estate to his wife in the first part of his will. There was not a clear intention in the succeeding paragraph, entitled "Codicil," or the subsequent "Appendix" to the will to reduce that estate to a life estate. Since we hold that an undiminished fee simple estate existed, it becomes unnecessary to consider appellants' other contention.

Reversed and remanded with directions for entry of a decree consistent with this opinion.

JAMES R. LONG, T. B. JACKSON AND THORP THOMAS *v.* LEO MABRY

5-5356 470 S. W. 2d 319

Opinion delivered June 14, 1971
[Rehearing denied October 4, 1971.]

Thorp Thomas, Fred A. Newth, Jr., Rose, Barron, Nash, Williamson, Carroll & Clay; By: *John Haley,* for appellants.

House, Holmes & Jewell; By: *Robert L. Robinson Jr.,* for appellee.

ROBERT L. JONES, JR., Special Justice. The appellants and the appellee entered into an agreement, dated July 28, 1966, under the terms of which appellee agreed to advance the sum of $5,000.00 "for administrative and printing costs to form a non-profit corporation to be known as National College Award Foundation." The duties and obligations of the appellants are not specifically stated, but it is implied that they would furnish services rather than money as their part of the investment. The appellee actually advanced $4,750.00. The Agreement further provided a method whereby the appellee was to receive back all of the money he had invested out of fees from the sale of memberships. The "non-profit corporation" was formed, but never became operational and appellee filed suit against appellants for rescission of the Agreement, alleging that there was a failure of consideration. Later an amended complaint was filed also alleging violations of the Arkansas Securities Act, Act 254 of 1959, Sections 1, 7, 14 and 22. The trial court found that appellee was entitled to rescission, ordered restitution of the sum of $4,750.00, plus court costs, from which order the appellants bring this appeal.

There is very little dispute in this case about the facts. After the written agreement was entered into, on July 28, 1966, the appellee advanced the sum of $4,750.00. $2,250.00 was paid to John B. May to reimburse Mr. May for money that he had paid to Mr. Jackson and Mr. Long as an investment in the National College Award Foundation. A second check was issued by the appellee to Mr. Jackson and Mr. Long in the amount of $2,500.00. It is obvious from the testimony of all of the parties that all four of the persons connected with this transaction expected to make a profit. Appellee was to get his money back first, then the appellants and the appellee were to share equally in the profits. It also appears obvious that all of the parties knew that there was some question as to the legality of the proposal. The appellee inquired of Mr. Jackson how it was possible to make a profit out of a non-profit corporation, and Mr. Jackson told him that they would do it the same way that private clubs operate. The appellee ad-

mits that he was told that it would be necessary to secure the approval from either the Attorney General's Office or the Securities Commissioner's Office before the corporation could commence business; he further admits that he was not led to believe that such approval had already been secured before he entered into the contract.

The non-profit corporation was formed, and Mr. Thomas attempted to secure the approval of the State Securities Commissioner. The Securities Commissioner failed to find any merit in the program for the public of Arkansas, and so advised Mr. Thomas by letter. After Mr. Thomas failed to obtain the approval of the Securities Commissioner, he did some further legal research and found that under Ark. Stat. Ann. § 67-1248, there is a specific exemption for any corporation organized not for profit, but exclusively for educational purposes. Based on this exclusion, Mr. Thomas told Mr. Long and Mr. Jackson that in his opinion, they could go ahead without the approval of the Securities Commissioner. An effort was also made (through an official authorized to receive an opinion from the Attorney General) to obtain an opinion from the Attorney General as to the legality of the plan but no such opinion was obtained.

There is testimony that by this time, the money advanced by appellee had been spent. It also appears that the appellants were reluctant to proceed without the approval of the Securities Commissioner or the Attorney General, and for these reasons, the matter became dormant, which resulted in the filing of this action for rescission by the appellee.

It is a well-established rule that this Court hears and determines appeals from chancery courts *de novo*. As stated in *Sharum* v. *Terbieten,* 241 Ark. 57, 406 S. W. 2d 136 (1966):

> "Whether the Chancellor makes a finding or bases his decision on an erroneous conclusion does not preclude our reviewing the case 'de novo.' *Culber-*

house v. *Hawthorne,* 107 Ark. 462, 156 S. W. 421; *Langley* v. *Reames,* 210 Ark. 624, 197 S. W. 2d 291."

1. *Was there a failure of consideration?* It is not contended that any of the appellants made false or fraudulent representations to the appellee to induce him to invest $4,750.00. Rather, appellee contends that there was a failure of consideration on the part of the appellants. The basis of this contention is that appellants made certain promises which they failed to fulfill. The written agreement between the parties contains no promises on the part of appellants. However, the undisputed oral testimony is that appellants would seek to obtain the approval of the Securities Commissioner, or an opinion from the Attorney General that "memberships" in the Foundation could be sold without being registered as a security under the provisions of the Arkansas Securities Act (Ark. Stat. Ann. § 67-1235, et seq.). Appellants formed the corporation and made an effort to obtain the approval of the Securities Commissioner, and an opinion from the Attorney General, but were unsuccessful on both counts. Accordingly, it appears that the appellants did what they agreed to do, and that there is no failure of consideration.

2. *Were the parties in pari delicto?* Even if there was a failure of consideration, the appellee is not entitled to rescission of the Agreement and to obtain restitution if he was *in pari delicto* with the appellants. It is well settled that courts of equity will not aid parties to an illegal agreement, but will leave the parties where it finds them.

In *Williams* v. *Wilson,* 181 F. Supp. 351 (1960), Judge Henley correctly stated the law of Arkansas on this point as follows:

"It is a settled principle of law in Arkansas that courts will not enforce illegal bargains or those that are *contra bonos moros,* and that where the parties to such bargains are *in pari delicto,* the law will leave them where it finds them. *Womack* v. *Maner,*

227 Ark. 786, 301 S. W. 2d 438, 60 A. L. R. 2d 1271, and cases there cited."

All of the parties connected with this transaction knew from the outset that the legality of the undertaking was questionable and the appellee admits that he was told that it would be necessary to obtain the approval of the Securities Commissioner or an opinion from the Attorney General that registration under the Arkansas Securities Act was not necessary. Knowing that such approval had not been obtained, he was willing to risk his money on the possibility of making a profit. All of the parties are therefore *in pari delicto.*

3. *Was the agreement a security?* Appellee contends that even though the parties are *in pari delicto,* that appellee is still entitled to rescission of the Agreement under the provisions of Ark. Stat. Ann. § 67-1256, if the Agreement entered into between the parties is a "security". We have examined the definition of "security" as contained in Ark. Stat. Ann. § 67-1247 (1), and find that the Agreement between the parties, dated July 28, 1966, was not a "security" within the meaning of the Statute.

It is, therefore, the opinion of the Court that the appellee is not entitled to rescission of the Agreement and is not entitled to full restitution. Appellee is only entitled to an accounting of the funds which were agreed to be spent "for administrative and printing costs". The decree is therefore reversed and the cause remanded to the trial court for the purpose of determining that all of the money advanced by appellee was spent for the purposes provided in the Agreement. The appellee is entitled to a return of any funds that remain unexpended, and is entitled to judgment for any funds spent by appellants for purposes other than "administrative and printing costs". In making such determination, appellants are not entitled to compensation for time expended for the reason that time and services constituted their investment in this venture.

Reversed and remanded.

SMITH and FOGLEMAN, JJ., and MURPHY, S.J., dissent.

BYRD and HOLT, JJ., not participating.

LOWELL PERKINS AGENCY, INC. *v.* VELMA J. JACOBS AND RUSSELL JACOBS

5-5576 469 S. W. 2d 89

Opinion delivered June 21, 1971
[Rehearing denied August 9, 1971.]

Lightle & Tedder, for appellant.

Darrell Hickman, for appellees.

CARLETON HARRIS, Chief Justice. This litigation arises out of a sale made by Lowell Perkins Agency, Inc., automobile dealers and appellant herein, to Velma J.

Jacobs, appellee herein.[1] On July 22, 1969, Mrs. Jacobs purchased a 1969, 4 door, 8 cylinder, Rebel automobile from the appellant for the sum of $3,044.20. This automobile was in the category of what is generally known as a "factory" car, being a vehicle that the manufacturer had rented to an agency and then, after a few thousand miles had been driven, was reclaimed by the manufacturer and reconditioned.[2] Such cars carry a full new car warranty. At the time of the transaction between the parties, Mrs. Jacobs traded in a 1966 Rambler automobile as a down payment of $645.00, and executed a purchase contract and note for the balance, this contract and note being hypothecated the following day to the Universal C.I.T. Credit Corporation in the usual course of business. On the same day, the purchased automobile was delivered to Mrs. Jacobs in Augusta, together with the papers, and the title and transfer papers were obtained from appellee for the 1966 Rambler. Thereafter, apparently also on the 23rd, Mrs. Jacobs applied for a license but was told by the revenue office that she would have to pay sales tax on the car, this tax amounting to $86.00 or $87.00. She then took the papers back to the salesman and advised that she did not want the automobile. Appellee went to see the manager of the automobile agency, Jack Stubbs, and learned that Mr. Perkins was in Little Rock. She advised that she would go home and wait for him to call, and that if he called by 3 p.m. and said that he would pay the tax, she would keep the car. No call was received and the following morning appellee called Perkins, told him that she was bringing the car over, and was going to have Universal C.I.T. cancel it. She said that he advised her that he could not cancel it and that he was not going

[1]Though the name of Mr. Jacobs appears as an appellee, the suit having been brought in his name as well as his wife's, he does not appear to have any interest in the proceedings. The contract of sale was strictly between the agency and Velma J. Jacobs, and she testified that the car belonged to her; accordingly, this opinion will only refer to the appellee.

[2]Marlin Stubbs, a car salesman for appellant, testified that such an automobile is handled like a demonstrator, and that customarily *i. e.*, meaning in the absence of an agreement, the purchaser pays the sales tax; the car comes from the manufacturer, and bears a dealer's tag.

to pay the tax on it. She then went to the Universal office and, according to her testimony, which will be subsequently discussed, was told by a Mr. Weir that the contract would be cancelled.[3] Appellee returned to the automobile agency, parked the car in the driveway, and gave the keys to the manager's wife.

Mrs. Jacobs, on August 19, instituted a replevin action for the 1966 Rambler, simply alleging that appellant was in possession of this property which belonged to her. However, no order of delivery was issued and no bond was made.

The first payment to Universal C.I.T. was due on August 22; Mrs. Jacobs had already sent a letter saying that she was not going to pay for the car, and on September 9, this company sent notice to appellee, in compliance with the Commercial Code, that unless she paid the amount due under the contract, including expenses of repossession and delinquent charges, within seven days, the car would be sold at private sale. Mrs. Jacobs received the notice, but made no payment. Perkins was then requested by the finance company to repurchase the contract, which was done, and thereafter this car was sold by appellant on October 22, for $2,565.78. The car traded in by appellee had been sold on September 3rd. Witnesses were not sure of the sale price but it is pretty well agreed that the value of the car was $600.00.

With reference to the suit filed by appellee, appellant moved to make the complaint more definite and certain and appellee amended to allege that appellant's agent had stated that no taxes would be due or payable on the automobile when the license was purchased; that she discovered that taxes would be due and payable and returned the vehicle "and rescinded the contract". An answer was filed denying the allegations of the complaint and both parties then moved to transfer the case to chancery court, which was done. There, appellee

[3]No "Mr. Weir" testified, but Mr. Billy Robinson, district manager for the company, testified that such a contract cannot be cancelled except by the dealer, who, of course, has to repurchase the car.

amended her complaint to allege unjust enrichment on the part of appellant company. On trial, the court found:

"1. On July 22, 1969, the parties entered into an agreement whereby the Plaintiff was to purchase a 1969 vehicle from the Defendant, and the Plaintiff traded in a 1966 vehicle of a value of $600.00.

2. Subsequently, the Plaintiff rescinded the contract by her actions, and the Defendant sold both of the vehicles.

3. It is the finding of the Court that the Plaintiff should recover from the Defendant the sum of $600.00, the value of the 1966 vehicle which she transferred to the Defendant."

Judgment was then entered against appellant for $600.00 together with interest and costs from which judgment (decree) appellant brings this appeal. For reversal, it is simply asserted that the evidence was insufficient to sustain a judgment for appellee.

We agree with appellant that the evidence is insufficient to sustain the decree. Of course, there is no evidence of mutual mistake, and so the sole question is when rescission is proper for a unilateral mistake. In *Hubbert* v. *Fagan,* 99 Ark. 480, 138 S. W. 1001, it is said:

"Where relief is given because of the mistake of one party alone, it is where it is induced by the conduct of the other party or because the other seeks unconscionably to take advantage of it, and the ground of jurisdiction is really fraud."

Likewise, in *American Laundry Machinery Company* v. *Whitlow,* 198 Ark. 175, 127 S. W. 2d 817, this court commented:

"In 12 American Jurisprudence 624, § 133, it is held, as the rule sustained by practically universal authority, that a unilateral mistake alone will not justify a rescis-

sion. May it not be sufficient to say the law upon this subject is black type textbook law."

In *Gall* v. *Union National Bank of Little Rock, Trustee,* 203 Ark. 1000, 159 S. W. 2d 757, we quoted from Black on Rescission and Cancellation, 2d Ed., Vol. I, § 128, p. 397, as follows:

> "The generally accepted rule is that rescission cannot be enforced or ordered on account of the mistake of one party only, which the other did not share, but for which he was not responsible, unless some special ground for the interference of a court of equity can be shown. That is, there can be no rescission on account of the mistake of one party only, where the other party was not guilty of any fraud, concealment, undue influence, or bad faith, did not induce or encourage the mistake, and will not derive any unconscionable advantage from the enforcement of the contract."

What does the evidence show in the case before us? In the first place, the original complaint simply contained the allegations that the car belonged to appellee, and was being held by appellant. The amended complaint stated that she was told no taxes would be due or payable on the automobile when the license was purchased. This is the only allegation that bears on fraud or concealment, and the evidence, hereafter discussed, does not support that allegation. What is the evidence on this point? Mrs. Jacobs first testified that she was satisfied with the trade, and that title papers were delivered to her for the new car; she turned in the papers for the old one and said she thought she was getting a "good buy". She was then asked the following question "When you found out you had to pay the sales tax you wanted to rescind your contract?" The answer to that question is, we think, most pertinent, her reply being, "No I didn't. I thought it wasn't fair. *He should have told me I had sales tax to pay on this car* [Our emphasis] and I would have took the car had he agreed to pay the sales tax". Further,

> "Q. He did not mislead you about that in any way?

A. No but he did not tell me either. * * * He should have made it clear to me. * * *

Q. That is the reason you decided you were not going to take the car or pay for it?

A. I agreed to pay for the car if he would call me about three o'clock but he did not have the courtesy to call me.

Q. It is not the tax but because he did not call you?

A. No if he had called me by three o'clock and said he would pay the tax, and he didn't call me.

Q. That was the condition you were making?

A. Yes."

It is thus apparent from the evidence of appellee herself that no one told her that she would not have to pay the sales tax. It was simply an assumption on her part. Certainly no fraudulent statements were made, nor was there undue influence, nor does the record indicate that the sales tax payment was intentionally concealed. Also, Mrs. Jacobs had every opportunity to acquire any information needed before the contract was signed, or to ask any question desired, for this apparently was no "hurried up" affair. It appears that while Mrs. Jacobs was conversing with Mr. Perkins in closing the transaction, that another lady came in who was bitten by the Perkins' dog, and this occasioned some delay in completing the transaction.[4] The statute (Ark. Stat. Ann. § 84-1903 [Repl. 1960]) provides who shall pay the tax, and we are unwilling to place the additional requirement that every purchaser must be told who will

[4]From the record of the testimony of Mrs. Jacobs: "But I stayed there four hours trying to get this contract signed while he called his lawyer, his wife and everybody else in the country about this dog bite. By that time I was getting a little bit unhappy but I really wanted the car and they knew it."

pay the tax or else his contract will be subject to rescission. For that matter, from the testimony of Mrs. Jacobs, it appears that the fact that she was due to pay the tax was not the sole reason she attempted to revoke the contract; also, she gave him a "deadline" of calling her by three o'clock and telling her that he would pay the tax "and he didn't call me". Actually, the testimony reflects that subsequently appellant company did agree to pay it. Marlin Stubbs, who had sold appellee the car, stated that the subject of who would pay the sales tax was never mentioned, but when she returned the day after the transaction, she wanted appellant to pay this tax; that the company had consented to pay one-half, but she replied that that was not good enough. She subsequently called again, and his father, Jack Stubbs, "told her we would pay the sales tax on it. Then she said 'Well, if you are willing to pay the sales tax, there is bound to be something wrong with the car' I said 'I guess you know the car is backed by five years, fifty thousand mile warranty. You have no right to be scared of the car.' "

The record reflects that the provisions of the Commercial Code were followed in selling the repossessed automobile, following Mrs. Jacobs leaving it at the company agency, and, of course the car which she was trading in was daily losing value from depreciation as it remained on the lot. The sale of this car could have been prevented simply by the making of a bond, but this was not done by appellee.

Appellee argues that her claim was for unjust enrichment and that the court properly found that appellant was enriched and "very unjustly". We do not agree with this contention. There can be no "unjust enrichment" in contract cases. In *Materese* v. *Moore-McCormack Lines,* 158 F. 2d 631, the matter is stated very succinctly as follows:

"The doctrine of unjust enrichment or recovery in quasi-contract obviously does not deal with situations in which the party to be charged has by word or deed legally consented to assume a duty toward the party

seeking to charge him. Instead, it applies to situations where as a matter of fact there is no legal contract, but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain, but should deliver to another."

In 17 C. J. S. Contracts § 6 p. 574, we find:

"It is generally held that where there is an express contract the law will not imply a quasi or constructive contract. The courts will not indulge in the fiction of a quasi or constructive contract where contracts implied in fact must be established, and will not substitute one promisor or debtor for another. A quasi-contractual principle of unjust enrichment does not apply to an agreement deliberately entered into by the parties, however harsh the provisions of such contract may seem in the light of subsequent happenings."

This court has recognized this principle at least as far back as 1860, where in *Jackson* v. *Jones,* 22 Ark. 158, we stated that the law never accommodates a party with an implied contract when he has made a specific one on the same subject matter.

It is apparent from what has been said that we find the judgment entered to be erroneous, and the decree of the White County Chancery Court is accordingly reversed.

It is so ordered.

HERMAN F. WRIGHT *v.* BEN M. HOGAN COMPANY ET AL

5-5578 468 S. W. 2d 233

Opinion delivered June 21, 1971

Youngdahl, Sizemore, Brewer, Forster & Uhlig, for appellant.

Terral, Rawlings, Matthews & Purtle, for appellees.

GEORGE ROSE SMITH, Justice. This workmen's compensation claim was denied by the referee, the commission, and the circuit court on the ground that the claimant's injuries did not arise out of and in the course of his employment. Whether that finding was correct is the principal question now before us.

The ultimate controlling facts may be stated quickly, for the commission quite properly gave the claimant the benefit of the doubt upon disputed issues. Wright was employed as a concrete worker upon the Eighth Street Expressway construction job in Little Rock. He came to work in his own pickup truck and voluntarily used it in hauling a spraying rig and other company-owned equipment from place to place on the job site. Wright's foreman did not require him to use his own truck, but he did allow Wright to take gasoline from the company's tank. Wright was never told that he could use company gasoline for traveling to and from his home.

Wright lived with his wife at Lamar, almost 100 miles from Little Rock. He went home on weekends, but during the week he stayed at a motel in North Little Rock, just across the river from the job site. On a certain Wednesday in 1968 a rainstorm halted all concrete work at midafternoon. Wright decided to drive to Lamar and spend the night with his wife. The next morning he arose early and started for Little Rock in his truck. At Lamar he entered a long stretch of interstate highway not yet open to the public. After having traveled that route for about 20 miles he ran into a pile of gravel on the pavement and sustained the injuries for which compensation is sought.

The going and coming rule ordinarily denies compensation coverage to an employee while he is traveling from his home to his job. A familiar exception to the rule recognizes coverage when the employer furnishes home-to-work transportation as an incident to the em-

ployment. *Ark. Power & Light Co.* v. *Cox,* 229 Ark. 20, 313 S. W. 2d 91 (1958). In comparatively recent years some courts have approved a related exception by which home-to-work coverage is sustained if the employer requires the worker to bring his own vehicle to work and use it on the job. Larson, Workmen's Compensation, § 17.50 (1968); *Smith* v. *Workmen's Comp. Appeals Board,* 73 Cal. Rptr. 253, 447 P. 2d 365 (1969); *Marshall* v. *Tribune-Star Pub. Co.,* 251 Ind. 557, 243 N. E. 2d 761 (1969); *Borak* v. *H. E. Westerman Lbr. Co.,* 239 Minn. 327, 58 N. W. 2d 567 (1953).

In the case at bar the commission expressed its approval of the more recent exception but wènt on to say:

> We think that claimant would have been within the exception had he been en route to and from his motel in North Little Rock. However in the instant case claimant had made a trip to his home in Lamar, Arkansas, for the purpose of spending the night with his wife. This brings in focus the purpose of the trip which determines this case.
>
> The Arkansas Supreme Court, in *Martin* v. *Lavender Radio & Supply,* 228 Ark. 85, 305 S. W. 2d 845 (1957), quoted with approval the test as stated by Chief Judge Cardozo in the case of *Marks Dependents* v. *Gray,* 251 N. Y. 90, 167 N. E. 181 (1929): "Unquestionably injury through collision is a risk of travel on a highway. What concerns us here is whether the risks of travel are also risks of the employment. In that view, *the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils.*"
>
> This is commonly known as the dominant purpose rule, which Arkansas apparently adopted in the *Martin* case, *supra.* Claimant testified that the job was rained out on September 4, 1968, and he decided to go to Lamar to spend the night with his wife. This was the dominant purpose of his trip.

> Therefore . . . the Opinion of the Referee . . . is hereby affirmed.

Assuming, without so deciding, that the exception in question should be added to our going and coming rule, we are nonetheless of the opinion that the distinction drawn by the commission was soundly grounded in the facts. Evidently Wright did not think it practical to travel back and forth between Lamar and Little Rock every day. Hence the commission was justified in treating the North Little Rock motel as Wright's work-connected home during the week. There is nothing in the rule in question that logically or reasonably demands that the workman be allowed to maintain two homes as a matter of right, expecially when one of them is so inconveniently placed that he gives it up temporarily to maintain his job. We accordingly conclude that the commission was supported by substantial evidence in finding that Wright's excursion to Lamar was a personal mission that took him out of the exception to the going and coming rule, just as if he had been a permanent resident of North Little Rock and had driven to Lamar to go fishing or to achieve some other purely personal purpose.

The claimant also argues two other possible theories for an award of compensation in the case at hand. Neither theory was mentioned in the commission's opinion, which indicates either that the points were not raised below or that the commission did not think them sufficiently meritorious to call for a discussion. We would affirm in any event.

One, in the course of the testimony it was casually mentioned now and then that Wright had also worked for the appellee Hogan on other highway construction jobs in Arkansas, there being references to Malvern, Fort Smith, and Clarksville. It is now suggested that Wright was therefore required to travel about the state and was entitled to the broad compensation coverage granted to traveling salesmen. The short answer to this argument is that the traveling salesman's work requires him to

travel away from his employer's premises while he is on duty. Larson, *supra,* § 25.10. Wright's travels, by contrast, were merely between his home and various job sites.

Two, Hogan was the paving contractor for the unopened interstate highway upon which Wright was injured. It is now argued that Wright was therefore upon his employer's premises and is entitled to invoke the premises exception to the going and coming rule. As Larson points out, however, the basis for the premises rule is the existence of a causal connection between the employment and the particular risk, as when the employees must cross railroad tracks near the plant entrance. Larson, § 15.15. There is patently no causal connection between Wright's employment in Little Rock and the risk involved in his election to travel an unfinished highway some eighty miles away.

Affirmed.

FOGLEMAN, J., not participating.

JAMES DAILEY, JR. AND RALPH WILLIAM ERWIN *v.* STATE OF ARKANSAS

5594 468 S. W. 2d 238

Opinion delivered June 21, 1971

Wiggins & Christian, for appellants.

Ray Thornton, Attorney General; *Garner L. Taylor, Jr.,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The two appellants, James Dailey, Jr., and Ralph William Erwin, were charged with having unlawfully dynamited a building in Fort Smith. Ark. Stat. Ann. § 41-4237 (Repl. 1964). The jury found both men guilty and assessed the same punishment for each of them: A fine of $2,000 and imprisonment for 15 years. Each appellant argues a single point for reversal.

Dailey contends that the trial court erred in refusing to suppress part of the testimony of Officer Eddie Brooks, who was allowed to testify that Dailey had orally admitted his guilt. After studying the record we are unable to say that the trial court was in error.

Dailey was arrested on July 24, 1970, and, according to the State's evidence, was then fully informed of his constitutional rights. He understood the explanation and did not then make any statement to the officers. While Dailey was still in jail his attorney filed a motion for an examination to determine Dailey's sanity. The motion was granted, the examination being set for 9:30 a.m. on September 1.

Early that morning Dailey sent word that he wanted to talk to Officer Brooks. Brooks's testimony about the occurrences during the day was to this effect: Brooks went to the jail to see Dailey. Dailey mentioned the psychiatric examination, which Brooks had not known about, and went on to say that "they" had stated that he (Dailey) was crazy and were trying to sent him to the nut house. Brooks explained that he could not talk to Dailey while he was represented by an attorney. Brooks did not urge Dailey to discharge his attorney, Bill Wiggins, but Brooks admitted that he did suggest that course to Dailey. Dailey said that he had not paid the attorney anything and also that he did not need an attorney if the best they could do was to send him to Little Rock (presumably meaning to the State Hospital).

Officer Brooks then left the jail and came back about an hour and a half later. Dailey indicated that he had seen his attorney, Wiggins, during the interval and had fired him. Dailey was taken to the office of a deputy prosecuting attorney, where he was told that he still had the right to have an attorney present. Dailey stated that he did not want a jury trial, that he knew he was guilty, that he had done wrong, and that he wanted to get it over with. Dailey refused to make a written statement but indicated that he would do so later on.

The foregoing testimony of Officer Brooks is almost uncontradicted. Dailey did not elect to testify, even at the in-chambers hearing on the motion to suppress the evidence. Attorney Wiggins testified positively that he was not discharged by Dailey on the day in question; but he had no way of knowing, and of course did not

attempt to say, whether Dailey had represented to Officer Brooks that Wiggins had been discharged. We are impressed by the fact that both Officer Brooks and the prosecuting attorney immediately made written records of what happened on the day in question. Their notes support their testimony. On the other hand, Wiggins apparently did not make any notes and admitted with candor that in some respects he had no basis for admitting or denying the prosecutor's statements. Upon the record as a whole we are unable to say that the trial court erred in refusing to suppress the challenged testimony of Officer Brooks.

The question presented by Erwin's appeal is comparatively free from difficulty. In effect he complains of three questions that were put to him on cross examination. First, he was asked about a threat that he had supposedly made. He denied having made the threat. Secondly, he was asked if he had thrown a brick through the vehicle of a guard at the plant where certain disturbances (in connection with a labor dispute) were taking place. Erwin's answer was "No, sir." Thirdly, he was asked if he had brandished weapons at Mexican laborers who were working at the plant during the dispute. Counsel objected at that point, and the question was not answered. Thus none of the three questions was answered in the affirmative and consequently no information whatever, much less any prejudicial information, reached the ears of the jury. In the circumstances there was clearly no reversible error.

Affirmed.

STATE OF ARKANSAS *v.* C. R. GEORGE

5-5671 470 S. W. 2d 93

Opinion delivered June 21, 1971
[Rehearing denied September 20, 1971]

Alex Streett, for petitioner.

Nathan Gordon, for respondent.

LYLE BROWN, Justice. The sole question is whether a special circuit judge can be elected pursuant to Ark. Const., art. 7, § 21, for the purpose of selecting jury commissioners and impaneling a grand jury in a situation where the presiding judge is obviously disqualified. When the regular circuit judge of the Pope County Circuit Court, Hon. Russell C. Roberts, was notified that the prosecuting attorney desired the impaneling of a grand jury for the purpose of investigating certain activities of the trial judge, the latter, purporting to act under art. 7, § 21, disqualified himself and called for an election by the attorneys in attendance upon the court. Respondent C. R. George was elected. At the behest of the prosecuting attorney we granted a temporary writ of prohibition suspending C. R. George's plan to proceed in the special matter for which he was elected. We are now asked to make that writ permanent. The prosecutor contends that art. 7, § 21 does not authorize the procedure of electing a special judge in the instant situation. That provision in our constitution is as follows:

> Whenever the office of judge of the circuit court of any county is vacant at the commencement of a term of such court, or the judge of said court shall fail to attend, the regular practicing attorneys in attendance on said court may meet at 10 o'clock a.m. on the second day of the term, and elect a judge to preside at such court, or until the regular judge shall appear; and if the judge of said court shall become sick or die or unable to continue to hold such court after its term shall have commenced, or shall from any cause be disqualified from presiding at the trial of any cause then pending therein, then the regular practicing attorneys in attendance on said court may in like man-

> ner, on notice from the judge or clerk of said court, elect a judge to preside at such court or to try said causes, and the attorney so elected shall have the same power and authority in said court as the regular judge would have had if present and presiding; but this authority shall cease at the close of the term at which the election shall be made. The proceeding shall be entered at large upon the record. The special judge shall be learned in law and a resident of the State.

Our analysis of Section 21 leads us to conclude that its purpose is to take care of emergency situations to avoid delay in the trial of pending causes which are about to be reached on the docket or which in fact have been reached. It is first provided that if the regular judge is absent at the commencement of a term, the practicing attorneys in attendance upon the court may on the second day of court elect a special judge to preside until the regular judge appears. Secondly, after the term has begun (which was the situation in this instance) and the regular judge is physically unable to continue court, or if for any reason he is disqualified in any cause then pending, the attorneys may elect a judge "to preside at such court or to try said causes." We think a sensible interpretation of Section 21 when applied to causes which arise after the commencement of the term is that a special judge may be elected to try only those causes which are pending at the time of the election. We cannot believe that the calling of a grand jury was intended to come under the phraseology "pending causes of action."

In *State* v. *Stevenson,* 89 Ark. 31, 116 S. W. 202 (1909), this court said that Section 21 was "merely provided to keep the circuit courts going by special judges," and that the exclusive function of those special judges is to "hold sessions of court" and to try those matters pending at the time of their appointment and until they are lawfully succeeded. It is pointed out that there are many duties of the court besides the trying of cases and that Section 21 does not confer any of those numerous functions on a special judge.

We refer again to the phrase "pending causes"—what was pending before the Pope Circuit Court at the time respondent assumed the office of special judge? The regular judge had taken notice of the fact that the prosecuting attorney had filed a petition with the supreme court requesting the assignment of a special judge for the purpose of impaneling a grand jury. A copy of the petition was placed on file by the circuit judge with the circuit clerk of Pope County. Thereupon the regular judge took notice of the filing of the petition and declared himself disqualified. The filing of that petition did not create a "pending cause" as that term is commonly used in legal parlance; it did not create any semblance of an adversary proceeding. It did not create a "case pending in the circuit court" within the universally accepted meaning of the phrase. See *Cruson* v. *Whitley,* 19 Ark. 99 (1857).

Our interpretation of Section 21 is reinforced by the language of the section which immediately follows it in the 1874 constitution. After providing for the election of special judges in Section 21, the drafters then provided for the exchange of regular judges in Section 22, which provides:

> The judges of the circuit courts may temporarily exchange circuits or hold courts for each other under such regulations as may be prescribed by law.

That section is worded so that the procedure of exchange of circuits is a permissible but not the exclusive method by which a judge may be selected to preside over a circuit court; it allows the Legislature to regulate the exchange of circuits. Accordingly, the Legislature provided in Ark. Stat. Ann. § 22-142 (Supp. 1969) for the assignment of a judge by the chief justice of our supreme court. Section 22-142 is in harmony with our holding in *Knox* v. *Beirne,* 4 Ark. 460 (1842). That case approved an almost identical provision in the Constitution of 1836 relative to judges being sent into other districts. Thus the exchange of circuits upon agreement

of the circuit judges or the appointment by the chief justice is open as an alternative method of selecting a judge to preside over the impaneling of a grand jury in Pope County Circuit Court to inquire into the activities of Judge Russell C. Roberts.

Writ granted.

BRYD, J., not participating.

WILLIAM S. ARNOLD, Special Justice, joins in the opinion.

Supplemental opinion on denial of rehearing
Delivered September 20, 1971

Alex G. Streett, for petitioner.

Nathan Gordon, for respondent.

LYLE BROWN, Justice. The original opinion in this case was handed down on June 21, 1971, and appears in 250 Ark. 968. Appellant timely filed a petition for rehearing and asked that we reconsider that part of the opinion which would permit Judge Russell Roberts to exchange circuits with another judge. See art. 7, § 22, of our constitution. On rehearing we have been furnished with citations of authority not previously mentioned in the briefs. Those citations, coupled with our additional research, lead us to the conclusion that appellant's argument on rehearing is well taken. The rule of law which governs the question before us may be succinctly stated: A trial judge should not exercise the discretionary powers of his office in a matter in which he will be personally affected.

Judge Roberts, in choosing a judge with whom to exchange, will not be performing a purely ministerial act, but will be selecting a judge based upon Judge Roberts's own judgment—it would clearly constitute an act of discretion. The subject matter which occasions the selection of another judge unquestionably affects Judge Roberts's personal interests.

Our conclusion is supported by the common law, by our constitution, by statute, and by the canons of judicial ethics.

The Common Law. We said in *Morrow* v. *Watts,* 80 Ark. 57, 95 S. W. 988 (1906), that by common law interest of a judge of a court of record was ground for disqualification.

The Constitution. Article 7, § 22, provides that "the judges of the circuit courts may temporarily exchange circuits or hold courts for each other under such regulations as may be prescribed by law." But that section must be read in conjunction with § 20 in the same Article, which says that "no judge or justice shall preside in the trial of any cause in the event of which he may be interested." In the strictest sense Judge Roberts would not be "presiding at a trial" when entering an order making an exchange of circuits. However, the selection of a judge is an integral part of the entire proceeding and, consistent with our well-established practice, we give a broad and liberal scope, rather than a technical or a strict meaning to the word trial. *Black* v. *Cockrill,* 239 Ark. 367, 389 S. W. 2d 881 (1965); *Byler* v. *State,* 210 Ark. 790, 197 S. W. 2d 748 (1946). By so doing "the courts may achieve impartiality in the minds of the public as well as impartiality in fact." *Copeland* v. *Huff,* Judge, 222 Ark. 420, 261 S. W. 2d 2 (1953).

We have previously held that Article 7, § 20, required the disqualification of a judge in matters involving the exercise of judicial discretion when his personal rights were concerned. *Ladd* v. *Stubblefield,* 195 Ark. 261, 111 S. W. 2d 555 (1939). While pecuniary interests of the judge were involved in that case, there is no sound reason why the principle should not apply with equal force where, as here, individual rights other than pecuniary or property rights are involved.

Statutory Law. Under the provisions of Ark. Stat. Ann. § 22-113 (Repl. 1962) a circuit judge is prohibited from presiding over the "determination of any cause or proceeding in which he may be interested . . ." This court undoubtedly had this statute in mind, as well as art. 7, § 20, when it was faced with a similar situation in *Rowland* v. *State,* 213 Ark. 780, 213 S. W. 2d 370

(1948). There it was said that a regular presiding judge could not select a judge by exchange if the regular presiding judge was a litigant in the pending cause. It is true that such statement was dictum but the fact that it was approved by a unanimous court is significant. It was indicative of the way in which this court might well hold when the question squarely presented itself.

We do not agree with respondent's argument that the *Rowland* dictum is inapplicable in this case because Judge Roberts is not yet, strictly speaking, a "litigant." We find no logical reason why the principle of the *Rowland* dictum should govern only after the judge involved has technically become a party to an adversary proceeding and not when he is exercising, or called upon to exercise judicial discretion in matters where his personal rights will be affected. When we give the words of the statute a broad and liberal scope, as we do in construing statutory law relating to disqualification of judges, it can hardly be doubted that an exchange of circuits is a "proceeding" in the determination of which Judge Roberts is interested. See *Wimberly* v. *State,* 90 Ark. 514, 119 S. W. 668 (1909), and definitions of "proceeding" in Webster's New International Dictionary, Second and Third Editions.

Canons of Judicial Ethics. In our publication styled "Miscellaneous Rules of the Supreme Court," published in January 1963, are found the canons of judicial ethics adopted by this court (after their adoption by the Arkansas Judicial Council in September 1958). Section 29 thereof provides that "A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved." That is not only, in essence, a statement which harmonizes with the law as we view it, but it tends to promote the appearance of impartiality as mentioned in *Copeland* v. *Huff, supra.* An apt statement of the principle is found in 46 Am. Jur. 2d, Judges § 86:

> The law goes further than requiring an impartial tribunal; it also requires that the tribunal appear to be impartial on the theory that next in impor-

> tance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge. . . . It is also for the purpose of the appearance of impartiality that where grounds for disqualification exist, a judge should disqualify himself.

Respondent places his principal reliance upon *Evans* v. *State,* 58 Ark. 47, 22 S. W. 1026 (1893). We do not consider that case to be either controlling or persuasive. There the disqualification of the judge arose from his relationship to a "party." Here the disqualification results because the proceedings affect the individual rights of the judge. We have long recognized that the latter basis is within the purview of our constitutional provisions that require no statutory implementation as is the case when the basis is relationship to a party. *Foreman* v. *Town of Marianna,* 43 Ark. 324 (1884); *Osborne* v. *Board of Improvement of Paving District No. 5,* 94 Ark. 563, 128 S. W. 357 (1910); *Morrow* v. *Watts, supra.*

Respondent also argues that, if the assignment of a judge under Act 496 of 1965, Ark. Stat. Ann. § 22-342, et seq. (Repl. 1962), is the only proper method of procedure under prevailing circumstances, there was a 91-year hiatus after the adoption of our present constitution during which there would have been no means of acting when the regularly elected judge was disqualified in a situation similar to that now presented. We need not consider what might have happened during that 91-year period or speculate on the reasons for legislative inaction. The General Assembly has wisely made provision for this contingency through Act 496. We did hold in *Morrow* v. *Watts, supra,* that failure of the legislative branch to act where implementation was called for by the express language of the constitution might make the provision for disqualification inoperative. We did not hold that even that provision was permanently atrophied nor have we ever said that a common law disqualification could be negated merely by legislative inaction.

Nothing contained herein should be taken as preventing a proper transfer, by a disqualified judge, of any proceeding to a division of the same court which is existing and permanent but over which he does not preside.

The last two paragraphs of the original opinion are deleted, beginning with the statement, "Our interpretation of Section 21 . . ." and this supplemental opinion is substituted for the deleted portion. This action does not disturb the order granting the writ.

BYRD, J., not participating.

WILLIAM S. ARNOLD, Special Justice, joins in the supplemental opinion.

BOBBY GENE TARKINGTON

v.

STATE OF ARKANSAS

5494 469 S. W. 2d 93

Opinion delivered June 21, 1971
[Rehearing denied August 9, 1971.]

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

Ray Thornton, Attorney General; *Milton Lueken,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant states 15

points for reversal of his conviction of the crime of rape. He argues them in four groups and relies upon those arguments to support his first three points, which are not otherwise covered.

Appellant first asserts that his conviction was based upon prejudice, bias, speculation, conjecture, surmises and irrelevant and impeached testimony. This argument is based upon attacks on the credibility of the prosecutrix. He contends that her testimony is the only incriminating evidence against him. He points out that his accuser made no outcry, gave no notice to her neighbors in a thickly populated district in the city of North Little Rock, made a positive identification of a ring and a knife which she said appellant had in his possession at the time of the alleged attack without any reason for her certainty, or means of distinguishing them from thousands of other such objects similar in appearance, and varied her testimony at different times as to the hour and minute of the alleged crime and her state of dress when it occurred. This witness was positive in her identification of appellant, but he says that the jury could not have properly based its verdict upon her testimony, because it should be considered as incredible.

Appellant concedes that corroboration of prosecuting witness is not essential to a conviction of the crime of rape. *Lacy* v. *State,* 240 Ark. 84, 398 S. W. 2d 508. Where the prosecuting witness is positive in her identification, the question of her credibility is for the jury. *Hamm* v. *State,* 214 Ark. 171, 214 S. W. 2d 917. Prosecutrix, who said that she was then 15 years old, testified that she attempted to scream, but "nothing would come out." She also said that appellant, who had pulled a knife on her, told her that he would not kill her if she cooperated, but if she said anything he would kill her. Failure of the prosecutrix to make an outcry or to make prompt complaint is properly considered when the defense is based upon her consent or want of resistance or upon the contention that a rape was not committed by someone. *Kurch* v. *State,* 235 Ark. 688, 362 S. W. 2d 713, cert. denied, 373 U. S. 910, 83 S. Ct. 1299, 10 L. Ed.

2d 412; *Daniels* v. *State,* 186 Ark. 255, 53 S. W. 2d 231; *Jackson* v. *State,* 92 Ark. 71, 122 S. W. 101. Even then the failure to make an outcry is excused if prevented by fear of the prosecutrix for her life or bodily safety. *Pemberton* v. *State,* 221 Ark. 19, 251 S. W. 2d 825; *Zinn and Cheney* v. *State,* 135 Ark. 342, 205 S. W. 704. But no such defense was made, and the prosecutrix testified that she did not make an outcry because of her assailant's threats. The prosecutrix and her husband had only lived at the apartment where the offense took place for three weeks. She testified that she told an elderly lady across the street what had happened when she found that she was unable to reach her husband by telephone because it was out of order. She then went by cab to the place her husband was in school and reported the incident to him. Questions of identification and alibi (the defense made by appellant) were jury questions. *Hamm* v. *State, supra; Lacy* v. *State, supra.* Resolution of conflicts in the testimony of the prosecutrix was also a jury function. *Marshall* v. *State,* 250 Ark. 585, 466 S. W. 2d 920.

The next group of points argued by appellant turns upon his argument that a lineup identification, when he was without the assistance of counsel, violated his constitutional rights. Appellant was charged with having committed the crime on January 17, 1967, and the lineup in question was held on January 24, 1967, so the decisions in *United States* v. *Wade,* 388 U. S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149, and *Gilbert* v. *California,* 388 U. S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178, both decided June 12, 1967, do not apply. *Stovall* v. *Denno,* 388 U. S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967); *Foster* v. *California,* 394 U. S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). Appellant contends, however, that the identification procedures at the lineup, when judged by the totality of the circumstances, were so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law, relying upon *Foster.* Appellant also contends that his testimony about the lineup identification was more persuasive than that of the arresting officer. The determina-

tion of persuasiveness of the testimony on this point is a matter in which we must give substantial weight to the circuit judge's superior opportunity to evaluate credibility. See *Jackson* v. *State,* 249 Ark. 653, 460 S. W. 2d 319.

The circumstances here are entirely different from those in *Foster,* however. Sergeant Bruce of the North Little Rock Police Department picked Tarkington up off the streets, from a description given by the prosecutrix, and a radio report that a man fitting that description was in the area. Another suspect had been previously picked up from this description, but the prosecuting witness failed to make an identification in a lineup in which he was placed, so he was released. According to Bruce, he placed Tarkington and three other persons in a lineup to be viewed by the prosecutrix at police headquarters. None of the others resembled Tarkington except that one of them was near Tarkington's weight and size. Tarkington said he was in the lineup about 10 minutes. Mrs. Jones testified that as soon as she looked at Tarkington, she said, "That's the man." Her immediate identification of Tarkington was corroborated by Bruce.

The essential elements making the lineup identification a denial of due process in *Foster* are lacking here. Foster was at least six inches taller than both of the other persons in that lineup. He wore a jacket similar to one which the victim of the crime described as worn by the person who robbed him. The victim there could not positively identify Foster. Even after a face-to-face confrontation across a table in the absence of anyone else except prosecuting officials, the witness was unsure whether Foster was one of the robbers. At a second lineup in which there were five persons, of which Foster was the only one who had been in the first, the victim was convinced of Foster's identity. It was held that the procedures followed had the police, in effect, saying to the witness, "This is the man," made eventual identification of the accused by the victim inevitable and so undermined the reliability of the identification as to violate

due process. Since one man in the lineup with Tarkington was of his weight and size, and the prosecutrix was prompt and positive in her identification after having failed to identify her assailant in a previous lineup, we find no violation of due process here. It also seems significant to us that a "class" ring fitting the description of one worn by the assailant, as related by the prosecutrix, had been removed from Tarkington's hand before the lineup was viewed by the prosecutrix.

The next group of points argued by appellant has to do with an allegedly prejudicial course of conduct of the prosecuting attorney. In appellant's original motion for new trial, he only asserted that the prosecuting attorney violated the orders of the court by asking him if he were not charged with assault with intent to rape on January 23, 1967, and improperly argued that appellant's whole defense was framed by Robert Tarkington, his father. An amended motion filed later asserted the single ground that the prosecuting attorney conducted a star chamber proceeding at which certain witnesses were intimidated and harassed.

We are not aware of any question propounded to appellant about his being *charged* with assault with intent to rape. The only question of that nature called to our attention is one commenced by the deputy prosecuting attorney conducting the trial for the state. He asked appellant, "On the twenty-third day of January, 1967, did you assault Lois _ _ _ _?" He never completed the question because the prompt objection by appellant was sustained by the circuit judge, who also admonished the jury to disregard the question.

There are several reasons, in addition to appellant's failure to make this question a part of his motion for new trial, why there was no prejudicial error. The court's admonition was certainly calculated to remove any prejudice. If appellant had felt that it failed to do so, he should have moved for a mistrial. Not having done so, he is in no position to complain. *Freyaldenhoven* v. *State,* 217 Ark. 484, 231 S. W. 2d 121; *Fair* v.

State, 241 Ark. 819, 410 S. W. 2d 604. When a defendant takes the stand, he may be asked, in good faith, about other crimes he may have committed, for the purpose of throwing light upon his credibility, but he cannot be asked if he has been charged, indicted or accused of other crimes. *Johnson* v. *State,* 236 Ark. 917, 370 S. W. 2d 610. Appellant's argument apparently goes, however, to the deputy prosecuting attorney's good faith in asking the question because appellant relates the question to earlier incidents in the trial. It is admitted that, at the beginning of the trial, the court had directed the deputy prosecuting attorney not to call Lois Sikes as a witness. The court had heard a statement by the deputy prosecuting attorney that he expected to prove a similar incident within a week after the rape of the prosecutrix. During the course of the trial the deputy prosecuting attorney called Lois Sikes as a witness. She came from the witness room and walked past the jury box, but never took the stand, because of an objection by appellant's counsel and his request for a hearing in chambers.

At the hearing in chambers the deputy prosecuting attorney made the following proffer:

> I have called as my next witness Mrs. Lois Sikes, and I would propose to prove by her that on the 23rd of January, 1967, this defendant came to her house asking about vacant apartments; that he asked her for a drink of water in order to gain entrance; that, upon gaining entrance, he pulled a knife on her and stated to her that he was going to have sexual relations with her; that, at that time, she lived at 505 Olive Street in North Little Rock, in close proximity to the residence of the complaining witness in this case; and I propose to introduce this testimony for the purpose of showing a course of conduct, not for the purpose of proving guilt or innocence in the case which we are trying today.

Although the circuit judge expressed some uncertainty about the matter, he sustained appellant's objection, and the state rested its case. After a motion for a directed

verdict by appellant was denied, the court instructed the deputy prosecuting attorney to call his next witness. The deputy prosecuting attorney responded that he understood the court to have ruled that Mrs. Sikes (the state's last witness) would not be permitted to testify, and that the state rested.

It was appropriate for the circuit judge to be extremely cautious about the admission of such testimony, as any real doubt about the question should be resolved in favor of the accused. We have zealously guarded the rights of accused persons to have the state's evidence strictly confined to the issues to insure that no one is convicted because he has committed offenses other than that for which he is on trial or because he is of bad character and addicted to crime. See *Alford* v. *State,* 223 Ark. 330, 266 S. W. 2d 804; *Moore* v. *State,* 227 Ark. 544, 299 S. W. 2d 838, cert. denied, 358 U. S. 946, 79 S. Ct. 356, 3 L. Ed. 2d 353. Yet the mere fact that evidence shows the defendant was guilty of another crime does not prevent its being admissible when otherwise competent on the issue on trial. *State* v. *Dulaney,* 87 Ark. 17, 112 S. W. 158, 160.

In *Alford,* we held that evidence of a prior assault with intent to rape by a defendant on trial for rape was inadmissible. Intent was not an issue either there or here. We recognized, however, that if conduct other than that with which an accused is charged is relevant as tending to prove some material point in issue, and not that the defendant is a criminal, evidence of that conduct may be admissible, but that a proper cautionary and limiting instruction should be given. Among those instances we gave was that arising where alibi is an issue.

In *Moore,* the state had been permitted to prove that two of four defendants on trial for murder committed in the perpetration of robbery assaulted and robbed another victim five days after the crime for which they were on trial. We held that error was committed in admitting this evidence because no connection between the two crimes was even alleged. The only similarity between the two was that the victims in both were picked

up while hitchhiking. We again pointed out that there are innumerable situations in which proof of other conduct on the part of an accused is relevant and competent, even though it also shows the commission of another crime.

We have long recognized that evidence of other conduct by a defendant which shows other crimes by him is admissible when relevant to show mode or methods of operation, habits and practices of the defendant and to identify him as the person who committed the crime for which he is on trial. *Tolbert* v. *State,* 244 Ark. 1067, 428 S. W. 2d 264; *Wood* v. *State,* 248 Ark. 109, 450 S. W. 2d 537; *Roach* v. *State,* 222 Ark. 738, 262 S. W. 2d 647; *Parks* v. *State,* 136 Ark. 562, 208 S. W. 435; *Puckett* v. *State,* 194 Ark. 449, 108 S. W. 2d 468; *Larmon* v. *State,* 171 Ark. 1188, 286 S. W. 933. We have repeatedly held that evidence of the commission of other similar crimes or acts by a defendant at about the same time, tends to show the guilt of the defendant when it tends to establish his identity as the person who committed the crime charged. *Kurck* v. *State,* 242 Ark. 742, 415 S. W. 2d 61; *Miller* v. *State,* 160 Ark. 469, 254 S. W. 1069; *Keese and Pilgreen* v. *State,* 223 Ark. 261, 265 S. W. 2d 542; *Reed* v. *State,* 54 Ark. 621, 16 S. W. 819; *Nash* v. *State,* 120 Ark. 157, 179 S. W. 159; *Cain* v. *State,* 149 Ark. 616, 233 S. W. 779.

One of the most widely recognized applications of the rule is in cases where the modus operandi tends to establish identity. If the crime charged has been committed by a novel means or in a particular manner, and the identity of its perpetrator is in issue and not otherwise conclusively established, evidence of a defendant's commission of a similar offense by that means or in such manner is admissible as tending to show identity of the perpetrator when the similarity of the means or manner employed logically operates to set the offenses apart from other crimes of the same general variety and tends to suggest that the perpetrator of one was the perpetrator of the other. *Jones* v. *Commonwealth,* 303 Ky. 666, 198 S. W. 2d 969 (Ct. App. 1947); *People* v. *Haston,* 69 Cal. 2d 233, 70 Cal. Rptr. 419, 444 P. 2d 91

(1968); *State* v. *Moore,* 460 P. 2d 866 (Ore. 1969); *Harris* v. *State,* 189 Tenn. 635, 227 S. W. 2d 8 (1950); *Wollaston* v. *State,* 358 P. 2d 1111 (Okla. Crim. 1961); *Nester* v. *State,* 75 Nev. 41, 334 P. 2d 524 (1959); *State* v. *Francis,* 91 Ariz. 219, 371 P. 2d 97 (1962); *State* v. *Redmond,* 19 Utah 2d 272, 430 P. 2d 901 (1967); *Thessen* v. *State,* 454 P. 2d 341 (Alaska 1969), cert. denied, 396 U. S. 1029, 90 S. Ct. 588, 24 L. Ed. 2d 525; *Ferrell* v. *State,* 429 S. W. 2d 901 (Tex. Crim. App. 1968); *Anderson* v. *State,* 222 Ga. 561, 150 S. E. 2d 638 (1966); *Brasher* v. *State,* 33 Ala. app. 13, 30 So. 2d 26 (1946); Affirmed & modified, 249 Ala. 96, 30 So. 2d 31 (1947); *Williams* v. *State,* 80 S. Ct. 102, 4 L. Ed. 2d 86; *United States* v. *Johnson,* 382 F. 2d 280 (2nd Cir. 1967); *Fernandez* v. *United States,* 329 F. 2d 899 (9th Cir. 1964), cert. denied, 379 U. S. 832, 85 S. Ct. 621, 13 L. Ed. 2d 40; *State* v. *Sorenson,* 270 Minn. 186, 134 N. W. 2d 115 (1965); *State* v. *Stevens,* 26 Wis. 2d 451, 132 N. W. 2d 502 (1965); *Layton* v. *State,* 248 Ind. 52, 221 N. E. 2d 881 (1966); *State* v. *McClain,* 240 N. C. 171, 81 S. E. 2d 364 (1954). See also, *State* v. *Stephenson,* 191 Kan. 424, 381 P. 2d 335 (1963); *State* v. *Turner,* 81 N. M. 571, 469 P. 2d 720 (1970).

Examples of application of the identity exception to the general rule of exclusion to the method or means of approach taken by an assailant are numerous. See *e. g., Allen* v. *State,* 201 Ga. 391, 40 S. E. 2d 144 (1946), where the common elements were that all the rapes and attempts to rape were committed by a negro upon white women in the same general section of a city, and a knife was the means of intimidation and coercion; *Hart* v. *State,* 447 S. W. 2d 944 (Tex. Crim. App. 1970), where the subsequent event about which evidence was admitted occurred eight days after the rape charged and was similar in that the person involved made his approach after watching the women in a washateria; *Nester* v. *State,* 75 Nev. 41, 334 P. 2d 524 (1959), where the rape charged occurred about six months prior to the other rape and was similar in that the fuses or lights were unscrewed to keep the area where contact was made in darkness, the assailant concealed his face, the threatening language was virtually identical, the method of forcible entry was similar and accomplished without removal of the

victim's garments; *State* v. *Francis,* 91 Ariz. 219, 371 P. 2d 97 (1962), where the victim and another young female were each stopped on different occasions by a man who showed a badge, identified himself as a juvenile officer and each was asked to get into his automobile; *Williams* v. *State,* 110 So. 2d 654 (Fla. 1959), in a prosecution for rape, where the assailant, who concealed himself in the back seat of the victim's automobile in a parking lot at night, explained that he had crawled into the automobile to take a nap, thinking it was his brother's, evidence was permitted to show that six weeks earlier the accused gave the same explanation when frightened away from another lady's automobile in which he had concealed himself at night; *People* v. *Lindsay,* 227 Cal. App. 482, 38 Cal. Rptr. 755 (1964), wherein the charged rapes and uncharged ones were similar in that the perpetrator covered the faces or eyes of his victim, and bound her before committing the rape; *State* v. *Stevens,* 26 Wis. 2d 451, 132 N. W. 2d 502 (1965), where all thefts by fraud and attempts followed a procedure by which the thief would come to the home of a stranger, ask for an unknown person, claim ability to cure an ill person in the home, ask for a glass of water in which she put certain material, ask for money to bless and wrap in a cloth, use ruses to get both husband and wife out of their house and then disappear with the money; *State* v. *Moore,* 460 P. 2d 866 (Ore. App. 1969), where the robber in both cases initiated the robbery with the question, "Would you believe this is a holdup?" and then pulled a gun; *People* v. *Adamson,* 225 Cal. App. 74, 36 Cal. Rptr. 894 (1964), where the robbery charged occurred in Sacramento, California, two weeks prior to another in Reno, and in both cases, two men entered, one produced a hand weapon, pointed it toward a clerk and caused the clerk to turn his back while the other went behind a counter and removed only currency from a cash register; *State* v. *Woolard,* 467 P. 2d 652 (Ore. App. 1970), where a ring was discovered missing in a jewelry store on two occasions shortly after the accused and a female companion had left after trying on rings; *People* v. *Perez,* 65 Cal. 2d 615, 55 Cal. Rptr. 909, 422 P. 2d 597 (1967), where all the robberies were committed during the evening or early morning, two or three men participated,

one or more of whom wore a mask, a gun was used, and no victim was physically injured: *Thessen* v. *State,* 454 P. 2d 341 (Alaska 1969), where 10 fires were started in trash piles with paper towels or tissue and the fire charged was started with paper towels taken from a trash bucket; *Ferrell* v. *State,* 429 S. W. 2d 901 (Tex. Crim. App. 1968), where the robber of two different motels on occasions eight days apart was wearing a hat, drawstring gloves, a woman's hose over his face and exhibited an automatic pistol; *Webster* v. *State,* 425 S. W. 2d 799 (Tenn. Crim. App. 1967), cert. denied, 1968, where the instructions given and procedures followed by the abortionist in all instances were the same. Other cases where evidence of rapes or attempts to rape other persons was held admissible to establish identity in trials for rape or carnal abuse include: *Mitchell* v. *State,* 45 Ala. App. 668, 235 So. 2d 917 (1970); *Mosley* v. *State,* 211 Ga. 611, 87 S. E. 2d 314 (1955); *Anderson* v. *State,* 222 Ga. 561, 150 S. E. 2d 638 (1966); *People* v. *Clark,* 6 Cal. App. 3d 658, 86 Cal. Rptr. 106 (1970).

We have made this application of the rule in some cases without actually stating it, apparently accepting it as well established. For instance in *Puckett* v. *State,* 194 Ark. 449, 108 S. W. 2d 468, we held testimony about an attempted burglary by the appellee about 15 minutes prior to the burglary with which he was charged to be admissible. The house burglarized was entered by cutting a screen and breaking a window in about the same manner as the accused was earlier seen attempting entry into another house. In *Kurck* v. *State,* 242 Ark. 742, 415 S. W. 2d 61, testimony of witnesses about previous similar attempts to defraud by a "green money racket money press" was held properly admitted to show the accused's identity, scheme, purpose, intent, design and motives.

In this case, the prosecutrix testified substantially as follows:

> Appellant knocked at her door and inquired about the apartment next door. When she brought a rent

> receipt to the door to show appellant the name of the apartment building operator, Tarkington asked her for a drink of water. She told him to wait at the latched screen door, but when she returned with the water, he had entered the living room. She persuaded him to come outside by showing him the apartment office, but he asked for another drink of water. She became frightened and tried to get inside her apartment and close the door, but appellant followed her, prevented her from closing the door and followed her into the bedroom. When she turned he had a knife in his hand and was saying, "Don't be scared. I won't hurt you if you will just cooperate." He told her to pull off her housecoat, then pushed her down on the bed and raped her.

While the trial judge must exercise a sound judicial discretion in admitting such evidence, the similarity in the approach was such that the admission of Lois Sikes' testimony consistent with the proffer would not have been error especially if accompanied by an instruction limiting the purpose for which the jury might consider this evidence.

Appellant seeks to connect the calling of Mrs. Sikes to the stand, the later question partially propounded to her and testimony on hearing of his motion for new trial that this proposed witness had been seen talking to some of the jurors. The subject of the conversation was not shown. Mrs. Sikes denied that any such thing took place. If the testimony of his witnesses, both of whom were relatives of appellant, was given full credit, perhaps the trial court would have been justified in finding prejudice or conducting further investigation. No juror was ever identified. The only one called as a witness could not remember Mrs. Sikes' having been called to the witness stand or anyone's having spoken to him at all. We are unable to predicate reversal upon the record in this regard, as the question was one of credibility.

Appellant's argument about the "star chamber" proceeding is based upon the following sequence of events. His first witness was his father, Robert Tarkington. This

witness laid the foundation for appellant's defense of alibi. The father identified one Gerald Cox as a person who was working with him on the date of the offense charged and as one who would know the date and time of a telephone call the father received from his son on that date. After two other alibi witnesses had testified, appellant called Gerald Cox as his next witness. The state's attorney then inquired whether the witnesses who had testified and those who had not were being segregated. When informed that they were not, he requested that this be done, and the court granted the request. Appellant's motion for mistrial was denied. The deputy prosecuting attorney requested a hearing in chambers, which was granted. At that hearing conducted while the jury was excused for the noon recess, the deputy prosecuting attorney examined Robert Tarkington and Gerald Cox, the uncle of appellant's wife, as to whether the witnesses who had testified and returned to the witness room had discussed the proceedings during their testimony with the witnesses who had not been called, and he specifically asked Tarkington if he had "coached" the other witnesses. When no significant disclosure was made, the deputy prosecuting attorney made no motion. Appellant's counsel again moved for a mistrial on the ground of intimidation of witnesses.

Appellant argues that this proceeding placed the witnesses under such a strain that their demeanor was affected and their credibility damaged. At the hearing on the motion for new trial, three of appellant's witnesses who had not been on the witness stand prior to this proceeding testified that the elder Tarkington and Cox returned to the witness room all "shook up" and even though they would not say anything, this frightened or made them nervous. One of these three said that he could not look at or talk straight to the jury. Another, appellant's father-in-law, said he was sick. Cox said that he was nervous. One of these witnesses stated that a rumor "got out" that anybody from Faulkner County would be prosecuted for perjury. The circuit judge heard all the testimony on the motion for new trial and observed these witnesses when they did testify. We cannot

say that there was any intimidation of witnesses through this proceeding or that the discretion of the trial judge was abused in denying a new trial on any alleged misconduct on the part of the attorney prosecuting.

It is not at all clear to us how conduct of the prosecutrix during the trial is misconduct of the prosecuting attorney. Nevertheless, appellant showed by the testimony of the deputy prosecuting attorney that the prosecutrix was present on the second day of the trial and that she and her husband were in an anteroom of the judge's chambers. He denied any recollection of this witness having cried in the presence of jurors outside the courtroom or at any time except while she was testifying, although appellant's attorney stated that he had witnessed the prosecutrix crying hysterically and waving her arms in the presence of eight or nine jurors. Appellant's first cousin, his uncle and one Junior Lee Smart, identified as appellant's father's brother-in-law, all testified that such an incident occurred during a recess, and the two relatives said that the prosecutor was with her. One of them testified that appellant's attorney saw what took place. The uncle said that someone got her out quickly. Appellant's father said that appellant's attorney had discussed the matter with him at the time it occurred. Yet, this matter was never called to the circuit judge's attention in any way prior to the motion for new trial. Even though appellant now argues that the witness was under the control of the deputy prosecuting attorney, and that he should have prevented such an occurrence, no excuse is offered for failure on the part of appellant to ask any action by the trial court at the time, or even to make the circuit judge aware of the incident, even though, according to appellant, both he and his attorney were aware of it. The circuit judge did not abuse his discretion in denying a new trial on this ground.

Appellant concedes that there is no record of the deputy prosecuting attorney's closing argument. Neither is there any record of any objection to it. Of course, we cannot consider any point based on statements in the

course of this argument. We find no reversible error for the misconduct of the state's attorney.

The next group of points relates to action of the trial court. Two points argued by appellant have to do with statements made by the trial judge. One of these was the court's admonition to the jury at the end of the first day of the trial. He admonished the jurors not to read newspapers, stating that if they did, he would have to declare a mistrial, and it had cost the state a couple of thousand dollars up to that time. Later during the presentation of appellant's evidence, he offered exhibits in the form of weather bureau reports purporting to show amount of snowfall in the Little Rock area during the months of January, February and March. The trial judge remarked that lots of times it is raining at Adams Field and not at his house. When the deputy prosecuting attorney stated that he was at a loss to determine what the offered exhibits showed, the judge asked: "Do you want to let the jury guess on it?" While the judge's statement as to the cost of the trial and his comments in regard to the weather bureau reports in the presence of the jury were perhaps inadvisable, we find no basis for reversal. Appellant did not object on either occasion, did not ask any corrective action and did not ask for a mistrial. *Kimble* v. *State,* 246 Ark. 407, 438 S. W. 2d 705.

Another argument advanced by appellant in this category is that the circuit judge erroneously refused to permit him to read the transcribed testimony of Lawrence Keathley at an earlier hearing pertaining to the case, because the witness was outside the jurisdiction of the court. He admits that the record does not disclose this action in any way.

Appellant moved for diminution of the record in this respect on April 20, 1970. We granted certiorari. The writ was returned indicating that there was no such record. The court reporter filed her affidavit that no written or oral motion to make this testimony a part of the record was ever presented to the court, and that no subpoena was issued for Lawrence Keathley.

Appellant then renewed his motion and asked permission to file a bystander's bill of exceptions. We then remanded the case to the trial court for the purpose of settling the record on June 22, 1970. When the record had not been returned, we again issued a writ of certiorari on October 9, 1970. Return of this writ on November 6, 1970, indicated that the record was complete. Appellant's motion on November 25, 1970, for certiorari or diminution of the record and for additional time to prepare a bystander's bill of exceptions was denied by this court.

Appellant now argues that we must consider a bystander's bill on this point, in spite of these proceedings. We do not agree. While appellant relies on Ark. Stat. Ann. §§ 27-1750 and 27-1751 (Repl. 1962), we have no record of the proceedings in the trial court before us and no bystander's affidavit, even though the record was on remand to the trial court for the purpose of settling the record for more than four months. Neither do we know that the testimony of the witness was relevant, material or competent.

The judgment is affirmed.

ARKANSAS STATE HIGHWAY COMM'N *v.*
JULIUS N. DELAUGHTER, JR., A MINOR

5-5583 468 S. W. 2d 242

Opinion delivered June 21, 1971

Thomas B. Keys and *Bedford G. Webb,* for appellant.

R. D. Rouse and *Tackett, Young, Patton & Harrelson,* for appellee.

J. FRED JONES, Justice. This is an eminent domain case in connection with the construction of Interstate Highway No. 30 through Nevada County, Arkansas. The State Highway Commission took 30.66 acres for highway purposes diagonally, in a northeasterly-southwesterly direction, across a 409 acre tract belonging to Julius N. DeLaughter, Jr., leaving approximately 182 acres west of the right-of-way and approximately 196 acres east of the right-of-way. The west end of the tract fronts, for approximately one-half mile, on old Highway 67, or Bowden Road; and the east end of the tract is bounded by the Little Missouri River. The Commission deposited $8,750 into the registry of the court as just compensation. Two expert witnesses for DeLaughter testified to damages in the amounts of $38,649 and $30,365 respectively as just compensation. The jury awarded $23,699; judgment was entered for that amount and on appeal the Commission has assigned error under designated points as follows:

> "The court erred in allowing testimony regarding alleged valuable gravel deposits on the subject land without a proper foundation being laid for the introduction of such evidence.
>
> The court erred in refusing to strike the testimony of Charles Wilburn and P. M. Brown, witnesses for the appellee, based on their testimony of inconsistent highest and best uses of the subject property."

Mr. DeLaughter, the owner, is 20 years of age and testified that he acquired the land from his grandfather and had been familiar with it ever since he was two years of age; that ever since he has known the property it has been used for "cattle grazing and gravel operation." He testified that approximately one-half of the land is open and one-half in wooded area; that prior to the taking he had access to all fields and that his cattle could run free through the bottom land without

the hazard of being trapped by high water coming up from the river on the east portion of the land. He says that since the highway has been constructed his only access from the west to the east portion of the property is through underpasses built for relief bridges for Black Bayou and another creek that runs from west to east across his land and empties into the river. He says that during the winter months and during rainy seasons he is unable to get any kind of vehicle from the west to the east side of the property because of the high water in the creeks in the underpasses. He says that since the construction of the highway all the surface drainage from his property west of the highway must flow through the two underpasses; that when the water backs up in the creeks, his cattle can not get through the underpasses and are in danger of being cut off from access to high ground by the rising water from the river. Mr. DeLaughter answered questions propounded by his attorney as follows:

"Q. What farm equipment can you get through those underpasses to the big tract of land?

A. This big tract of land?

Q. The 196 acre tract?

A. I can't get any farm equipment at the present time.

Q. Can you get any gravel equipment, gravel trucks or equipment through there?

A. No, there is no way."

Mr. DeLaughter testified that the only future use he could make of the land east of the highway would be for cattle grazing, which would be limited to approximately six or seven months out of the year. He testified that he has been selling gravel from a gravel pit on approximately 20 or 25 acres "above relief bridge number two on high ground"; that the gravel pit is approximately 30 steps from the right-of-way taken,

and that since October, 1967, he has received a total of $8,458 for gravel sold from the property. He testified that there was some gravel on the east side of the right-of-way, but that he has sold no gravel from that area. He testified that he did sell some fill dirt from approximately two acres on the east side of the right-of-way for use in the construction of the interstate. He says that prior to the taking his land would support approximately 170 head of brood cows and that since the taking he can run approximately 70 to 90 head of brood cows on the property. Mr. DeLaughter testified on redirect examination that he could not get vehicles and farm machinery from the west side to the east side of his property at any time, and that cattle could go from one side to the other for approximately six or seven months out of the year.

Mr. Roy Stanley, a geologist, testified that he was familiar with the land involved; that it is farm and cattle grazing land containing extensive deposits of sand and gravel which could be commercially extracted.

Mr. Charles Wilburn, a realtor from Texarkana, testified that he had familiarized himself with the property involved and as to the highest and best use of the land in question, he testified as follows:

"Q. Do you have an opinion what the highest and best use is?

A. I do.

Q. What is that opinion?

A. The highest and best use is farming grazing, cattle operation.

Q. Are there any other uses that this land might be put to?

A. It is enhanced with gravel.

Q. What do you mean enhanced with gravel?

A. It has the possibility of gravel production."

This witness testified that the fair market value of the property prior to the taking was $122,700 or $300 per acre, and that after the taking the remaining property had a market value of $84,051, leaving a difference of $38,649 as damage to the property because of the taking. This witness testified that he took into consideration comparable sales in the area consisting of one sale of upland at $200 per acre; another sale of 147.99 acres at $223 per acre, and another at $187.50 per acre. This witness then testified as follows:

"Q. Tell the jury why you feel the market value has been effected in the sum of $38,649?

A. Well, if I want to buy a 378 acre place or had a prospect looking at it, he would, in my opinion, sincerely question the access if I've got limited access to property over a property that didn't have any restrictions. 378 acres in one tract where you could go from one side to the other, the cattle could move freely from one side to the other, and like property that would be controlled with access and subject to flooding where you couldn't get cattle back through the area that remained open, then it would seriously affect the market value of the property."

On cross-examination Mr. Wilburn testified that he had been on the property eight or ten times since 1967 and he then testified as follows:

"Q. Talking about this highest and best use, now as far as cattle ranching and gravel mining is concerned, what portion of that do you place the highest and best use on for cattle ranching?

A. To the extent of the market value of cattle land, grazing land, river bottom land.

Q. You put the entire tract all as cattle ranching?

A. It is enhanced by the value of the gravel being underneath it.

Q. What I want to know, are you placing so-called and across the board highest and best use to the whole 409 acres as cattle ranching?

A. That would be the primary use for it.

Q. How much of your $38,649 that you testified to are you attributing to the gravel portion of it?

A. You don't separate it, it's being enhanced. Like a farm being nearer town. It may be better but you don't know how much better. It depends on the market."

On redirect examination Mr. Wilburn testified that in arriving at his opinion as to the value of the land before and after taking, he took into consideration the fact that there were gravel deposits on the land, and that he took into consideration sales of comparable land containing gravel deposits. He testified as to sales of comparable gravel land in Clark and Little River Counties ranging in price from $380 to $700 per acre. The Highway Department moved to strike Mr. Wilburn's testimony *in its entirety* for the reason it stated as follows:

> "He put the highest and best use of cattle ranching and he says it's enhanced by gravel deposits which he also states has a highest and best use. It is our position the highest and best use are totally inconsistent. You cannot graze cattle and mine gravel off the same tract of land. He was unable to separate that portion of the testimony he attributed to the highest and best use for gravel as to the cattle ranching. It is inconsistent and improper and we move it be stricken."

The motion was denied by the trial court.

Mr. P. M. Brown, another real estate appraiser and broker from Texarkana, testified as an expert for the owner. He testified that he had been familiar with the land involved since the taking in 1966. He testified that the fair market value of the entire tract at the time of the taking was $143,150, and that after the taking the value was $112,785, leaving a difference of $30,365 which he considered as just compensation. He also testified that he took into consideration comparable sales within the area including 160 acres which sold for $28,800, which amounted to $180 or $190 per acre; another sale of 324.40 acres which sold for $62,500, or approximately $190 per acre. This witness also testified as to sales of lands for gravel including a 20 acre tract near the Caddo River which sold for $400 per acre, and a 40 acre tract which sold for $875 per acre. He also testified as to another sale of comparable partially overflow land on Little River consisting of 95.22 acres which sold for $525 per acre. This witness testified that in his opinion the highest and best use of the property involved was for farm and grazing land enhanced by gravel deposits, and that in his opinion, just compensation would be $30,365. Mr. Brown then testified that he based his severance damage on lack of access from the west portion to the east portion during the winter months and during wet weather. This witness testified that there were considerable gravel deposits on both sides of the right-of-way and then testified as follows:

"Q. Do you know whether or not this gravel has been marketed?

A. Yes, sir. There has been gravel marketed off it.

Q. You know whether it has been marketed in a commercial quantity?

A. Yes, sir. The evidence is on the ground.

Q. Did you use this as a basis or one of the basis for your opinion in arriving at the fair market value of the land before and after the taking?

A. Yes, sir. I estimated the land had been enhanced by deposits of gravel that would be commercial."

An then on cross-examination this witness testified as follows:

"Q. Mr. Brown, you put the highest and best use on the land as grazing and enhanced by gravel deposits?

A. Farming and grazing and enhanced by gravel deposits.

Q. How much did you put on the gravel deposits?

A. I didn't put any separate—I used what the market would pay.

Q. Does this highest and best use apply to the entire 409 acres?

A. Yes, sir.

Q. It applies to the full 409?

A. That is what I—The market would pay for it."

On cross-examination this witness continued:

"Q. One final question, sir, on your, I believe the difference you testified to as just compensation was $30,365, is that correct?

A. That is correct.

Q. That is correct?

A. Yes, sir.

Q. And you say that you have not, you do not have a separate breakdown of that land which

is suitable for grazing and that land which is suitable for gravel mines?

A. No, sir. I did not break it down. The market wouldn't break it down. They buy it as one tract."

Mr. Benjamin Clardy, a geologist, testified as to extensive gravel deposits on the land involved. He testified that he would estimate from the walls he saw in the gravel pits that the deposits would run from six to eight feet deep, and that he would not be surprised if they would not reach a depth of 10 feet in some places. He testified that he had no idea how much gravel was in the 409 acres; that he knows there are several gravel deposits in the area, but that it would be presumptuous on his part to attempt to testify to the extent of any of them.

Mr. Charles Scott, a highway department appraiser, testified that in his opinion the highest and best use of the land was for cattle grazing. He testified that the market value of the entire tract was $51,500 or approximately $126 per acre prior to the taking, and that in his opinion the fair market value after the taking is $42,750 or approximately $114 per acre, leaving a difference of $8,750 as damages and just compensation for the taking. Mr. Scott also based his opinion on comparable land sales in the area ranging from $76.50 per acre to $191 per acre including improvements.

The court instructed the jury (without objections) as follows:

"The existence of gravel deposits on the condemned land is an element which you may take into consideration, but only to the degree that it influences the fair market value of the land."

As to the Commission's first point, we are of the opinion that there was sufficient evidence of a market for gravel to justify the court in allowing testimony as to gravel deposits on the subject land.

As to the Commission's second point, we are of the opinion that the trial court did not err in its refusal to strike the value testimony of Charles Wilburn and P. M. Brown. Both of these witnesses testified that the highest and best use of the land was for cattle grazing, but that the market value was enhanced by gravel deposits. Both witnesses testified that they took the gravel deposits into consideration in arriving at their opinion as to the market value, but both witnesses were unable to separate the values attributable to the highest and best use as farm and grazing land from the value as enhanced by the gravel deposits. There is no evidence in the record that the taking of the right-of-way disturbed the gravel deposit on the land at all.

When a part of an owner's tract of land is taken by eminent domain in this state, the rule is well settled that his just compensation is measured by the difference in the value of the land, when put to its highest and best use, immediately prior to the taking and immediately after the taking. *Ark. State Highway Comm'n* v. *Fox,* 230 Ark. 287, 322 S. W. 2d 81; *Ark. State Highway Comm'n* v. *Maus,* 245 Ark. 357, 432 S. W. 2d 478. Apparently the only intent and effect of the evidence in this case pertaining to gravel at all, was simply to show that this entire tract of land would bring a higher price per acre on the open market, both before and after the taking, because it contained gravel of commercial value.

The appellant-Commission cites and relies on statements in 4 Nichols on Eminent Domain, 1970 Cumulative Supplement, pages 61 and 217, as follows:

> "Where different segments of a parcel are susceptible of valuation on the basis of differing highest and best uses, it is error to attribute an overall or average unit of value to the entire parcel.
>
> While valuable mineral deposits on condemned land constitute an element of damages to be considered, if the development of such deposits is in-

> consistent with the highest and best use upon the basis of which the land is valued, such deposits may not be considered."

We do not agree with the Commission that Wilburn and Brown based their market valuation on two inconsistent highest and best uses. In fact, they refused to do so. They both clearly attributed the highest and best use as a cattle ranch or pasture land, and testified that it was more valuable per acre, on the market, because it contained gravel. No one testified that any one segment of the land involved in this case was susceptible of valuation for gravel mining purposes. Its highest and best use was for cow pasture land and there is no evidence that its value enhancement by its gravel content was any less after the taking than it was before.

By fair market value is meant the amount of money which a purchaser who is willing but not obligated to buy the property would pay to an owner who is willing but not obligated to sell it, taking into consideration *all uses* to which the land is adapted and might in reason be applied. *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792.

In 4 Nichols on Eminent Domain, 3rd ed., at page 402, § 13.2, is found the following:

> "When a tract of land taken by eminent domain contains ore, stone, coal, sand, gravel, peat, loam, oil, gas or other valuable deposits constituting part of the realty, the existence of these features can be taken into consideration in determining the compensation so far as they affect the market value of the land. The same rule would be applicable where the land is covered with growing crops or trees capable of being converted into lumber. But even in such case, the market value of the land as land remains the test. Hence, there can be no recovery for any of the foregoing elements valued separately as saleable items additional to the value of the land."

The "before and after" value rule only applies in condemnation cases where the owner is claiming severance damage, or damage to the remainder. Where there is no claim for severance damage, the owner's compensation for the land condemned is the market value thereof at the time of the taking for all purposes. *Lazenby* v. *Ark. State Highway Comm'n,* 231 Ark. 601, 331 S. W. 2d 705.

In arriving at the before and after value, of land in condemnation proceedings, the owner is entitled to compensation based on the market value of the land put to its highest and best use, but he is not required to confine his evidence to only the highest and best use to which the land is adapted. He may offer evidence of all purposes, comprehending its availability for any use for which it is plainly adapted as well as its most valuable purpose for which it can be used and will bring most in the market. *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.

In 1 Orgel on Valuation Under Eminent Domain, 2d Ed., § 30, is found the following:

> "A properly qualified witness may express an opinion that the property has a 'fair market value' of $10,000, and he may explain, both on direct and on cross examination, the particular qualities of the property which lead him to conclude that it is worth this amount. But he is not ordinarily permitted to testify that the property 'has a value of $10,000 for building lot purposes' or 'for the best use.' "

Property has but one market value, not one value for one use and another for another. *Napa* v. *Navoni,* 56 Cal. App. 2d 289, 132 P. 2d 566 (1942). And as was said by the California District Court of appeal in *Joint*

Highway Dist. No. 9 v. *Ocean Shore R. Co.,* 128 Cal. App. 743, 18 P. 2d 413 at p. 417:

> "This market value may be greater or less than the value in use to either the owner or the condemnor, but in the eyes of the law it is a fixed amount determined by 'the highest sum which the property is worth to persons generally, purchasing in the open market in consideration of the land's adaptability for any proven use.' "

In the case at bar neither Wilburn nor Brown attempted to place a value on the land for farm and cattle grazing as distinguished from a different value for gravel production. They both simply testified that the highest and best use of the land would be for a cattle operation, but that its value was enhanced by the fact that it had gravel deposits that would be considered by a purchaser in the open market. They both testified that the difference in the before and after market value was caused by the diminished access to that portion of the land east of the right-of-way.

The verdict of the jury was well within the difference in market value as testified to by Wilburn and Brown, and we conclude that the judgment of the trial court rendered on the verdict should be affirmed.

The judgment is affirmed.

ARTHUR RATZLAFF ET AL *v.* FRANZ FOODS OF ARKANSAS

5-5600, 5-5601 & 5-5602 468 S. W. 2d 239

Opinion delivered June 21, 1971

John O. Maberry, and *Putman, Davis & Bassett,* for appellants.

Crouch, Blair, Cypert & Waters, for appellee.

CONLEY BYRD Justice. Appellants Mr. and Mrs. Arthur Ratzlaff, Mr. and Mrs. Harold C. Collins and Mr. and Mrs. S. D. Molter brought separate actions against appellee Franz Foods of Arkansas, a subsidiary of Tyson's Foods, an Arkansas Corporation, to recover damages for certain noxious wastes discharged into the sewer system of the city of Green Forest, Arkansas, that allegedly polluted Dry Creek, a stream running through appellants' properties. The trial court sustained a demurrer and dismissed each of the complaints. The three causes have been consolidated in this court because of the identity of the issues.

The complaints set forth that appellants are dairy farmers owning lands through which Dry Creek runs and then allege:

"(5) That the defendant, in its business as a chicken processing and fertilizer plant, utilizes the sewers of the City of Green Forest, Arkansas, under a contract which requires and makes it the duty of the defendant to remove and eliminate from its deposits into the sewer system, some or all of the following: Refuse, offal of fowls, blood, wastes and other unwholesome, offensive and noxious waste products; that one purpose of this contract was to prevent the sewage facilities of the City from being oversaturated and to prevent harm to landowners located down-stream from the City sewage facilities and that the defendant at all times herein knew of the purpose of this contract.

"(6) Defendant is guilty of the following acts of negligence which were a proximate cause of plaintiffs' injuries and damages as hereinafter alleged:

(a) That the defendant, in violation of its contractual duty with the City of Green Forest, carelessly and negligently deposited great quantities of offensive waste products into the sewers of the City of Green Forest and thereby polluted and made foul Dry Creek to plaintiffs' damage.

(b) That defendant failed to comply with its contract with Green Forest by allowing waste, blood, refuse and other unwholesome products to get into the sewer system when it knew or by exercising ordinary care should have known that the types and quantities of waste being deposited into the sewer system were in violation of its contract with the City and would result in pollution of Dry Creek to the injury of plaintiffs.

(c) That defendant negligently washed down its processing facilities so as to cause the pollution originally contracted against to occur; that defendant knew or should have known that it was violating its duty under its contract so as to injure plaintiffs and was in a position to prevent a recurrence of

such injury and failed to prevent such recurrence to the damage of plaintiffs."

In determining whether or not the complaints state a cause of action we find that we must consider and analyze three established principles of law. The first proposition is the general rule that one who creates a nuisance such as pollution of a stream is liable to lower riparian owners for the direct and probable consequence of the nuisance. See *Smith* v. *Magnet Cove Barium Corp.,* 212 Ark. 491, 206 S. W. 2d 442 (1947) and *Spartan Drilling Co.* v. *Bull,* 221 Ark. 168, 252 S. W. 2d 408 (1952). The second proposition is that a user of a city sewer is clothed with immunity from liability once he lawfully deposits his sewage in the sewage system. The theory upon which immunity from liability is granted to the user is that once the sewage is deposited in the city's conduit, the user no longer has control of the disposal of the sewage because by law the city is given the exclusive right to control and dispose of sewage. See *Carmichael* v. *City of Texarkana,* 116 F. 845, 54 C. C. A. 179 (1902). It was upon this theory, apparently, that the trial court dismissed appellants' complaints.

The third principle of law is that a party who owes no obligation to third persons or the public in general may by contract assume an obligation to use due care towards such third persons or the public in general. See *Hogan* v. *Hill,* 229 Ark. 758, 318 S. W. 2d 580 (1958) and *Collison* v. *Curtner,* 141 Ark. 122, 216 S. W. 1059 (1919). When this principle is read in connection with the complaint allegations that the appellee violated its contract with the city to remove certain refuse to prevent oversaturation of the city's sewage disposal facilities, we find that the trial court erred in sustaining the demurrers and dismissing the complaints. This is supported both by logic and authority. The very essence of the immunity from liability, stated in the second principle above, is that the user of the city's conduit loses control of sewage once it is deposited and that exclusive control thereafter is in the city. However here the allegation is that the user who contracted not to oversaturate the city's treatment facilities violated such contract and thereby caused a pollution of the appellants' lands. Un-

der such allegations it does not logically follow that a user in violation of his contract can wrest the control of the city's sewage facilities from the city and at the same time stand behind the immunity which the law accords in the second principle stated above. Furthermore, in *Carmichael* v. *City of Texarkana, supra,* it was recognized that a user under some circumstances could be liable. It was there stated:

> "This conclusion has not been reached without a careful consideration of the broad averments in the bill that the demurrants and the city, acting together in concert at the same time, have, by means of the open sewer and its use, created and maintained this nuisance, and that they have not ceased to do so. If these allegations stood alone, they would undoubtedly charge these citizens with liability; but they are accompanied with averments that the demurrants invoked the power of the city to construct the sewer, that the city was guilty of gross negligence in building it, and that the demurrants had used, occupied, and operated it 'by authority of, under, and from the city.' When all these statements are read together with the statutes which vest the right to construct, to change, to repair, and to control this sewer exclusively in the city, there is no escape from the conclusion that the acts and omissions of the city, and not those of the citizens, constituted the proximate cause of the injury to the complainants, and that the inhabitants who requested the construction and operation of the improvement are not liable for those acts and omissions, because they had no power to command or control the city in their performance."

Reversed and remanded.

ARKANSAS AVIATION SALES, INC. *v.* CARTER CONSTRUCTION COMPANY ET AL

5-5570 469 S. W. 2d 118

Opinion delivered June 21, 1971
[Rehearing denied August 9, 1971.]

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

Holmes & Byrd, for appellees.

FRANK HOLT, Justice. Appellee, Carter Construction Company, filed an action for a declaratory judgment against appellant, Arkansas Aviation Sales, Inc., to determine the ownership of a Piper Cherokee Aircraft. Appellee asserts ownership by the provisions of a writ-

ten lease-purchase agreement. Appellant claims that this written agreement provides for a lease only and that it, therefore, retains ownership of the plane following completion of the agreed monthly rental payments.

The trial court found that appellant agreed to sell the aircraft to appellee under a lease-purchase agreement, and that the option to purchase was deleted from the contract "by agreement of the parties thereto and was not done with the intention of making said instrument a lease only of said aircraft * * *." For reversal appellant contends that the chancellor erred in admitting parol testimony which contradicted a prior written "Aircraft Lease" executed between the appellant and appellee. There is no appeal from that part of the decree finding a balance due on the contract and a note which were assigned to a local bank.

On May 1, 1965, the parties executed a five-year "Aircraft Lease" which contained an option to purchase clause. Appellee had the right to apply its monthly rental payments on the purchase price of $19,055.00 (which included sales tax) plus any accrued interest. There was evidence that about two weeks later the parties, by mutual agreement, deleted the lease-purchase option. Several months after the written agreement was made the corporate ownership of appellant was transferred to the present owners.

Appellant does not dispute "that the parties mutually agreed on having the language in the contract relating to the option to purchase stricken." Even so, appellant objects to the chancellor permitting the original parties to the transaction to testify that, at appellee's accountant's suggestion, the option to purchase was deleted for tax benefits to appellee and that this deletion was with the mutual understanding that the written agreement would remain a lease-purchase transaction.

In *Ferguson* v. *C. H. Triplett Co.,* 199 Ark. 546, 134 S. W. 2d 538 (1939) we reiterated that: "It is well settled in this state that parties to a written contract

may, subsequent to its execution, modify it and substitute a valid oral agreement therefor."

In the case at bar we think the chancellor was correct in permitting these original parties to this written contract to testify about their "side agreement." In Restatement, Contracts § 240 we find:

> "(1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and
>
> * * *
>
> (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract."

The Committee Comment on Subsection (1) (b) reads:

> "d. The justification of the Parol Evidence Rule is that when parties incorporate an agreement in a writing it is a reasonable assumption that everything included in the bargain is set down in the writing. Though this assumption in most cases conforms to the facts, and the certainty attained by making the rule a general one affords grounds for its existence, there are cases where it is so natural to make a separate agreement, frequently oral, in regard to the same subject-matter, that the Parol Evidence Rule does not deny effect to the collateral agreement. This situation is especially likely to arise when the writing is of a formal character and does not so readily lend itself to the inclusion of the whole agreement as a writing which is not limited by law or custom to a particular form. Thus, agreements collateral to a negotiable instrument if incorporated in it might destroy its negotiability, and in any event would deprive it of the simplicity of form characteristic of negotiable

> paper. So in connection with leases and other conveyances, collateral agreements relating to the same subject-matter have been held enforceable. These illustrations of what agreements 'might naturally be made' without inclusion in an integrated contract are not exclusive. It is not essential that a particular provision would always or even usually be made in a separate collateral agreement. It is enough that making such a provision in that way is not so exceptional as to be odd or unnatural."

In *Magee* v. *Robinson,* 218 Ark. 54, 234 S. W. 2d 27 (1950) we approved this section of the Restatement and permitted parol evidence to establish a contemporaneous oral agreement relating to a deed. There we said:

> "* * * the separate agreement as to possession of the lands is neither odd nor exceptional, but is one that might naturally be made by parties situated as were appellees and appellant at the time the deed was executed."

Also, in *Bourque* v. *Edwards,* 232 Ark. 665, 339 S. W. 2d 436 (1960) we again recognized the validity of § 240 in holding that although parol evidence is not admissible to vary a written instrument, it was there admissible to prove a "side agreement" with respect to whether a conveyance of real property included a butane tank.

We think this section is likewise applicable in the case at bar. There was evidence adduced that the customary and popular method of acquiring an aircraft by a business enterprise was by the lease-purchase contract and, as previously indicated, this provision was eliminated only for tax purposes. Further, the transaction was entered on appellant's books as a sale with the sales tax added and paid. In the circumstances, we are of the view that the deletion of the lease purchase paragraph from the written contract, for tax purposes, was a proper subject for a "side agreement;" that this deletion would not affect the original agreement between the parties and is consistent with their contract; and

that it is an oral or collateral agreement which "might naturally be made as a separate agreement by parties situated as were the parties to the written contract." Therefore, the trial court did not err in admitting parol testimony by the original parties to establish their "side agreement" made subsequent to the parties' written contract, and to show the scope and effect of this oral agreement.

There being no contention that the findings of the chancellor are against the preponderance of the evidence should the parol evidence be admissible, the decree is affirmed.

Affirmed.

BYRD, J., not participating.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot grasp the reasoning by which the court is saying that the effect of the action of the trial court and of the majority is not to permit the contradiction, alteration, or variation of, and addition to the terms of a valid and unambiguous contract by parol evidence, contrary to prior decisions of this court on the subject. Our rule permitting the modification of a written contract is appropriate, but its applicability here terminates before the end result is reached.

A clear, unambiguous written lease-purchase agreement was entered into between the parties. By mutual agreement, that lease-purchase agreement was modified to eliminate from it all clauses pertaining to purchase of the plane, making it a clear, unambiguous written lease agreement upon which appellant relied in the chancery court. The modification was accomplished by striking through the appropriate paragraphs, and the initialing of the action by the parties. The agreement, as modified, is that which appellee endeavored to vary and alter by proving a contemporaneous oral

agreement that the lease-purchase agreement remained in effect. In pleading, however, the appellee (plaintiff) only alleged that when the pertinent "purchase" paragraphs were eliminated, it was not the intention of the parties that the contract become a straight lease agreement, but that the plaintiff retained his option to purchase at any time prior to expiration of the lease, upon the very terms deleted. It also asserted that the interpretation of the contract sought by appellant would result in undue hardship to appellee and unjust enrichment of appellant. There was a further allegation by appellee that there was no consideration for the deletion of the clauses in the contract.

According to the officer of appellee who conducted the negotiations, the paragraphs were stricken two weeks after the contract was signed. The salesman for appellant stated that they were deleted the same day the transaction took place. They were stricken on advice of appellee's accountant, so that rental payments could be deducted by appellee on income tax returns. After the deletion, appellee did charge all rental payments off as such on its income tax returns. Language not stricken included the following:

> The Aircraft will be returned to the lessor at its office, aforesaid by the Lessee at the Lessee's expense at 12 o'clock Noon on the 1st day of April, 1970, in the same condition as when received except for reasonable wear and tear from ordinary use.
>
> * * *
>
> Lessee, at his own expense, agrees to keep the Aircraft in good condition and repair and will return the Aircraft to Lessor upon the termination of this lease in the same condition as when received except for reasonable wear and tear from ordinary use.

Oral testimony simply is not admissible to engraft

contemporaneous oral agreements upon a written contract. *Archer* v. *Bucy,* 235 Ark. 244, 357 S. W. 2d 636, and *Jones* v. *Cox,* 227 Ark. 750, 301 S. W. 2d 12, present close parallels to the present case, and reiterate our oft-stated parol evidence rule in this regard. In *Cox,* an effort was made to engraft a provision that the purchase price for a concrete mixer would be paid for solely from the net profits from its operation. See also: *Kelly* v. *DeWees,* 200 Ark. 770, 140 S. W. 2d 1011, where an effort was made to show a contemporaneous oral agreement that a written separation agreement would not be incorporated into a divorce decree; *Bridges* v. *Harold L. Schaefer, Inc.,* 207 Ark. 122, 179 S. W. 2d 176, where a purchaser under a contract for delivery of equipment f.o.b. factory without service wiring or plumbing sought to show a parol agreement that the seller was to install the equipment; *Kimmer* v. *New Gin, Inc.,* 199 Ark. 1187, 137 S. W. 2d 749, where the maker of a note having an apparently unconditional obligation thereon sought to show an oral agreement that the note be paid by application of the earnings of his shares of stock in the corporate payee; *Atkins* v. *Garner,* 222 Ark. 470, 261 S. W. 2d 266, where the buyers of automobiles sought to prove a contemporaneous oral agreement that they were not to be personally liable on an unconditional written obligation for the payment of the balance of the purchase price. Many other such examples could be cited.

It must be kept in mind that this is not an action to reform a contract, or one based on fraud. It should also be kept in mind that the purported oral agreement would directly contradict the written contract as modified by a subsequent agreement of the parties. Neither is it a case where there was an attempt to show that the binding effect of the contract was dependent upon any condition or contingency.

I do not agree that the wholesome rule applied in the cases above cited is made less applicable by the section quoted in Restatement of the Law or *by Magee* v. *Robinson,* 218 Ark. 54, 234 S. W. 2d 27,

or *Bourque* v. *Edwards,* 232 Ark. 665, 339 S. W. 2d 436. As I read Section 240 of Restatement, Contracts, insofar as applicable here, it prohibits, rather than permits, the result here. Comments b and c in pertinent part read:

> b. A collateral oral agreement in terms contradictory of the express words of a contemporaneous or a subsequent integration is necessarily inoperative. If there is any exception to this principle it is found in the law of negotiable paper, and is outside the Restatement of this Subject which relates to the general law of contracts. A prior (but not a contemporaneous) written agreement is superseded as completely as if it were oral.
>
> c. Even where the extrinsic agreement is not in terms contradictory of the integration, there may be a clear implication of fact from the writing that it fully expresses the whole bargain in regard to the matter in question. To contradict such an implication of fact by extrinsic evidence is no more permissible than to contradict the direct words of the writing. In either case the writing is inconsistent with the oral agreement.

The collateral oral agreement is certainly contradictory of the express terms of the writing, and particularly of those terms hereinabove quoted. There could be no clearer implication of fact that the modified writing fully expresses the whole bargain between the parties than exists here. The manner in which the modification of the original written contract was accomplished leaves room for no other implication.

Illustrations of the application of Section 240 in the Restatement text are pertinent:

> A and B in an integrated contract respectively promise to sell and to buy Blackacre for $3000. A contemporaneous oral agreement that B shall be allowed to pay the price by work taken at a stated rate of compensation is inoperative. The oral

> agreement is to pay in another medium than money or an obligation for money.
>
> A and B in an integrated contract respectively promise to sell and to buy a specific automobile. A contemporaneous oral undertaking on the part of A to warrant the quality of the machine beyond the warranties that the law would otherwise impose is inoperative. Oral representations by A of the quality of the machine which induce B to enter into the written contract are, however, operative to create a warranty. The representations are independent of the contract through an inducement to its formation, and the obligation of a warranty is imposed by law not from a promise but from an assertion of fact.

In *Magee* v. *Robinson,* supra, the contemporaneous oral agreement was not contradictory of the terms of the written deed, which usually contains no statement as to delivery of possession. In addition to, and immediately following, the portion of the opinion quoted in the majority opinion, we said:

> Moreover, that part of the contemporaneous oral agreement which provided that Robinson should retain possession and continue to receive the rents from Davis until Jan. 1, 1947, in lieu of interest on the deferred balance of the purchase price during that period, tends to explain the stipulation in the deed that the notes bear interest from Jan. 1, 1947.

This holding was in keeping with another illustration of their precepts by the writers of Restatement, as follows:

> A and B in an integrated contract respectively promise to sell and to buy specified goods. No time or place for delivery is specified. If no agreement is made as to these matters the rule of law is that the goods are deliverable in a reasonable time at the seller's place of business. A contempora-

neous oral agreement that the goods shall be delivered within thirty days, at the buyer's place of business, is operative.

In *Bourque* v. *Edwards,* supra, there was no objection to the testimony involved, and the court said that it could not be made for the first time on appeal. Furthermore, the question involved was whether a butane tank constituted a part of the realty conveyed by the deed, or whether it was personalty, as the court said the parties to the deed had treated it. It does not appear that the deed contained any statement on this subject at all. This case is hardly authority for the majority's result here.

While appellee argues that, in any event, there was no consideration for the modification, this seems to me to be a self-defeating argument. It is well founded only if appellee's version of the modification is accepted. If the agreement for modification was the elimination of the lease-purchase option, consideration passed to appellee by his benefit through tax deductibility of the full amount of its payments as rental and to appellant through its being relieved from the obligation to pass title to appellee when all the payments had been made. If the lease-purchase option remained in effect by side oral agreement, no consideration whatever for the modification passed to appellant.

I would reverse the decree and enter judgment for appellant.

ARKANSAS STATE HIGHWAY COMMISSION
v. ANNIE SUE McDONALD

5-5603 468 S. W. 2d 231

Opinion delivered June 21, 1971

Thomas B. Keys and *George O. Green,* for appellant.

Pickens, Pickens & Boyce; By: *James A. McLarty,* for appellee.

FRANK HOLT, Justice. This is a condemnation proceeding in which the State acquired 3.72 acres of land in fee and a permanent drainage easement upon another .46 acres of land belonging to appellee landowner. This acquisition from appellee's 102-acre farm was necessary for the relocation and construction of a part of U. S. Highway No. 64. The area taken in fee consisted of a 60-foot strip along the northern boundary of the farm. The easement acquired is located to the south and adjacent to the area taken in fee. Appellee's farm is near the City of McCrory and fronted approximately one-fourth mile on State Highway No. 17. The landowner testified that the highest and best use of her land was for residential development and estimated her damages at $13,000 ($102,000 valuation before the taking and $89,000 after). Three expert witnesses testified in appellee's behalf to the effect that the highest and best use of the property was for residential purposes. The damages estimated by these witnesses were $4,181, $3,837, and $3,762 respectively. Appellant's only witness estimated that the land had been enhanced in value in the amount of $2,800 ($31,000 before and $33,800 after). Appellant's estimate was on the basis that the highest and best use of the lands fronting on Highway No. 17, and at its junction with the new construction of No. 64, was commercial, with the remainder being agricultural. The court, sitting as a jury, found there was neither severance damage nor enhancement to the market value of the remaining land. The court awarded $4,800 for the lands actually taken. For reversal of that judgment, appellant contends there is no substantial evidence upon which the trial court, "upon its own motion," based its findings of fact.

Appellee, 81 years of age, testified on direct examination, without objection, that her father had purchased the property in 1888 when she was one year old; that this property was part of a larger farm which had been divided between her and her brother; that she had not

lived on her particular portion of the farm, although she had lived on that portion now belonging to her brother; that she had owned the property for "about 40 years" and lived nearby; that it is located near the city limits of McCrory; that she had farmed the land through her tenants during the 40 years; that she had sold timber off the property; that she had been on the farm many times and had made improvements upon the land; and that she was familiar with the surrounding land which had been developed into a residential section. She further testified that the highest and best use of the property is for residential development and that in her opinion the fair market value of her property was $102,000 before the taking and about $89,000 after the taking, or damaged in the amount of $13,000. A landowner's opinion testimony is admissible as to the question of value of his property, regardless of his knowledge of property values, in the event he has an intimate acquaintance with his property. *Arkansas State Highway Comm.* v. *Duff,* 246 Ark. 922, 440 S. W. 2d 563 (1969); *Lazenby* v. *Arkansas State Highway Comm.,* 231 Ark. 601, 331 S. W. 2d 705 (1960).

We think the appellee has shown that she is sufficiently familiar with her property. Having farmed the property through tenants for 40 years, she is certainly aware of the value of the property in terms of the amount of rental income it produces each year, as well as any income derived from the sale of timber. This evidence, along with the fact that she had knowledge of the residential development in surrounding areas, is sufficient to show that her testimony as to damages in the amount of $13,000 is not without a reasonable basis. Any infirmities in her testimony bear upon its weight.

On cross-examination appellant questioned appellee as to whether she had received any offers to purchase portions of her property and the prices made in such offers. Appellee replied that although she had received offers almost every week from prospective purchasers desiring to purchase the property for residential and commercial purposes, she had not allowed a price to

be set because she did not intend to sell. Appellee was not further questioned concerning the basis used to estabish value. This limited cross-examination was insufficient to destroy the reasonable basis of her value testimony which she had demonstrated on direct examination. In *Arkansas State Highway Comm.* v. *Clark,* 247 Ark. 165, 444 S. W. 2d 702, we said:

> "Since Clark did not base his opinion on comparable sales, appellant's assertion that he did not show that he was acquainted with the market and other sales in proximity to his lands relied upon by appellant's experts is of little consequence. Appellant never asked Clark about his knowledge of these sales or for an explanation of their comparability. Consequently, it is in no position to contend that this lack of knowledge made his testimony insubstantial."

Likewise, in the case at bar appellant's failure to further seek an explanation of the basis used by appellee to determine her land value precludes it arguing on appeal that her evidence is not substantial.

Furthermore, there was testimony, without objection, by an expert witness for the landowner that comparable lands in the surrounding area had sold for $1,-200 an acre about ten months after appellee's land had been taken by appellant.

In the case at bar the landowner, as we have indicated, was thoroughly familiar with the utilization of her property, the improvements, and its adaptability for the highest and best use. She was also familiar with the usages of the surrounding lands. Her expert value witness corroborated her testimony and placed a value upon her lands taken at $1,200 per acre based upon a comparable sale. The court awarded appellee $4,800 as just compensation. In doing so, the court allocated $4,464 for the 3.72 acres taken in fee ($1,200 per acre) and the blance of the total award represented just compensation

for the .46 acre taken for a permanent easement. In our view the findings of the court, sitting as a jury, are based upon substantial evidence.

Affirmed.

BROWN, JONES and BYRD, JJ., dissent and would reverse because the landowner showed no reasonable knowledge of market values as to residential property. *Arkansas State Hy. Comm'n* v. *Darr,* 246 Ark. 204, 437 S. W. 2d 463 (1969).

ARKANSAS STATE HIGHWAY COMMISSION *v.* SOUTHERN DEVELOPMENT CORPORATION

5-5508 468 S. W. 2d 102

Opinion delivered June 21, 1971
[Rehearing denied August 9, 1971.]

Thomas B. Keys, George O. Green, James N. Dowell and *Coleman, Gantt, Ramsay & Cox;* By: *John G. Lile,* for appellant.

John Harris Jones, for appellee and cross-appellant.

BEN CORE, Special Justice. Appellee, Southern Development Corporation, hereinafter called Southern, prior to this suit, was the owner of an 8.3 acres tract of land lying north and east of the Arkansas River upstream from the City of Pine Bluff. The tract fronts 940 feet on the River. The Arkansas State Highway Commission, hereinafter called Commission, filed this condemnation suit for the purpose of taking 1.60 acres of the tract in fee and a temporary easement on a smaller piece measuring 110 feet by 151.5 feet for a total of 2.01 acres. After the taking two tracts remained, one lying northwest of the bridge containing 3.31 acres and the other lying south of the bridge containing 2.98 acres. Preliminary to the order of possession the Commission deposited $2,500.00 with the Court as estimated just compensation. In its answer Southern contended that the land was adapted as a bridge site, commercial site or industrial site for motel, marina and recreational facilities or for other use considering its river frontage, elevation and accessibility to the urban area of Pine Bluff. Southern's answer as finally amended claimed $634,000.00. The jury awarded $35,000.00. The Commission has appealed and Southern has cross-appealed.

Points relied upon by the Commission, with some slight renumbering from the brief, are:

1. The Court erred in permitting the jury to consider the question of whether or not the highest and best use of the land was that of a bridge site.

2. The Court erred in permitting the jury to consider the testimony of Jim Hood as to the value of the land as a bridge site.

3. The verdict is excessive in that there is no substantial evidence to support it.

On its cross-appeal Southern contends that the trial court erred in the following particulars:

1. In excluding the testimony of L. P. Carlson and Leo Tyra as to the amount of savings on cost of construction of the bridge at this particular site over that of the next most feasible site;

2. The exclusion of the testimony of Jim Hood as to the basis of his opinion on the value of the land as a bridge site;

3. In the giving of the plaintiff's instruction number 12 which told the jury that it should consider the value of the land the landowner place on the property for tax purposes as evidence of its true value.

Southern contends that this court has the authority to and should increase the jury verdict to the sum of $207,500.00 upon Southern's consenting that the temporary construction easement be made permanent for highway and bridge purposes. The Commission contends that this court has the authority to and should reduce the verdict to $3,500.00, which is the market value figure established by the Commission's appraiser. *Arkansas State Highway Commission* v. *Bingham,* 231 Ark. 934, 333 S. W. 2d 728 (1960).

The Commission's points 1 and 2 can be rephrased into one contention which is that there was no testimony as to the special adaptability of this property as a bridge site and for that reason the jury should have been directed to disregard any valuation opinion based upon such adaptability. We think that just the reverse is true, which is that there was no competent testimony as to the value of the property as a bridge site and therefore its adaptability as such should not have been submitted to the jury. We, therefore, reverse on direct appeal.

Before demonstrating this result from the record, it will be helpful to set out the governing rules from prior decisions of this court. It is interesting to note that both parties cite substantially the same decisions of this court, with a few exceptions, to sustain their respective

positions. There is apparent agreement as to the establishment of the following rules concerning the taking of private property for public use.

Private property shall not be taken, appropriated or damaged for public use without just compensation therefor. Arkansas Constitution, Article 2, Section 22. The title to land is always held upon the implied condition that it will be surrendered to the government when the public necessities demand and when full compensation has been tendered. *L. R. Junction Ry.* v. *Woodruff,* 49 Ark. 381 (1887). The true measure of just compensation is the "market value of the property". *L. R. Junction Ry.* v. *Woodruff, ibid.*

> "The owner in parting with his property to the State is entitled to receive just such an amount as he could obtain if he were to go upon the market and offer the property for sale. To give him more than this would be to give him more than the market value and to give him less would not be full compensation."

In arriving at this market value the approach is to consider what has been taken from the owner, in other words, what the owner has lost, disregarding its value to the condemnor. The objective is to arrive at the market value, or the value in the market, of the property taken. It is thus opposed to the subjective consideration of what the condemnor has gained or what is the value of the property to the person or entity taking the same. Nichols on Eminent Domain, Volume 3, Section 8.61, page 49.

> "As a general guide to the range which the testimony should be allowed to assume, . . . the landowner should be allowed to state, and have his witnesses to state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. . . .In offering testimony on this issue the owner was not limited to any pre-existing use of

> the land. If it was of little value as a farm, or for common uses, and was of great value as mineral land or as a townsite, that fact might be shown, though it had never been so used." *St. L. I. M. & S. R. Co.* v. *Theo. Maxfield Co.,* 94 Ark. 135, 126 S. W. 2d 83 ( ).''

> ". . . the owner had the right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it can be used, whether so used or not." *Yonts* v. *Public Service Company of Arkansas,* 179 Ark. 695, 17 S. W. 2d 886 (1925)."

Market value is a factual issue peculiarly within the province of the jury and to be proved by the owner as a fact.

> ". . . we are asked to review the verdict upon the testimony. This is a delicate duty in any case, and especially so in a case where the sole issue is one as to value. This is so peculiarly within the province of the jury; . . . nothing but an extreme case would justify our interference. *L. R. Junction Ry.* v. *Woodruff, ibid.*

In addition to the principal issue of fact, which is the market value, sub-issues of fact can develop on the question of adaptability of the parcel to the various uses urged by the owner. The ultimate issue is the market value but other dependent factual issues can develop in the process of proving the ultimate issue.

In this case Southern pleaded the issue of the peculiar adaptability of this property as a bridge site. We think this is one of those possible characteristics which could be urged by a landowner as a contributing factor to the market value of his parcel. Further, we think that in this case there was proof introduced as to the existence of that characteristic of such substantial nature that reasonable minds could draw different conclusions therefrom as to such adaptability and, therefore, that a jury question was made on the issue of

adaptability. However, more is required before the issue can be submitted to the jury. Proof of a market value for the parcel for that use must be made. Mere proof of adaptability, without more, does not establish such market value. There must be such demand for the property for that use.

The only proof offered here as to such value as a bridge site was the testimony of Jim Hood establishing a difference in before and after value of $640,000.00. Jim Hood is president of Southern. He testified to training and experience sufficient to qualify himself as an expert in real estate management, development and appraisement. He testified on direct examination that, in his opinion, the highest and best use of the property was as a bridge site. He further testified that, in his opinion, for that use, the difference in the fair market value of the 8.3 acres before and after the taking was $640,000.00. If that were all that was in the record we think that no reversible error would be present because an expert is entitled to state his opinion as to market value on direct examination without further explanation and the same constitutes substantial evidence sufficient to support a jury verdict unless additional information is brought out demonstrating that such expert has no fair and reasonable basis for his opinion. In other words, the opinion of an expert is given the weight of evidence prima facie and, unless thereafter exposed as having no fair and reasonable basis, constitutes substantial evidence upon which a jury verdict can be based. *Arkansas State Highway Commission* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436; *Arkansas State Highway Commission* v. *Ptak,* 236 Ark. 105, 364 S. W. 2d 794 (1963).

However, in the direct examination Southern's attorney attempted to bring out the basis for his opinion. Counsel for the Commission anticipated the basis and objected to the same being brought out. The trial court sustained the objection. Even at that point we think that no reversible error had been committed. However, Southern's counsel then made an offer of proof on the basis of the opinion. The basis thus brought out was revealed to be that the witness had acquired bridge cost

information from the report made by the consulting engineers to the State Highway Department on the proposed bridge construction for which condemnation was brought. This is referred to by the witness and other witnesses as the Brighton Engineering Report. This report showed, according to the witness, that construction of the bridge on this site as opposed to the next most feasible site, would cost an estimated $831,500.00 less. The witness testified.

> "And from that I determined that this particular site, in my estimation this particular site, attributed $640,000.00, a $640,000.00 advantage to the bridge."

This testimony exposed the opinion on value to be without "a fair and reasonable basis" without which even the opinion of an expert fails as substantial evidence and must be stricken. *Arkansas State Highway Commission* v. *Ptak,* 236 Ark. 105, 364 S. W. 2d 794 (1963). It is true as pointed out by Southern that no motion to strike this testimony was made by Commission's counsel. However, counsel did seek to exclude from the jury the adaptability question by motion for directed verdict and by a requested instruction, both of which were denied by the court. This was sufficient to raise the question as to the presence in the record of adequate proof to raise a jury question on the market value of the land as a bridge site. The Jim Hood opinion, having been exposed as having no "fair and reasonable basis", was inadequate as such proof. The incompetency of this testimony was referred to by the commission's attorney in arguing his motion for directed verdict to the court. There was no other proof; therefore, the issue of the value as a bridge site should not have been submitted to the jury.

We feel, therefore, that the motion for directed verdict on the issue of peculiar adaptability as a bridge site should have been granted for failure of proof on value even though there was substantial proof on adaptability. When the landowner exposed the basis of his value figure as not being a fair or reasonable basis, the effect was to leave the bridge site adaptability without

proof of value. Without such proof of value there was no way the jury could have arrived at a figure for the market value of the land by reason of its adaptability as a bridge site. Therefore, the question of its value as a bridge site should not have been submitted to the jury.

We do not intend by this to say that the trial court should have excluded proof offered on the adaptability of the parcel as a bridge site until after some proof was offered on its market value for that use. In other words, we do not mean to say that proof of its market value for that use must come in as a condition precedent to proof as to adaptability for that use. We do not intend to set up any priorities as to the sequence of the admission of proof. What we do intend to say is that after all of the proof is in and instructions to the jury are being considered, no instruction should be given permitting the jury to consider the question of the market value of the property for any use on which there has been no proof as to such market value for that use even though there may have been proof as to its adaptability for that use. Further, if an instruction is requested admonishing the jury that it should not consider the question of the value of the property for that use such instruction should be given.

On retrial if proof can be made of its value as a bridge site along with the proof of its adaptability, the jury should be permitted to consider it.

We hold that the opinion on value of $640,000.00 was not proper because it violates the rule that the value of the site to the condemnor is not the measure of damages. Mr. Hood was simply taking the dollar amount of money saved in construction costs by the condemnor in placing his structure on this parcel as opposed to the next most feasible parcel. True the savings were discounted some in arriving at the market value figure, approximately 25%, but the market value figure is still obviously part and parcel of the "savings" in construction costs at the selected site over the next most feasible site. No more direct violation of the rule against con-

sidering the subjective value of the site to the taker could be imagined. He is required to divide his savings with the landowner on a one-fourth-three-fourths basis. Since that is the basis of the value figure given by Jim Hood, and since it is in direct conflict with a cardinal rule of condemnation law, the opinion figure simply cannot stand. Without it there is no guide for the jury as to the market value of the property as a bridge site.

We have not overlooked the case of *Gurdon and Fort Smith Railroad Co.* v. *Vaught,* 97 Ark. 234, 133 S. W. 1019 (1911), cited by Southern. Southern has done well to call our attention to that case because at first blush it appears to sustain the position of Southern on this issue. That case involved the condemnation of a right-of-way for railroad purposes through the mountainous terrain of Montgomery County near Caddo Gap. The landowner introduced testimony of a number of civil Engineers who, according to the language of the opinion:

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"testified to facts tending to show a demand for railroad construction in that section of the country, and that this Gap or Pass . . . was practically the only feasible route through this mountainous country. . . . Counsel for defendant urged that the Court erred in permitting these witnesses to testify that the land taken by defendant had a pecuniary advantage for a railroad site over all other lands in this vicinity. . . because of the great cost in making any other site feasible for the location of a railroad through these mountains; . . . the witnesses gave an estimate of the great expense and cost in preparing another site for railroad purposes in comparison with this site, . . . It is urged that this testimony in effect based the value of the site taken upon the benefit that it might be to defendant and of its necessities to acquire that particular property rather than on the actual market value thereof and the loss to the plaintiff by the defendant's appropriation thereof."

Thus a violation of the rule against basing value proof on the benefit to the condemnor was urged there and rejected by this Court. This Court said:

> "In order to show the adaptability of the land taken for the purpose desired, it is competent to show the cost and expense that would be necessary to put other land in the condition of the land taken, which condition gives it a peculiar value for the purpose for which it is appropriated. . . . . The cost and expense of placing any other site in that section of the country in a condition available or adaptable for railroad purposes which the site in controversy possessed would tend to prove the peculiar advantages of this location for such object and its adaptability for such purposes. It was not error to admit such testimony for that purpose."

The "purpose" for which the testimony there was admitted was to show adaptability and "special pecuniary value". Admittedly, this gets awfully close to violating the rule against considering value to the taker rather than loss to the owner. There may have been more of the former in this approach in the *Vaught case* than we had appreciation for at the time and we feel that it should be limited to its special facts.

The prime point, however, is that the costs and differences in costs treated in the *Vaught case* were those required to reshape the ground as, for example, the making of fills, cuts and tunnels. Money spent on the ground is far different from money spent on structural improvements. There is a basic and built in limitation upon costs of reshaping the mother earth to suit man's needs. On the other hand, when one leaves the earth and commences to consider the differences in costs of structures to be stationed upon the earth, there is no limit. The condemnor could be intending to locate an improvement costing one thousand dollars or ten billion dollars and the costs savings could vary in like extremes from one possible site to the next.

Southern contended in the trial court and contends here that the inquiry on costs savings of construction

at one site over the next most feasible site was introduced with approval by language used in the opinion of this court in *L. R. Junction Ry.* v. *Woodruff,* 49 Ark. 381, 395, 396 (1887). That language is preceded by the following:

> "One or more witnesses for appellees were asked to give the comparative cost of building bridges at different points along the river front above and below the Point of Rocks, or rather to state the difference in such cost. The witnesses were also asked, 'What is the value of the property for bridge purposes?' "

That objection was taken to this line of questioning by appellant's counsel is shown by later language of the court:

> "It is very apparent however from the argument that the objection taken by counsel is not the objection which we take to this interrogatory."

This reflects that the court also considered the line of inquiry improper, but for a different reason than did opposing counsel. The court then suggested, and this is the language relied upon by Southern:

> "It would have been less misleading to have asked "What would be saved by building a bridge at this point as compared with other points below or above?' or, 'What were the pecuniary advantages offered by this point for building a bridge?' "

To say that one question is less misleading than another leaves the implication that both are misleading to some degree. We think this falls short of submitting the "less misleading" question as a guide for future use or its line of inquiry as permissible in proof of market value on a parcel of ground adapted as a bridge site.

We recognize that Southern is going to have a problem on retrial of proving any market value for a bridge site. Demand is an essential element of market value. If

there is no demand there is no market value for that use of the property. It is easy to find property in remote and unpopulated areas that would be readymade for some intensive use that would give it tremendous value if only it were located somewhere else. If there is no demand for that use at that location the property does not have value for that use in the market. This is a necessary risk of ownership. The owner, in proving his market value, must prove a demand. This demand must be one other than that of the taker. The taker's need must be disregarded. If this landowner cannot prove a sufficient demand for bridge sites in this area, other than that of the Commission, to establish a market value on bridge sites, then he has no market for bridge sites and is not entitled to have its value as a bridge site considered.

In the *Woodruff case,* previously cited herein, this Court stressed the necessity of a showing of demand as a component of market value.

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> "Of course it does not follow that because a particular spot of ground constitutes a good bridge site, that it therefore has great market value. There may be no reasonable probability that anyone will ever want to build a bridge at that point. This probability is an essential condition of value in such cases."

For purposes of retrial, we feel it necessary to pass on the three points made by Southern on cross-appeal.

As to the exclusion of Jim Hood's testimony as to the basis of his opinion, this ruling came about in an unusual manner. Ordinarily the basis of the opinion of an expert is gone into much more thoroughly on cross-examination than on direct, and thus there is no objection to the evidence on the basis. But here the attorney for the Commission was already aware of what the basis was going to be and objected to the jury hearing it. On the other hand the landowner's attorney wanted the jury to hear it. Since it had a direct bearing on whether

the basis was "fair and reasonable" it should have been admitted. But, of course, when it is admitted it reveals the fact that the opinion of the witness as to market value of the land as a bridge site has no "fair and reasonable basis" and is subject to a motion to strike. Thus, the Commission, instead of objecting to this proof, should have been attempting to develop it, and the landowner, instead of attempting to develop it, should have been leaving it untouched. But the fact that the parties, by mutual misconception, got switched on sides of the issue should not obscure the fact that it is proper to show the basis of an expert's opinion. The proof should have been admitted for that purpose and then the directed verdict should have been granted. The costs proof would not have been admissible except to show the basis of the expert's opinion. It would not have been admissible as direct proof on market value.

What we have just said also covers the trial court's ruling excluding the costs savings testimony of the witnesses L. P. Carlson and Leo Tyra.

We hold that the third point of Southern is well taken. The record is identical to the situation found in *Arkansas Highway Commission* v. *McMillan,* 247 Ark. 419, 445 S. W. 2d 717 (1969) in that there is no proof that the landowner made the assessment revealed by the public records but only that it was shown "by the courthouse records". Instruction number 12 should have been refused for lack of proof to support it.

Reversal on both direct and cross-appeal and remanded for a new trial.

BYRD, J., not participating.

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

JOHN A. FOGLEMAN, Justice, dissenting. While I agree with much of the majority opinion, I do not agree with the result or with the application made of our law relating to evidence in eminent domain cases. What we

must never forget is that the polestar in these cases is just compensation to the owner of private property—not the easy or economical acquisition of that property for public purposes. Our policy is stated in Article 2, Section 22, of the Constitution, the full text of which is:

> The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.

We have said that the words "just compensation" used here mean full compensation. *Arkansas State Highway Commission* v. *Stupenti,* 222 Ark. 9, 257 S. W. 2d 37. Our rules of evidence in these cases have been directed toward assuring this objective.

I do not agree that the landowner was barred from showing the adaptability of his property as a bridge site, regardless of whether there was competent evidence as to its value as a bridge site.

The landowner is not confined strictly to testimony stating the market value of his property taken or damaged. Generally speaking, he may show anything that a buyer of prudence would consider before he would purchase or that a seller would weigh either before or after the taking. *Little Rock Junction Railway Co.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792, 4 Am. St. R. 51; *Yonts* v. *Public Service Co.,* 179 Ark. 695, 17 S. W. 2d 886; *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 2d 706; *Arkansas State Highway Commission* v. *Carpenter,* 237 Ark. 46, 371 S. W. 2d 535.

In *Little Rock & Ft. Smith Railway* v. *McGehee,* 41 Ark. 202, we affirmed a judgment in favor of the landowner where the condemnor had moved to exclude all evidence relating to the feasibility of establishing a ferry from the lands to the opposite bank.

In *Little Rock Junction Ry.* v. *Woodruff,* supra, we adhered to the rule of *McGehee,* saying that it went no further than to hold that the owner may be allowed

to show every advantage which his property possesses, present and prospective, in order that the jury may satisfactorily determine what price it could be sold for on the market. In arriving at the affirmance of the judgment in favor of the landowner, this language was used:

> As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the landowner should be allowed to state, and have his witnesses to state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual.
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> * * *
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> It can hardly be doubted that, if Woodruff had gone upon the market to sell this property, he would not have concealed the fact that it possessed superior advantages as a bridge-site. Now, if he would not have concealed it from a purchaser, it would be unfair to him for the court to conceal it from the jury. On the other hand, if one had been about to purchase the property, he would hardly have been so obtuse as to overlook an element of value so obvious as its eligibility for a bridge-site.

In *Ft. Smith & Van Buren Bridge District* v. *Scott*, 103 Ark. 405, 147 S. W. 440, we said:

> We do not understand the law to be, as contended by appellant, that because the 10 acres of land taken had no peculiar natural advantage over the next or any other 10 acres north of it, along the bank of the river for half a mile, for a bridge site, that therefore the land selected had no value for that purpose. It was in the line of travel, upon the usual traveled way between a thriving city, Van Buren, on the east side of the Arkansas river, and a large and important city, a few miles to the west, Ft. Smith, with an interurban car line that would

> cross the bridge, projected between the two cities, and already constructed and in operation down to the ferry upon the Ft. Smith side of the river, and an act of the Legislature providing for the construction of a free bridge within the limits of the city of Van Buren that must have a site for the west approach thereof upon the further bank opposite to said city, and we cannot see why these facts could not all be taken into account in estimating the value of the land condemned for a bridge site, nor why would they not have been such things as the owner of the land desiring to sell it would naturally call to the attention of one proposing to buy. Certainly, no man with capacity to own lands under similar conditions would overlook such facts as were shown to exist here, "the existing business and wants of the community," and such as could be reasonably expected in the immediate future, in attempting to make a sale thereof, to one proposing to purchase, as an inducement thereto and in substantiation of the value thereof in fixing a price therefor. And this court has often held that, in determining the value of land condemned for public purposes, the same considerations are to be regarded as in the sale of property between private parties, and the convenience and availability of this property for use as a landing for the bridge was a material consideration in fixing its value.

In *City of El Dorado* v. *Scruggs,* 113 Ark. 239, 168 S. W. 846, we said that in the determination of market value of the owner's property, the rule *established* in this state was 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.

In *Arkansas State Highway Commission* v. *Hood,* 237 Ark. 202, 372 S. W. 2d 387, we said:

> Of course, a castle costing a million dollars, built in the desert 100 miles from the nearest habitation

> may add very little, if anything, to the value of the desert land. But if the land was being taken in a condemnation proceeding the landowner would be entitled to show that a very fine castle was located thereon. Actually, it is conceivable that in some instances structures on the condemned property may cause it to have less market value than if the structures were not there.

In *Pulaski County* v. *Horton,* 224 Ark. 864, 276 S. W. 706, we affirmed a judgment in favor of the landowner for an amount in excess of his value expert's difference in market value before and after the taking, because the circuit judge, sitting as a jury, considered impairment of accessibility and drainage to the owner's remaining lands, along with cost of restoration, in arriving at the difference between the market value of the whole tract before and after the taking. The owner's expert witness had not taken into account these elements because he had no knowledge of, and did not take into consideration, the cost of providing ingress and egress or the cost of building a wall necessary to protect the remaining property. The cost of restoration of access and the wall was shown by an engineer who gave no testimony as to value. We reiterated the following statement from Woodruff:

> Every element that can fairly enter into the question of market value, and which a business man of ordinary prudence would consider before purchasing the property, should also be considered by the jury in arriving at the difference between the value of the property before and after the taking or damage to it. *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792.

In *Scott* v. *State,* 230 Ark. 766, 326 S. W. 2d 812, the only testimony relating to any value of the landowner's property taken for Pea Ridge National Park, other than for agricultural uses, was largely that of witnesses who stated facts tending to show the property had a value for park purposes. Some of them expressed opinions as to value ranging from $50,000 to $125,000.

Most of them expressed no opinion as to value at all. The condemnor's witnesses placed the value principally for agricultural purposes at $5,000 to $9,067.50, one of them adding $10,000 for "historical purposes." In increasing the compensation from $16,500 to $30,000, this court quoted the following, inter alia, from *Gurdon & Ft. Smith Rd. Co.* v. *Vaught,* 97 Ark. 234, 133 S. W. 1019:

> The peculiar circumstances of its location and the character of the surrounding country may be proved in order to show the adaptability of the land taken for the purpose desired, because that would be an element of value which the owner would have a right to insist upon in estimating the value of his land.

In *Stuttgart & R. B. R. Co.* v. *Kocourek,* 101 Ark. 47, 141 S. W. 511, the condemnor contended that scope of inquiry as to damages in a partial taking permitted by the court was too large. After restating the guide to the range of testimony in *Woodruff,* and other cases, we rejected the idea that the range was restricted because of want of any opinion and estimate of value, based on the particular advantage of the property involved. We said:

> From these authorities, it appears what range the inquiry as to the damages caused by the condemnation and taking of land for public purposes may properly take, both as to the *elements* of damage *and* the witnesses' *opinions and estimates* thereon, and we do not find that its scope was extended beyond the prescribed limits in this cause, nor that any error was committed by the lower court on that account. (Emphasis mine.)

In *Arkansas State Highway Commission* v. *Ormond,* 247 Ark. 867, 448 S. W. 2d 354, we held that the testimony of the landowner as to the value of his property for catfish farming should have been stricken because it was based entirely upon speculation as to anticipated income. Yet we said:

> It must be remembered that only Ormond's opinion as to the land value before the taking would have been stricken. This would leave for the jury's consideration, not only Ormond's opinion as to the value of the remaining lands, but his testimony as to the characteristics of the land and as to a much disputed point—its highest and best use. This was appropriate. Ormond was entitled to show every advantage that his property possessed, present and prospective, in order that the jury might satisfactorily determine what price it could have been sold for on the market. *Arkansas State Highway Commission* v. *Carder,* 228 Ark. 8, 305 S. W. 2d 330; *Arkansas State Highway Commission* v. *O. & B., Inc.,* 227 Ark. 739, 301 S. W. 2d 5; *City of El Dorado* v. *Scruggs,* 113 Ark. 239, 168 S. W. 846; *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792, 4 Am. St. R. 51; *Kansas City Southern Ry. Co.* v. *Boles,* 88 Ark. 533, 115 S. W. 375. He could state and have his witnesses state any and every fact concerning the property which he would naturally be supposed to adduce in order to place it in an advantageous light if he were selling it to a private individual. *Little Rock Junction Ry.* v. *Woodruff,* supra; *Stuttgart & R. B. R. Co.* v. *Kocourek,* 101 Ark. 47, 141 S. W. 511. An owner is entitled to show the availability of his property for any and all purposes to which it is plainly adapted, or for which it is likely to have value and induce purchases. *Arkansas State Highway Commission* v. *Brewer,* 240 Ark. 390, 400 S. W. 2d 276; *Arkansas State Highway Commission* v. *Griffin,* 241 Ark. 1033, 411 S. W. 2d 495; *Gurdon & Ft. Smith R. Co.* v. *Vaught,* 97 Ark. 234, 133 S. W. 1019. The same considerations are to be regarded as in a sale between private parties. *Ft. Smith & Van Buren Bridge District* v. *Scott,* 103 Ark. 405, 147 S. W. 440; *Little Rock & Fort Smith Railway* v. *McGehee,* 41 Ark. 202.

We have many times permitted evidence of value-influencing factors to be considered in arriving at just compensation without any testimony relating to their

relationship to before and after values, under the rules hereinabove stated, which include:

> Details as to kind and character of materials that went into the construction of a home on lots across which a railroad right-of-way was taken. *Kansas City Southern Ry. Co.* v. *Boles,* 88 Ark. 533, 115 S. W. 375
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> Increased cost of transportation of select material for highway construction from the site nearest to lands taken. *Arkansas State Highway Commission* v. *Cochran,* 230 Ark. 881, 327 S. W. 2d 733.
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> The number, kind and value of various nursery plants on land condemned. *Arkansas State Highway Commission* v. *Hood,* 237 Ark. 202, 372 S. W. 2d 387.
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> Cost of replacing a fence, replacement of shrubs and flowers, moving house back from right-of-way line, replumbing and rewiring house and loss of trees. *Arkansas State Highway Commission* v. *Carpenter,* 237 Ark. 46, 371 S. W. 2d 535.
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> Cost of additional well, additional flume, and new road required because of severance of rice farm by highway right-of-way. *Arkansas State Highway Commission* v. *Speck,* 230 Ark. 712, 324 S. W. 2d 796.
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> Rental income or value. *Desha* v. *Independence County Bridge Dist.,* 176 Ark. 253, 3 S. W. 2d 969.
>
> Cost of restoration of a retaining wall. *Kirk* v. *Pulaski Road Improvement Dist.,* 172 Ark. 1031, 291 S. W. 793.
>
> Reproduction cost of improvements. *City of Little Rock* v. *Sawyer,* 228 Ark. 516, 309 S. W. 2d 30.
>
> Cost of relocation and reconstruction of a combination store building and residence. *Arkansas State*

Highway Commission v. *Bryant,* 233 Ark. 841, 349 S. W. 2d 349.

Moving costs. *Arkansas State Highway Commission* v. *Jackson County Gin Co.,* 237 Ark. 761, 376 S. W. 2d 553.

If a landowner is deprived of receiving the value of his land as a bridge site on the theory that there is no demand for such a site by anyone except the condemnor, then our constitutional provision is rendered meaningless in such a case. The rule that value to the condemnor is not the measure of just compensation certainly should not be so applied. True, just compensation is to be measured by market value, but that value is to be measured by the price the land would bring in the market where sellers and buyers are informed as to all uses for which it is available and adaptable. We have previously avoided such a result. See *Ft. Smith & Van Buren Bridge District* v. *Scott,* supra, as quoted.

In *Little Rock & Ft. Smith Ry.* v. *McGehee,* 41 Ark. 202, where the owner sought to recover for his land as a ferry site this court said that, although no ferry may have ever been established there, it was possible, and maybe probable, that a change of circumstances or the development of the country might require one in the near future. The condemnor had contended that this use of the property should not be considered, because of supposed exclusive privileges in the proprietors of a ferry one mile away, and the doubt whether a ferry license would ever be granted and a ferry actually established.

In *Scott* v. *State,* supra, we said:

> It seems to us that the very fact that the State desires to acquire this land so that it may be deeded to the United States for national park purposes is a strong indication that appellant's land has a peculiar value.

I submit that, even if appellant's "motion for a directed verdict" could be considered as a motion to strike Hood's value testimony, which I do not concede, it cannot be the basis for reversible error, because it came too late. In *Arkansas State Highway Commission* v. *Stallings,* 248 Ark. 1207, 455 S. W. 2d 874, we held that the landowner's testimony was based upon an improper standard for market value and did not constitute substantial evidence. Still we said that failure to strike his *value* testimony was not error when the condemnor did not object or move to strike the testimony until after the landowner had presented the testimony of an expert witness and rested. There we said:

> The same authorities demonstrate that inexcusable delay in making a motion to strike objectionable testimony may be grounds for denial of the motion and that a court may properly overrule such a motion made after a witness has been excused from the stand, or discharged from attendance at the trial or after other witnesses have testified or after the proponent's case has been concluded. It may well be that the proponent would be severely prejudiced by a delay in making a motion to strike or that the trial judge should not be expected to put the testimony to which belated objection is made in proper perspective to make a correct ruling after other witnesses have testified, particularly where a close question is involved and the exact words of a witness may be the determining factor. The trial judge is in a much better position than an appellate court to judge whether such a motion is timely under the circumstances existing when it is made. He should only be held to the exercise of a sound judicial discretion under the circumstances existing here. We cannot say that denial of the motion of appellant was an abuse of discretion so we find no error on this point.

The trial judge sustained appellant's objection to Hood's stating the basis of his opinion on the value on a bridge site. Appellant did not object to Hood's

stating his opinion as to the value, and withheld objection until he began to state his basis. Then the objection went only to the basis, not to the value opinions. Appellee then made an offer of proof as to what this testimony would have been. Thereafter, no further testimony was given on this subject by Hood, and appellant did not cross-examine him on his valuation of the property as a bridge site. I would be unable to say that the trial judge abused his discretion in this regard. There must have been some tactical reason why appellant did not object to appellee's value testimony based on the property's adaptability as a bridge site and did not make a timely motion to strike it. Appellant should not be heard to say that, under the circumstances, there was an abuse of discretion in denying a belated motion.

Turning to the argument that Hood's testimony did not constitute substantial evidence, because he used an improper basis, *i. e.,* the saving to condemnor in utilizing this site, rather than the one it found next best, I would point out that the majority opinion entirely overlooks the fact that this basis of valuation was never known to the jury and that Hood valued the whole property at $648,000 for industrial purposes before the taking and the remainder at $15,000 after the taking. Appellant does not argue that this testimony was inadmissible. It does make a cursory argument that it is not substantial, which hardly extends beyond a bare statement that it is not. Assuming for the moment, but not conceding, that appellant is correct, there is no ground for reversal on this basis either. The owner's value testimony, both that relating to a bridge site and that relating to industrial uses, was manifestly not prejudicial, and was obviously disregarded by the jury. It obviously did not enhance the award, and the verdict was supported by other substantial evidence. *Arkansas State Highway Commission* v. *Ormond,* 247 Ark. 867, 448 S. W. 2d 354. Time and space limitations prevent elaboration, but I do not consider that appellant demonstrated that the opinion of appellee's expert witness Garland Hudson was without any reasonable basis. He testified that the whole property had a value of $150,400,

and the remainder a value of $16,000, making a difference of $134,400. The jury verdict was substantially less.

Other points covered in the majority opinion have to do principally with points raised by appellee on cross-appeal. I concur in the majority's holding as to evidence of the tax assessment. I do not agree with that as to difference in construction costs. I think that the evidence offered should have been admitted, and I do think that authority for its admission is found in *Gurdon & Ft. Smith Railroad Co.* v. *Vaught,* 97 Ark. 234, 133 S. W. 1019 and other cases. I would enlarge upon the majority's quotation from that case. This court there said:

> Counsel for defendant urge that the court erred in permitting these witnesses to testify that the land taken by defendant had a pecuniary advantage for a railroad site over all other lands in this vicinity along any possible route for a railroad, because of the great cost in making any other site feasible for the location of a railroad through these mountains; and in this connection the witnesses gave an estimate of the great expense and cost in preparing another site for railroad purposes in comparison with this site, to which testimony objection was made. It is urged that this testimony, in effect, based the value of the site taken upon the benefit that it might be to defendant and of its necessities to acquire that particular property, rather than on the actual market value thereof, and the loss to the plaintiff by the defendant's appropriation thereof. But we do not think that this contention is well founded. The measure of the compensation which the landowner is entitled to recover from a railroad company which has appropriated same for its right of way is the market value of the land so taken. In estimating that market value, it is perfectly competent to consider the availability and adaptability of the land for the very purpose for which it is taken by the railroad company as an element of value which would attract any buyer for that purpose. In order to show the adaptability of the land

taken for the purpose desired, it is competent to show the cost and expense that would be necessary to put other land in the condition of the land taken, which condition gives it a peculiar value for the purpose for which it is appropriated. This would not be estimating the damages by reason of the value of the property to the corporation which appropriated it, or by reason of its necessities to acquire same; but would be simply showing an element of its value to any one who might desire it for that purpose. The owner has a right to obtain the market value of the land based upon its availability for the most valuable purposes for which it can be used. The peculiar circumstances of its location and the character of the surrounding country may be proved in order to show the adaptability of the land taken for the purpose desired, because that would be an element of value which the owner would have a right to insist upon in estimating the value of his land. In the case of *Boom Company* v. *Patterson,* 98 U. S. 403, the Supreme Court of the United States has laid down the rule that, in determining the value of the land appropriated for public purposes, the inquiry is what is it worth from its availability for all valuable uses. This rule has been approved by this court in a number of cases. [Citing cases.]

The market value of property is to be determined, not by the price of the property for any one particular purpose, but for any and all purposes for which it is likely to have value and induce purchases. And so it is competent to show that it has a value for a peculiar purpose which would attract buyers and any testimony is competent to show its adaptability for that peculiar purpose. Its availability for such peculiar purpose may be proved by showing its advantages over other property that might also be probably available for such purpose, for that would be an element of value that any buyer would take into consideration if he wished to purchase the property for such purpose. Testimony, therefore, of the cost and expense of placing other property

> that might be available for the desired purpose in that condition of the property taken, would tend to show the advantages of such property and its true market value to prospective buyers. This was the character of the testimony of which complaint is made. But we think that this testimony was competent. This testimony did not tend to base the value of this gap or pass upon what it was worth to the defendant or upon how profitably it might be employed or used by it. The purpose and tendency of this testimony was to show that this site had a special pecuniary value over any other place in that mountainous section of the country for the location of a railroad, and thereby to show its availability and adaptability for railroad purposes. Its advantageous location was an element of value, and in determining what was its market value it was competent to show the facts and circumstances which made that location advantageous for railroad purposes which thus gave to it this element of value. The cost and expense of placing any other site in that section of the country in a condition available or adaptable for railroad purposes which the site in controversy possessed would tend to prove the peculiar advantages of this location for such object and its adaptability for such purposes. It was not error to admit such testimony for that purpose. [Citing cases.]

The distinction made by the majority is one without a difference. What is the difference in building a fill and building a span? One's redesigning his structure to fit mother earth may even be less costly than trying to make mother earth fit his designs, and there is no indication or likelihood that the channel of the Arkansas River would or could be changed at the alternate sites considered to accommodate a bridge at any of them that would minimize hazards to navigation to the extent required. The additional construction at the next best site may well have been only a substitute for an even more expensive fill. The result of a survey by appellant's consulting engineers was very favorable to this

location. This was the point at which the bridge would be the shortest and where the crossing could be at a right angle to the stream. Leo Tyra, a civil engineer, testified that he concurred in the report of the consulting engineer, just as did appellant's bridge engineer at the time the decision was made, and, as a matter of fact, appellant itself. It appeared obvious to Tyra that the location of the bridge was based upon selection of the site on appellee's side of the river and the terminus on the other side then located to the best advantage to meet design criteria. Hood also testified, in camera, that he had studied the report of the consulting engineers and that they had considered a number of other routes, but abandoned them when preliminary investigations indicated disadvantages not inherent in locations on appellee's land and another site. He also testified that one advantage lay in the fact that appellee's land afforded a high and stable bank—one that had not moved for as long a period of time as available pictures of the river would reveal.

I do not feel that the majority's attempt to distinguish *Little Rock Junction Ry.* v. *Woodruff,* 49 Ark. 381, 5 S. W. 792, 4 Am. St. R. 51, is based upon a valid distinction. The court did not determine the admissibility of the evidence on the question whether the interrogatories to the witness were misleading. When other statements of the court are considered, it is apparent to me that the court there held that testimony as to savings and pecuniary advantages in the utilization of one bridge site rather than another is admissible. The full text follows:

> One or more witnesses for appellees were asked to give the comparative cost of building bridges at different points along the river front above and below the Point of Rocks, or, rather, to state the difference in such cost. The witnesses were also asked, "What is the value of the property for bridge purposes?" It would have been less misleading to have asked, "What would be saved by building a bridge at this point, as compared with other points

> below and above?" or, "What were the pecuniary advantages offered by this point for building a bridge?" It is very apparent, however, from the argument, that the objection taken by counsel is not the objection which we take to this interrogatory. He objects to any and all testimony about a bridge-site, while we only criticise because we are disposed to suspect that counsel for appellees introduced the word "value" in this connection as a sort of covering for the rather scant testimony with which their case was clothed. In fact, if there had been an ample supply of direct testimony as to the market value, we cannot say that the form of this interrogatory would have called for any animadversion. We think, however, that if any mistaken impression was made upon the minds of the jury by this method of examination, it was effectually removed by the emphatic and repeated injunctions contained in the instructions, to the effect that the market value should be considered by the jury as the aim and end of their verdict.

In the present case, the court gave appropriate instructions on the measure of just compensation, including the following, requested by appellant:

> In this case, just compensation which the Constitution of Arkansas entitles the owner to receive for land on account of the taking for highway purposes is the difference between the fair market value of the defendants' land as of the date of taking, which was March 29, 1968, and the fair market value of the land remaining immediately after the taking, considering the facility constructed and in place.
>
> You are instructed that in order to consider the highest and best use of the property sought to be acquired as that of a bridge site, you must first determine that the 2.01 acres are peculiarly adapted for such use.
>
> In arriving at the market value of the land before the taking, you are not limited to the uses to which

> it is at the time applied, but the owner is entitled to compensation considering the market value for any use for which the property is suitable, having regard to the existing business or needs of the community, or such as may be reasonably expected in the immediate future. The owner has the right to obtain the market value of his land based upon its availability for the most valuable purpose for which it can be used, whether or not he so used it.

The holding in *Woodruff* certainly seems to be applicable here. We thought so in *Arkansas State Highway Commission* v. *Carpenter,* supra; *Pulaski County* v. *Horton,* supra; *Kirk* v. *Pulaski Road Imp. Dist.,* supra; *Kansas City Southern Ry. Co.* v. *Boles,* supra, as well as in *Vaught.*

In *Missouri Pacific Railroad Co.* v. *Clements,* 225 Ark. 268, 281 S. W. 2d 936, we affirmed an award of $3,200 for land worth $700 as timberland. This was based on 80,000 cubic yards of fill dirt worth 4¢ per yard, taken from the owner's land, there being no other evidence of market value. Significantly, the court said:

> It is undisputed that the location and terrain of the land destroyed made it by far the most suitable and economical in the area for the railroad's use. The use of any other available land in the area would have entailed a much longer haul and added considerably to the cost of the project.

I would affirm the judgment.

I am authorized to state that Chief Justice HARRIS and HOLT, J., join in this dissent.

C. C. DECKER *v.* DR. DAVID L. GIBBONS

5-5596 468 S. W. 2d 252

Opinion delivered June 28, 1971

Ben M. McCray and *Kenneth C. Coffelt,* for appellant.

Hall, Tucker & Lovell, for appellee.

CARLETON HARRIS, Chief Justice. Appellant, C. C. Decker, instituted suit against Dr. David L. Gibbons, alleging that his forehead was cut when his cattle truck was wrecked, and that he was admitted to the hospital at Ozark where the doctor was called upon to treat Decker; that Gibbons sewed up the cut and left foreign substances in his head. Allegations relating to damages suffered were then set out; a judgment of $35,000 was sought for compensatory damages and $35,000 for punitive damages. On trial, the jury returned a verdict

for Gibbons, and from the judgment entered in accordance with the verdict, Decker brings this appeal. For reversal, it is simply urged that Defendant's—Appellee's Requested Instructions No. 4 and 5, which were given by the court constituted error, and the judgment should be reversed.

None of the testimony is abstracted, and the objections made to these instructions were only general objections. Accordingly, the objections cannot be sustained unless the instructions were inherently erroneous. *Vogler* v. *O'Neal,* 226 Ark. 1007, 295 S. W. 2d 629. An instruction, of course, is inherently erroneous only when it cannot be correct under any circumstances. *Insured Lloyds* v. *Mayo,* 244 Ark. 802, 427 S. W. 2d 164.

Appellant's principal argument is directed to Defendant's Instruction No. 4, which reads as follows:

"You are instructed that a physician and surgeon who is requested, and undertakes, to render only first aid emergency treatment to a patient, owes to the patient a duty to exercise only such reasonable skill and care as is ordinarily and reasonably used by physicians and surgeons in good standing in the community in rendering first aid emergency treatment under the same or substantially similar circumstances[1] "

Appellant asserts that this instruction is erroneous on its face; that all treatment by physicians and surgeons is more or less of an emergency nature, and it is contended that a physician and surgeon is bound by the same degree of care in an "emergency" case as at any other time. While there might well be fact situations where this instruction would not be proper, we cannot say that it was erroneous in this instance. It must be remembered that not one line of evidence has been abstracted, and we accordingly have not the faintest idea of the facts shown by the testimony. The instruction certainly would, under some circumstances, be proper for emergency treatment does not ordinarily include

[1] This instruction, word for word, is found in 15 Am. Jur. Pleading and Practice Forms, Form 15: 1081 p. 599.

detailed tests, x-rays, and charts, nor does it afford the time for study of the patient's history and condition, or consultation with an associate. After all, this instruction is nothing more than a defining of what constitutes reasonable care to be used by physicians and surgeons under all the circumstances existing at the time.

It is also contended that defendant's instruction No. 5 was erroneous. That instruction reads as follows:

"You are instructed that defendant's negligence or lack of skill cannot be presumed or inferred merely because of the institution of this action, or the mere failure of his wound to heal properly, or from the fact, that Plaintiff has undergone a subsequent treatment for said injury; such facts, or any of them, are not alone evidence of defendant's failure to exercise that degree of reasonable skill and care which the law imposes on physicians and surgeons in the treatment of such injuries. Neither can mere surmise or conjecture that there may have been negligence take the place of proof."

Appellant asserts that this instruction is a comment on the evidence and is argumentative; also he argues that the instruction infers that conjecture and surmise exist and this portion of the instruction stands out. AMI 603 was also given by the court as its instruction No. 6, stating, "The fact that an injury occurred is not, of itself, evidence of negligence on the part of anyone." Thus, it might also be argued that No. 5 is somewhat repetitious of this instruction, and thus overly emphasizes the position taken by appellee. Without detailing the specific faults of the instruction, let it be said that it is clearly in conflict with the Per Curiam order entered by this court on April 19, 1965, relative to Arkansas Model Jury Instructions. That order reads as follows:

"If Arkansas Model Jury Instructions (AMI) contains an instruction applicable in a civil case, and the trial judge determines that the jury should be instructed on the subject, the AMI instruction shall be used unless the trial judge finds that it does not accurately state the law. In that event he will state his reasons for re-

fusing the AMI instruction. Whenever AMI does not contain an instruction on a subject upon which the trial judge determines that the jury should be instructed, or when an AMI instruction cannot be modified to submit the issue, the instruction on that subject should be simple, brief, impartial, and free from argument."

The detailed listing of the situations that would *not* constitute negligence or lack of skill results in an instruction that is heavily slanted in favor of the defendant, for it emphasizes defenses, rather than being impartial; it appears argumentative, rather than free from argument, and, in addition, it is lengthy rather than brief. If such a specific objection had been made on trial, we would unhesitatingly reverse. However, we are not yet willing to say that an instruction which violates the quoted Per Curiam order is inherently erroneous for that reason.

For this case to be reversed, one of the instructions here under attack must be held to be inherently erroneous. Since we do not agree with appellant that either can be placed in that category, it follows that the judgment should be, and is, affirmed.

It is so ordered.

SMITH, J., concurs.

GEORGE ROSE SMITH, Justice, concurring. I agree that the challenged instructions are not inherently erroneous; but I think that we should, if not now then at the next opportunity, prospectively abandon our rule that a general objection to an instruction is sufficient if the instruction is inherently erroneous. A general objection, within this rule, may consist merely of an attorney's statement for the record: "I object generally to Instruction Number 1."

Arkansas is one of only four or five states that recognize this rule. I can think of nothing to be said in its favor. It is unfair to the trial judge, since the rule may lead to a reversal upon a ground not called to the trial

judge's attention. It is unjust to opposing counsel, since he is not given a fair opportunity to correct the defect. Moreover, it allows the objecting attorney to conceal the real basis for his objection, so that he can accept a favorable verdict but reject an unfavorable one. Finally, the rule is a blemish upon our system of procedure, for it increases the likelihood of unnecessary new trials—unnecessary because in most instances the defect could readily have been corrected on the spot if a specific objection had been required. The matter is certainly a proper one for legislative attention, but since this court was responsible many years ago for the creation of the rule I think that we should also preside over its interment.

WILLIAM McDONALD *v.* E. A. BOWEN, JR. ET AL

5-5643 468 S. W. 2d 765

Opinion delivered June 28, 1971

[redacted]

Sloan, Butler, Ragsdale & Dishongh, for appellant.

Joseph C Kemp, City Atty. and *Smith, Williams, Friday & Bowen,* for appellees.

GEORGE ROSE SMITH, Justice. The city of Little Rock, with some aid from a group of private citizens, proposes to submit for approval at a special election a $9,500,000 bond issue under the authority of Constitutional Amendment No. 18 and its implementing statute, Act 206 of 1963, compiled as Ark. Stat. Ann., Title 19, Ch. 31 (Repl. 1968). This is a taxpayer's suit brought by the appellant to enjoin the city directors from proceeding with the election and to obtain a declaratory judgment holding the implementing act to be unconstitutional and declaring some or all of the purposes of the bond issue to be beyond the proper scope of Amendment 18. After a hearing at which a number of witnesses testified the chancellor entered a decree declaring the city's proposal to be valid in every particular. The taxpayer's complaint was accordingly dismissed for want of equity. Upon this appeal the taxpayer argues five points for reversal, which must be discussed separately.

I. As a precautionary argument, the appellant first states that his appeal should not be dismissed for lack of a justiciable issue. We agree with his position. If the contemplated election is in fact illegal, as the appellant contends, the expense of holding it would constitute an illegal exaction for which the constitution provides a remedy by injunction. *Townes* v. *McCollum,* 221 Ark. 920, 256 S. W. 2d 716 (1953). Moreover, a declaratory judgment is especially appropriate in disputes between private citizens and public officials about the meaning of the constitution or of statutes. *Culp* v. *Scurlock,* 225 Ark. 749, 284 S. W. 2d 851 (1955).

II. The appellant contends that the first paragraph of Amendment 18 contemplates a five-mill tax to be voted annually and does not authorize a continuing levy to support a bond issue. We find no merit in that contention. The Amendment provides that the tax may be levied "for the period that may be provided by law." The implementing act authorizes a continuing tax levy to support a bond issue maturing serially over a period of not more than 35 years. Ark. Stat. Ann. §§ 19-3106 and -3107. In a substantially similar situation, where the constitution provided for an annual twelve-mill school tax, we held that the legislature could authorize the electorate to approve a continuing levy to support a long-term bond issue. *Woodruff* v. *Rural Special Sch. Dist. No. 74,* 170 Ark. 383, 279 S. W. 1037 (1926). We see no material difference between that case and this one.

III. The most serious question in the case is whether Amendment 18 authorized the city to utilize the five-mill tax levy to support a bond issue as a means of financing the nine separate proposals that are set forth in the petition for the special election. (The petition contains a tenth catch-all proposal, but counsel for the appellees conceded at the oral argument that the language is too broad and vague to justify judicial sanction of the expenditure of funds under that clause of the petition.)

Amendment 18 was clearly designed to enable cities of the first class in counties having a population of at least 105,000 to levy a five-mill property tax for the purpose of attracting industries. The Amendment begins with these words: "It being most apparent that factories, industries and transportation facilities are necessary for the development of a community and for the welfare of its inhabitants, a special tax not exceeding five mills on the dollar of all taxable property . . . may be levied . . ." The rest of the Amendment goes on to specify how and by whom the proceeds of the tax levy are to be spent.

The third paragraph of the Amendment enumerates five purposes for which the tax money may be used.

We are quoting that paragraph verbatim, except that for convenience of discussion we have divided it into subparagraphs and have inserted parenthetical numbers for the several enumerated purposes:

"The proceeds of such tax may be expended as may be provided by law

(1) for the purpose of securing the location of factories, industries, river transportation and facilities therefor within and adjacent to such cities or

(2) other public purposes, exclusive of charities and those now within the powers of said cities to perform,

and the expenditures may also be made for

(3) advertising such cities and the State, or

(4) making secured loans to such factories and industries, or

(5) for any other public purpose that may be provided by law, connected with securing the location of such factories and industries and encouraging them."

We have no hesitancy in holding that five of the purposes enumerated in the petition for the special election are set forth in such general language that we cannot properly declare that those purposes fall within the scope of Amendment 18. We quote the language of the petition with respect to those five proposals:

2. To improve by reconstructing and paving certain streets and to construct certain streets, including, where necessary, acquisition of rights of way, widening, curbing, overpasses, underpasses, bridges and draining appurtenances.

3. To construct or reconstruct certain storm drainage facilities, including, where necessary, acquisition of rights of way and appurtenances.

4. To construct, reconstruct, equip or re-equip certain fire stations.

* * * *

7. To acquire, construct, establish, develop and improve facilities for the off-street parking of vehicles and any facilities or improvements necessary or desirable in connection with the utilization and operation thereof.

* * * *

9. To acquire, construct, establish, develop and improve parks and recreational facilities, indoor and outdoor, and facilities necessary or desirable in connection with the utilization and operation thereof.

It will be noted that none of the foregoing purposes are defined in such a way as to limit the expenditures to projects, such as streets, having a *direct* connection with the factories, industries, etc., that are the primary subject of the Amendment. See, by way of contrast, *Myhand* v. *Erwin,* 231 Ark. 444, 330 S. W. 2d 68 (1959), where Amendment 49 was held to authorize the construction of a road leading to a $35,000,000 industrial plant.

Here the appellees introduced witnesses who testified in general terms that business men and corporations are apt to be favorably impressed, in seeking a location for a new plant or the like, by a city which has well-paved streets, adequate storm drainage facilities, sufficient fire stations, and so on. The fact remains, however, that nothing in the petition requires any direct connection between the proposed capital improvements and the new industries. It would be entirely permissible for the city to spend all or any part of the bond proceeds for the improvement of streets in residential areas or for other improvements having only a remote bearing upon the attraction of new industries. That authority, however, already existed and certainly was not the reason for the adoption of Amendment 18, with its attendant tax levy.

Nor do we think the scope of the Amendment to be indefinitely broadened by what we have numbered as its second purpose: "[O]ther public purposes, exclusive of charities and those now within the powers of said cities to perform." We are unwilling to lift the words, "other public purposes," from their context and take them to mean absolutely any conceivable public purpose, regardless of its connection with the rest of the Amendment. In Words and Phrases there are listed some fifty public purposes that might appropriately be accomplished by the use of municipal funds. McQuillin points out that the term "public purpose" is so broad that the courts as a rule have not attempted a judicial definition of it. McQuillin, Municipal Corporations, § 10.31 (3d ed., 1966).

In holding that the phrase, "other public purposes," was not an open-end authorization of unlimited scope, we are influenced by two principles of interpretation. First, the rule of construction known as *noscitur a sociis* (It is known from its associates) requires that general language be construed to be comparable to the specific language of its context. *Altus Cooperative Winery* v. *Morley,* 218 Ark. 492, 237 S. W. 2d 481 (1951). Here every other clause in the Amendment has to do with the attraction of new industry. In that context the reference to other public purposes may fairly be taken to mean those of the same nature as the enumerated ones, even though not specifically set forth.

Secondly, the rules of statutory construction also apply to the interpretation of constitutional amendments. *Bailey* v. *Abington,* 201 Ark. 1072, 148 S. W. 2d 176 (1941). Hence, in cases of ambiguity, it is proper to refer to the title of such an amendment as an aid to its interpretation. *Haile* v. *Foote,* 90 Idaho 261, 409 P. 2d 409 (1965); *State ex rel. Getchell* v. *O'Connor,* 81 Minn. 79, 83 N. W. 498 (1900); *Rathjen* v. *Reorganized Sch. Dist. R-11,* 365 Mo. 518, 284 S. W. 2d 516 (1955). The title of Amendment 18, which was all that the voters saw upon their ballots in voting for that initiated measure, read as follows:

> To authorize the voters to vote a special tax in the cities of the first class located in counties now

> or hereafter having not less than one hundred and five thousand population to secure the location and encourage the operation of factories, industries, river transportation and facilities therefor within and adjacent to such cities. [Acts of Arkansas, 1929, p. 1526.]

Under our Initiative and Referendum Amendment the ballot title must contain a fair statement of the scope and import of the proposed measure. *Westbrook* v. *McDonald,* 184 Ark. 740, 44 S. W. 2d 331 (1931). Since the title to Amendment 18 gave the voters no hint that taxes might be levied under the measure for purposes other than those stated, we are confirmed in our conclusion that no such sweeping construction of the Amendment should be adopted.

We are of the opinion, however, that the other four purposes enumerated in the petition now before us fall fairly within the scope of Amendment 18. One is the construction of a convention center, which is shown to be not only a means of advertising the city but also a facility having a direct connection with the specific purpose of attracting new industries. Two of the purposes have to do with river transportation, barge terminals, railroad terminals and facilities, and similar improvements falling fairly within the purview of the Amendment. The ninth purpose: "To provide capital for a nonprofit small business investment company to aid in the financing of industries when such financing is not available from private sources," appears to be an appropriate means of achieving what we have numbered as the fourth express aim of the Amendment, the making of secured loans to new factories and industries.

IV. Amendment 18 provides that the proceeds of the tax levy are to be expended by a board of three commissioners. One of the commissioners is to be selected by a majority of the judges of this court, a second by a majority of the circuit, county, and chancery courts in the county, sitting as a board, and the third by a majority of the banks and trust companies located in the city. It is quite apparent that the three

commissioners were to be carefully selected and were to have positions of responsibility and authority in the expenditure of the funds collected under the Amendment. We must therefore hold that section 5 of the implementing act, Ark. Stat. Ann. § 19-3105, is unconstitutional to the extent that it attempts to strip the board of commissioners of all the authority vested in them by the Amendment, to reduce them to mere puppets having no duties except to receive the tax proceeds from the county treasurer and deposit them in a bank account, and to vest all the powers of the commissioners in the governing body of the city. The conflict between the act and the Amendment is so direct that the two cannot possibly be reconciled. In such a situation the provisions of the constitution are of course controlling.

V. Finally, the Amendment provides that the petition for the special election must be signed by "ten per cent of the owners of real property in such city." Neither the constitution nor the implementing act attempts to say how the necessary ten per cent is to be determined, as, for example, by number, by the area of the property, or by its assessed value. The city proposes to solve the problem by accepting a petition signed by the owners of property having at least ten per cent of the total assessed value of the real property within the city.

We do not think that the proposed procedure conforms to the intent of the Amendment. Ten per cent of the owners by assessed value might enable a comparatively small group of wealthy persons or corporations to call the election. But the Amendment says "ten per cent of the owners of real property," not the owners of ten per cent of the real property. We think the plain language of the Amendment means ten per cent in number of the total real property owners within the city. In that way the small property owner, whose taxes are just as burdensome to him as those paid by a large corporation are to it, has a real voice in the calling of the election.

In conclusion, we should add that we have not overlooked an amicus curiae brief filed by certain mem-

bers of the Jefferson county bar. We are told that Jefferson county or the city of Pine Bluff wishes to construct a convention center, but the county does not have sufficient population to bring it within the provisions of Amendment 18. We are asked to decide instead whether the county or city may construct such a center under the provisions of an entirely different part of the constitution; namely, Amendment 49.

We must decline that invitation. There does not appear to be any case pending in Jefferson county or elsewhere involving the question now posed. Certainly there is in this court no record of any such case. Consequently we are being asked to render a purely advisory opinion upon an academic question, which we have consistently refused to do. *Hogan* v. *Bright,* 214 Ark. 691, 218 S. W. 2d 80 (1949).

The decree of the chancery court is affirmed in part and reversed in part and the cause remanded for the entry of a declaratory decree consistent with this opinion.

FOGLEMAN, J., concurs in part and dissents in part.

JOHN A. FOGLEMAN, Justice, concurring in part, dissenting in part. I concur in most of the majority opinion and in some of the results reached where I cannot fully subscribe to the reasons given for reaching them. My principal disagreement with the majority relates to a specific purpose for which taxes levied and bond proceeds may be utilized.

At the outset, I should express my agreement that appellees were well advised to concede that one purpose included in the proposed petition was far too vague to form the basis for a tax levy under Amendment 18. That item was:

> To accomplish any or all of the improvements authorized by the Amendment No. 18 Implementing Act of 1963.

Voters certainly could have no understanding of what

they were being called upon to approve from such vague and comprehensive language.

My reading and rereading of clause (2) with the entire amendment leads me only to the conclusion that this clause would, except for the ballot title, authorize a large city to levy a 5-mill tax, in addition to the 5-mill general purpose tax authorized by Article 12, Section 4, of our Constitution as amended by Amendment 10, and the 5-mill tax authorized by Amendment 13, for any public purpose for which the city did not already have the authority to expend taxes otherwise authorized. A look at the wording of the amendment, and particularly this clause, seems to eliminate, rather than indicate, a more limited interpretation. Purposes (1) and (2) are connected by the conjunction "or." The use of the disjunctive militates against the application of the maxim of noscitur a sociis. 82 C. J. S. 656, Statutes, § 331. In this context, it cannot be taken to indicate that the two clauses express alternate meanings, or that the latter is explanatory of the former. More important, however, is the fact that the words "other public purposes" are followed by words limiting their meaning. If the meaning of "other public purposes" is limited by purpose (1) then we have a tremendous waste of words —a luxury we are not afforded in constitutional or statutory construction. If the reasoning of the majority is correct, then the amendment would mean the same thing with or without purpose (2). Furthermore, the words "exclusive of public charities and those now within the powers of cities to perform" would be totally unnecessary. That securing the location of factories and industries prior to the adoption of Amendment 18 was a public purpose is at least subject to serious doubt. See, e. g., *City of Little Rock* v. *Raines,* 241 Ark. 1071, 411, S. W. 2d 486. But if "other public purposes" must be those having a direct connection with other purposes of the amendment then it was a useless gesture to go to the trouble to exclude charities. What possible connection could "charities," as the word is commonly understood, have with any of the other of the purposes specifically listed in the amendment? Or what caused the draftsmen to provide for exclusion of those "public purposes" then within the powers of said cities to per-

form? I have been unable to find any of the powers already possessed which had to be eliminated because of their connection with securing the location of factories, industries, etc., or any of the other specified purposes. In other words, under the majority application, there would have been no "other public purpose" to be excluded. There must have been an intention to exclude something.

In the next place, it is inconceivable to me that both purposes (2) and (5) would have been stated if "other public purposes" in purpose (2) was to have been limited by the words preceding it. Purpose (5) seems to me to say everything the majority says purpose (2) says.

In statutory and constitutional construction, if it is possible to do so, we are bound to give meaning and effect to every word, phrase and clause, so that no word is rendered void, superfluous or insignificant or discarded as surplusage. *Locke* v. *Cook,* 245 Ark. 787, 434 S. W. 2d 598; *Cupp* v. *Frazier's Heirs,* 239 Ark. 77, 387 S. W. 2d 328.

I cannot accept the premise that my construction of this part of purpose (2) of Amendment 18 would render the listing of specific purposes superfluous. In 1929, or even today, there would be room for doubt that securing the location of factories and industries could be a public purpose without constitutional or statutory specification. The same is true with regard to advertising. Making secured loans to factories or industries was not only unauthorized, it was prohibited. Article 12, Section 5, Constitution of Arkansas.

The number of public purposes that might have been accomplished would not be so broad as to cause any misgivings about the meaning of the clause. In the first place, restriction to those purposes not then within the power of such cities is a considerable limitation. In the second place, determining whether a purpose is public has never presented any problem. We have had no difficulty in defining public purposes in eminent do-

main and tax exemption cases. We have held that the following are public purposes: a highway approach to a proposed private toll bridge, *McClintock* v. *Bovay,* 163 Ark. 388, 260 S. W. 395; a 40-acre tract, which has been a public park, used for track meets and agricultural exhibits and keeping livestock used in working streets, *Hope* v. *Dodson,* 166 Ark. 236, 266 S. W. 68; a city dumping ground, *Hudgins* v. *Hot Springs,* 168 Ark. 467, 270 S. W. 594; impoundment of water by an irrigation company to supply surface water commercially to 5,000 acres of rice land in an area where rice farming was the principal activity, *Smith* v. *Ark. Irrig. Co.,* 200 Ark. 1022, 142 S. W. 2d 509; in tax exemption cases, "public property used for public purposes" has been defined as meaning use by the public generally as distinguished from proprietary use, *Yoes* v. *City of Ft. Smith,* 207 Ark. 694, 182 S. W. 2d 683. We should have no difficulty in determining which purposes are public purposes.

I do not agree that the doctrine of noscitur a sociis, or ejusdem generis, the specific application of the maxim utilized by the majority, controls here. I do agree that, generally speaking, rules of statutory construction are applicable. But the maxim, or its specific application, is a rule of construction to be applied only when the legislative intent cannot be determined from the language of the statute itself. *Edwards* v. *Mayor and Council of Borough of Moonachie,* 3 N. J. 17, 68 A. 2d 744 (1949). The maxim should never be utilized to render general words meaningless because that would disregard the primary rule that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute are to be taken according to their natural meaning. *Mason* v. *U. S.,* 260 U. S. 545, 43 S. Ct. 200, 67 L. Ed. 396 (1923); Annot., Ann. Cas. 1914C 305; Crawford, Statutory Construction 328, § 191 (1940); 2 Sutherland, Statutory Construction 405, § 4913 (1943); *Morgan* v. *State,* 208 Miss. 185, 44 So. 2d 45 (1950); *Crabb* v. *Zerbst,* 99 F. 2d 562 (5th Cir. 1938); *Edwards* v. *Mayor,* etc., supra; *United States* v. *Mescall,* 215 U. S. 26, 30 S. Ct. 19, 54 L. Ed. 77 (1909); *United States* v. *Alpers,* 338 U. S. 680, 70 S. Ct.

352, 94 L. Ed. 457 (1950). The rule is not applied when the context of the statute rebuts it. See Crawford, Statutory Construction 329, § 191 (1940); 2 Sutherland, Statutory Construction 407, § 4914 (1943).

After much deliberation, and with considerable reluctance, I have come to the conclusion that I must accept the majority view as to limitations on this clause only by reason of the ballot title. In this respect, I do not follow the exact line of reasoning of the majority because I do not take the language involved to be really ambiguous. Yet, I conclude that the general rules pertaining to statutory construction in this respect should not apply to an initiated constitutional amendment. The ballot title is all that a voter sees when he marks his ballot. I agree that the average voter who cast an affirmative vote on this amendment when it was proposed would have had no idea that he was voting to authorize a property tax to pay for some public improvement only remotely connected, if at all, with securing the location or encouraging the operation of factories, industries, river transportation and facilities therefor.

The importance of the ballot title on initiated measures has always been recognized in this state. When a petition for a constitutional amendment is filed, the exact title to be used must be submitted by the petitioner with the petition filed with the Secretary of State and the State Board of Election Commissioners, who, in turn, certify the title to the Secretary of State. Amendment 7, Constitution of Arkansas.

In keeping with the spirit of the initiative and referendum amendment, we have gone to great lengths to insure that no measure was presented to the voters under anything other than an intelligible, honest title without any misleading amplification, omission or fallacy. *Newton* v. *Hall*, 196 Ark. 929, 120 S. W. 2d 364, *Bailey* v. *Hall*, 198 Ark. 815, 131 S. W. 2d 635; *Sturdy* v. *Hall*, 204 Ark. 785, 164 S. W. 2d 884; *Washburn* v. *Hall*, 225 Ark. 868, 286 S. W. 2d 494. We early recognized the purpose of this title and its importance in

Westbrook v. *McDonald,* 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331, when we said:

> It is true that if one were to read the act itself even casually he would know that it had not been enacted that one might obtain a divorce in this state by proving a residence therein for ninety days only; but it is equally true that the great body of the electors, when called upon to vote for or against an act at the general election, will derive their information about it from the ballot title. This is the purpose of the title.

We have not hesitated to strike down as insufficient any ballot title that would mislead by omission of a material fact. *Shepard* v. *McDonald,* 189 Ark. 29, 70 S. W. 2d 566; *Westbrook* v. *McDonald,* supra. Of course, it is not necessary that the ballot title constitute a complete abstract or synopsis of the proposal, if it sufficiently though concisely apprises the voters of the general purposes of the proposed law. *Coleman* v. *Sherrill,* 189 Ark. 843, 75 S. W. 2d 248; *Leigh & Thomas* v. *Hall,* 232 Ark. 558, 339 S. W. 2d 104; *Sturdy* v. *Hall,* supra. The test seems to be whether the matter omitted would be misleading to the average voter. We held a title insufficient as misleading when it failed to disclose that proposed assistance to the aged and blind would be provided by a permanent general sales tax. *Walton* v. *McDonald,* 192 Ark. 1155, 97 S. W. 2d 81.

Our rule of statutory construction that resort be had to the title of an act to determine the legislative intent only when the act is ambiguous is based largely upon the premises that there is no constitutional requirement that an act have a title and that the title is not a part of the act. *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.

Since there is a constitutional requirement that an initiated proposal for a constitutional amendment have a ballot title, and since the purpose of the ballot title is to inform the voter when he exercises his right of

suffrage, I would follow, in respect to the significance of the title, holdings in states whose constitutions require a legislative proposal to bear a title. Generally speaking, where there is a mandatory constitutional requirement that the subject of a statute be expressed in its title, the title limits the valid scope of the act and nothing can validly be included in its provisions which is not covered by a liberal construction of the title, except for means and provisions reasonably adopted to carry out and make effectual the purpose of the act. 82 C. J. S. 372, Statutes, § 220. On this basis, I agree that the "other public purpose" section should be limited.

Based upon this construction, I would find authority for the construction of a convention center. I agree, however, that it could also be justified as a means of advertising the city as a means of attracting and encouraging new industries.

I do not agree that the petition's ninth purpose is authorized by Amendment 18. It is quite true that the commissioners named under that amendment may make secured loans to *such* factories and industries as are secured through means provided by the amendment. Still, the ninth purpose in the petition is not limited to loans to those industries, but would permit "aid" in financing industries, without restriction. The scope of the amendment is not that broad. In my opinion, it does not authorize loans to just any industry. It certainly does not permit grants, rather than loans, as the word "aid" would imply. More significantly, while Amendment 18 does amend Article 12, Section 5, to permit a city's funds to be loaned, it does not eliminate the prohibition against donating these funds to a corporation. See *Luxora* v. *Jonesboro, L. C. & E. R. Co.*, 83 Ark. 275, 103 S. W. 605, 13 L. R. A. (n. s.) 157, 119 Am. St. R. 139. There is no exemption for nonprofit corporations. Furthermore, it would substitute the discretion and judgment of the officers and directors of the corporation for that of the commissioners. The commissioners could, by this device, delegate their responsibility and authority to these officers and directors. I do not believe that this was intended. Such a result

seems inconsistent with the majority opinion holding Section 5 of Ark. Stat. Ann. § 19-3105 (Repl. 1968) unconstitutional, with which I concur.

BARBARA WILLIAMS *v.* WESTINGHOUSE CREDIT CORPORATION ET AL

5-5591 468 S. W. 2d 761

Opinion delivered June 28, 1971

U. A. Gentry, for appellant.

Owens, McHaney & McHaney and *Hale & Fogleman,* for appellees.

LYLE BROWN, Justice. Prior to her demise Mrs. Janet Hesson, mother of appellant Barbara Williams, entered into a conditional sales contract with appellee Poole Trailer Sales, Inc. of West Memphis, Arkansas, for the purchase of a mobile home. The contract was assigned to appellee Westinghouse Credit Corporation. Mrs. Hesson paid each monthly installment until her death in April 1967. After her death the administrator of her estate paid the monthly installments until the mobile home was transferred to appellant in November 1968 in the course of the administration of the estate. Appellant has made no payments on the contract since the transfer and a balance remains due of $3,155.90.

Appellee Westinghouse as assignee of the conditional sales contract filed suit in circuit court praying for judgment against appellant in the sum of $3,155.90 and for sale by the court of the mobile home or surrender to Westinghouse for sale by it pursuant to the Uniform Commercial Code whereby the proceeds would be applied to the payment of the judgment. In the alternative appellee Westinghouse prayed judgment for the recovery of the mobile home, for damages for detention thereof, and for all other proper relief.

Appellant answered the complaint, alleging that the contract entered into by Mrs. Hesson and appellee Poole Trailer Sales was usurious and alleging that Poole Trailer Sales agreed to purchase credit life insurance payable to appellee for the benefit of Mrs. Hesson and failed to do so, all to appellant's damage in the amount

of the remainder due upon the contract. Appellant further denied that appellee Westinghouse was entitled to possession of the mobile home and alleged that the institution of a suit for a money judgment waived the retention of title to the subject property and thereby relegated Westinghouse to its alleged right to a personal judgment. By way of amendment appellant alleged that the sales contract did not reflect the correct purchase price. Appellant prayed, the above premises considered, that appellee Westinghouse take nothing and for all other general and equitable relief to which she was entitled.

On motion of both appellee Westinghouse and appellant Barbara Williams the cause was transferred to chancery court on February 12, 1970, for the reason that certain defenses asserted in the answer and amended answer were equitable in nature. Thereafter, on May 8, 1970, appellant filed a written motion asking that the cause be transferred back to circuit court, alleging that the pleadings did not disclose any equitable grounds for determination of the issues and, therefore, chancery was without jurisdiction. The chancellor denied the motion.

Appellant filed an amended and substituted answer in chancery on May 26, 1970, which made essentially the same allegations as previously made and additionally alleged that Poole Trailer Sales and Westinghouse were jointly and severally liable to the estate of Mrs. Hesson and/or appellant as successor to the rights of the estate. Appellant then prayed that Poole Trailer Sales be made a party to the suit and in the alternative that if Westinghouse be awarded judgment in its favor, appellant Barbara Williams have and recover of and from Poole Trailer Sales a sum equal to the amount awarded. Appellant further prayed for all other general relief to which she might be entitled.

At the opening of the trial on November 2, 1971, appellant again objected to the jurisdiction of chancery to try the cause due to the fact that appellee Westinghouse had filed a suit originally in circuit court in

which a personal judgment was sought against appellant and the impounding of the mobile home and that such a suit was exclusively within the jurisdiction of a court of law. Appellant contended that such an action constituted a waiver of the security interest which Westinghouse had by virtue of the title retaining contract and constituted an election of a remedy inconsistent with a proceeding to foreclose a security interest lien. Appellant further contended that the fact that Westinghouse had admitted to the court at the beginning of the trial that it did not plan to produce any evidence which would subject appellant to a personal judgment but was merely seeking to realize upon the security interest in the mobile home pursuant to the Uniform Commercial Code, affected its right to further proceedings in chancery.

The chancellor overruled the objections to jurisdiction and proceeded with the trial. The chancellor reached the following conclusions of law: That the chancery court had jurisdiction of the parties and subject matter; that the seeking of a personal judgment and sale of the property by the court or by the plaintiff pursuant to the Uniform Commercial Code or alternatively, of a judgment for possession, did not constitute an election of an inconsistent remedy and a waiver or abandonment of its security interest in the collateral; that the dismissal of the cause against appellant for a personal judgment with the consent of Westinghouse at the opening of the trial did not oust chancery of jurisdiction to determine the right of possession of the mobile home; that the evidence was not sufficient to show that Poole Trailer Sales contracted to furnish credit life insurance; that appellant had failed to establish her defense of usury; that payments under the contract were in default; and that Westinghouse was entitled to judgment for possession of the mobile home. The chancellor ordered that Westinghouse be given possession of the mobile home to dispose of it pursuant to the Uniform Commercial Code and apply the proceeds as provided in Ark. Stat. Ann. § 85-9-504 (Add. 1961). The cross-complaint of appellant against Poole Trailer Sales was denied and dismissed.

Now as to the points at issue on appeal. Appellant contends:

(1) That the complaint discloses a cause of action exclusively within the jurisdiction of the circuit court and it was error for the chancellor to refuse to remand;

(2) That if the chancery court had any jurisdiction it was lost when Westinghouse waived its prayer for personal judgment against appellant; and,

(3) That Westinghouse elected to seek judgment and sale of the property, which election precluded it from thereafter trying to shift to another remedy, namely, to enforce a contractual lien.

The first two points are without merit and can be disposed of in one answer. We have heretofore detailed the pleadings of the parties and the findings of the chancellor and they show beyond question that these issues were before the chancellor at all times:

(1) The request by Westinghouse that the trailer be sold pursuant to the terms of the Uniform Commercial Code;

(2) Appellant's contention that the contract was usurious;

(3) Appellant's assertion that Poole Trailer Sales agreed to purchase credit life insurance on the debtor, Mrs. Hesson, and its failure to do so entitled appellant to judgment over against Poole for any balance due; and,

(4) Appellant's contention that Poole Trailer Sales filled in the signed, blank contract showing the purchase price to be $5010 instead of $4885.

With those multiple issues (some of which were equitable) before the chancellor we simply cannot say that he had no jurisdiction. It seems to be appellant's contention that when Westinghouse waived its prayer for personal judgment against appellant, only a prayer

for possession and sale remained, which was cognizable only in a law court; consequently, a transfer back to law court was mandatory. Appellant is in error. Even if the complaint did not state a proper ground for relief in equity, the answer of appellant supplied the defect. *Spikes* v. *Hibbard,* 225 Ark. 939, 286 S. W. 2d 477 (1956); *Nottingham* v. *Knight,* 238 Ark. 307, 379 S. W. 2d 260 (1964). Appellant's answer alleged that the written contract which was attached to Westinghouse's complaint was not the true contract between Poole and Mrs. Hesson. That answer was, it would appear to us, a request for reformation. Reformation of a contract lies exclusively in chancery court. *Washington Standard Life Ins. Co.* v. *Agee,* 231 Ark. 594, 331 S. W. 2d 261 (1960). Appellant's answer further pleaded usury, an action cognizable in equity which permits the cancellation of the usurious contract. *Bailey* v. *Commerce Union Bank,* 223 Ark. 686, 269 S. W. 2d 314 (1954). Thus appellant invoked the jurisdiction of chancery by pleading equitable defenses in her answer. Having invoked the aid of chancery in matters not wholly beyond equitable cognizance, appellant cannot object to the jurisdiction of that court. *Spikes* v. *Hibbard, supra; Ark. State Highway Comm'n.* v. *Gladden,* 238 Ark. 988, 385 S. W. 2d 934 (1965); and *Nottingham* v. *Knight, supra.* We have in many instances upheld the right of chancery to retain jurisdiction to decide all the issues of both law and equity when there are essential equitable matters to be litigated. *Gregory* v. *Oklahoma Mississippi River Lines, Inc.,* 223 Ark. 668, 267 S. W. 2d 953 (1954).

Appellant relies on *Spitzer* v. *Barnhill,* 237 Ark. 525, 374 S. W. 2d 811 (1964), for the proposition that the case should have been transferred back to circuit court when Westinghouse dropped its pursuit of a personal judgment against appellant. In *Spitzer,* however, all equitable issues were resolved by the chancellor and he then transferred the remaining issue as to tort liability to circuit court. But in the case at hand the parties were in chancery because they requested a transfer of the entire case to equity. Later the appellant requested that the *entire* case, which of course included equitable issues, be retransferred to law court. We agree with the

chancellor that equity had the right, in those circumstances, to retain jurisdiction.

As to appellant's final point, election of remedies, we agree with appellees that the argument fails for two reasons. First, as noted by Professor Eugene F. Mooney in his article, The Old and the New: Article IX, 16 Ark. L. Rev. 145, 151 (1961-62):

> The most significant change in the law of conditional sales contracts is the final and conclusive eradication of the doctrine of election of remedies which has dogged conditional sellers and overjoyed conditional buyers almost since the founding of the State of Arkansas. This was the tricky legacy of the common law: The seller could either sue for damages on the contract *or* rescind and repossess; *but not both.* It was all keyed to title passage. The conditional seller (secured party) could not repossess, sell and get a deficiency judgment for the remainder of the sale price. The article by Robert Anderson and Jim Hale in 4 Ark. L. Rev. 19 (1949-50) at page 27 details this once-flowering branch of the law. With the following language from § 85-9-504(2) the whole limb is lopped off: "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency."

The fact that Westinghouse asked for a judgment and sale as provided by the UCC and in the alternative for possession is not an election of inconsistent remedies. The Code provides specifically that, "The rights and remedies referred to in this subsection are cumulative." Ark. Stat. Ann. § 85-9-501(1) (Add. 1961).

Second, even if the UCC were not involved, Westinghouse cannot be said to have elected an available remedy. An essential element to an election of remedies is that both remedies are available. *Eastburn* v. *Galyen,* 229 Ark. 70, 313 S. W. 2d 794 (1958). In *Sharpp* v. *Stodghill,* 191 Ark. 500, 86 S. W. 2d 934 (1935), we held

that the pursuit of a remedy which does not in fact exist is not an election but a mistake as to which remedy is available. The mistake may be one of fact or of law. In the case at bar, appellee Westinghouse sought a personal judgment against appellant without knowing that she had not assumed the obligations of the contract between Poole Trailer Sales and her mother, Mrs. Hesson. The remedy of a personal judgment against appellant never being available, Westinghouse did not make an election of an inconsistent remedy.

Affirmed.

FOGLEMAN, J., not participating.

CARRIE SIMS DAVIDSON ET AL *v*
TROY HARTSFIELD

5-5505 468 S. W. 2d 774

Opinion delivered June 28, 1971

John M. Pittman, James P. Baker, Jr., and *U. A. Gentry,* for appellants.

David Solomon, for appellee.

JOHN A. FOGLEMAN, Justice. This action originated with a complaint by appellants in which they sought to cancel the claim of appellee to an 80-acre tract of land in Phillips County as a cloud on appellants' title.[1] Ap-

[1]After filing of the complaint, it was discovered that appellee claimed only 40 acres of the tract. The litigation was thereafter conducted as if it related only to the portion claimed by appellee.

pellants alleged that appellee had planted and harvested crops on parts of the land in 1967 and 1968. Appellants professed not to know the exact nature of appellee Hartsfield's claim. Appellee filed an answer claiming title by virtue of deeds to him by Beaver Bayou Drainage District of Phillips County, dated June 11, 1966, and from the Cotton Belt Levee District No. 1 of Phillips County, dated April 29, 1967. He alleged that these districts acquired title through actions foreclosing their liens on the lands arising from taxes, benefits and assessments and that the interest of appellants was thereby extinguished. He also alleged that before the conveyances to him, the districts had acquired the title of the State of Arkansas, which also resulted from the nonpayment of taxes due it. Appellee further pleaded the statute of limitations, laches and estoppel. The chancery court found the issues in favor of appellee and dismissed appellants' complaint.

On appeal, appellants state that the respective improvement district titles were barred by adverse possession of appellants and their predecessors in title. There seems to be no doubt that appellants, their predecessors in title or their tenants had been in actual possession of the lands in question, most of which were in cultivation for many years, up to and including the year 1966. Appellants contend that their continued possession of the land following its sale for nonpayment of accruing installments of benefits assessed in the improvement districts barred the rights of the districts, and, consequently, of their grantee. This argument, insofar as deeds to the districts more than seven years prior to appellee's taking possession are concerned, would be well taken in each instance were it not for Act 82 of 1945. That act made the statute of limitations inapplicable to lands which had been sold to an improvement district. Yet, it is necessary that we determine the effect of this act on appellee's title.

The contentions of the parties and the validity of the deeds under which appellee claims can best be under-

stood by the following chronological table of the pertinent proceedings:[2]

No.	Date	Item (Where land descriptions are not given the instrument affected the entire 40 acres involved.)
1	May 21, 1925	Decree of chancery court foreclosing lien of Beaver Bayou Drainage District for unpaid installment of assessed benefits for 1924.
2	Sept. 24, 1925	Report of commissioner's sale to Beaver Bayou Drainage District pursuant to decree described as Item 1 confirmed by chancery court, and commissioner directed to execute deed to purchaser. Deed was acknowledged in open court and approved.
3	June 14, 1927	Commissioner's deed pursuant to Item 2 recorded.
4	June 24, 1930	Clerk of Phillips County certified that S½ NW¼ NE¼ of Sec 3, T 3S, R 2E, was sold to the State of Arkansas for nonpayment of the state and county taxes assessed for the year 1927, which remained unredeemed on that date and were forfeited to the state.
5	May 26, 1934	Title of the state under tax sale and forfeiture for nonpayment of 1927 taxes was confirmed by the chan-

[2]We do not consider a foreclosure by Cotton Belt Levee District No. 1 for an unpaid installment of assessed benefits for 1922 because the lands are described as all E. of Big Creek W½ Frl. NE¼ of Sec. 3. Examination of a plat and aerial photograph in the record convinces us that this description does not include any of the lands involved here.

		cery court in a suit brought by the state pursuant to Act 296 of 1929, S½ NW¼ NE¼ Sec 3.
6	Mar. 1947 term	Decree of chancery court foreclosing lien of Beaver Bayou Drainage District for unpaid installment of assessed benefits for 1946 on S½ NW¼ NE¼ Sec 3.
7	July 31, 1947	Commissioner sold lands to Beaver Bayou Drainage District pursuant to Item 6.
8	Sept. 20, 1950	Commissioner's deed pursuant to Items 6 and 7 approved and acknowledged in open court.
9	Sept. 22, 1950	Commissioner's deed described in Item 8 recorded.
10	Aug. 15, 1951	County clerk certified that N½ SW¼ NE¼ of Sec 3 was sold to the state for nonpayment of general taxes assessed for the year 1947, which remained unredeemed on that date and was forfeited to the state.
11	Jan. 17, 1952	Decree of chancery court foreclosing lien of Cotton Belt Levee District for unpaid installments of assessed benefits for 1937 and 1938 on S½ NW¼ NE¼ Sec 3.
12	July, 1952 term	Decree of chancery court foreclosing lien of Cotton Belt Levee District No. 1 for unpaid installments of assessed benefits for 1939 on S½ NW¼ NE¼ Sec 3.
13	July 28, 1952	Commissioner sold land to Cotton Belt Levee District pursuant to Item 12.

14	July 28, 1952	Decree of chancery court foreclosing lien of Cotton Belt Levee District No. 1 for unpaid installments of assessed benefits for 1940 and 1941.
15	Aug. 21, 1953	State deeds lands to the Beaver Bayou Drainage District, upon evidence of erroneous certification of the lands as forfeited pursuant to Act 206 of 1943.
16	Sept. 29, 1954	Commissioner sold lands to Cotton Belt Levee District No. 1, pursuant to Item 11 and reported sale which was confirmed by chancery court; deed was approved and acknowledged in open court.
17	Sept. 29, 1954	Commissioner's report of sale set out in Item 13 approved by chancery court. Deed approved and acknowledged in open court.
18	Sept. 29, 1954	Commissioner sold lands to Cotton Belt Levee District No. 1 pursuant to Item 14 and reported sale, which was confirmed by chancery court. Deed was approved and acknowledged in open court.
19	Sept. 30, 1954	Commissioner's deed pursuant to Items 11 and 16 recorded.
20	Sept. 30, 1954	Commissioner's deed described in Item 17 recorded.
21	Sept. 30, 1954	Commissioner's deed pursuant to Items 14 and 18 recorded.
22	Mar. 29, 1955	Title of the state to N½ SW¼ NE¼ Sec 3 under tax sale and forfeiture for nonpayment of 1947 taxes confirmed by the chancery court in a suit brought by the state.

23	June 11, 1966	Quitclaim deed from Beaver Bayou Drainage District to appellee conveying all right, title and interest of district by reason of tax forfeiture for the year 1966 and prior years.
24	Apr. 29, 1967	Quitclaim deed from Cotton Belt Levee District No. 1 to appellee conveying all right, title and interest of district by reason of tax forfeitures from the year 1965 and prior years.

It is extremely difficult to follow appellants' arguments, because all are lumped under their only point to be relied on—"that the learned trial court erred in finding for the appellee on the issue of title." They do contend, however, that the foreclosure of the lien of Cotton Belt Levee District No. 1 for unpaid installments of benefits assessed for the years 1937 and 1938 (Item 11 above) was barred by the three-year statute of limitations provided by Ark. Stat. Ann. § 20-1140 (Repl. 1968). This statute does not apply to this district or to Beaver Bayou Drainage District. See Ark. Stat. Ann. § 20-1142 (Repl. 1968); *Whitaker & Co.* v. *Sewer Imp. Dist. No. 1,* 229 Ark. 697, 318 S. W. 2d 831. However, Ark. Stat. Ann. § 20-1128 (Repl. 1968) does apply and, insofar as pertinent, contains identical language. We find nothing whatever in the abstract of title exhibited or the abstract of the record to indicate the date when the foreclosure suit was filed, so we are unable to say whether this statute of limitations would have applied, in any event.

Foreclosure suits by levee districts and drainage districts are conducted in accordance with the practice and proceedings of chancery courts, with minor and irrelevant exceptions. Ark. Stat. Ann. § 21-634 (Repl. 1968); Ark. Stat. Ann. § 21-547 (Repl. 1968). A statute of limitations, generally speaking, is a defense in judicial proceedings. *Western Union Telegraph Co.* v. *State,* 82 Ark. 309, 101 S. W. 748; *Harris* v. *Mosley,* 195

Ark. 62, 111 S. W. 2d 563. It must be specially pleaded in a chancery foreclosure. *Livingston* v. *New England Mortgage Security Co.,* 77 Ark. 379, 91 S. W. 752. A decree of foreclosure by a court having jurisdiction cuts off all defenses that could have been raised therein, including the statute of limitations. *Livingston* v. *New England Mortgage Security Co.,* supra; *Shaw* v. *Polk,* 152 Ark. 18, 237 S. W. 703; *Briggs* v. *Manning,* 80 Ark. 304, 97 S. W. 289. A decree cannot be avoided on collateral attack upon the ground of any defense, including the statute of limitations, that might have been asserted in the proceeding in which it is rendered. *Lewis* v. *Bank of Kensett,* 220 Ark. 273, 247 S. W. 2d 354; *Wallace* v. *Brown,* 22 Ark. 118, 76 Am. Dec. 421. A decree by default is as conclusive on collateral attack as any other rendered by a court having jurisdiction. *Lewis* v. *Bank of Kensett,* supra. A decree of a court, vested by statute with jurisdiction to foreclose specified liens by suits in rem upon constructive service by publication, is not subject to collateral attack, when the provisions of the act have been followed and such a decree is given the same favorable presumptions as those rendered upon personal service. *Hobbs* v. *Lenon,* 191 Ark. 509, 87 S. W. 2d 6.

Even if the record had disclosed that the statute had run, this defense is not now available to appellant. For the same reason, it is not available in regard to any of the improvement district foreclosures.

Appellants also contend that Beaver Bayou Drainage District's title under the foreclosure proceedings on account of the 1924 installment was barred by the seven-year statute of limitations set out in Ark. Stat. Ann. § 37-101, (Repl. 1962), before it was amended in 1945. This statute began to run on the date the period of redemption expired. *Pinkert* v. *Polk,* 220 Ark. 232, 247 S. W. 2d 19. The date of the foreclosure sale is not disclosed in the record, but it obviously was prior to September 24, 1925, the date of the commissioner's report of sale. The period of redemption expired after two years, so the statutory bar against Beaver Bayou on account of this foreclosure became complete at least by

September 24, 1934. Section 24, Act 279 of 1909, also Ark. Stat. Ann. § 20-1145 (Repl. 1968). The subsequent amendment to the statute (37-101) could not revive the district's claim since the rights of appellants had become vested under the statute before amendment. See *Smith* v. *Spillman,* 135 Ark. 279, 205 S. W. 107, 1 A. L. R. 136; *Dean* v. *Brown,* 216 Ark. 761, 227 S. W. 2d 623; *Meadows* v. *Costoff,* 221 Ark. 561, 254 S. W. 2d 472; *Pope's Ex.* v. *Ashley's Ex.,* 13 Ark. 262; *Couch* v. *McKee,* 6 Ark. 484. Appellee cannot succeed upon the basis of this foreclosure. (Items 1, 2 and 3.)

Beaver Bayou District also foreclosed on the S½ NW¼ NE¼ on account of the 1946 installment. (Items 6, 7, 8 and 9.) The three-year statute of limitations would not have applied to this foreclosure, even if pleaded. Appellants contend, however, that the seven-year statute bars this foreclosure in spite of the 1945 amendment.

Act 82 of 1945, effective February 21, 1945, (*Pinkert* v. *Lamb,* 215 Ark. 879, 224 S. W. 2d 15), added the following proviso to Ark. Stat. Ann. § 37-101 (Repl. 1962):

> Provided, however, that this section shall not apply to lands which have been sold to any improvement district of any kind or character for taxes due such districts, or to any taxes due any such improvement district, but the lien of said taxes shall continue until paid.

Appellants argue that this proviso is not available to appellee, a purchaser from an improvement district, but that it benefits improvement districts only. The plain language of the statute answers this argument. It does not provide that the seven-year statute does not apply to improvement districts. It does provide that it does not apply to *lands* which have been sold to any improvement districts of any kind or character for taxes due such districts. The statute would be meaningless if construed according to appellants' contention, because the district could never dispose of property to which it held title but not possession. The clear inten-

tion of the statute was to permit an improvement district to hold title without taking possession from the landowner but not at the risk of bar of a prospective sale by the seven-year statute.

It has been held that this statute is not only available as a defense to one in possession, but that it amounts to an investiture of title and may be used as the basis for title in an affirmative action by the possessor. *Worthen* v. *Rushing*, 228 Ark. 445, 307 S. W. 2d 890; *Jeffery* v. *Jeffery*, 87 Ark. 496, 113 S. W. 27; *Hart* v. *Sternberg*, 205 Ark. 929, 171 S. W. 2d 475. The quitclaim deed to appellee conveyed all title and right of the district. Consequently, appellants' additional argument that the statute, as amended, cannot be relied upon by appellee in appellants' action to quiet title as distinguished from one for recovery of possession is without foundation. Appellants themselves are using the statute as the basis of their action and not as a defense, in spite of the supposed limitation of the statute, before the amendment, to suits for recovery of land. It would be inconsistent to hold that the statute is available to one as basis for quieting title, but that the added proviso was not available to another defending that very action.

Title was vested in Beaver Bayou District by this 1946 foreclosure. Title in the district because of previous foreclosures had been previously divested by adverse possession as above pointed out. Consequently, appellee's title to this 20-acre tract must prevail against appellants' claim.

The Cotton Belt Levee District title on account of the foreclosure for the 1937 and 1938 installments (Items 14, 18 and 21); were also valid for the same reasons. was also the date of sale. The bar of the seven-year statute no longer applied, because of Act 82 of 1945. We should add that the foreclosures on this tract for 1939 (Items 12, 13 and 17) and for 1940 and 1941 (Items 14, 18 and 21) were also valid for the same reasons. Appellants argue that these subsequent foreclosures could not be valid because of our previous holding in

such cases as *Crowe* v. *Wells River Savings Bank,* 182 Ark. 672, 32 S. W. 2d 617. (See also *Terry* v. *Drainage District No. 6,* 206 Ark. 940, 178 S. W. 2d 857, in which *Word* v. *Grigsby,* 206 Ark. 164, 174 S. W. 2d 439, infra, was ignored.) In these cases we had held that once an improvement district acquired title through foreclosure, it could not rely upon later foreclosures to vest title. These cases are no longer authoritative. In *Street Improvement District No. 419* v. *Pinkert,* 221 Ark. 265, 253 S. W. 2d 780, we rejected such a contention as is made here, pointing out the unsoundness of the premise on which *Crowe* was decided. We relied upon *Word* v. *Grisby,* supra, (in which *Crowe* was not mentioned), where we reached a result directly contrary to that of *Crowe.* Not only is the rule in *Street Improvement District No. 419* v. *Pinkert,* supra, a later declaration, it is certainly the sounder of the two rules. If the first foreclosure sale should prove to be invalid, then under the *Crowe* rule an improvement district could be barred as to subsequent unpaid installments both on those on which it had also foreclosed and on those on which it had not foreclosed in reliance on the *Crowe* rule. Such a result is contrary to the basic fundamentals on which improvement districts are organized and financed. The earlier Beaver Bayou foreclosures did not bar these by Cotton Belt. *Street Improvement District No. 419* v. *Pinkert,* supra. Appellee's title to the entire 40 acres is valid because of these foreclosures.

We need not consider the effect of the deed from the state to Beaver Bayou Drainage District, in view of the validity of appellee's title by reason of the improvement district foreclosures. Neither the forfeiture for 1927 (Item 4) nor that for 1947 (Item 10) was any impediment to the improvement district foreclosures upon which appellee's title is based. Ark. Stat. Ann. § 20-1146 (Repl. 1968).

The decree is affirmed.

ARKANSAS LOUISIANA GAS COMPANY *v.*
McGAUGHEY BROTHERS, INC.

5-5581 468 S. W. 2d 754

Opinion delivered June 28, 1971

Hout, Thaxton & Hout, for appellant.

Pickens, Pickens & Boyce; By: *Tim F. Watson,* for appellee.

JOHN A. FOGLEMAN, Justice. Arkansas Louisiana Gas Company appeals from a jury award of $28,314 as compensation for lands of McGaughey Brothers, Inc., taken by eminent domain for installation, maintenance and operation of a 24-inch underground gas pipeline. McGaughey Brothers owned and operated 3,586 acres of farmland located on the east bank of the White River. Crops produced were rice, cotton, soybeans and feed crops. 870 acres were in improved pasture over which there were unimproved roads. The owners of the farm-

ing corporation maintained a herd of 200 to 250 brood cows with calves and replacement heifers.

Appellant took 3.45 acres in fee simple upon which it erected a tower 168.5 feet high to support a pipeline suspended over White River, 20.4 acres as permanent right-of-way easement 80 feet wide for an underground pipeline, and temporary ingress, egress and "regress" for construction purposes over appellee's private roads, the area of which totalled 26.4 acres. This pipeline was located north of and parallel to six 10-inch pipelines on the McGaughey property, which converged into one line on that farm. 15 acres of unharvested soybeans were damaged as a result of the pipeline construction.

Appellant argues that the circuit court erred in permitting appellee to introduce evidence of damages to the private roads during the period of construction and the cost of their restoration, over its objection. It asserts that error was committed in admitting testimony about the condition of the roads after appellant's work had been completed. It contends these were special damages which had not been pleaded. We have held, in a case where a railroad constructed its tracks upon a right-of-way which it used for a short time and then removed its tracks and abandoned the right-of-way, the measure of damages to the landowner was the rental value of the land taken, in the condition it was when taken, for the time it was occupied, its depreciation in value by reason of timber cut and other acts done thereon by the railway company and the damages to the remainder of the owner's land resulting from the building of the road across it and from flooding or overflow caused by the construction. *Pine Bluff & W. Ry. Co.* v. *Kelly,* 78 Ark. 83, 93 S. W. 562.

Whenever the contemplated construction for which a right-of-way is taken has not been completed, damages are assessed upon the presumption that it will be built with skill and proper precautions; however, if construction is complete at the date of the trial, the jury may consider the state of facts then existing in the light afforded by actual construction. The assessment of dam-

ages embraces all past, present and future damages, including those arising from faulty construction, which the location of the facility for which the right-of-way is taken may reasonably produce. *Springfield & Memphis Railway Co.* v. *Rhea,* 44 Ark. 258; *Missouri & N. A. Ry. Co.* v. *Bratton,* 92 Ark. 563, 124 S. W. 231. Such damages are not special damages which must be pleaded. In *Arkansas Central Railroad Co.* v. *Smith,* 71 Ark. 189, 71 S. W. 947, we said:

> Counsel for the company say that, if the pond was left upon the premises by the improper construction of the road, this would be an element of special damages, which could not be proved in this action, for the reason that there was no allegation to that effect, and no notice to the defendant of such a claim. This contention must be overruled, for, in the first place, there is no evidence and no contention that the road was improperly constructed. The mere fact that the excavation of earth for the roadbed left a pond of water does not necessarily show that the road was improperly constructed. But even if it did, it would make no difference for the road had already been constructed at the time of the trial; and it was for the jury to consider the state of facts then existing, and, with the light afforded by the actual construction of the road, determine what the damages were.

In *Arkansas Power & Light Co.* v. *Harper,* 249 Ark. 606, 460 S. W. 2d 75, we held that any error in the admission of testimony as to timber removed from a right-of-way and windrowed along and partially beyond its outside edges as evidence of unpleaded special damages was cured by the court's proper instruction as to the measure of the landowner's recovery. The correct instruction as to the measure of appellee's compensation was here as in *Harper,* as will be presently illustrated.

Assuming, however, that the damage to the roads constituted special damages which should have been pleaded, we cannot say that there was any prejudice to appellant, because it did not plead surprise or request a

continuance. When the trial court permits the introduction of evidence in face of an objection that the point at issue was not raised by the pleadings, the effect of the ruling is to treat the pleadings as amended to conform to the proof. *Bonds* v. *Littrell,* 247 Ark. 577, 446 S. W. 2d 672. So the trial court's ruling here was equivalent to treating the issue as if it had been asserted by a pleading amended at that stage of the proceeding. The purpose of requiring special damages to be pleaded is to prevent surprise. *Arkansas State Highway Commission* v. *Dixon,* 247 Ark. 130, 444 S. W. 2d 571. If appellant had pleaded surprise, when its objection was overruled, it might have been entitled to a continuance, if an issue of special damages not pleaded had arisen, in order to prepare to meet it. *Missouri Pacific Transportation Co.* v. *Williams,* 194 Ark. 852, 109 S. W. 2d 924. But where no surprise is pleaded and no time requested to prepare to meet the issue, there is no error. *Arkansas State Highway Commission* v. *Dixon,* supra; *Missouri Pac. Transp. Co.* v. *Williams,* supra; *Bennett* v. *Snyder,* 147 Ark. 206, 227 S. W. 402; *Ft. Smith Refrigeration & Equipment Co., Inc.* v. *Ferguson,* 217 Ark. 457, 230 S. W. 2d 943; *The Famous Store* v. *Lund-Mauldin Co.,* 149 Ark. 658, 233 S. W. 767; *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553.

Appellant's second point for reversal relates to the giving and refusal of instructions relating to the measure of just compensation to the landowners. The circuit court gave appellant's requested Instruction No. 4, as follows:

> Under the law, McGaughey Brothers, Incorporated, is entitled to recover the fair market value of the lands acquired by Arkansas Louisiana Gas Company, determined as of the 28th day of September, 1964, together with the difference, if any, in the fair market value of the remainder of the lands immediately before and immediately after the taking.
>
> You will, therefore, ascertain the difference between the market value of the entire tract of land of McGaughey Brothers, Incorporated, before the taking

and the fair market value of the lands remaining in the tract after such taking, and that difference is the amount that McGaughey Brothers, Incorporated, is entitled to recover, and your verdict should be for McGaughey Brothers, Incorporated, in such amount.

When I use the expression "fair market value," I mean the price that the property of McGaughey Brothers, Incorporated, would bring on the open market in a sale between a seller who is willing to sell and a buyer who is willing and able to buy after a reasonable opportunity for negotiations.

Appellant's requested Instruction No. 5, which was refused, read:

In determining the amount of compensation to be paid to McGaughey Brothers, Inc., by Arkansas Louisiana Gas Company, you are to consider that the use of the lands acquired by Arkansas Louisiana Gas Company is limited to those uses for which they were acquired, and that McGaughey Brothers, Inc., has the absolute right to continue using the surface of the lands acquired for the right-of-way for other purposes not inconsistent with the use of the easement by Arkansas Louisiana Gas Company.

The court gave an instruction requested by appellee after modifying it to read as follows:

(Request)

You are instructed that Arkansas Louisiana Gas Company acquires by this Condemnation Proceeding the power to make such use of the 20.4 acre right-of-way across the property of the landowners as its present and future needs require for the purpose for which the right-of way is condemned, and Arkansas Louisiana Gas Company is liable to the landowners as though the lands were taken in fee simple or absolute title.

(Modification)

> As to the 3.45 acreage, McGaughey Brothers have no further right or control. As to the 20.4 acres over which the Arkansas Louisiana Gas Company now holds an easement, the McGaughey Brothers, Incorporated, have the right to such use and control of the surface of these lands so long as the uses and purposes to which they are put are not inconsistent with the Arkansas Louisiana Gas Company's right to maintain and operate their pipeline.

Appellant first argues that the instruction given was erroneous because it made the condemnor "liable to the landowners as though the lands were taken in fee simple or absolute title," rather than "liable for the full market value of the land taken as if it were taken in fee simple absolute." This semantic argument is not well founded. We do not see how the jury could have been misled when the instructions are read as a whole. "As if" and "as though" are commonly accepted as conveying the same meaning. Webster's New International Dictionary, Unabridged, Second Edition.

Appellant's principal argument relating to these instructions, however, is based upon *Arkansas Power & Light Co.* v. *Mayo,* 244 Ark. 435, 425 S. W. 2d 531. There the court (three members dissenting) said that we could not be certain that the instructions given in a similar case did not confuse the jury as to the proper measure of the landowner's recovery. The court here, however, followed the teaching of *Mayo.* It is true that the appellee's requested instruction before its modification was quite similar in wording to the instruction requested by the landowner in *Mayo,* which we said might have been misleading and confusing to the jury when read with the instruction on the measure of compensation, given by the court, so that a double award might have resulted. The first paragraph of the instruction given by the court at appellant's request is virtually identical to the instruction which the condemnor had requested in *Mayo,* and which we said more clearly expressed the law than the court's instruction there, even

though the latter standing alone was correct. In view of the modification of appellee's requested instruction and the giving of the first paragraph of appellant's requested instruction, the two instructions read together were not likely to have confused the jury or misled it into a double award.

Appellant also alleges that the verdict is excessive because there is no substantial evidence to support it. We are unable to agree. Appellee's six witnesses stated differences in the market value of the property before and after the taking ranging from $45,100 to $67,671.35. No useful purpose would be served by outlining all the testimony. J. C. McGaughey, an officer, director and assistant manager of appellee, testified that the value of the lands taken totalled $10,732.50. He also testified that it was necessary to move $1,000 worth of dirt in to restore the roads used by appellant and to reblade and rework them. DeWitt McGaughey, also an officer and director of appellee, who was also its manager, said that it would cost $2,000 to get the roads in proper shape.

Appellant first attacks the substantiality of the testimony of these witnesses upon the ground that none of them mentioned any comparable sales. All of them qualified as competent to state opinions as to the market value of the lands. Having done so, they were not required to refer to comparable sales on direct examination or give the basis of their opinions. *Arkansas State Highway Commission* v. *Hartsfield,* 248 Ark. 821, 454 S. W. 2d 82; *Arkansas State Highway Commission* v. *Johns,* 236 Ark. 585, 367 S. W. 2d 436. The burden was upon appellant to demonstrate that the testimony of these witnesses was without any reasonable basis. *Urban Renewal Agency of Harrison* v. *Hefley,* 237 Ark. 39, 371 S. W. 2d 141; *Arkansas State Highway Commission* v. *Johns,* supra. As far as we can tell from the abstract of the testimony, none of the six witnesses was asked about comparable sales or the extent to which he relied upon them. Failure to cross-examine on this subject might be taken to mean that appellant was satisfied on this subject. *Arkansas State Highway Commission*

v. *Hartsfield,* supra. Appellant is in no position to contend that the testimony of any such witness was insubstantial because of his lack of knowledge of comparable sales. *Arkansas State Highway Commission* v. *Clark,* 247 Ark. 165, 444 S. W. 2d 702.

Appellant states that the reasons given by some of the witnesses for the reduction in value of appellee's remaining lands after the taking were:

> (1) during floods, appellee's cattle would have to walk around the tower erected on the land taken in fee or swim out through low land that admittedly was there before the acquisition by appellant; (2) speculation that appellant would continue to use appellee's private roads in the future and leave gates open, even though it is admitted that appellant has no further rights to the use of those roads; (3) supposed devaluation of improvements, even though the acquisition by appellant takes none; (4) the continuing right of appellant to traverse the right-of-way for maintenance purposes; (5) seepage and loss of drainage due to the pipeline, although a pipeline owned by another company is located parallel to appellant's pipeline and was laid long before appellant's pipeline was laid; (6) the tower located on the tract condemned in fee hinders the aerial application of chemicals on appellee's crop, although it was admitted that there were trees in the area; and (7) the nuisance factor is that the pipeline is "there."

Appellant then argues that the evidence in this case brings it within the ambit of *Texas Illinois Natural Gas Pipeline Company* v. *Lawhon,* 220 Ark. 932, 251 S. W. 2d 477, in the sense that nuisance or inconvenience to the landowner because of the presence of the pipeline constituted the principal basis for the opinions of the witnesses, so that there was no substantial basis to fully support the jury verdict. Granting, without deciding, that the value testimony of certain witnesses may have been subject to this infirmity, it is clear that the testimony of others was not shown to be. While not con-

trolling, it is significant that appellant not only did not challenge the qualifications of any witness to express his opinion as to values, but it moved to strike the testimony of only one of the six.

Appellee's witnesses testified that the cattle operation of McGaughey Brothers, Inc., like that of most of the neighboring farms bordering the river, was carried on along the river. From December to May, however, J. C. McGaughey testified that the cattle were pastured on about 1,500 acres of land on which soybeans were later planted. During times the river was at high stage, some of the lands were flooded.

According to J. C. McGaughey, prior to the taking, the cattle would go to the high ridge along the river as it rose, and walk to safety. The tower site, he said, covers a ridge so that it cannot be crossed by the cattle, and they would have to swim out if they were below the tower when the water rose. He said that there were four fences crossing the right-of-way designed to keep cattle out of crops. He could not accurately estimate the amount by which the improvements were devaluated. He also took into consideration the compounding of drainage problems due to the additional pipeline and inability to use a dragline for ditching across the right-of-way, problems connected with aerial application of insecticide, seepage problems due to the excavation for the pipeline and the fill and the attendant difficulty in maintaining dikes for flooding rice fields. He could not break the devaluation due to the last item into dollars and cents.

John Keel, a neighboring farm owner corroborated the existence of a drainage problem due to the impoundment of surface water by the fill over the pipeline. D. L. Buffington, a Newport real estate man, whose qualifications were admitted, placed the difference in values at $53,796.53. He considered as elements of damages to appellee's remaining lands: interference with the cattle operation (which he said was attributable to the fact that the tower effectively cut off 200 acres of the farm in high water); the probability that emergencies might

cause the condemnor to go across appellee's farmland, the only way by which the pipeline can be reached, without permission, which would involve time and trouble in a landowner's recovering damages; and aggravation of the drainage problems due to the additional pipeline. Buffington stated that if the cattle were cut off during high water and would not go through the water, the owners would have to take them out by boat or take them around by Tupelo or other such place. He was not asked to allocate a specific figure to any element.

In *Arkansas State Highway Commission* v. *Wallace,* 247 Ark. 157, 444 S. W. 2d 685, we said that a witness' testimony to a total compensation figure could not stand against a motion to strike if it included an impermissible element of damage, unless the amount improperly included can be distinguished. But we said that the witness should be afforded an opportunity to specify the amount improperly included. We denied a challenge to value testimony both by motion to strike and by the contention that the verdict did not have substantial evidentiary support, because each witness considered at least one element proper for the jury's consideration, but was not afforded an opportunity to specify the amount attributable to an improper element of damage. *Arkansas State Highway Commission* v. *Woody,* 248 Ark. 657, 453 S. W. 2d 45.

Both J. C. McGaughey and Buffington considered permissible elements of damage. The impoundment of surface water and impairment of drainage was a compensable element of damage. *Springfield & Memphis Railway Co.* v. *Henry,* 44 Ark. 360; *Arkansas State Highway Commission* v. *Dixon,* 247 Ark. 130, 444 S. W. 2d 571; *Miller Levee District No. 2* v. *Wright,* 195 Ark. 295, 111 S. W. 2d 469. So was the severance damage because of the inability of the cattle to travel from one part of the land to another, *Arkansas State Highway Commission* v. *Freyaldenhoven,* 246 Ark. 688, 439 S. W. 2d 791, and decreased value of improvements. *Miller Levee District No. 2* v. *Wright,* supra; *Donaghey* v. *Fones Brothers Hardware Co.,* 171 Ark. 1056, 287 S. W. 414; *Donaghey* v. *Lincoln,* 171 Ark. 1042, 287 S. W. 407.

Since these elements, and perhaps others,[1] were properly considered, we cannot say that the testimony of these witnesses was not substantial. Neither was afforded an opportunity to state the damage attributable to any impermissible element. We cannot say that their testimony was not substantial evidence.

The judgment is affirmed.

[1]Increased difficulty in cultivation of a farm by reason of obstacles to use of farm machinery by electric transmission lines and towers seems to be a recognized element of damages. *Illinois Iowa Power Co.* v. *Rhein,* 369 Ill. 584, 17 N. E. 2d 582 (1938); *Central Illinois Public Service Co.* v. *Lee,* 409 Ill. 19, 98 N. E. 2d 746 (1951); *Southwestern Public Service Co.* v. *Goodwine,* 228 S. W. 2d 925 (Tex. Civ. App. 1949). Aerial application of insecticides is a common farming practice. Increased difficulty in this practice increasing cost and diminishing efficiency would seem to fall in the same category.

MISSOURI PACIFIC RAILROAD COMPANY *v.* JAMES CLEBORN BALLARD

5-5597 469 S. W. 2d 72

Opinion delivered June 28, 1971

William J. Smith, Boyce R. Love and *Frederick S. Ursery,* for appellant.

Howell, Price, Howell & Barron, for appellee.

J. FRED JONES, Justice. James Cleborn Ballard was injured while in the course of his employment as a switchman for the Missouri Pacific Railroad Company when he was struck by an automobile being driven by a Mr. Pack on a service road in the Missouri Pacific yards in North Little Rock. He filed suit in the Pulaski County Circuit Court against Pack and the railroad company, charging Pack with common law negligence and charging Missouri Pacific with negligence under the Federal Employers' Liability Act (45 U. S. C. A. § 51 et seq.). Both defendants pleaded Ballard's own negligence as a bar to recovery, and the issues of negligence were submitted to the jury on interrogatories. The jury apportioned the negligence as 10% to Ballard, 10% to Pack and 80% to Missouri Pacific. It found that Ballard had sustained damages in the amount of $35,000 as a proximate result of the combined negligence. Judgment on the verdict was rendered against Missouri Pacific for $31,500 and on appeal to this court Missouri Pacific relies on the following points for reversal:

> "The court was in error in failing to direct a verdict for the Missouri Pacific Railroad Company at the close of the plaintiff's case and at the close of all the evidence.

The verdict is not supported by substantial evidence.

The court was in error in giving AMI 305 among its instructions to the jury.

The court was in error in giving AMI 1909 among its instructions to the jury."

The facts as we gather them from the record are as follows: Mr. Ballard was injured about midnight on September 4, 1966. There were three individuals involved in connection with the incident resulting in the injuries—Mr. Ballard, Mr. Pack and Mr. Thurman. All three were employees of Missouri Pacific and were the only eye witnesses to the occurrence resulting in the injuries. Mr. Ballard was a switchman in the transportation department and was engaged in his duties as such when he was injured. The defendant Pack was a locomotive engineer and was on his way to work when Mr. Ballard was injured, and Mr. Thurman was a rip track foreman in charge of repairing damaged railroad cars when they were placed on the rip track for that purpose. The rip track, where cars were repaired, was laid out in a north-south direction and was protected at each end against careless switching operations by switches locked with blue colored locks. Only Mr. Thurman, and car repair personnel under his supervision, carried keys to blue locks and they were the only ones who had authority to open the switches into the rip track; regular switchmen or transportation personnel had no such authority.

An access road with asphalt surface about 18 or 20 feet wide ran near, and parallel to, the rip track. It was designed and used for motor vehicular traffic by employees going to and from their work at various places in the railroad yard. On the night in question, the switching crew with which Mr. Ballard was working was directed by the yard master to switch approximately 45 railroad cars into the north end of the rip track. Upon arriving at the north end of the rip track, they found the rip track switch closed with the blue lock, so they were then directed to take the cars

into the rip track from the south end. In the meantime, and while the switch engines and crew were on their way to the south end of the rip track with the cars, Mr. Thurman, the rip track foreman, was directed by the yard master to open the switches into the rip track by removing the blue locks at both ends of the rip track. Mr. Thurman drove in his automobile to the north end of the rip track and opened the switch at that point. He then drove to the south end of the rip track where he found the switch crew in the process of taking the cars through a regular switch adjacent to the access road; after which, that switch would be thrown and the cars would be shuttled back onto the rip track, through the nearby rip track switch. Mr. Ballard was attending the switch through which the cars were passing and about five of the cars had passed through the switch when Mr. Thurman arrived in his automobile headed south on the access road. Mr. Ballard was standing an undisclosed distance from the switch and an undisclosed distance from the access road, but he had his back to the access road and was watching the cars pass through the switch which he was to realign after the cars had passed through. Mr. Thurman stopped his automobile across the access road from Mr. Ballard. He called from his automobile to Mr. Ballard and inquired as to whether the nearby rip track switch was open. There is a slight conflict in the testimony of Mr. Ballard and that of Mr. Thurman as to the exact details of what happened at this point; but, in any event, Mr. Pack, who was driving his automobile north on the access road, struck and injured Mr. Ballard.

Mr. Ballard's original complaint alleged negligence on the part of Pack in driving at an excessive rate of speed; in failure to keep a proper lookout; in failing to keep his vehicle under proper control; and in driving although afflicted with poor eyesight. The original complaint as amended alleged negligence on the part of Missouri Pacific in failing to provide Mr. Ballard with a reasonably safe place in which to work, and in requiring Mr. Ballard to go to the service road to receive instructions from Mr. Thurman. A second amendment to the complaint against Missouri Pacific alleged

that Thurman was a fellow-employee of Ballard's and that his negligence was imputable to Missouri Pacific; that Thurman, as a superior of Ballard, called Ballard over to the edge of the road where he was struck by an automobile; that Thurman as agent for Missouri Pacific, was negligent in enticing Ballard to enter a place of danger in the course of his work; and in failing to warn Ballard of the approach of a motor vehicle which presented danger to his person and in sitting silently by while observing an automobile bearing down on his person and in otherwise failing to observe ordinary care under the circumstances.

Mr. Pack answered by general denial and alleged that the injuries to Ballard were proximately caused, or contributed to, by his own negligence, or resulted from a risk assumed by him; and that in so far as Pack was concerned the accident was an unavoidable mishap.

Missouri Pacific answered by general denial and alleged that Ballard's injuries were proximately caused by his own negligence or his contributory negligence and the negligence of Mr. Pack. In answer to the second amendment to Ballard's compalint, Missouri Pacific, in addition to repleading the matter set out in its original answer, further pleaded the doctrine of assumption of risk.

Approaching the points relied on in reverse order, we are of the opinion that the trial court did not err in giving AMI 1909 among its instructions to the jury. AMI 1909, as given by the trial court, is as follows:

> "At the time of the occurrence, there was in force a Federal statute which provided that in any action brought against a railroad to recover damages for injury to an employee, the employee shall not be held to have assumed the risks of his employment in any case where the injury resulted in whole or in part from the negligence of any of the officers, agents or employees of the railroad."

Missouri Pacific as well as Pack definitely and affirmatively pleaded assumption of risk and although

neither requested an instruction on assumption of risk, the evidence as presented constituted very potent factors of assumed risk. Although the trial court failed to define "assumed risk" for the jury, we are of the opinion that the giving of instruction AMI 1909 was not reversible error under the facts and circumstances of this case. In the Committee comment as to the use of this instruction is found the following: "Giving an instruction that the employee has not assumed the risk of his employment has been sustained without regard to whether the defense has been asserted. *Wantland* v. *Illinois Central R. Co.,* 237 F. 2d 921." (See also *Larsen* v. *Chicago & N.W. R. Co.,* 171 F. 2d 841).

As to Missouri Pacific's third point, AMI 305, as given by the trial court, is as follows:

> "It was the duty of all persons involved in the occurrence to use ordinary care for their own safety and the safety of others."

This instruction as given was in the exact wording of the Model Jury Instruction 305B as approved by this court. As set out in the Committee comment, this instruction is designed for use when negligence on the part of the plaintiff is an issue, or when the jury is to consider a counterclaim or multi-party suit. This instruction was preceded by AMI 303 as follows:

> "A failure to exercise ordinary care is negligence. When I use the words 'ordinary care,' I mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case. It is for you to decide how a reasonably careful person would act under those circumstances."

It was Ballard's contention that Thurman was an agent for Missouri Pacific; that his negligence in calling Mr. Ballard from his position of safety into the unsafe highway, and in failing to warn him of impending danger was a proximate cause of Ballard's injuries and

damage; and that such negligence was imputed to Missouri Pacific. Mr. Ballard, Mr. Pack and Mr. Thurman were the only persons involved in the occurrence and each of them was charged with negligence. We find no error in giving instruction AMI 305 under the circumstances of this case.

Missouri Pacific's assignments under its second and first points are closely related and have given us considerable difficulty. Recognizing that every case of negligence must turn on its own particular facts, we find it necessary to set out the facts in this case as well as the facts in similar Federal decisions in much greater length and detail than would be necessary if this were a simple common law negligence case to be decided under state law and decisions, rather than the Federal Employers' Liability Act as interpreted and applied by the Federal Courts.

The situation in the case at bar is similar to the one presented in *Missouri Pacific R. Co.* v. *Eubanks,* 212 Ark. 652, 207 S. W. 2d 610, where (substituting Mr. Pack for Mrs. Keene) we said:

> "The suit was brought to compensate a single injury against two defendants having no relation to each other, and different rules are applicable in determining their respective liability. The suit against Mrs. Keene [Mr. Pack] is determinable by the laws of this state, but our state laws are not determinative of the liability of the railroad company. As against the railroad company the Federal Employers' Liability Act governs and as said in the case of *St. L. S. F. Ry. Co.* v. *Smith, supra,* 'the question as to the sufficiency of the evidence to establish negligence must be determined by that act and the applicable principles of the common law as construed by the federal courts.' "

The dissenting opinion in *Eubanks* further points up the problem before us by citing from Federal Court decision the following language:

" 'The focal point of judicial review is the reasonableness of the particular inferences or conclusion drawn by the jury. It is the jury, not the court, which is the fact finding body . . .'

* * *

. . . Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, [under F. E. L. A.] if the negligence of the railroad has 'causal' relation,—if the injury or death resulted *'in part'* from defendant's negligence, there is liability.

The words 'in part' have enlarged the field or scope of proximate causes—in these railroad injury cases. These words suggest that there may be a plurality of causes, each of which is sufficient to permit a jury to assess a liability. If a cause may create liability, even though it be but a partial cause, it would seem that such partial cause may be a producer of a later cause. For instance, the cause may be the first acting cause which sets in motion the second cause which was the immediate, the direct cause of the accident."

Returning now to the evidence of Missouri Pacific's negligence through Mr. Thurman; he was directed to open the switch at the south end of the rip track. He testified as follows:

"Q. When you drove up there, he had his back toward you and let me ask you this, this train is in motion down on this 311 rail, wasn't it?

A. Yes, sir, it was.

Q. And he had his back over here towards your car and he was facing the train and facing the switch that he is going to throw when it passed?

A. Yes, sir.

Q. To your knowledge, was there any reason for him to leave his position there by the switch prior to your coming up there?

A. No, not to my knowledge.

Q. All right. Now, he did leave that position there by the switch, did he not?.

A. Yes, sir.

Q. What distracted his attention away from the train and caused him to draw nearer to you?

A. I called to him across the road and spoke to him and asked him if the switch was unlocked.

Q. Was this train making noise moving by?

A. Making a little noise.

Q. All right. Now, what did he do?

A. When I asked him the question?

Q. Yes.

A. He made a motion backwards and answered me, yes.

Q. When you say he made a motion backwards, he took a step backwards?

A. As near as I can remember, yes, sir, took kind of a step backwards.

Q. Took a step back and...

A. And he was...

Q. And in which direction did he turn?

A. He was turning his head from left to right and at the time he answered me, his head was to the left.

Q. Turning his head from left to right, turning his head to the left?

A. And to the right, watching his cars.

Q. Well, he turned to the left to get to facing toward you, did he not?

A. Yes, sir.

Q. And then back over here to where the train was running? He moved himself in a position to where his back was toward an oncoming car that we are going to talk about in just a minute, isn't that true?

A. I don't recall his back being turned completely towards the oncoming car, his back was to the road.

Q. That was where he was positioned originally?

A. Right.

Q. His position originally?

A. Yes, sir.

Q. But when you called him, he made a turn to the left, he made a turn around this way to where his back was then facing in this direction?

A. I don't recall him turning completely around.

Q. Well, partially around.

A. Yes, sir.

Q. The point still being that he had turned away from the direction this car was coming from?

A. Partially, yes, sir.

Q. All right. Now, at the time you drove up there, stopped your vehicle, and at the time you called him, were you aware of an automobile approaching from the south going north?

A. Yes, sir.

Q. Did you see it?

A. Yes, sir.

Q. Did you know it was coming?

A. Yes, sir.

Q. Were you parked on the road or off the road?

A. Partially off and on.

Q. You were partly on the road?

A. Yes, sir.

Q. And partly off the road.

A. Mostly off the road.

Q. Why didn't you park completely off the road?

A. It just didn't occur to me to pull completely off the road, I was only going to be there a second.

Q. Is this a wide road out there?

A. No, sir.

Q. It's a right narrow road, isn't it?

A. Yes, sir.

Q. Did you turn your lights off?

A. Beg your pardon?

Q. Did you turn your lights off?

A. No, sir.

Q. Did you turn them down to dim?

A. They were on dim.

Q. Now, let's get back to Mr. Ballard. You've described to the jury that he's got his back towards you, looking at the switch and the train going by him and he takes a step backward and turns partially to the left to where he can speak kind of directly to you, that's what happened wasn't it?

A. Yes, sir.

Q. And you said what?

A. I asked him if the switch was unlocked.

Q. What did he say?

A. He said yes.

Q. What did he do then?

A. He started moving back towards his switch.

Q. How far did he ever get onto that road from the time he made a step back until the time he started moving back toward his switch?

A. I don't remember him ever getting more than one foot on the road.

Q. You saying to the jury that he never got more than a twelve inch distance on the edge of that road?

A. Something in that proximity, one leg.

Q. And his only time on that road was to step back up here and answer your question, to say yes, and immediately move away?

A. It wasn't necessary for him to come up on the road to answer me.

Q. I didn't ask you that. I didn't ask you that. I asked you did he move one step back and answered your question and immediately moved back to that switch.

A. Yes, sir.

Q. And all the time you knew Mr. Pack's car was coming down the road because you had seen it and been watching it, hadn't you?

A. Yes, sir.

Q. Did you ever, at any time, give any warning to Mr. Ballard that this car was approaching from the back, from his back side at a place where you were partially on that highway, did you ever at any time give him any warning of the approach of that car?

A. No, sir."

Mr. Thurman testified that there were several telephone poles between the railroad track and the service road on which he was parked but that, in his opinion, the roadway was well lighted and one would have to be looking for shadows of poles in order to find them.

On cross-examination Mr. Thurman testified that when he brought his automobile to a stop, he noticed Mr. Pack's automobile lights approaching from about a mile away; that he simply called to Mr. Ballard and asked "is that switch unlocked?" and that Mr. Ballard was backing up toward him and replied, "yes it is," and about that time Mr. Pack's automobile struck Mr. Ballard. Mr. Thurman testified that the service road on which he had parked his car had a blacktop surface and was about 18 or 20 feet wide; he says that the railroad track runs parallel with the road at this point, and that the telephone poles, referred to in his direct examination, were between the track and the service road about eight feet from the edge of the pavement. He says that Mr. Ballard was holding his signal lantern in his right hand while he was facing the railroad track and that Mr. Pack's automobile approached him from the right side.

On cross-examination Mr. Thurman was asked why he did not tell Mr. Ballard about the approaching automobile and he answered that he felt certain that Mr. Ballard had seen the automobile, and that he did not think that Mr. Ballard was in any danger from the approaching automobile. He denied that he was Mr. Ballard's superior and testified that he and Mr. Ballard were not acquainted with each other.

Mr. Ballard testified that he alighted from one of the engines pulling the freight cars and was standing near the switch waiting for the cars to pass through. He testified that he was facing the tracks with his back to the service road and intended to realign the switch as soon as the cars passed through so that the cars could then be shuttled back onto the rip track through the switch at the south end of the rip track. He says that the cars were moving through the switch immediately in front of him and that his first knowledge that Mr. Thurman was in the vicinity was when he heard someone say something to him from behind. Then Mr. Ballard testified on direct examination as follows:

"Q. Now, with this train and the noise that it was making as you were standing there, did you know Mr. Thurman at the time he called you?

A. When I turned around and seen him, I didn't know what his name was, but I know that he was with the Car Department, yes, sir.

Q. Why did you move backward from near that switch onto the edge of the road?

A. Because I didn't understand what Mr. Thurman said.

Q. Because of what?

A. Because of the noise of the cars.

Q. As you moved back there, what did he say to you?

A. He asked me was the switch locked?

Q. What did you tell him?

A. I told him I didn't know and I turned to go see.

Q. Did you turn immediately?

A. Yes, sir.

Q. I know you don't go out there and time these movements, but was there any appreciable time at all that it took you from the time he hollered to you and the time you moved closer to him to hear what he had to say and then give him an answer and moving back. Was there any more time lapse than that?

A. No, sir.

Q. Now, are you all supposed to be out there, I'm talking about out there in the yards at these switches?

A. Yes, sir.

Q. Were you doing what you were supposed to be doing?

A. Yes, sir, the best I knew how."

Mr. Ballard testified that on some occasions it is necessary for a switchman to get out into the service road to conduct his switching duties, but that this is only necessary on a long string of cars when the engineer on the engine is around a curve where he cannot see the signals when given from nearer the track. He testified that the service road where the accident occurred is used by the employees of the railroad company and their families in driving to and from work. Mr. Ballard then continued as follows:

"Q. Did you ever see Mr. Pack's car coming down the road?

A. No, I didn't.

Q. Tell the jury how far you ever got out off of that road.

A. Well, I don't even remember putting my foot on the road, I thought I just went out . . . the best I remember, I just went out to the edge of the road as far as I went, I could have had one foot on it, I wouldn't argue the point, I don't know, but as far as my own knowledge, I don't even remember stepping a foot on the pavement, I thought I was on the shoulder of the road.

Q. Now, with reference to these light poles and with reference to the lights and poles they had in the yard, describe, if you will

for the jury, this matter, if it be so, of shadows and lights out there.

A. Well, sir, you have some places there that the road has sufficient lights and then there's places that it has shadows.

Q. Does this actually vary from day to day with reference to boxcars and with reference to telephone poles . . . I know the telephones don't, but the boxcars move.

A. Oh, yes sir, I would say it will vary, depending on how many cars you have in the yard, if they are hopper cars or boxcars or what have you.

Q. What was the first thing that you knew with reference to Mr. Pack's vehicle?

A. The first thing I heard was just brakes squalling and then just bam, that was it.

Q. Was it almost that close together?

A. Yes, sir.

Q. Were you, at the time, moving away from the road back towards the switch?

A. Yes, sir to the best of my knowledge, I was headed back to see if the switch was locked where I could tell Mr. Thurman whether it was locked or not.

Q. As far as you know, you were not even on the road at the time?

A. As far as I know, I was not."

On cross-examination Mr. Ballard testified that he weighed around 230 pounds and he then testified as follows:

"Q. Where this accident happened, Mr. Ballard, in 1966, do you agree with me that a man standing on the edge of the road where you were, if he looked, could see close to a mile down that road around that curve, cars approaching from the south?

A. No, no, sir, I don't think you could see that far.

Q. All right, how far would you say that you could see a car?

A. 'Tween a quarter and a half of a mile.

Q. You would say you could see a car coming from the south, the direction from which Mr. Pack was coming, for a distance of about a quarter to a half of a mile?

A. Yes, sir.

Q. All right, sir. Now, on the night this happened, you never did see Mr. Pack's car?

A. No, sir, I never did.

Q. You do know better than to step out into a road without looking both ways, do you not?

A. Yes, sir.

Q. Did you look both ways?

A. Yes, sir.

Q. You did look toward the direction from which Mr. Pack was coming?

A. Yes, sir.

Q. But you didn't see him?

A. No, sir.

Q. Do you agree with me that once you get past the poles, which are approximately eight feet to the east of the pavement, once you get on the pavement side of the poles, that there's nothing to prevent you from seeing a car that was coming from the direction from which Mr. Pack's car was coming?

A. There's no obstruction, no, sir.

Q. Coming from the switch toward the pavement, once you walked by the poles, there's nothing to prevent you from seeing Mr. Pack's car coming from the south?

A. There's nothing.

Q. Sir?

A. There's no poles or obstacles, no, sir.

Q. Did you look in Mr. Pack's direction after you passed the poles?

A. I don't know. To tell you the truth, I don't know.

Q. You may have looked . . .

A. I may have looked.

Q. Before you passed the poles?

A. I may have looked before, I wouldn't swear to it, but I think I looked after I got past the poles, I'm not for sure, I wouldn't swear to it.

Q. All right, sir. You do know that cars travel up and down that road?

A. Yes, sir.

Q. When you were working, you probably went back and forth to work over that road, didn't you?

A. Yes, sir.

Q. Did you not?

A. Yes, sir.

Q. All right, sir. And at shift change time, I guess there are a number of cars on that road?

A. Yes.

Q. Was this about shift change time, Midnight?

A. Well, yes, sir, it was pretty close to shift change.

Q. When this happened, am I correct that there are about five boxcars that had gone by you and you were waiting for forty more to go by before you were going to throw that switch?

A. Approximately, somewhere there abouts.

Q. You were going to wait there by the switch for about forty cars to go by?

A. Yes, sir.

Q. Now, I didn't hear you say, but Mr. Price demonstrated and you agreed with him, as to how this happened. He showed you standing facing the train, backing towards Mr. Thurman and going back towards the train. Is that the way it happened?

A. No, sir.

Q. How did it happen?

A. The best I remember, when I heard Mr. Thurman's voice, I turned and seen him sitting in his automobile, I turned and walked to the road, at no time did I back or I would remember backing up.

Q. It's your recollection that as you approached the road, you were facing it?

A. Yes, sir.

Q. All right, and that you looked left and right?

A. Yes, sir.

Q. And you were carrying a lantern, were you not?

A. Yes, sir.

Q. Do you agree that a lantern of the type you were carrying can be seen if you are holding it down?

A. Yes, sir, it can be seen . . . well, it all depends on which side you are holding it on whether it could have been seen from which side or not.

Q. Assuming there was nothing in the way, if you hold the lantern out here, holding it down, it can be seen from the side?

A. Yes, sir, unless the light is down by your leg and you are coming from the other side.

* * *

Q. As far as you recall, you may have been

hit off the pavement, is that what you said?

A. I could have, I don't ever remember putting my foot on the pavement. I could have had one on it, I said I wouldn't swear to it, I don't know whether I had one foot on or they was both on the shoulder or what.

Q. As far as you are concerned, Mr. Pack may have hit you off the pavement?

A. As far as I know, I did not have both feet on the pavement, I could have had one on the pavement, I don't know."

Mr. Pack testified that the speed limit posted inside the Missouri Pacific shop area is 30 miles per hour and that he was traveling to work on the night in question at about 25 miles per hour. He testified that as he approached the scene of the accident, he saw the headlights of Mr. Thurman's vehicle parked on his left-hand side of the service road. He testified that he slowed down a little bit when he saw the parked automobile and he then testified as follows:

"Q. What happened then, sir?

A. Then all at once, an object appeared in front of me, just like that, looked about a car length.

Q. What was this object?

A. Well, it must have been Mr. Ballard, it was just so quick you couldn't tell what it was.

Q. All right, you know now it was Mr. Ballard?

A. Oh, yes.

Q. What did it look like to you at that time?

A. Well, it was just . . . just a form, it just happened so quick.

Q. What did you do?

A. Slammed my brakes on and went to the left. I thought I had missed him, then I heard that thump on the side of the car. I stopped just as quick as I could.

Q. What did you do then?

A. I ran back to Mr. Ballard and I said, 'Oh, Mr. Ballard,' and put my hat under his head, 'Mr. Ballard, I'm so sorry, I didn't see you in time to stop.'

Q. And did he say anything to you?

A. He said, 'I know you didn't, Mr. Pack,' he said, 'I know you couldn't help it, I didn't see you.' "

On cross-examination Mr. Pack testified as follows:

"Q. Mr. Pack, you were looking down the road and you were keeping your view up ahead of you for objects on the road?

A. Yes, sir.

Q. You have heard the testimony with reference to these lights and shadows on the road, do they have an impact or do they have some bearing on a person's ability to see?

A. They sure do.

Q. And a person in the shadows as cast by those poles, do they tend to hide him from a person traveling down the road?

A. I would say they do, they cast a shadow on the road, I would say they do.

Q. He wasn't any great distance on the road, was he, or was he actually on it?

A. It looked like about two or three feet over in the roadway to me.

Q. Well, do you actually know?

A. Well, it just looked like, I'm not sure, but it looked about two or three feet over in the road.

Q. And there was nothing to block your view of him as you approached that area, was there?

A. No, I don't know that there was."

In *Wilkerson* v. *McCarthy,* 336 U. S. 53, a switchman was injured in railroad yards when he slipped and fell into a wheel-pit while walking over the pit on a narrow board walk. The walk was constructed for the use of employees using the pit and switchmen had no occasion to use it. The railroad company did not know switchmen used the walk but there was evidence that employees other than pit crews did use the walk. There also was evidence that switchmen could easily go around the pit without crossing on the walk. The railroad company pleaded contributory negligence; the trial court directed a verdict in its favor and the Utah Supreme Court affirmed. In reversing the Utah Supreme Court on certiorari the United States Supreme Court said:

"There are some who think that recent decisions of this Court which have required submission of negligence questions to a jury make, 'for all practical purposes, a railroad an insurer of its employees.' See individual opinion of Judge Major, *Griswold* v. *Gardner,* 155 F. 2d

333, 334. But see Judge Kerner's dissent from this view at p. 337 and Judge Lindley's dissenting opinion, pp. 337-338. This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissible. It rests on another assumption, this one unarticulated, that juries will invariably decide negligence questions against railroads. This is contrary to fact, as shown for illustration by other Federal Employers' Liability cases, *Barry* v. *Reading Co.,* 147 F. 2d 129, cert. denied, 324 U. S. 867; *Benton* v. *St. Louis-San Francisco R. Co.,* 182 S. W. 2d 61, cert. denied, 324 U. S. 843. And *cf. Bruner* v. *McCarthy,* 105 Utah 399, 142 P. 2d 649, cert. dismissed for reasons stated, 323 U. S. 673. Moreover, this Court stated some sixty years ago when considering the proper tribunal for determining questions of negligence: 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' *Jones* v. *East Tennessee R. Co.,* 128 U. S. 443, 445. And peremptory instructions should not be given in negligence cases 'where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences.' *Washington & G.R. Co.* v. *McDade,* 135 U. S. 554, 572. Such has ever since been the established rule for trial and appellate courts. See *Tiller* v. *Atlantic C.L.R. Co.,* 318 U. S. 54, 67, 68. Courts should not assume that in determining these questions of negligence juries will fall short of a fair performance of their constitutional function. In rejecting a contention that juries could be expected to determine certain disputed questions on whim, this Court, speaking through Mr. Justice Holmes, said: 'But it must be assumed that the constitutional tribunal does its duty and finds facts only because they are proved.' *Aikens* v. *Wisconsin,* 195 U. S. 194, 206."

In *Missouri Pacific R. Co.* v. *Eubanks, supra,* Mr. Eubanks was a brakeman engaged in a switching operation at Elaine, Arkansas. The night was dark but the weather was clear. Mr. Eubanks was standing on the front of an engine as it slowly proceeded onto a street crossing. A Mrs. Keene was approaching the crossing in her automobile and Mr. Eubanks flagged the oncoming car with his lantern and thought that the automobile had stopped. As the engine entered the intersection, Mrs. Keene drove her automobile into the front part of the engine striking and injuring Mr. Eubanks. Mr. Eubanks filed suit against Mrs. Keene and the railroad company alleging joint and concurring negligence; alleging that the railroad company failed to maintain a proper lookout; that signals were not given, and that proper care for Mrs. Keene's safety was not exercised after her peril was discovered or should have been discovered. A verdict was returned by a jury against Mrs. Keene in the sum of $2,500 and against the railroad company in the sum of $7,500. In reversing the judgment against the railroad, this court, in addition to the language quoted, supra, said:

> "So here, if we were considering a suit by or against Mrs. Keene, the question of the failure to blow the whistle or ring the bell, thereby giving warning of the movement of the train, would be important, under common law principles, as ordinary care required that notice of the movement of the train be given by blowing the whistle or otherwise; but blowing the whistle or ringing the bell were not the only methods by which warning could be given. The undisputed testimony is that a warning which should have sufficed was given according to appellee's own testimony. The evidence appears therefore to be 'so overwhelming on one side as to leave no room to doubt what the fact is,' that the negligence of Mrs. Keene was the sole proximate cause of appellee's injury, there being no sub-

> stantial evidence of negligence on the part of the railroad company contributing to the injury."

The United States Supreme Court granted certiorari and in 334 U. S. 854 reversed the decision of this court by Per Curiam which simply stated as follows: "The petition for writ of certiorari is granted and the judgment of the Supreme Court of Arkansas is reversed. See *Myers* v. *Reading Co.,* 331 U. S. 477, and *Ellis* v. *Union Pacific R. Co.,* 329 U. S. 649."

As was stated in *Eubanks* and also in *St. L. S. F. Ry. Co.* v. *Smith,* 179 Ark. 1015, 19 S. W. 2d 1102,

> " 'Since this suit was brought and prosecuted under the Federal Employers' Liability Act, which does not define negligence, the question as to the sufficiency of the evidence to establish negligence must be determined by that act and the applicable principles of the common law as construed by the Federal Courts.' "

In *Anderson* v. *Atchison, T. & S. F. R. Co.,* 333 U. S. 821, a railroad conductor was injured when he fell from the rear vestibule of a train. The train traveled past three stations before other employees reported his absence and any attempt was made to find and rescue him. The conductor was taken to a hospital where he died three days later. His widow sued alleging negligence in the company's failure to search for the decedent within a reasonable period of time, and that as a result he died due to exposure to the cold weather from the time he fell until he was finally rescued. The trial court found that even if the allegations in the complaint were true, they were insufficient to support a judgment for plaintiff, and entered judgment for defendant. The state Supreme Court affirmed and on certiorari, the United States Supreme Court by Per Curiam opinion said:

> "We are unable to agree that had petitioner been permitted to introduce all evidence relevant under

her allegations, the facts would have revealed a situation as to which a jury under appropriate instructions could not have found that decedent's exposure and consequent death were due 'in whole or in part' to failure of respondent's agents to do what a 'reasonable and prudent man would ordinarily have done under the circumstances of the situation.' *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 67. See also *Jamison* v. *Encarnacion,* 281 U. S. 635, 640, 641; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353; *Blair* v. *Baltimore & O. R. Co.,* 323 U. S. 600, 604; *Lillie* v. *Thompson,* 332 U. S. 459, 461-462."

In *Lillie* v. *Thompson,* 332 U. S. 459, the female petitioner for certiorari was employed in the respondent's railroad yards in Memphis. Her duties were to transmit orders to the various employees working in the yards. About 1 A.M. she opened the door of her office in response to a knock which she assumed to be one of the respondent's trainmen and she was attacked and beaten with a piece of iron by a person who was not an employee of the railroad company. She filed suit under the Employers' Liability Act alleging that the respondent was negligent in sending her to work in a place that they knew to be unsafe without taking reasonable measures to protect her. The District Court dismissed the complaint for failure to state a cause of action and entered summary judgment for the respondent. In reversing by Per Curiam on certiorari, the United States Supreme Court said:

"The district court stated, in explanation of its action, that there would be no causal connection between the injury and respondent's failure to light or guard the premises, and that the law does not permit recovery 'for the intentional or criminal acts' of either a fellow-employee or an outsider.

We are of the opinion that the allegations in the complaint, if supported by evidence, will

warrant submission to a jury. Petitioner alleged in effect that respondent was aware of conditions which created a likelihood that a young woman performing the duties required of petitioner would suffer just such an injury as was in fact inflicted upon her. That the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nonetheless had a duty to make reasonable provision against it. Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence."

In *Lavender* v. *Kurn,* 327 U. S. 645, the petitioner's intestate was attending switches in the switch yards of the Grand Central Station in Memphis, Tennessee; it was a dark night and he was found near the track with a skull fracture from which he died. The evidence indicated that he had fallen forward and some indication that his feet had dragged a few inches southward as he fell. He sustained a gash in the back of his head with a corresponding black mark on the outside of a white cap he was wearing. It was the petitioner's theory that her intestate was struck by a mail crane swinging from a car and it was the respondent's theory that he was murdered. His gold watch and ring remained on the body but his wallet without money was found a few days later some distance from where his body was found. The ground was uneven in the area where the body was found and it appeared that it would have been necessary for the decedent to have been standing on one of the mounds in the area in order for a mail crane to strike him. It could have been inferred from the facts, however, that he could have been struck by a mail hook if he were standing on one of the mounds. In reversing a judgment against the railroad company, the Supreme Court of Missouri held that "all reasonable minds would agree that it would be mere speculation and conjecture to say that Haney was struck by the mail hook," and that "plaintiff failed to make a submissible case on that

question." It was ruled that there "was no substantial evidence that the uneven ground and insufficient light were causes or contributing causes of the death of Haney." On certiorari the United States Supreme Court reversed, stating:

> "The evidence we have already detailed demonstrates that there was evidence from which it might be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn. That inference is not rendered unreasonable by the fact that Haney apparently fell forward toward the main Frisco track so that his head was 5½ feet north of the rail. He may well have been struck and then wandered in a daze to the point where he fell forward. The testimony as to blood marks some distance away from his head lends credence to that possibility, indicating that he did not fall immediately upon being hit. When that is added to the evidence most favorable to the petitioner as to the height and swing-out of the hook, the height and location of the mound and the nature of Haney's duties, the inference that Haney was killed by the hook cannot be said to be unsupported by probative facts or to be so unreasonable as to warrant taking the case from the jury.
>
> It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of wit-

nesses and arrive at a conclusion opposite from the one reached by the jury. See *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 67-68; *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 353-354; *Tennant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29, 35. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or dis-believe whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In the Arkansas case of *Missouri Pacific R. Co., Thompson, Trustee* v. *Keeton, Adm'x,* 207 Ark. 793, 183 S. W. 2d 505, (cert. granted 326 U. S. 689), the decedent brakeman fell from the front of a gravel car in a switching operation involving six cars of sand and gravel. The decedent was sitting astride the corner or the front car with one foot resting on the gravel and the other on a grabiron on the outside of the car. The allegations of the complaint were that the train stopped suddenly which jerked or caused the decedent to fall from the car. All of the train crew testified that there was no unusual jerk or jar in the operation and no sudden stop or quick

jerk at all. The appellee-widow testified that her husband, in a "dying declaration," told her that he was sitting on the corner of the car with his switch list in one hand and a light in the other; that there was a sudden stop and that after he was jerked off of the car he knew nothing more after the sudden hard stop and he was jerked off of the car. A judgment entered on a verdict for the widow was reversed by this court, on the grounds that there was no substantial evidence of negligence on the part of the railroad company. Justice Robins dissented because of the widow's testimony as to the dying declaration. The Supreme Court of the United States granted certiorari and reversed by Per Curiam opinion holding that the question of respondent's negligence should have been submitted to the jury.

In *Jenkins* v. *Kurn,* 313 U. S. 256, a fireman saw a standing train on a track in front of the moving train he was working on and he shouted to the engineer to apply the emergency brake. The engineer turned and looked at the fireman but did nothing. The fireman then rushed across the cab and stood behind the engineer for a brief time but said nothing. When the train was near collision with the stopped train, the engineer applied the brakes and the fireman jumped from the train landing in rocks and injuring himself. In his suit against the railroad the fireman alleged that he notified the engineer of imminent peril; that the engineer negligently failed to respond, thereby creating a dilemma of imminent peril which forced the fireman to jump from the train. A jury trial resulted in a verdict for $12,000 and judgment thereon. The Supreme Court of Missouri held that the railroad company's motion for a directed verdict should have been granted and in reversing on certiorari, the United States Supreme Court said:

> "There was evidence from which the jury could have concluded that if not subject to any physical disability the engineer would have comprehended petitioner's monition and understood that peril was

imminent. Petitioner testified without contradiction that he 'hollered' his warning loudly; that only a narrow space separated his perch from the engineer's seat; that the engineer's hearing was 'all right'; that petitioner and the engineer could and did carry on 'normal conversations' while the train was operating; and that there was comparatively little noise in the cab from the train."

In *Larsen* v. *Chicago & N.W. R. Co.,* 171 F. 2d 841, the court said:

"Unless there is a complete absence of probative facts, Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916, the question of whether defendant was guilty of negligence in furnishing a reasonably safe place to work was for the jury to determine from all the facts and circumstances. Bailey v. Central Vermont Ry., supra, 319 U. S. at page 353, 63 S. Ct. 1062, 87 L. Ed. 1444. And once there is a reasonable basis for concluding that there was negligence which caused the injury, it is irrelevant that fair minded men might reach different conclusions. In such cases the trial judge is not justified to substitute his conclusions for those of the jury. Lavender v. Kurn, supra, and Ellis v. Union Pacific R. R. supra, 329 U. S. at page 653, 67 S. Ct. 598, 91 L. Ed. 572. Bearing these principles in mind and applying them to our case, we believe there was a reasonable basis for concluding there was negligence which caused the injury, hence the trial court properly left it to the jury to say whether defendant was guilty of negligence in placing the caboose ahead of the pusher engine and whether plaintiff's injuries resulted in whole or in part from such negligence.

* * *

. . . It also insists that the court erred in instructing the jury that the Federal Employers'

Liability Act provided that people working in the railroad business did not assume the risk of employment. We see no error in the instruction given."

In *Wantland* v. *Illinois Central R. R. Co.,* 237 F. 2d 921, the court said:

"In actions under this Act, the issue of the carrier's negligence is for the jury to determine and it is the jury's function to weigh the contradictory evidence and inferences, judge the credibility of witnesses and draw the ultimate conclusions as to the facts. Wilkerson v. McCarthy, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497, rehearing denied 336 U. S. 940, 69 S. Ct. 744, 93 L. Ed. 1098. If the jury can find every fact exists which must exist to sustain the plaintiff's case and if the evidence on the issue of negligence is such that reasonable minds might differ on the question of whether the carrier has been negligent, the case is one for the jury. Frizzell v. Wabash R. Co., 8 Cir., 199 F. 2d 153, certiorari denied 344 U. S. 934, 73 S. Ct. 505, 97 L. Ed. 718.

* * *

Only a complete absence of probative facts to support the verdict reached by the jury would justify this court in substituting its conclusions for those of the jury. Lavender v. Kurn, 327 U. S. 645, 652, 66 S. Ct. 740, 90 L. Ed. 916. We cannot say as a matter of law that the plaintiff was guilty of negligence which was the sole, proximate cause of this accident."

The above cited cases are by no means all the Federal Court decisions construing the Federal Employers' Liability Act as amended by 45 U. S. C. A. § 54 (1939), but they point up the general attitude of the courts "where such injury or death resulted in whole *or in part* from the negligence of any of the officers, agents, or employees of such carrier."

In the case at bar the 80% negligence attributed to Missouri Pacific seems out of all proportion to the negligence of Ballard and Pack under the evidence as we view the record; but, in *Mumma* v. *Reading Co.*, 247 F. Supp. 252, the plaintiff-employee was wearing rubbers over his regular work shoes and they became saturated with oil negligently spilled by his fellow-employees and through which he was required to walk in the performance of his duties. He was injured when he slipped and fell because of the oil on his rubbers. A jury made a finding of 45% contributory negligence. In approving the verdict the court said:

> "Thus, as to the second accident, there is at least some suggestion in the evidence that the plaintiff might have taken some additional precautions for his own safety. While the percentage of blame attached to plaintiff by the jury seems out of all proportion, that determination was nonetheless for the jury."

See also *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, a suit under the Jones Act, 46 U. S. C. A. § 688, where the District Judge directed the jury to return a verdict for the defendant, stating:

> "There is some evidence of negligence, and there is an accidental death. But there is not a shred of evidence connecting the two."

And where the Court of Appeals affirmed, saying that while the evidence was "perhaps at most only doubtfully sufficient to present a jury question as to defendant's breach of duty," it failed to show "where the accident occurred" or "that it was proximately caused by any default on the part of the defendant." But where the Supreme Court said:

> "In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that

> defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. * * * Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

See also *Stone* v. *N. Y., Chicago & St. Louis R. Co.,* 344 U. S. 407, where a section hand injured his back while helping to remove a crosstie from under the rails of the track, and in reversing the Missouri Supreme Court which had reversed a judgment of the trial court on a jury verdict in favor of the section hand; the United States Supreme Court said: "We think there was evidence of a causal connection between the order of Stouston to pull harder and petitioner's back injury."

In the case at bar there is little question that Ballard was safe from the hazard of traffic on the access road while he was standing near the switch he was attending in the proper performance of his assigned duties. The record does not reveal the distance between the switch Ballard was attending and the access road where he was injured, but there is no question that Ballard left the safety of his position near the switch and went to the access road where he was injured. According to the evidence pertaining to light poles, he walked at least eight feet toward the road. Whether Ballard walked backwards as testified by Thurman, or whether he walked forward as he testified, makes no difference.

There is no question that Ballard left his safe position near the switch and went to the access road where he was injured in response to a call from Thurman, and there is little question that Ballard would not have been injured if Thurman had performed his own duties as the yard master had directed. We hold that there was sufficient evidence of negligence on the part of Missouri Pacific through Mr. Thurman, to take the case to the jury.

The jury could reasonably have found that Mr. Thurman was negligent in parking his automobile across the access road from Ballard and shouting a question to Ballard under circumstances that would distract Ballard's attention from his assigned duties and cause him to come to the access road in order to understand the question over the noise of moving cars. The jury could have further found that as Pack approached Thurman's automobile on the narrow access road, he gave it a wide berth in anticipation of passengers alighting from Thurman's automobile rather than someone coming from the busy railroad tracks from across the access road to Thurman's automobile. We conclude that there is some substantial evidence to support the verdict and that the judgment must be affirmed.

The judgment is affirmed.

FOGLEMAN and BYRD, JJ., concur.

NORMA RICHARDSON CAMPBELL *v.*
SAM M. RICHARDSON, III

5-5554 468 S. W. 2d 248

Opinion delivered June 28, 1971

Allen, Young & Bogard and *Gaughan, Laney, Barnes & Roberts,* for appellant.

Brown, Compton, Prewett & Dickens, for appellee.

FRANK HOLT, Justice. This action was instituted by the father, appellee, to secure custody of his minor son who, by agreement, had been in the custody of his mother, appellant, since July of 1967 when appellee secured a divorce. At the time of the divorce, the minor, Samuel Richardson, IV, was eight years old and was residing with his parents in El Dorado where appellee and appellant were closely acquainted with another married couple, William and Sara Campbell. The Campbells were divorced in May of 1967, two months prior to the divorce of appellant and appellee. Mrs. Campbell was awarded custody of the Campbell boys, ages 5 and 7. On October 26, 1968, Sam Richardson, III, appellee, married Sara Campbell and they have continued to reside in El Dorado. On January 4, 1970, Norma Richardson, appellant, married William Campbell and almost immediately moved, with her son, to Little Rock where Mr. Campbell was and still is employed. Sam Richardson, III then filed a petition for a change of custody of his son from Norma Richardson Campbell to himself. After a lengthy hearing the chancellor, on July 2, 1970, awarded custody to the appellee-father. On appeal appellant contends for reversal that "there was no showing of a change in circumstances occurring since entry of the original decree of divorce as would justify modifi-

cation of that decree; and that the welfare of the child is best served by having the custody remain in the mother." We cannot agree with appellant's contentions.

During the two and one-half years appellant and her son lived in El Dorado following the divorce, the child had the company and close relationship of his father, grandparents, and friends. It appears that the appellee enjoyed very liberal visitation rights and was seeing his child one or two nights during the week and also on the weekends when they attended church together regularly. Immediately following the divorce, as before, Sammy also spent a great deal of time, including vacations, with his paternal grandparents; however, this relationship was gradually curtailed. During the four and one-half months that Sammy resided with appellant in Little Rock, he spent about one weekend a month in El Dorado with appellee.

Subsequent to her divorce, it appears undisputed that appellant had an affair with Mr. Campbell, her present husband; however, nothing of this relationship was ever revealed to Sammy. She stated that when Mr. Campbell was in her home it was at the invitation of Sammy and that he had shared Sammy's bedroom with him. The appellee adduced evidence that Mr. Campbell's car was frequently observed at appellant's house late at night and early in the morning. There was also evidence presented that appellant had a clandestine affair with a married man, a co-employee at a local mental health center, with the expectation of eventual marriage.

Upon appellant's marriage to Mr. Campbell, she, her husband, and Sammy resided in one of the nicest apartment complexes in Little Rock. Appellant secured employment as a medical secretary and was at home within thirty minutes after her son's school hours. An experienced babysitter attended him until she arrived. The stepfather, who had suffered financial reverses, was repaying his debts from an estimated $18-20,000 per year income and expressed a strong desire that appellant retain custody of Sammy. There was evidence that appellant and the stepfather were devoted to Sammy and

spent a great amount of time and effort in attempts to help him adjust to his new surroundings by assisting him in his studies and affording him a comfortable home and recreational activities. However, Sammy did not adjust to his new environment; in fact, there was a drastic drop in his school grades. In El Dorado he had received "A's" and "B's" whereas during the four and one-half months he was in Little Rock he received mostly "D's" or failing grades. Also, Sammy was late to school 14 times.

Dr. Donald Martin, a counselor in psychology, at the request of appellee, saw Sammy on February 14, 1970, to determine his emotional problems. This witness stated that he also forwarded a drawing test to Sammy on May 2, 1970. According to Dr. Martin, Sammy was depressed because of anxiety which affected his ability to concentrate and also, to ignore what goes on around him and that these difficulties would cause his school grades to drop. He further stated that the testing showed Sammy had a very deep attachment for his father who showed warmth and understanding and that he was fearful of his mother, mainly that she would harm his father. He stated that Sammy needs someone who accepts, understands, and loves him so that he can get his confidence built up; that Sammy must be stabilized as quickly as possible; and that his father would be the one to fulfill his son's needs.

Dr. Patrick Caffey, a clinical psychologist with a PhD, testified that Dr. Martin conducted a very "limited" evaluation and is not trained to work with children; however, that all the tests given by Dr. Martin were recognized in the field of psychology with the exception of one. Dr. Caffey stated that the two and one-half-hour testing session conducted by Dr. Martin with Sammy only was inadequate; that generally six or seven series of tests are given before a competent diagnosis can be made and only then after adequate consultation with the child and both parents. Dr. Caffey further stated that he was acquainted with the parties; that he was a friend of appellant's; that he had seen Sammy casually on two or three occasions when the child was with appellant;

that the child did not seem distressed; that he seemed overly affectionate; and that there was nothing to suggest any need for counseling the child. He further stated that he was familiar with the school system in El Dorado and in Little Rock; that the Little Rock school system was more difficult than El Dorado's; and that following the change of schools the drop in Sammy's grades could be expected until he adjusted.

Appellant, her present husband, parents, and numerous friends testified that appellant and her son had a very close mother-son relationship and her witnesses said that they had observed nothing detrimental to his welfare nor anything that would indicate the boy was not adjusting to his change in environment.

Numerous witnesses attested to appellee being a respected and successful businessman; a church and civic leader; an exemplary father who spent time with his son by assisting him in his school studies and participating with him in such recreational activities as baseball, golf, and horseback riding.

Appellee's present wife, the stepmother who is a school teacher, testified that she wanted Sammy in her home; that her two boys, aged 8 and 10 at the time of the hearing, were compatible with Sammy; and that she would no longer work after her expected child was born within a few months.

According to the transcript of an in-chambers proceeding in which the chancellor questioned Sammy, by agreement and in the presence of counsel for each of the parties, Sammy testified that, although he loved his mother, he preferred to live with his father.

An appeal from the chancery court is reviewed de novo; however, the decision of the chancellor will be affirmed unless it is clearly against the preponderance of the evidence. *Hampton* v. *Hampton,* 245 Ark. 579, 433 S. W. 2d 149 (1968).

Appellant correctly asserts that the rule to be ap-

plied in suits seeking a modification of a custody order is set out in *Myers* v. *Myers,* 207 Ark. 169, 179 S. W. 2d 865 (1944). There we said:

> "* * * While there is continuing authority in the court granting a decree of divorce to revise or alter orders contained in such decree affecting the custody and control of the minor children of the parties, such orders cannot be changed without proof showing a change in circumstances from those existing at the time of the original order, which changed circumstances, when considered from the standpoint of the child's welfare, are such as to require or justify the transfer of custody from one parent to the other."

Further, in 27B C. J. S. Divorce § 317(2) it is stated:

> "* * * The mere fact that conditions have changed since the divorce of the parents is insufficient in itself to warrant a modification of the custody order. Therefore, it is insufficient to establish some change in circumstances or a slight change in conditions; there must be a showing of material, permanent, and substantial change in the circumstances or conditions of the parties, affecting the welfare of the children to a substantial or material extent, the two issues being closely intertwined."

However, in making this determination the best interest and welfare of the child are the paramount considerations. *Holt* v. *Taylor,* 242 Ark. 292, 413 S. W. 2d 52 (1967). Sammy, the twelve-year-old boy, testified that, although he loved his mother, he wanted to live in El Dorado, and that he felt he would receive better care from his father and stepmother. In *Aaron* v. *Aaron,* 228 Ark. 27, 305 S. W. 2d 550 (1957), we quoted with approval:

> "* * * the wishes of the children were consulted, and, while their preference is not of controlling importance, it is a circumstance which cannot be ignored * * *."

Furthermore, in *Beene* v. *Beene,* 64 Ark. 518, 43 S. W. 968 (1898), we said:

> "* * * The elder of the boys, now about nine years old, has probably arrived at that age when a father's peculiar character of oversight and control may begin to be more necessary than the mother's * * *."

We think this reasoning is applicable to the case at bar.

In *Qualls* v. *Qualls,* 250 Ark. 328, 465 S. W. 2d 110 (1971), a case involving an appeal from an order granting custody of a nine-year-old boy to his father, we affirmed and said:

> "For reversal the appellant relies principally upon the law's inclination to favor the mother in custody cases involving very young children. That principle, however, loses some of its force as the child grows older and is not so strong in the case of a ten-year-old boy as it would have been much earlier in the child's life. Moreover, the trial judge saw fit to award custody to the father in spite of the rule in question. We view this case much as we did the situation in *Wilson* v. *Wilson,* 228 Ark. 789, 310 S. W. 2d 500 (1958) where we said: 'We know of no type of case wherein the personal observations of the court mean more than in a child custody case. The trial judge had an opportunity that we do not have, *i. e.,* to observe these litigants and determine from their manner, as well as their testimony, their apparent interest and affection, or lack of affection for the child. Under our oft repeated rule that we will not disturb the findings of the chancellor unless they are clearly against the preponderance of the evidence, we affirm this temporary order.' We are of a similar opinion in the case at bar."

Likewise, in the case at bar we certainly cannot say that the chancellor's findings are against the preponderance of the evidence.

Affirmed.

BYRD, J., dissents.